

McKew v Shaw

2020 NY Slip Op 32660(U)

August 10, 2020

Supreme Court, New York County

Docket Number: 656214/2016

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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MARK L. MCKEW, AS RECEIVER OF 11-15 ST.
NICHOLAS AVENUE HDFC AND ITS REAL PROPERTY,

Plaintiff,

INDEX NO. 656214/2016

MOTION DATE 03/13/2020

MOTION SEQ. NO. 011

- v -

ROBERT SHAW, ABC MANAGEMENT CORP.,
JPMORGAN CHASE & CO., ANN BROOKS, MARTA
BATIZ, TYRONE PATTERSON,

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 011) 235, 236, 237, 238,
239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 252, 253, 254

were read on this motion to/for DISMISS.

BACKGROUND

In this action to recover money damages, inter alia, for conversion of corporate assets,
and for declaratory relief, the court, by order dated October 9, 2018, appointed Mark McKew,
Esq., as temporary receiver to manage the affairs of the subject residential building located at
11-15 St. Nicholas Avenue in Manhattan, a cooperative housing development fund corporation
(HDFC). The court has discussed the facts of this case in previous orders. Essentially, the
plaintiff, and now the receiver, allege that there were fraudulent transfers of shares between and
by the tenants, shareholders and prior building management. Defendant Tyrone Patterson, a
porter in the building, once had a license to occupy Apartment 1D as part of his compensation,
but never paid maintenance. He now claims an ownership interest in Apartment 1E. He was
added as a defendant in this action on or about September 19, 2019. The amended complaint
alleges causes of action for fraud, ejectment and unjust enrichment as against him.

By this motion, the receiver moves to dismiss the two counterclaims asserted by defendant Tyrone Patterson in his amended answer, one for declaratory relief and one for attorney's fees. Specifically, Patterson seeks (1) a judgment declaring that he is "the bona fide holder in due course of a valid share certificate and in good standing under the appurtenant occupancy agreement for Unit 1E" and (2) an award of \$25,000 in attorney's fees for his defense of this action. The receiver argues that he has a defense to the first counterclaim based on documentary evidence (CPLR 3211[a][1]) and that the second counterclaim fails to state a cause of action upon which relief can be granted (CPLR 3211[a][7]). Patterson opposes the motion. The motion is granted as to the second counterclaim seeking attorney's fees.

DISCUSSION

. Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014).

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84

NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026

Declaratory judgment is a discretionary remedy which may be granted “as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” CPLR 3001; see e.g., Jenkins v State of N.Y., Div. of Hous. & Community Renewal, 264 AD2d 681 (1st Dept 1999). It has long been the rule that, in an action for declaratory judgment, the court may properly determine respective rights of all of the affected parties under a lease. See Leibowitz v Bickford’s Lunch Sys., 241 NY 489 (1926).

In regard to the first counterclaim, the receiver argues that Patterson cannot establish that he is a “bona fide purchaser for value,” the applicable term as defined in Real Property Law § 265- a (2) (b), because his assertion “is contradicted by documentary evidence.” The receiver argues that Patterson’s counterclaim fails to allege “(i) who he purchased the subject real property from; (ii) when he purchased; (iii) what consideration he paid; and/or (iv) whether any mortgage was extended in connection with the alleged purchase and sale transaction;” and concludes that “Patterson has failed to tender any corroborating evidence to Plaintiff that can show that he is either, or both, a shareholder and/or owner of the Premises.” However, the documentary evidence submitted by the receiver includes two stock certificates (dated 1999 and 2017) which appear to indicate that Patterson is the joint owner of 250 shares of 11-15 St. Nicholas Avenue HDFC or may have an ownership interest of some sort in apartment 1E Thus, the receiver’s documentary evidence do not conclusively dispose of that counterclaim.. However, the court notes that, in opposition to the motion, Patterson provides no proof to support his claim of ownership, no affidavit of his own and no cogent explanation as to how he acquired shares to Unit 1E, the unit next to his porter’s unit. While Patterson may not ultimately succeed in whole or part on this counterclaim either at trial or on summary judgment; it is not subject to dismissal pursuant to CPLR 3211(a)(1).

Patterson’s second counterclaim seeking an award of attorney’s fees must be dismissed pursuant to CPLR 3211(a)(7) “Under the general rule, attorney’s fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule.” Hooper Assoc. v AGS Computers, 74 NY2d 487, 491 (1989); see Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept 1976). Patterson does not identify any such agreement, statute or court rule. Indeed, the attorney’s fees claim is not addressed at all. Nor has Patterson been the “prevailing party” on his counterclaim for declaratory relief. Therefore, the counterclaim for attorney’s fees is dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of plaintiff Mark L. McKew, as Receiver of 11-15 St. Nicholas Avenue HDFC and its Real Property, to dismiss the counterclaims of defendant Tyrone Patterson is granted to the extent that the second counterclaim is dismissed, and the motion is denied as to the first counterclaim, without prejudice, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

8/10/2020
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART SUBMIT ORDER