

Enfeld Holdings, LLC v Carroll
2021 NY Slip Op 30697(U)
February 23, 2021
Supreme Court, New York County
Docket Number: 654919/2019
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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ENFELD HOLDINGS, LLC,

Plaintiff,

DECISION AND ORDER

- v -

LOUISE CARROLL in her capacity as the
COMMISSIONER OF THE NEW YORK CITY
DEPARTMENT OF HOUSING PRESERVATION AND
DEVELOPMENT, AWILDA ABREU, SHAHNAZ
AMIRSHAHI, MICHAEL ARDEBILI, REZA
ARDEBILI, SIMON BERA, JENNIFER BLISS,
TOMAS CABRERA, TOM COLBY, ROBERT
COSTELLI, FRANK COSTELLI, MAXIMINA
DUBON, ELIAS ESTEVEZ, VIRGINIA FABRE-
HERNANDEZ, S. NORREN FABRE-STAHN,
ESPERANZA FUNES, ELVIS SALAMON, DANIEL
GELBER, JAMES GRAHAM, MICHAEL JACKSON,
EVAN JONES, YUNUSA KENCHI, MARTIN
KLONOWSKI, ADELAIDA MARTINEZ, IVAN
PAULINO, GIZELLE PAULINO, EDGAR
SANTIAGO, JULIA SANTIAGO, IBRAHIM
SOLYMAN, IRMA DELEON and LORI WALLS

Index No. 654919/2019

MOT SEQ 001 002

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this declaratory judgment action arising from an agreement to purchase the shares appurtenant to 28 of the 32 cooperative units in the building located at 314-16-18 West 36th Street in Manhattan, the plaintiff, Enfeld Holdings LLC (Enfeld), seeks an order tolling the closing of the contracts of sale and enjoining the owners of the 28 units (the seller-

defendants) from initiating, authorizing, or accepting the release of the contract deposits being held in escrow pending a final determination of the legality of the transaction (MOT SEQ 001). The seller-defendants opposed the motion and cross-moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint. That cross-motion was later withdrawn.

The plaintiff moves separately pursuant to CPLR 3212 for partial summary judgment on its first cause of action seeking a declaration that the only remaining restrictions on the shares of the units under the New York Private Housing Funding Law (PHFL) or the building's governing documents are income limits for occupants and subtenants that require that the units be provided to low-income occupants (MOT SEQ 002). The plaintiff maintains this requirement is not applicable to it as a potential shareholder since it intends to lease the units to qualifying individuals and, therefore, regardless of its corporate form and income, it may proceed to purchase the units.

Defendant Louise Carroll, the acting Commissioner of New York City Department of Housing Preservation and Development (HPD), opposes the motion. The seller-defendants also oppose the motion and again purport to cross-move, this time without proper notice of motion, to dismiss the complaint pursuant to CPLR 3211(a)(3) and (10).

The motion for a preliminary injunction, the motion for partial summary judgment and the purported cross-motion to dismiss are denied.

II. BACKGROUND

A. The Building and the Restrictions in Place Under the PHFL and Governing Documents

The building located at 314-16-8 West 36th Street in Manhattan is owned by non-party 314-16-18 West 36 Street Housing Development Fund Corporation (W36 Corp.). W36 Corp. is a Housing Development Fund Corporation (HDFC) organized pursuant to Article XI of the PHFL. In accordance with PHFL § 573(3)(a), W36 Corp. is organized exclusively to develop and maintain housing for persons of low income.

The deed to the property, obtained by W36 Corp. from the City of New York on October 28, 1992, restricts the sale or transfer to the property for 25 years. The deed provides that W36 Corp. "covenants and agrees not to sell, transfer, exchange, encumber, mortgage, place a lien upon, or subject to any security instrument whatsoever or otherwise dispose of all or substantially all of the premises for twenty-five years from the date of this deed without prior written approval of the Commissioner of the City's Department of Housing Preservation

and Development.” This 25-year resale period is also incorporated into W36 Corp.’s certificate of incorporation.

Pursuant to W36 Corp.’s bylaws, during the 25-year resale period any profit from the disposition of shares by a seller-defendant must be allocated such that the City of New York receives 40% and the remaining 60% of the profits be apportioned between the seller and W36 Corp. pursuant to a formula in the bylaws. The 25-year restriction expired in October 2017.

