Mendez v One Sunset Park Condominium
2021 NY Slip Op 30879(U)
March 18, 2021
Supreme Court, Kings County
Docket Number: 526936/2019
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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NYDIA RIVERA MENDEZ, et al.,

Plaintiffs,

-against-

ONE SUNSET PARK CONDOMINIUM, MATT LEVI, PAUL KLAUSNER, and 4401 SUNSET HOLDINGS LLC,

Defendants.

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DECISION / ORDER

Index No. 526936/2019

Motion Seq. No. 1, 3*

Recitation, as required by CPLR 2219 (a) of the papers considered in the review of plaintiffs' motion for summary judgment and defendants' cross motion to dismiss the amended complaint

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmations, Affidavits and Exhibits Annexed.....	30-44
Notice of Cross Motion, Affirmations and Exhibits Annexed……..	99-113
Affirmations in Opposition and Exhibits Annexed.....	80-98, 148-151
Reply Affirmations.....	152-158, 164

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

In Mot. Seq. #1, defendants One Sunset Part Condominium and Matt Levi move for an order 1) granting them summary judgment dismissing the entire complaint, or 2) alternatively, dismissing the fourth cause of action, and 3) granting them summary judgment and issuing a declaratory judgment (a) declaring the moving defendants have not violated the Martin Act or any other statutory provision set forth in the complaint; (b) declaring that the plaintiffs who are tenants are not entitled to an injunction barring the moving defendants from destroying, combining or otherwise reconfiguring the common and general areas of the building located at 792 44th Street, Brooklyn, New York,

* and MS #2 in 527484/2019

("the Building") [also known as 4401 Seventh Avenue] that is the subject of this action, or from selling the lot, the common and/or general area of the building to another person or entity; and (c) declaring that the moving defendants are not obligated to correct any of the conditions or remove any of the violations which resulted from the fire which occured at the Building on April 3, 2019; and 4) for an order granting them summary judgment on their first counterclaim and declaring that the tenants' further possessory or other rights in the Building were extinguished upon the total destruction of the Building resulting from the fire at the Building on April 3, 2019, and 5) for an order granting the moving defendants summary judgment on their second counterclaim and an order declaring that the tenants have no further possessory or other rights in the Building, as 72.45% of the unit owners have voted not to restore or rebuild the Building, as is authorized by Article V § 5.5 (D) of the By-Laws and New York Real Property Law § 339-cc.

In MS #3, plaintiffs who were tenants oppose MS #1 (and MS #2 brought under the wrong index number) and cross-move for an order granting plaintiffs summary judgment and dismissing, pursuant to CPLR 3211 (a) (7), defendants One Sunset Park Condominium’s and Matt Levi’s first and second counterclaims and also dismissing, pursuant to CPLR 3211 (a) (7), defendants 4401 Sunset Holdings, LLC’s and Paul Klausner’s (virtually identical) first and second counterclaims (interposed in their Amended Answer dated February 13, 2020).

In MS #2, a motion sequence number for a motion brought incorrectly under the index number of a related action, 527484/2019, defendants 4401 Sunset Holdings LLC (hereafter “4401 Sunset”) and defendant Paul Klausner seek an order granting them

summary judgment on their counterclaims in this action (as well as summary judgment on their complaint in that action). Their counterclaims in this action are identical to the causes of action asserted in the related action, which was dismissed by order issued simultaneously with this order. They are also the very same counterclaims which plaintiffs seek to dismiss in MS #3. All of the motion papers for motion #2 brought by defendants 4401 Sunset Holdings LLC and defendant Paul Klausner were filed under the other index number, and so are not referenced in the list of papers provided above. The movants' papers are E-File Docs. 46-80, the opposition 83-101, and the reply affirmation is at 121, all in the file for Ind. No. 527484/2019, which is, as of today, dismissed.

Lastly, a motion was made to dismiss the Housing Court action (Civ Ct, Ind. No. 2282/2019) commenced by NYC HPD, which motion was transferred to Supreme Court before it was decided, when the Housing Court action was consolidated with this action, by order dated February 20, 2020. That motion too will be addressed herein.

The court, simultaneously with the issuance of this decision and order, has denied the motion for summary judgment brought by 4401 Sunset Holdings LLC and Paul Klausner in the other action, and granted the cross motion brought by the defendants in that action, who are essentially the plaintiffs in this action, and dismissed the complaint in the other action. Therefore, the court relies on that decision, without repeating all of the analysis in that decision, and dismisses the counterclaims asserted in this action by One Sunset Park Condominium and Matt Levi, as well as those asserted by 4401 Sunset Holdings LLC and Paul Klausner, because the court does not have subject matter jurisdiction to entertain the action or to grant the relief requested in

the first instance, as the New York State Division of Housing and Community Renewal, an agency in the New York State executive branch, has exclusive original jurisdiction.

