

**White v New York City Dept. of Hous. Preserv. &
Dev.**

2018 NY Slip Op 32493(U)

October 2, 2018

Supreme Court, New York County

Docket Number: 656038/2016

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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SOPHIA WHITE,

Plaintiff,

Index No.: 656038/2016

-against-

Mot. Seq. No. 004

THE NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT, and
50 WEST 112TH STREET HDFC,

Defendants.

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MELISSA A. CRANE, J.S.C.:

The New York City Department of Housing Preservation and Development (“HPD”) has created thousands of affordable homes as shareholder-owned Housing Development Fund Corporation (“HDFC”)’s cooperatives, making them a significant part of the fabric of New York City’s affordable housing. Pursuant to New York City Charter 1802(6)(d), HPD has the duty and power to represent the city in carrying out the provisions of the Private Housing Finance Law (“PHFL”). Included as a PHFL provisions is Article XI, that the Legislature enacted in response to an alarming lack of safe, sanitary, and affordable housing options for low-income New Yorkers (*see* PHFL 571). Article XI created a government program to provide temporary financial aid to enable tenant associations and other non-profits to build or rehabilitate housing in New York City. Thus, HPFCs were born.

Under the PHFL, HPD is the supervising agency of HDFCs (*see* PHFL 572[14]). HPD has the power to approve the formation of HDFCs, and any subsequent amendments made to an HDFC’s certificate of incorporation. HPD can also require that an HDFC enter into a Regulatory Agreement as a condition precedent to receiving a loan from HPD. The Regulatory Agreement

may provide for additional restraints on a HDFC's maximum income level for residents, allocation of profits, and dividend restrictions.

All HDFC cooperatives are incorporated under Article XI. Article XI requires HDFC cooperatives to provide housing to people whose household income does not exceed 165% of the area median income, at the very most. In addition, prices should be low enough that a purchasing household would not spend more than 30% of its income on housing costs, including mortgage and maintenance payments. In return, HDFCs are subject to a partial property tax exemption, referred to as the "DAMP" exemption. Co-defendant, 50 West 112th Street HDFC, is one such cooperative subject to HDFC restraints and HPD's supervision.

By this motion, defendant HPD, moves to dismiss, under CPLR 3211, the causes of action plaintiff has asserted against it: fraud (second cause of action), violation of GBL § 349 (tenth cause of action), negligence (eleventh cause of action), unjust enrichment (twelfth cause of action), and attorney's fees (thirteenth cause of action). Defendant HPD also asks the court to deny plaintiff's request for injunctive relief to direct HPD to take affirmative action necessary to ensure elimination of the effects of the alleged unlawful acts (*see* Complaint, prayer for relief [c]). The remaining eight causes of action are only against co-defendant 50 West 112th Street HDFC, and, therefore, are not at issue on this motion.

Background

Plaintiff Sophia White is a resident of New York County, residing at 50 West 112th Street, #31, New York, New York 10026 (the "Premises") (Complaint, ¶ 7). Defendant, New York City Department of Housing Preservation and Development ("HPD"), is New York City's municipal housing preservation and development agency, and is responsible for the regulation and oversight of New York City Housing Development Finance Corporations (HDFCs) (*id.*, ¶ 8).

Co-defendant, 50 West 112th Street HDFC, is an active New York City Housing Development Finance Corporation (“HDFC”) under the laws of the State of New York that acquired the Premises from the City of New York. In 1996, HDFC became the current tenant of the Premises and current owner and landlord of the building (*id.*, ¶ 9).

Plaintiff, Sophia White, is a low-income New York resident who moved into the Building in 1998. She signed a lease for Unit 4A (*id.*, ¶ 11). The lease contained a clause that permitted plaintiff to purchase Unit 4A for \$4,500. Plaintiff claims that, while she could not purchase the apartment at the time, she relied upon the stated promise of a fixed purchase price (White Opp, p.6).