The deed further provides that “[W36 Corp.] covenants and agrees to operate the premises solely as a housing project for persons or families of low income as defined in Section 576 of Article XI of the Private Housing Finance Law.” The income limits imposed by Section 576 are also incorporated into the W36 Corp.’s bylaws and the proprietary leases entered into by the seller-defendants, requiring that all residents and subtenants meet the income requirement.

The bylaws and proprietary leases further provide that each shareholder is to be a primary resident of the apartment to which their shares are allocated. However, the offering plan and proprietary leases also allow shareholders to sublet their respective apartments, subject to board approval or approval of a majority of shareholders, as long as the subtenant also satisfies the income requirements for the building.

B. The Plaintiff and Seller-Defendants' Agreement to the Sale of the Units.

In July of 2017, the seller-defendants claim that they were approached by Joel Werzberger on behalf of non-party The Joyland Group (Joyland) who offered them each \$700,000 for their shares in W36 Corp., 250 being allotted to each unit, on the condition that they deliver title clean of any HPD restriction. The seller-defendants declined that offer. In December 2018, the seller-defendants claim that Joyland again approached them offering them each \$420,000 for their shares as long as they closed the deal without reaching out to any governmental agency and representing that Joyland would deal with any governmental agency after the closing occurred. The seller-defendants claim that they agreed to a sale under those terms.

In early 2019, the seller-defendants claim that Werzberger again contacted them, this time with his partner Martin Erehenfeld, seeking to proceed with the transaction discussed in December 2018 although through the plaintiff company, Enfeld, and not through Joyland. The seller-defendants again agreed to the sale and through March 2019 they each entered into separate contracts of sale with identical terms. Pursuant to the terms of the sales contracts, the plaintiff escrowed \$20,000 towards the purchase price for each of the units as a deposit. Under Section

13 of the contracts, the seller-defendants are entitled to retain the deposits in the event of the plaintiff's default.

Section 4.1.9.2 of the contracts further provides that at closing "the shares, lease, personalty and any included interest shall be free and clear of liens...other than liens which are against the entire property or against other units in the property or liens, encumbrances, and restrictions imposed by NYC or any of its agencies pertaining to the fact that this is an HDFC." Notably, this term was inconsistent with Werzenbger's alleged prior representation that the buyer would deal with any governmental agency after the closing.

Section 1.15 of each of the contracts also provides that closing would occur on or about five business days from the plaintiff's receipt of W36 Corp.'s approval of the sale of the 28 units ratified by its shareholders and the plaintiff's receipt of confirmation from Riverside Title Company (Riverside) that there are no impediments to the title of each unit or the corporation and its premises. Section 1.15 also provides that in the event the plaintiff fails to close within five business days after the notice to clear, the seller-defendants may send a demand to close within three days of the date of the notice and time shall be of the essence for the plaintiff to close.

C. Closing Under the Contracts, HPD's Position on the Sale,
and the Instant Action

On April 11, 2019 W36 Corp.'s board of directors convened a special meeting in which they approved the proposed sale. At the same meeting, a super-majority of the shareholders ratified the board's approval.

On June 6, 2019, Isaac Katz, the plaintiff's advisor on rent regulations and HPD requirements and Allen Turek, the plaintiff's counsel, met with Mark Matthews of the HPD. Katz and Turek sought to confirm that the resale period had expired in 2017 and that there were not any statutory or regulatory prohibitions or restrictions on who may own shares in the building. The plaintiffs contend that at the meeting Matthews confirmed that the resale period had expired and that there were no regulatory or statutory requirements regarding income restrictions that applied to W36 Corp. except for those provided in its governing documents.

The seller-defendants contend that by August 6, 2019, all necessary documentation for the sale had been provided and the parties were cleared to close under the respective contracts. The plaintiff contends that the notice provided by the title company Riverside was prematurely and improperly given, and that Riverside was merely confirming that it had received all

necessary paperwork from the seller-defendants, and not that there was clearance to close the transaction.

On August 8, 2019, Katz and Turek requested written confirmation from Matthews of HPD that there were, in fact, no regulatory restrictions that would impede the sale. Matthews responded that W36 Corp.'s units can be sold to income eligible buyers. However, the following week, on August 14, 2019, Matthews sent an email to the plaintiff's proposed lender for the sale in which he stated that the proposed sale may be in violation of the PHFL inasmuch as the plaintiff itself does not meet the income requirements for shareholders under the PHFL that were incorporated into the W36 Corp.'s deed and certificate of incorporation. The email also stated that HPD's position was that a single entity should not own multiple apartment units in an HFDC and be able to sublease them indefinitely.