Background

This action is brought by the individuals who were the Rent Stabilized non-purchasing tenants of ten apartments in a fifty-four-unit apartment building in Sunset Park, which became unsold condominium units when the property was converted to condominium ownership pursuant to a non-eviction plan in 2009. Some of the tenants may be Rent Controlled tenants – the papers are not clear on this point. Consequently, for purposes of this motion, the court considers that all of the tenants are Rent Stabilized. The outcome would not be different if one or more were Rent Controlled. The condominium is known as One Sunset Park Condominium (hereafter One Sunset). There was a fire at the building on April 3, 2019, and the NYC Department of Buildings as well as the NYC Department of Housing Preservation and Development issued Vacate Orders, after determining that it was unsafe for anyone to return to the building. On the date of the fire, the named plaintiffs in this action occupied 10 of the 17 unsold units, and were non-purchasing tenants when the building was converted to a condominium. As such, their rights are governed by General Business Law 352-eee, which essentially states that they retain all of the rights which they had before the building was converted to a condominium.

The unit owners of the Condominium have complied with all applicable laws, and have determined not to rebuild the building.[1] The unit owners had the requisite meeting

[1] Section 339-cc of NY Real Property Law states, in relevant part, as follows:
§ 339-cc. Repair or reconstruction
1. Except as hereinafter provided, damage to or destruction of the building shall be promptly repaired and reconstructed by the board of managers, using the proceeds of insurance, if any,

pursuant to RPAPL § 339-cc and were not able to obtain a vote of 75% or more of the units to rebuild, primarily because the fire insurance coverage, which has been tendered, was only about one-third the estimated cost of rebuilding. An architectural firm retained by the condominium provided a professional opinion that the building "has been over seventy five percent destroyed as a result of the fire and the resulting conditions." These are the two prerequisites for a partition action in a condominium after a fire, pursuant to Real Property Law § 339-cc. The partition action was commenced (508641/2020) and is proceeding before this court.

Plaintiffs' First Cause of Action in this matter seeks "an injunction ordering Defendants to correct all conditions that gave rise to the DOB Vacate Order pursuant to the N.Y.C. Administrative Code, Section 28-205.1."

Plaintiffs' Second Cause of Action seeks "an injunction ordering Defendants to correct all conditions that gave rise to the HPD Vacate Order pursuant to the N.Y.C. Administrative Code, Section 27-2115(h) and Section 27-2121 of the Housing Maintenance Code. Defendants are further entitled to an order directing Defendants to pay their relocation costs until the HPD Vacate Order is lifted pursuant to Administrative Code of the City of New York §§ 26–301(1)(a)(v), 26–305."

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on the building for that purpose, and any deficiency shall constitute common expenses; provided, however, that if three-fourths or more of the building is destroyed or substantially damaged and seventy-five per cent or more of the unit owners do not duly and promptly resolve to proceed with repair or restoration, then and in that event the property or so much thereof as shall remain, shall be subject to an action for partition at the suit of any unit owner or lienor as if owned in common, in which event the net proceeds of sale, together with the net proceeds of insurance policies, if any, shall be considered as one fund and shall be divided among all the unit owners in proportion to their respective common interests, provided, however, that no payment shall be made to a unit owner until there has first been paid off out of his share of such fund all liens on his unit.

Plaintiffs' Third Cause of Action seeks "an injunction barring Defendants from destroying, combining, dividing or otherwise reconfiguring Plaintiffs' rent regulated apartments under the terms of Plaintiffs' leases and the provisions of the Rent Stabilization Code and Rent and Eviction regulations."

Plaintiffs' Fourth Cause of Action seeks "(1) a declaratory judgment that Defendants have violated the Martin Act by failing to adequately insure the premises; (2) an injunction barring Defendants under the provisions of the General Business Law § 352-eeee of the Martin Act from destroying, combining, dividing or otherwise reconfiguring the common and general areas of the premises or particularly Plaintiffs' rent regulated apartments, or from selling the lot, the common and/or general areas of the premises, or Plaintiffs' dwelling units to another person or entity for purposes of doing the same (for clarity, without seeking any injunction on individual owners of units other than those resided in by Plaintiffs from selling or transferring such units); and (3) an order directing Defendants to correct all conditions disturbing or interfering with the comfort, repose, peace or quiet of Plaintiffs in their use or occupancy of their dwelling units or the facilities related thereto."

Plaintiffs' Fifth Cause of Action seeks compensatory damages which arose from defendants' alleged "negligence in failing to keep the premises in good repair, and in failing to insure the building adequately."

Plaintiffs' Sixth Cause of Action seeks damages which arose from "defendants' constructively evicting plaintiffs."