In 2005, Christina Davis became the President of the Board of Directors of Defendant 50 West 112th Street HDFC, allegedly with the goal of maximizing profits (*id.*, ¶¶ 14-15). Shortly after Davis became Board President, plaintiff expressed her desire to purchase an apartment in the building (White Opp, p. 6). Then residents received notice from co-defendant, 50 West 112th street HDFC, that purchase prices would be raised substantially (*id.*, ¶ 15). Plaintiff began viewing units in the building available for purchase. Eventually, the Board offered her Unit 6H. However, before plaintiff could sign the lease, another individual moved into the apartment (*id.*, ¶¶ 16-18). Afterwards, the Board presented Unit 5H to plaintiff. She ultimately declined to rent because it was infested with vermin (*id.*, ¶ 20, Exh A).

In 2010, plaintiff allegedly agreed to rent apartment 3I after Christina Davis told her that they would discuss the future purchase of that unit (*id.*, ¶ 23). Plaintiff informed Christina Davis that she could not afford the \$68,000 purchase price for the apartment. Davis said she would have a meeting with the Board to discuss a more affordable purchase price (*id.*, ¶¶ 24-25). Plaintiff then signed the lease to rent unit 3I based on this representation, and made

improvements to the unit, including redoing the floors, molding, paint, replacing old radiators, and adding recessed lighting (*id.*, ¶¶ 27-28, 30).

The monthly rent for unit 3I was originally \$850 per month. However, the HDFC Treasurer and President informed plaintiff the rent would increase to \$950 monthly because plaintiff added recessed lighting without permission (*id.*, ¶ 30). Plaintiff never received notice, either prior to or during the renovation, that her rent would increase. It was not until after the completion of recessed lighting that plaintiff received notice of the permanent rent increase. (*id.*, ¶ 30).

Since then, despite paying her rent on time each month, plaintiff alleges that the Board cited her as having a “poor rental history.” As recently as 2015, plaintiff was told that she is simply not allowed to purchase any unit within the Building (*id.*, ¶ 32). Throughout this process, plaintiff became outspoken over the apparent mismanagement of the Building, and the Board’s favoring of wealthier tenants (*id.*, ¶ 33). In retaliation, plaintiff alleges that the Board continues to inflict rental increases and has orchestrated distinct decreases in services that make it unsafe for plaintiff and her child (*id.*, ¶¶ 34-36).

Plaintiff claims co-defendant 50 West 112th Street HDFC, through its co-op board, focuses on lucrative sales by selling apartments for escalated prices with an 85% flip on each unit (*id.*, ¶¶ 38-39). Listings for apartments, that specifically request all cash, or cash preferred buyers, range from \$175,000 for one-bedroom and up to \$330,000 for a two-bedroom apartment. All cash transactions allow for the exclusion of most potential low-income buyers, because cash assets are not calculated under an HDFCs income restrictions (*id.*, ¶ 42-44).

HPD has done nothing to supervise co-defendant, plaintiff alleges. Plaintiff repeatedly tried filing complaints with HPD and other housing entities but received no adequate response or

investigation (*id.*, ¶ 45, Exh B). The Board's actions, inactions, and lack of repairs only serves to make housing inaccessible to plaintiff as a low-income tenant (*id.*, ¶ 46).

Discussion

A court must deny a motion to dismiss under CPLR 3211 (a)(2) "if from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept 2003] [internal quotation marks omitted], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]). The court must afford the pleading a "liberal construction," and "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, the court may disregard "bare legal conclusions" and "inherently incredible" facts. *Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). Moreover, "[w]hen the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether [he or] she has stated one" (*Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 [2d Dept 2005]).

Notice of Claim

Defendant HPD argues that the court should dismiss the second cause of action for fraud, and the eleventh cause of action for negligence, because plaintiff did not file a notice of claim with the Comptroller's office. Plaintiff argues that she was not required to file a notice of claim, because the main type of relief plaintiff seeks from HPD is equitable rather than monetary.

When a claimant brings an action against a New York City entity involving tort claims, the New York State General Municipal Law § 50-e and Administrative Code § 7-201(a) requires the filing of a notice of claim upon the Comptroller's Office within 90 days after the claims arise (*see Maxwell v City of New York*, 29 AD3d 540, 541 [2nd Dept 2006]). If a plaintiff fails to file

a notice of claim where necessary, claimant must move within one year and 90 days of the accrual date of the claim for leave to serve a late notice of claim (*Id.*, General Municipal Law § 50-e[5]). However, plaintiff need not file a notice of claim if the action involves “equity to restrain a continuing act, and to demands for money damages which are merely incidental to such equitable claims” (*Am Pen Corp v City of New York*, 26 Ad2d 87, 87-88 [1st Dept 1999]).