On August 21, 2018, the seller-defendants sent a time is of the essence notice to close on the sale. The notice required that the plaintiff close on or before August 28, 2019, or the sellers would be entitled to the remedies provided for under the contracts, including the retention of the down-payments and the collection of additional legal fees.

On August 22, 2018, Turek responded to the seller-defendants' notice by providing HPD's position that the sale may

violate the PHFL, the deed, and the certificate of incorporation. Turek also provided an email from Riverside stating that its underwriter had not yet given clearance to close the transaction, as the transaction may be in violation of the restrictions contained in W36 Corp.'s lease. On August 25, 2018 the seller-defendants offered to return the deposit funds currently held in escrow in order to terminate the contract and find a different potential buyer. The plaintiff refused. Instead, the plaintiff commenced the instant action on August 26, 2019.

D. The Litigation

The plaintiff seeks a declaration that, pursuant to the deed and W36 Corp.'s governing documents, the resale period has expired by its terms, and the sole remaining restrictions upon the building and the transfer of the seller-defendants' shares are: (i) the income limits of occupants and subtenants of the individual units; and (ii) the requirement under PHFL that the purpose of the HDFC is to provide housing for low-income residents. The plaintiff also asserts causes of action alleging that the seller-defendants either misrepresented their ability to sell their shares or that the parties were mutually mistaken as to their belief that the seller-defendants could sell their shares to the plaintiff.

The same day, the plaintiff filed a proposed order to show cause seeking to toll the closing of the 28 contracts of sale and enjoining the seller-defendants from initiating, authorizing, or accepting the release of the contract deposits pending a final determination of the legality of the transaction (MOT SEQ 001). On August 27, 2019, this court signed the order to show cause and granted a temporary restraining order, granting the above relief pending a hearing on the motion.

On October 21, 2019, HPD interposed an answer reiterating its position that the contracts of sale between the seller-defendants and the plaintiff violated the PHFL and W36 Corp.'s governing documents based upon, *inter alia*, the income requirements for owners and occupants. HPD also asserted an affirmative defense that the plaintiff failed to name a necessary party, W36 Corp., to the proceeding.

On November 14, 2019, the seller-defendants filed their opposition to the plaintiff's motion, and cross-moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the action and for attorneys' fees. By a so-ordered stipulation dated November 26, 2019, the seller-defendants withdrew their cross-motion to dismiss and converted the remainder of their motion to opposition to the plaintiff's order to show cause.

On December 28, 2019, the seller-defendants interposed their answer asserting general denials and counterclaims. The gravamen of the seller-defendants' counterclaims is that the plaintiff represented to them that it would handle any regulatory issues following the sale, thereby inducing them to sell their units for a lesser value, all while planning to engage in the instant litigation that would either ratify the sale and increase the value of the units or allow them to escape the terms of the contract.

On January 22, 2020, the plaintiff filed a second proposed order to show cause seeking partial summary judgment on its first cause of action for declaratory judgment. HPD opposed the motion arguing that i) discovery had not yet commenced, ii) the plaintiff failed to name necessary parties as defendants in the proceeding, and iii) the proposed sale would be in violation of the PHFL and W36 Corp.'s corporate documents (MOT SEQ 002). The seller-defendants also opposed the motion and purported to cross-move, without a Notice of Motion, to dismiss the complaint pursuant to CPLR 3211(a)(3) and (10) for lack of standing and failure to include a necessary party.

In a so-ordered stipulation dated January 29, 2020, the court set a further briefing schedule and extended the TRO until a further order of the court.

III. DISCUSSION

A. Plaintiff's Motion for a Preliminary Injunction (MOT SEQ 001)

The plaintiff seeks a preliminary injunction tolling the closing of the 28 contracts of sale and enjoining the seller-defendants from initiating, authorizing, or accepting the release of the contract deposits being held in escrow pending a final determination of the legality of the transaction.

To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary injunction is not granted, and (3) a balance of equities in his or her favor. See CPLR 6301; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839 (2005); Doe v Axelrod, 73 NY2d 748 (1988). The function of a preliminary injunction "is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits." Olympic Tower Condo. v Coccoziello, 306 AD2d 159, 160 (1st Dept. 2003). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. See Doe v Axelrod, supra, at 750.

