

**Onativia v Deleon**

2019 NY Slip Op 33689(U)

December 18, 2019

Supreme Court, New York County

Docket Number: 155696/19

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8  
DECISION/ORDER/JUDGMENT  
INDEX NO. 155696/19

RICHARD ONATIVIA

MOT. DATE

- v -

MOT. SEQ. NO. 001

HERIBERTO DELEON et al.

The following papers were read on this motion to/for <u>Art 78</u>	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

In this Article 78 proceeding, petitioner seeks an order directing respondents to immediately issue the stock certificate and proprietary lease to him "evidencing his ownership and leasing" of apartment number 3B at 237 East 121st Street, New York, New York (the "apartment"). Respondents oppose the petition and cross-move to dismiss based upon CPLR 3211 [5], [7] and [8]. Petitioner opposes the cross-motion. This proceeding was calendared for oral argument on September 25, 2019, at which time only respondents' counsel appeared and petitioner's counsel did not. The court's decision follows.

Petitioner alleges that in April 2010, while he was residing in the apartment, he entered into a contract with respondent 237 East 121st Street Housing Development Fund Corporation (the "HDFC") to "formally purchase" the shares and lease of the apartment for \$15,000. No written contract has been provided to the court.

He claims that on April 12, 2010, he made an initial payment of \$5,000 and made unspecified monthly payments thereafter. Petitioner, however, explains that he stopped those payments due to water damage "until repairs were completed." As evidence of this, petitioner has provided to the court a copy of a letter on the HDFC's letterhead addressed to petitioner and dated December 1, 2010. The 12/1/10 letter agreement provides that the board will perform certain repairs. It further reads in relevant part:

*In addition we the Board of Directors agreed to repair the the (sic) apartment 3B. In the course of repairing the apartment, the purchase can withhold his payment of (PURCHASE, MAINTENANCE, SUBLEASE FEE) until the apartment is ready to occupy. Repairs will take place starting on the 12/15/2010 as agreed. No completion date has been established by the board as of yet until further action.*

The 12/1/10 letter agreement is signed by Johnny Flores as President/Treasurer, Felicita Lozada as Vice President/Secretary and petitioner as "Purchaser".

Dated: 12/18/19

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, J.S.C.

1. Check one:  CASE DISPOSED     NON-FINAL DISPOSITION
2. Check as appropriate: Motion is  GRANTED  DENIED  GRANTED IN PART  OTHER
3. Check if appropriate:  SETTLE ORDER  SUBMIT ORDER  DO NOT POST
- FIDUCIARY APPOINTMENT  REFERENCE

Petitioner alleges that sometime thereafter, his "personal life underwent a series of dramatic events while repairs were being made". Petitioner lost his job, got divorced and his mother had a "major accident" requiring multiple surgeries and petitioner's assistance.

Petitioner asserts that the HDFC's Board of Directors "agreed to help petitioner to continue to pay for the apartment by allowing him to sub-lease the apartment to continue his monthly purchase and maintenance payments, in return for an additional monthly sub-lease fee payment to the corporation." Petitioner has provided to the court a copy of the sublease between him and John E. Colon and Karen Acevedo as subtenants. According to the sublease, the subtenants were required to pay rent at \$1,000 per month from May 1, 2012 through April 30, 2014. Page 3 of the sublease is a document entitled "BOARD OF DIRECTORS CONSENT" and it appears to be signed by Flores dated May 1, 2012.

Petitioner claims that in July 2013, he attempted to obtain his stock certificate and signed proprietary lease, but respondents have refused to provide same. He states that the HDFC elected a new board of directors in June 2013. As for the delay, petitioner asserts that once he became employed again, he retained an attorney to bring this proceeding. Annexed to the petition is, *inter alia*, a photographic copy of a stock certificate in petitioner's name for 250 shares.

Petitioner has also submitted the affidavits of Felicita Lozada-Atwell and Johnny Flores. Lozada-Atwell, who is apparently the same Lozada who signed the 12/1/10 letter as Vice President/Secretary, supports petitioner's allegations. She states that during her tenure as VP and Secretary, "the Board prepared the papers and documents necessary to substantiate [petitioner's] ownership of Apt. No. 3B. The only act remaining was to formally transfer the stock certificate and proprietary lease to [petitioner]." Flores confirms this claim in his own affidavit.

Lozada further states that petitioner made his final payment on August 6, 2012 and has provided a copy of the letter of full payment the HDFC issued in connection therewith. That letter is dated August 13, 2012, states in relevant part that "We the Board of Directors [of the HDFC] have received the full complete payment of \$15,000 on apartment 3B from [petitioner] on August 6, 2012", and is initialed next to the printed names of Lozada and Johnn Flores, as president.

A second letter is annexed to the aforementioned. The second letter is also dated August 13, 2012. It is on the HDFC's letterhead and is addressed to petitioner. The subject line reads: "APARTMENT 3B/ FULL COMPLETE APARTMENT PURCHASE PAYMENT". This letter is signed by Flores, Lozada and petitioner. The letter provides:

*An agreements (sic) made between the Board of Directors and the Tenant [petitioner] residing at [the apartment]. The Board of Directors and the Purchaser schedule a (sic) agreement written on the day of May 23, 201 (sic), in full detail of the apartment purchase payment plan. Payment has been fulfilled as planned and now we are coming to a closing with the tenant. The tenants purchase of the apartment is now completely PAID IN FULL \$15,000.00, last payment scheduled for payment completion was on August 1, 2012.*

**PURCHASER PAID LAYOUT:**  
CO-OP PRICE..... \$15,000.00  
PAID..... \$8,000.00  
REMAINING..... \$7,000.00  
PAID..... \$6,000.00  
PAID..... \$1,000.00  
**PAID IN FULL..... \$15,000.00**

Respondents raise a number of arguments. They contend that the HDFC respondent was not properly served, that the return date of the petition was not in accordance with CPLR 7804, and that pe-

itioner's claim is barred by the statute of limitations and the statute of frauds. Finally, cross-movants argue that petitioner has failed to state a cause of action against the individual respondents.

