

Harway Terrace, Inc. v Kharchenko

2021 NY Slip Op 34213(U)

September 21, 2021

Supreme Court, Kings County

Docket Number: Index No. 506482/19

Judge: Mark I. Partnow

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of September, 2021.

P R E S E N T:

HON. MARK I PARTNOW,

Justice.

-----X

HARWAY TERRACE, INC.,

Plaintiff,

- against -

Index No. 506482/19

OLENA KHARCHENKO,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

Affidavits (Affirmations) Annexed_____

21-49, 78

Opposing Affidavits (Affirmations)_____

51-76, 81

Reply Affidavits (Affirmations)_____

84

Upon the foregoing papers in this action by Harway Terrace, Inc. (Harway) to terminate defendant Olena Kharchenko's cooperative lease in a Mitchell Lama building because defendant allegedly does not primarily reside in the unit, defendant moves (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 3212, granting her summary judgment dismissing the complaint and awarding her summary judgment on her first counterclaim.

2021 OCT 4 PM 5:29
NYSCEF
FILED

Background

On March 25, 2019, Harway commenced this action by filing a summons with notice, which provides that:

“NOTICE: The nature of this action is for money damages and equitable relief arising from, inter alia, Defendant’s acquisition through fraud, negligent misrepresentations, and/or other improper means of an interest in 473,940 shares (the ‘Shares’) in Plaintiff and the appurtenant Proprietary Lease dated September 23, 2016 for apartment 14K (the ‘Lease’) in 2475 West 16th Street, Brooklyn, New York 11214 (the ‘Unit’).

“Plaintiff seeks rescission of the conveyance of the Shares to the Defendant, rescission of the Lease, a declaratory judgment that Defendant is not the valid owners and holders of the Shares and corresponding stock certificate, reformation of the Lease’s annual rent price to increase same to market rental rate, a money judgment in the amount of the privatized share value of the Shares, a money judgment for damages incurred by Plaintiff’s loss of use [] of the Unit, a money judgment for Defendant’s past use and occupancy of the Unit for the difference in market rent rates and maintenance amounts actually paid since the time of the fraud, punitive damages, costs, disbursements, attorneys’ fees, and such other and further relief as the Court deems just and proper.”

On May 23, 2019, defendant filed a notice of appearance and a demand for the complaint.

On June 12, 2019, Harway filed a verified complaint alleging that it “is a market-rate conventional cooperative housing corporation, privatized pursuant to Article 2 Section 35 of the Private Housing Finance Law (the ‘Mitchell-Lama Housing Law’) on or about December 11, 2015 as a for-profit corporation under the New York Business Corporation Law (the ‘BCL’) and it the owner of a large-scale, residential building at 2475 West 16th Street in Brooklyn (complaint at ¶¶ 1 and 3). The complaint alleges that defendant, “a

purported shareholder-tenant of Harway[,]” acquired the cooperative shares in the Unit through fraud by “falsely represent[ing] to Harway in written documents intended for the cooperative’s reliance that Defendant continuously occupied the residential unit appurtenant to the contested shares as her primary residence, which is a condition precedent to the cooperative’s conveyance of its shares to Defendant” (*id.* at ¶¶ 6-8).

Specifically, the complaint alleges that “[p]rior to Harway’s privatization [in 2015], Defendant submitted to Harway sworn Tenant/Shareholder Annual Household Income Affidavits (the ‘Income Affidavits’), in which she represented to Harway that she occupied Unit 14K as her primary residence” (*id.* at ¶ 20). In addition, the complaint alleges that “[i]n connection with Harway’s privatization and issuance of the disputed shares, Defendant submitted to Harway a signed written statement, dated as of September 23, 2016, in which Defendant stated that ‘[t]here are presently no tenants or persons in possession of the Unit other than Deponent(s)’ and ‘Deponent(s) makes (make) this affidavit to induce Harway Terrace, Inc. to issue the Shares to Deponent(s)’” (*id.* at ¶ 25).

The complaint further alleges that Harway recently discovered that “Defendant occupied another cooperative apartment known as Unit B8 located at 1975 83rd Street, Brooklyn, New York (‘Unit B8’) as her primary residence” (*id.* at ¶ 33). The complaint alleges, upon information and belief, that on or about May 13, 2014, defendant conveyed her interest in the shares of stock she owned in 1975 83rd Street Owners Corp. to her husband, non-party Archy Bakhrakh, for no consideration (*id.* at ¶¶ 36-39). The complaint also alleges that Harway recently discovered that defendant and her husband have been

residing in another Mitchell Lama cooperative apartment – unit 20G at 350 65th Street in Brooklyn in a building known as “Towers of Bay Ridge” (*id.* at ¶ 41). The complaint also alleges, upon information and belief, that defendant “permitted others to reside in and occupy Unit 14K prior to Harway’s privatization and failed to disclose such other residents to Harway in her Income Affidavits” (*id.* at ¶ 45). The complaint asserts three causes of action for: (1) fraud; (2) negligent misrepresentation; and (3) a judgment declaring that “[d]efendant is not the valid owner or holder of the Converted Shares or any shares in Harway Terrace, Inc.”