Plaintiffs' Seventh Cause of Action seeks an order "enjoining Defendants from destroying or discarding Plaintiffs' belongings remaining in the subject property after enforcement of the vacate order."

Discussion

The occurrence of a fire in a building with Rent Stabilized tenants is not a novel or rare event. When there is a fire, and the Rent Stabilized tenants must temporarily vacate, and the landlord does not want to rebuild, it is clear that the landlord cannot come to court for relief in the first instance. This is because the Court of Appeals held in 1991 that the Supreme Court does not have jurisdiction to hear such matters (*Sohn v Calderon*, 78 NY2d 755 [1991]). While defendant 4401 Sunset Holdings LLC is an LLC with a principal, Paul Klausner, (and thus at least one member) who was a principal of the Sponsor of the condominium conversion, it is not inequitable to treat this party as the landlord of the apartments at issue, as the change in status from landlord of the apartments to the owner of the unsold units, occupied by the very same tenants, took place without any participation by the tenants or any change in the tenants' rights under the Rent Stabilization Laws. However, the two individual defendants and the condominium defendant are not proper defendants, and the complaint must be dismissed as against them. This matter is solely between 4401 Sunset as landlord and plaintiffs as tenants. There is no duty which runs from the condominium board of managers to the tenants. The board of managers is an unincorporated association which manages the condo for the unit owners pursuant to the powers of attorney each unit owner signs to give the board such authority.

With regard to the plaintiffs' first four causes of action, claims to establish the tenants' rights following the fire, the court finds that just as with the landlord's wish to have its rights established, the DHCR has exclusive original jurisdiction. Thus, as the owner of the Rent Stabilized apartments, defendant 4401 Sunset must apply to DHCR for permission to remove the apartments from Rent Stabilization, as the court does not have subject matter jurisdiction to determine either plaintiffs' claims or defendant 4401 Sunset's counterclaims.

Describing the Supreme Court's lack of jurisdiction, the Court of Appeals states, in *Sohn v Calderon*, 78 NY2d 755, 765-769 [1991]:

> "It is clear beyond question that the Legislature intended disputes over a landlord's right to demolish a regulated building to be adjudicated by the DHCR and, to a lesser extent, HPD. . . . Article VI, § 7 of the NY Constitution establishes the Supreme Court as a court of "general original jurisdiction in law and equity" . . . [that] "is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed" . . . . However, . . . rent-control and rent-stabilization disputes are a modern legislatively created category not encompassed within the traditional categories of actions at law and equity referred to in section 7 (a) of article VI of the NY Constitution.
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> . . . [S]ection 7 (b) of article VI . . . provides: "If the legislature shall create new classes of actions and proceedings, the supreme court shall have jurisdiction over such classes of actions and proceedings," even though "the legislature may provide that another court or courts shall also have jurisdiction and that actions and proceedings of such classes may be originated in such other court or courts." [However,] . . . concurrent original jurisdiction is not necessarily conferred on the Supreme Court when the Legislature provides for the adjudication of regulatory disputes by an *administrative agency* within the executive branch. . . .
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> In situations where the Legislature has [conferred exclusive original jurisdiction upon an executive agency], the Supreme Court's power is limited to article 78 review, except where the applicability or constitutionality of the regulatory statute, or other like questions, are in issue.
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> The only issues raised by plaintiff's complaint were his satisfaction of the regulatory conditions for obtaining certificates of eviction and demolishing a structure containing protected apartment units. The . . . provisions of the rent-control and rent-stabilization laws demonstrate that the Legislature intended DHCR and HPD to be the *exclusive* initial arbiters of whether an owner has, in fact, met these regulatory conditions. . . .

> Since concurrent Supreme Court jurisdiction was not contemplated in this situation and the Constitution does not require it . . ., Supreme Court erred in entertaining plaintiff's claims on the merits . . . [and its] consideration of the delays that purportedly typify the administrative adjudicative process was inappropriate . . . .
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> [T]he Supreme Court should not have entertained plaintiff's action for declaratory and related relief in connection with his efforts to demolish the building. . . . [and, instead,] should have dismissed the complaint for lack of subject matter jurisdiction" (*Sohn*, 78 NY2d at 765-769 [internal citations omitted and emphasis added]).

A case with similar facts, *Bernard v Scharf* (246 AD2d 171 [1st Dept 1998]), which was unfortunately reversed and remanded for dismissal by the Court of Appeals as moot, provides precedent of unclear value. In *Bernard v Scharf* (246 AD2d 171), the Appellate Division states "we emphasize the fact that appellants' rights in the property are subject to their statutory and regulatory obligations to their rent-regulated tenants. However, this fact has no bearing on whether the building's owner can be compelled into an investment with a negative rate of return. Whatever the answer to that question, appellants would still not be free to walk away from this situation entirely. If the building is not restored, petitioners may have the right to compensation for the loss of their tenancies" (*id.* at 175).