Here, the monetary relief plaintiff seeks is significant. Specifically, plaintiff seeks \$81,000 for HPD’s alleged fraud and negligence. However, plaintiff seeks these damages only in conjunction with her legal claims. Therefore, plaintiff’s failure to file a notice of claim warrants dismissal of the second and eleventh causes of action. However, the balance of plaintiff’s request for injunctive relief remains, as it arises from sufficiently separate facts to remove it from the ambit of those tort claims. This is because plaintiff seeks a mandatory injunction to ensure that HPD oversees the HDFC here, so that co-defendant can act out its mandate and provide affordable housing to the low-income residents of New York City.

Fraud

Even if the court put aside plaintiff’s failure to file a notice of claim, plaintiff did not adequately plead fraud in the complaint. To plead fraud, plaintiff must allege (1) a material misrepresentation of a fact; (2) knowledge of its falsity; (3) an intent to induce reliance; and (4) justifiable reliance by the plaintiff and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

Plaintiff alleges that: “(1) on or about September 2014, defendant HPD represented to plaintiff that HPD could do nothing to address plaintiff’s complaints that [the HDFC] was grossly mismanaged and subverting its duty to provide adequate and affordable housing,” (2) “this representation was a falsity given that the HPD has the power and duty to intervene where

HDFC's are mismanaged," and (3) "plaintiff justifiably relied on the representation and sought no further information or advice or redress from HPD," and (4) "Plaintiff suffered damages as a result of HPD's alleged actions" (Complaint, ¶¶ 64-67). Plaintiff compares the HPD representative's statement that HPD could do nothing for her, to the Real Estate Finance Bureau Memorandum issued July 16, 2015 (Complaint, Exh F), that notes HPD has the power and duty to supervise "HDFC's that own real property in New York State..."

Defendant argues no fraud occurred at all. Specifically, defendant claims that the statements HPD's representative made to plaintiff in the September 23, 2014 email, that advised plaintiff to reach out to the Urban Homesteading Assistance Board to seek assistance with her complaints, and that the shareholders have the power to replace the Board, were reasonable and not misleading. Defendant further argues that the HPD's representative's statement that plaintiff could take legal action if she thought the Board and HDFC violated her lease, was accurate and in accordance with the law.

The court cannot infer deception or scienter on the facts in plaintiff's complaint. Nothing suggests that HPD's representative intentionally misled plaintiff. The July 16, 2015 New York State Real Estate Finance Bureau Memorandum, that notes HPD's duty to intervene an HDFCs mismanagement, is not enough to show that the HPD representative intended to deceive plaintiff. Further, plaintiff did not reasonably rely on the HPD representative's statements, because plaintiff did sue. Therefore, the court dismisses plaintiff's second cause of action, for fraud against HPD.

General Business Law § 349

To plead a violation of General Business Law ("GBL") § 349, plaintiff must allege that (1) the challenged transaction was "consumer-oriented;" (2) defendant engaged in deceptive or

materially misleading acts and practices; and (3) defendant's deceptive or misleading conduct injured plaintiff (*see Denenberg v Rosen*, 71 Ad3d 187 [1st Dept 2010]; *Oswego v Marine Midland*, 85 NY2d 20 [1995]).

Both parties focus on whether or not the defendant's comments to plaintiff was "consumer oriented." This misses the mark. GBL § 349 first requires a misleading act or practice. The complained of comments are simply not misleading.

Nevertheless, the complaint sufficiently alleges the Board's policy of imposing onerous financial requirements, such as all cash. Plaintiff alleges that the Board maintains these requirements specifically to exclude low income persons, such as herself. Finally, plaintiff alleges that HPD's *raison d'être* is to oversee HDFC entities to enhance the goal of preserving low income housing. When viewed in this context, and against the backdrop of New York City's severe housing crisis, the complaint certainly alleges a sufficient public interest to justify a claim under GBL § 349. The problem with the complaint is that plaintiff premises her GBL § 349 on the comments that HPD made about its ability to assist plaintiff, rather than its failure to oversee in general. Whether this alleged lack of oversight can satisfy a GBL § 349, or whether some other law precludes this potential claim, remains to be seen. Accordingly, the court dismisses the cause of action alleging a violation of GBL § 349 against HPD with leave to replead.