The plaintiff fails to demonstrate a likelihood of success on the merits insofar as it seeks a declaration essentially ratifying its proposed purchase of the seller-defendants'

shares. That issue is discussed later herein on the plaintiff's motion for partial summary judgment. In essence, the plaintiff is not likely to be able to establish that it is a qualified purchaser under the PHFL and W36 Corp.'s governing documents. However, even were the plaintiff able to establish a likelihood of success on the merits, it nonetheless fails to establish its entitlement to a preliminary injunction as it cannot demonstrate irreparable harm or a balance of the equities in its favor.

The plaintiff claims that it will suffer irreparable harm by losing its bargained-for ability to purchase the seller-defendants' shares according to the terms of the sales contracts. The argument is without merit. "Where the plaintiffs can be fully compensated by a monetary award, an injunction will not issue because no irreparable harm will be sustained in the absence of such relief." Mar v Liquid Mgmt. partners, LLC, 62 AD3d 762, 763 (2nd Dept. 2009); see Meissner v Yun, 126 AD3d 565 (1st Dept. 2015); Zodkevitch v Feibush, 49 AD3d 424 (1st Dept. 2008). More specifically, where a plaintiff's "interest in real estate is commercial, and the harm that they fear is the loss of their investment, as opposed to loss of their home or a unique piece of property in which they have an unquantifiable interest, they can be compensated by damages and therefore cannot demonstrate irreparable harm." Broadway 500 W. Monroe Mezz II LLC v Transwestern Mezzanine Realty Partners II, LLC, 80 AD3d

483, 484 (1st Dept. 2011) citing SK Greenwich LLC v W-D Grp., 2010 WL 4140445, *1 (SD NY, Oct. 21, 2010, No. 10-CV-7846 [RPP]). Similarly, the loss of ability to purchase shares at a specific price is calculable as money damages, and therefore does not rise to the level of irreparable harm. See After Six Inc. v 201 E. 66th St. Assocs., 87 AD2d 153 (1st Dept. 1982). That is the case here.

In determining the balancing of the equities, the court must determine the relative prejudice to each party accruing from a grant or denial of the requested relief. See Sau Thi Ma v Xuan T. Lien, 198 AD2d 186 (1st Dept. 1993). Here, were the court to grant a preliminary injunction, the seller-defendants would be restrained from selling their shares while the court determines the remaining restrictions thereon, despite the seller-defendants having entered into the transaction at a reduced price upon the belief that they could sell the shares without having to participate in litigation. A preliminary injunction would also require the seller-defendants to prepare to vacate their homes, if they have not already done so, on short notice pending the determination of the matter and would restrict them from being able to sublet any of the units for an indefinite period of time. Thus, the prejudice to the seller-defendants far outweighs any prejudice that would be suffered by the plaintiff if the preliminary injunction were denied and the

plaintiff was forced to either consummate the sale that it negotiated or abandon its attempts to purchase the units pending a final determination of the legality of the transactions. Therefore, the plaintiff's motion for a preliminary injunction is denied.

Furthermore, to the extent that the plaintiff seeks injunctive relief to prevent the loss of the security deposits, the plaintiff again does not establish a likelihood of success on the merits. This is because the purported clear title notice that the seller-defendants relied upon when sending their time is of the essence notice was not "commitment from Riverside Title Company confirming that there are no impediments to title in regard to the unit[s] and the corporation and its premises" as required in the contracts of sale. However, as the damage that the plaintiff would suffer from the loss of its security deposits is purely monetary, the plaintiff cannot establish irreparable harm. See Harris v Patients Medical, P.C., 169 AD3d 433 (1st Dept. 2019); SportsChannel Am. Assocs. v Nat'l Hockey League, 186 AD2d 417 (1st Dept. 1992).

B. Plaintiff's Motion for Partial Summary Judgment (MOT SEQ 002)

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form

sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851 (1985); O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) quoting Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

In declaratory judgment actions, a court may award partial or complete summary judgment to the appropriate party if there are no factual issues presented by the pleadings or the facts

are undisputed. See Lionel Freedman, Inc. v Glens Falls Ins. Co., 27 NY2d 364 (1971); Oriental Boulevard Co. v Heller, 27 NY2d 212 (1970); Janos v Peck, 21 AD2d 529 (1st Dept. 1964). However, where there are issues of fact "precluding a determination or declaration...summary judgment may not ordinarily be granted." Janos v Peck, supra at 536.