Respondents have also submitted the affidavit of Roman Santos, named in the caption, who states that he resides at the building, is a shareholder of the HDFC and "acting manager assisting the board of directors in the operation and care of the HDFC's building." Santos claims that in or about July 2013, petitioner appeared at a board meeting shortly after the new board was elected and "demanded that the board issue him the shares and proprietary lease pertaining to Apartment 3-B." Santos states, however, that "[a]ccording to the HDFC's records, that apartment had been rented by the HDFC to [the subtenants] in March 2011. Santos points to copies of one of four money orders respondents have provided to the court. Specifically, he points to the copy with a notation next to same that reads:

Apartment 3-B  
John E. Colon & Karen Acevedo  
Date: 03/21/11  
--- Security Deposit

It is unclear who provided that notation. There are numbers on the money order which seem to indicate that it was deposited March 21, 2011. The money order is signed by Karen Acevedo and was made payable to "237 E 121<sup>st</sup> HDFC Apt 3B"). Under the section entitled "PAYMENT FOR/ACCT #" is written "Security Deposit". The PURCHASER'S ADDRESS section lists 2383 Second Ave. Apt 2302. The three other copies of money orders appear to have been deposited in 2012 and are for \$1000 and were purchased by one of the subtenants.

Santos disputes that there was ever a sublease as petitioner claims. He maintains that "[t]here is no record of petitioner ever residing in the apartment" nor is there any evidence of payments to the HDFC by petitioner. Santos states that petitioner's request for the stock certificate and proprietary lease for the apartment was properly denied at the July 2013 board meeting. After that meeting, Santos states that he "never saw" petitioner again.

In opposition to the cross-motion, petitioner has provided the sworn affidavit of Karen Acevedo. She states therein that her and Colon rented the apartment from petitioner from June 1, 2011 through the present day and that initially they had an "informal" agreement but in May 2012 entered into a "formal lease agreement." She further claims:

Shortly after Johnny Flores was voted out of office, I had a meeting with Mr. Angelo Domenech, the new president, to verify the status of apartment 3B ... I and my sister, who accompanied me at that time, sat with Mr. Domenech and he broke it to us that in no way [petitioner] had ownership to the apartment (3B) because Mr. Domenech has a black binder where all documents and ownership papers are stored. As Mr. Domenech was flipping the binder open to show me and my sister, it just so happens that in that black binder [petitioner's] ownership papers were right there. Afterwards Mr. Domenech said that he had to see how official those papers were and just thanked us for meeting with him and ended the meeting.

Next, petitioner has provided another affidavit from Flores, who states that in February 2006, the HDFC entered into an agreement with Santos "regarding allegations of his misconduct, corruption and abuse of position." A copy of that agreement has been provided to the court. It provides, in relevant part, that Santos pay \$3,500 to the HDFC and refrain from participating in the operation and management of the HDFC for ten years. Flores also points to a printout from "hpdonline.hpdnyc.org" which lists Heriberto Deleon as the head officer, Angelou Domenech as officer and Maria Perez as managing agent.

Otherwise, petitioner has provided a copy of a proprietary lease for the apartment dated April 1, 2010 and listing himself as shareholder and "owner of 250 shares issued by the [HDFC], to which this lease pertains and which have been allocated to Apartment 3-B in the Building."

Finally, on reply in connection with the cross-motion to dismiss, respondents have submitted the affidavit of Domenech and another affidavit from Santos. Domenech states that he agrees with Santos that "there is no record in the HDFC's books and records of any such lease having been issued to petitioner". He claims that the photocopy of the proprietary lease petitioner has provided "appears to be an altered copy of someone else's proprietary lease and a fabrication."

### Discussion

At the outset, respondents argue that the HDFC was not properly served. Respondents are correct. Petitioner's affidavit of service indicates that he served the petition on the HDFC on June 20, 2019 by "affixing" to the HDFC's door "since admittance would not be obtained upon reasonable application or a person of suitable age and discretion found who would receive same." The affidavit reflects that further attempts to personally serve the HDFC were made on two other separate occasions and that service was completed by mailing on June 21, 2019.

The HDFC, however, is a corporation and such service is not authorized under CPLR § 311(a) or BCL § 306. Therefore, the HDFC has not been properly served. Accordingly, the Court lacks jurisdiction over the respondent HDFC and the petition against it must be dismissed. The court notes that petitioner has not asked the court to extend his time to serve the HDFC.

However, petitioner's claims are barred by the statute of limitations. "An action to recover a stock certificate is governed by a three-year statute of limitations for recover of a chattel (*Loscalzo v. 507-509 President Street Tenants Ass'n Housing Development Fund Corp.*, 153 AD3d 614 [2d Dept 2017]). Here, petitioner alleges that he first demanded the stock certificate in 2013. Long after the three-year period from that demand expired, petitioner commenced this proceeding. Since petitioner's claim is untimely, the cross-motion to dismiss must be granted and the petition denied.

In light of this result, the court declines to consider the parties' remaining arguments as moot.

Accordingly, it is hereby **ORDERED** that the cross-motion to dismiss; and it is further

**ADJUDGED** that the petition is denied and this proceeding is dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated:

12/18/19  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.