Negligence

For the reasons stated *supra*, plaintiff failed to file a notice of claim, and, is therefore precluded from bringing a negligence cause of action.

Unjust Enrichment

To plead unjust enrichment, plaintiff must allege that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the

other party to retain what is sought to be recovered” (*see Georgia Malone & Co. v Ralph Rieder*, 86 AD3d 406, 411 [1st Dept 2011]). Under CPLR 3211(a)(5), a defendant bears the burden to establish that the time to bring a lawsuit has expired (*Savarese v Shatz*, 273 AD2d 219, 220 [2d Dept 2000]). For unjust enrichment claims, plaintiff must bring a claim six-years from the date that the alleged wrongful act gave rise to restitution (*see* CPLR 213[1]).

Defendant argues that plaintiff’s time to bring an unjust enrichment claim has run. In its complaint, plaintiff alleges that defendant HPD “benefited from certifying the 50 West 112th HDFC and undertaking no practical oversight by gaining financially from the sale of the building, and, upon information and belief, receiving a percentage of the unit sales” (Complaint, ¶ 135). In addition, plaintiff alleges defendant HPD also benefited from the improvements that plaintiff made to the apartment, including paying for an exterminator to remedy infestations (*id.* at ¶¶133-135).

HPD sold the building to the HDFC in 1996, two years prior to when plaintiff became a tenant in the building. The sale, in 1996, is also 20 years prior to the commencement of this action. The statute of limitations allows for six years. Therefore, the statute of limitations may bar plaintiff’s unjust enrichment claim. Even if plaintiff’s claim has not yet accrued, she fails to allege how HPD gained financially from the sale of the building, prior to plaintiff’s tenancy. As for plaintiff’s second allegation, it is unclear how the improvements plaintiff made to her apartment benefit HPD. Therefore, the court dismisses plaintiff’s twelfth cause of action, for unjust enrichment.

Attorney Fees

Under GBL § 349(h), a prevailing plaintiff is entitled to reasonable attorney’s fees. However, attorney fees is not a cause of action but part of a remedy to which plaintiff would be

entitled were they to recover under GBL ¶ 349. Therefore, the court dismisses plaintiff's thirteenth cause of action, for attorney's fees.

Injunctive / Mandamus Relief

Plaintiff asks the court to direct HPD to take affirmative action necessary to ensure elimination of the effects of the alleged unlawful acts of co-defendant 50 West 112th Street HDFC (*see* Complaint, prayer for relief [c]). Plaintiff argues that they are actually asking for injunctive relief. Defendant calls it mandamus relief.

Plaintiff wants HPD to intervene and force HDFC to adhere to the 1996 purchase price of \$4,500, and offer plaintiff a unit in the Premises at that price. As stated earlier, plaintiff has stated no basis to make this award, at this juncture. But plaintiff also alleges HPD's responsibility to intervene in instances of HDFC mismanagement. Plaintiff claims that HPD "failed to conduct any investigation or take any act upon receiving information that HDFC was being grossly mismanaged financially or otherwise" (compl. ¶ 127). Under the facts as alleged, HPD may very well have the authority to promulgate emergency rules, to fix imminent safety conditions, and provide due process protection to HDFC's tenants. Accordingly, the court declines to dismiss that part of plaintiff's complaint that seeks an order directing HPD "to take such affirmative action as is necessary to ensure that the effects of these unlawful acts are eliminated" (compl. prayer for relief, subpart c.)."

Accordingly, it is hereby

ORDERED that the court grants defendant HPD's motion to dismiss, to the extent that the court dismisses the second, eleventh, twelfth, and thirteenth causes of action against defendant HPD with prejudice; and it is further

ORDERED that the court grants defendant HPD's motion to dismiss the tenth cause of action (GBL § 349) without prejudice;

ORDERED that the remaining claim for injunctive relief is severed and shall continue.

ORDERED that the parties are directed to appear for a status conference in Room 303, 71 Thomas Street, on November 8, 2018, at 10:30am.

Dated: 10-2-2018

ENTER:



HON. MELISSA A. CRANE, J.S.C.

HON. MELISSA A. CRANE
J.S.C.