Here, the plaintiff seeks a declaration that the 25-year resale period contemplated in the deed, certificate of incorporation and bylaws has expired and that only remaining restrictions on the shares of the condominium units and the building itself are that the units must be occupied by low-income tenants and that any occupant or subtenant fit within the income requirements established under the PHFL and W36 Corp.'s governing documents. Essentially, the plaintiff asks the court to declare that it may purchase the shares notwithstanding its corporate form or income so long as it subleases the units to qualifying low-income individuals. The plaintiff's submissions do not establish its entitlement to that relief.

In support of its motion, the plaintiff submits, *inter alia*, the deed issued to W36 Corp. on October 28, 1992. The plaintiff also submits W36 Corp.'s certificate of incorporation, by-laws, and a form copy of the proprietary lease purportedly entered into between W36 Corp. and the various seller-

defendants. These documents all contain the 25-year resale period restrictions which ran from the date of the conveyance of title to W36 Corp. As such, they are sufficient to demonstrate that the 25-year resale period contemplated has expired. However, they would not entitle the plaintiff to the declaration it seeks to enable the sale to proceed. That is, a declaration that these documents show that there are no income restrictions on purchasers of shares or at least not on the plaintiff given its intention to sublease to qualified individuals.

In that regard, the plaintiff claims that W36 Corp.'s governing documents only require that residents, occupants, and subtenants approved by the board of directors meet the low-income restrictions of the PHFL, and that they are silent as to any income requirements for a purchaser or shareholder. However, the plaintiff also submits a "HDFC Fact Sheet for Cooperative Shareholders" which provides that "Article XI [of the PFHL] requires HDFC cooperatives to provide housing for persons and families of low income. Under the PHFL, this means persons and families whose household income does not exceed 165% of the area median income. Anyone purchasing shares in an HDFC cooperative must meet this requirement." This contradiction alone would warrant a denial of the plaintiff's motion.

The plaintiff also relies on an affidavit of Martin Erenfeld, the manager of the plaintiff, averring that if there are income requirements imposed upon purchasers or shareholders under W36 Corp.'s governing documents or the PHFL, they should be disregarded in this instance as the plaintiff intends to transfer ownership of each of the units to various trusts once the sale is completed which would satisfy the income requirements for owners. This argument is specious.

Section 5.03 of W36 Corp.'s bylaws require that "the shareholder must use the apartment as his or her primary residence" and that "if the apartment ceases to be the shareholder's primary residence, then no occupancy or use of the apartment, including any sublease or assignment, which otherwise complies with this lease will be permitted." As such, the plaintiff's purported plan to own the shares, or transfer ownership of the shares to a trust, and then indefinitely sublet the apartments to income-eligible subtenants would be barred by the terms of the lease and violative of W36 Corp.'s by-laws and the PHFL. The plaintiff provides no basis in these papers to conclude otherwise.

Since the plaintiff does not meet its burden in the first instance of demonstrating the absence of a triable issue of fact, the court need not examine the opposition. In any event,

the opposition papers offer, if not any additional facts, some further legal bases to support denial of the motion.

HPD argues that the motion should be denied as premature because insufficient discovery has taken place (see CPLR 3212[f]), and the plaintiff failed to name W36 Corp. as a necessary party (see CPLR 1001). The seller-defendants also oppose the motion and cross-move, without a Notice of Motion (see CPLR 2214, 2215) to dismiss the complaint for lack of standing (see CPLR 3211[a][3]) and failure to join W36 Corp. and the remaining shareholders in the action (see CPLR 3211[a][10]). The seller-defendants' cross-motion is addressed separately.

HPD's first contention, that the instant motion is premature, is without merit. HPD contends that it does not have sufficient information regarding the plaintiff's assets, income, and corporate structure, and W36 Corp.'s bylaws, proprietary lease, or the subject sales contracts. However, the plaintiff readily admits that it would exceed that income restriction such that discovery of information regarding its financials are unnecessary for a determination of the motion. Moreover, most of the documents sought by HPD are all readily available on NYCEF.