The Rent Stabilization Code now provides (9 NYCRR § 2504.4 [f]) what compensation is minimally required. It states that a landlord who applies to DHCR for permission to not renew leases so the building may be demolished is required to pay the tenant's moving expenses, to relocate the tenant to a suitable apartment and to pay the tenant a stipend (using the "Demolition Stipend Chart") for six years if the rent at the new apartment is higher than the rent was at the landlord's building. This analysis and the resulting calculations may only be employed administratively by DHCR, not by the

court. We do not have "demolition stipend charts." Nor are we in a position to determine if a proposed apartment is "suitable" as defined in the regulations.

Here, 4401 Sunset has demonstrated that it is powerless to compel the condominium to rebuild, as they have voted to not rebuild due to the inadequate insurance that was available. This makes rebuilding economically infeasible, seemingly a valid affirmative defense for a landlord whose property sustains damage from a fire (*see Bernard v Scharf*, 246 AD2d 171 [1st Dept 1998], *revd and remanded on other grounds*, *Matter of Bernard*, 93 NY2d 842 [1999]). There is a related action, wherein the condominium unit owners (excluding 4401 Sunset) are suing the board of managers for maintaining inadequate insurance (516926/2020). The tenants do not have standing to sue anyone for inadequate insurance, as the insurance was only for the benefit of the unit owners. In insurance jargon, the tenants do not have an insurable interest. They are however, entitled to a "suitable" apartment and other relief. The tenants' rights are only as against the landlord, 4401 Sunset, the holder of unsold units, who did not have a majority interest in the condominium and could not have alone determined the amount of insurance to acquire. That would have been a board decision, and, as stated above, the unit owners are suing the board of managers for making an allegedly improper decision.

The defendant 4401 Sunset, as holder of unsold units, owns approximately thirty percent of the common interest in the building.[2] It is important to note that whether 4401 Sunset voted to rebuild or not to rebuild, the outcome would have been the same, as 75% or more of the unit owners had to vote to rebuild in order for the rebuilding to

[2] The exact percentage cannot be ascertained as there is no list of the 17 unsold units in the papers.

occur. 4401 Sunset's thirty percent presumably voted against rebuilding, but even if it had voted for rebuilding, it would not have made the 75% threshold required. Thus, the decision whether or not to rebuild was not within the control of the holder of unsold units.

Therefore, the court concludes that DHCR should permit 4401 Sunset to apply for approval to terminate the Rent Stabilized tenancies on the basis that the building will be demolished, pursuant to 9 NYCRR § 2504.4 (f). This would be the equitable way to analyze this issue and would provide the tenants with the legally required compensation. The court also notes that the condominium's decision not to rebuild means that 4401 Sunset, as the holder of unsold units, will not be required to fund thirty percent of the reconstruction costs which exceed the insurance coverage, which would be somewhere around Five Million Dollars for 4401 Sunset's share. On the other hand, 4401 Sunset should not be allowed to receive the entire amount of its proportionate share of the insurance money and the money that will be generated by a sale of the property, without compensating the tenants, as that would be a windfall to the holder of the unsold units. Compensating the tenants who lost their homes from 4401 Sunset's share of the proceeds would be both equitable and appropriate. It is unclear to the court why 4401 Sunset has not already applied to DHCR for permission to terminate the defendants' tenancies and have the amount of their compensation determined.

With regard to the motion to dismiss HPD's action, the court finds that it must be adjourned for oral argument, and requests that the attorney for HPD, Nicole Hilliard, Esq. of Corporation Counsel's Office, contact chambers at tdevans@nycourts.gov to

schedule it. When the court issued an order transferring the file from Civil Court, the file was not transferred, and copies of the papers will need to be submitted to the court.

Conclusions of Law

For the reasons stated above, plaintiffs' motion for summary judgment is denied and defendants' motion for summary judgment is granted with regard to defendants One Sunset Park Condominium, Matt Levi and Paul Klausner, and the complaint is dismissed as against them. With regard to 4401 Sunset Holdings LLC, the First through the Fourth Causes of Action are dismissed due to the court's lack of subject matter jurisdiction. The remainder of the complaint, the Fifth through Seventh causes of action, is not dismissed, other than the branch of the Fifth Cause of Action for "failing to obtain adequate insurance" which is dismissed, and the parties should commence discovery. There is nothing in 9 NYCRR § 2504.4 [f] which bars a suit for damages in addition to the remedies provided for therein. Further, 4401 Sunset should figure out a method for the tenants' possessions, or at least those which are salvageable, to be returned to them.

The foregoing constitutes the decision and order of the court.

Dated: March 18, 2021

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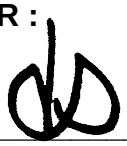

Hon. Debra Silber, J.S.C.