As such, HPD fails to demonstrate how discovery would uncover further relevant evidence or material in exclusive possession of the plaintiff. See Kent v 534 East 11th Street, 80

AD3d 106, 114 (1st Dept. 2010). It has not shown that "its claims in opposition are supported by something other than mere hope or conjecture [citation omitted], and that [it] has at least made some attempt to discover facts at variance with the moving party's proof." Voluto Ventires, LLC v Jenkins & Gilchrist Parker Chapin LLP, 44 AD3d at 557 (1st Dept. 2007); see River Park Assocs. (1972) L.P. v Richman Plaza Garage Corp., 178 AD3d 422 (1st Dept. 2019); Singh v New York City Housing Auth., 177 AD3d 63 (1st Dept. 2019).

However, HPD and the seller-defendants are correct in arguing in opposition to the motion that W36 Corp. and its remaining shareholders are necessary parties to this action. CPLR 1001(a) mandates a joinder of a party where that party is necessary for complete relief between the parties in the action or where they may be inequitably affected by the judgment in the action. See City of New York v Long Island Airports Limousine Serv. Corp., 48 NY2d 469 (1979). Here, there is reason to join both W36 Corp. and its several remaining shareholders as a determination in this action may inequitably affect them. The litigation involves the transfer of shares of stock in the corporation and the proprietary leases assigned to the subject units. See Application of Folic, 139 AD2d 456 (1st Dept. 1988). Any determination as to the propriety of the proposed sale requires a declaration determining the rights and restrictions

that are currently associated with the shares now that the 25-year resale period has elapsed. A denial of the proposed sale would adversely impact the value and transferability of the shares of the non-joined parties. A ratification of the proposed sales plan would potentially allow the plaintiff to assume control of W36 Corp. and its board of directors, potentially to the detriment the non-joined parties. As such, the instant motion is denied. See CPLR 1001(a).

Finally, notably absent from the plaintiff's papers is any persuasive authority supporting their position that the proposed sale of a majority of the shares of an HDFC building to an investor is in keeping with the letter or intent of PHFL.

C. Seller-Defendants' Cross-Motion to Dismiss (MOT SEQ 002)

The seller-defendants purportedly cross-move to dismiss the complaint pursuant to CPLR 3211(a)(3) on the ground that the plaintiff lacks standing and pursuant to CPLR 3211(a)(10) and for the plaintiff's failure to join the aforementioned parties, but do so without filing any Notice of Cross-Motion (see CPLR 2214; 2215). Even overlooking the procedural defect, the contentions are without merit.

The plaintiff is a party to the subject contracts of sale and is seeking to enforce contractual rights. As such, the

plaintiff has an actual legal stake in this matter and thus has standing. See Silver v Pataki, 96 NY2d 532 (2001).

Nor is dismissal pursuant to CPLR 3211(a)(10) mandated. It is well settled "dismissal for failure to join a necessary party should eventuate only as a 'last resort' (Saratoga Count Chamber of Comm. v Pataki, 100 NY2d 801, 821 [2003])." L-3 Commications Corp. v SafeNet, Inc., 4 AD3d 1, 11, (1st Dept. 2007). The court should only grant a motion to dismiss based on nonjoinder when the unnamed party is not subject to the jurisdiction of the court, will not appear voluntarily, and no remedy is available under CPLR 1001(b). See Siegel, Practice Commentaries C3211:34; 1 New York Civil Practice: CPLR P 1003.04. That is not the case here, where the absent parties are a New York corporation and residents of New York. Thus, while the parties should be joined as discussed herein, the complaint is not now subject to dismissal for nonjoinder.

The cross-motion is denied, and the court does not reach the other purported "fatal" procedural defects in the seller-defendants' motion papers highlighted by the plaintiff.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the plaintiff's motion for a preliminary injunction is denied (MOT SEQ 001); and it is further,

ORDERED that the temporary restraining order issued by this court in the order dated August 27, 2019, which tolled the closing under each of the contracts of sale and enjoined the seller-defendants from initiating, authorizing, or accepting the release of the contract deposits being held in escrow, is hereby vacated in its entirety; and it is further,

ORDERED that the plaintiff's motion for partial summary judgment is denied (MOT SEQ 002), and it is further,

ORDERED that the seller-defendants' cross-motion to dismiss the complaint is denied (MOT SEQ 002); and it is further,

ORDERED that the plaintiff may serve an amended complaint joining necessary parties within 30 days of entry of this order; and it is further,

ORDERED that the parties shall jointly contact chambers on or before May 14, 2021, to schedule a status conference.

This constitutes the Decision and Order of the court.

Dated: February 23, 2021



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