On June 20, 2019, defendant answered the complaint, denied the material allegations therein and asserted affirmative defenses, including: (1) “[a]t all times relevant, Defendant occupied the subject unit as her primary residence”; (2) “[d]efendant has not sublet the Subject Premises”; (3) “[t]he Board has commenced this baseless complaint to harass and in retaliation for complaints against the Board and how it operates”; and (4) laches (answer at ¶¶ 85, 87, 89 and 97). In addition, defendant asserted a counterclaim for an award of legal fees, pursuant to Real Property Law § 234 (*id.* at ¶¶ 101-104).

On July 1, 2019, Harway responded to defendant’s counterclaim and asserted affirmative defenses, including that “RPL 234 is inapplicable to the nature of this action seeking rescission of shares based upon fraud and negligent misrepresentation, which is not an action to enforce a covenant or obligation of a lease or due to the violation of a lease.”

Defendant's Summary Judgment Motion

On December 24, 2020, prior to engaging in any discovery, defendant moved for summary judgment dismissing the complaint and awarding her summary judgment on her counterclaim for attorneys' fees. Defendant submits an affidavit attesting that:

"The Complaint is filled with deliberate lies and misrepresentations, and, as a shareholder in Harway, I am angered at the waste of corporate funds which this action represents.

"This action is a blatant attempt to punish me for the many complaints, which I and other shareholders have made, because of the mismanagement and illegal actions which have occurred since the current President and her associates took control of the board of Harway in 2016.

"To be clear, Harway's Complaint is all opportunely devoid of specificity to the alleged fraud claim and instead offers sweeping conclusions and tirades of issues that have occurred with other tenants in the residential complex.

"This Complaint should be summarily dismissed because Harway has nothing of substance to challenge the status of my residency during the period of 2012 to 2016."

Defendant annexes the following documents "as proof of [her] residence at Unit 14K during the relevant time period through 2015 (and beyond) . . .": (1) her federal income tax returns from 2012 through 2016; (2) her New York resident income tax returns from 2012-2016; (3) her W-2s for the years 2012 through 2016; (4) a copy of a 2012 Traditional IRA Adoption Agreement from Chase Bank; (5) her "Payroll History" from 2012 and 2015; (6) medical and optical records from 2012; (7) a copy of her driver's license issued in 2012 and valid through June 2020; (8) her voter registration information; (9) a

December 27, 2013 letter from her attorney addressed to her at Unit 14K; (10) her Chase bank statements from 2013 through 2016; (11) a retirement account deposit receipt for 2013; (12) her New York DMV vehicle registration for 2013 and 2014; (13) 2014 court records from a small claims action; (14) Chase credit card statements from 2014 through 2016; (15) her 2014 Geico insurance card; (16) BMW leasing documents and service invoices from 2014; (17) a 2014 life insurance withdrawal request; (18) a copy of a 2014 IRS refund notice; (19) a 2015 paystub; and (20) a blurry copy of a prescription bottle. Defendant asserts that “[t]hese documents certainly substantiate that the Apartment was my primary residence for the relevant period before privatization.”

Regarding Unit B8 at 1975 83rd Street in Brooklyn, defendant attests that “beginning in 2004, my husband had a tenant, Ms. Irina Zaveliskaya, who has confirmed that she’s been living at Unit B8 since 2004, and that from 2004 to present, I have never lived there.” Defendant submits an affidavit from Ms. Zaveliskaya in which she asserts that she and her husband live in Unit B8, a one-bedroom apartment, and have lived in Unit B8 since 2004. Ms. Zaveliskaya further attests that, since 2004, defendant has never lived in Unit B8.

Defense counsel submits an affirmation asserting that defendant is entitled to summary judgment dismissing the complaint because “there are no triable issues of fact in light of the incontrovertible documentary evidence confirming Olena’s primary residence at all relevant times was at apartment Unit 14K . . .” Defense counsel asserts that:

“Here, it is respectfully submitted that Olena meets all . . . criteria. She specified Unit 14K as her residence on her many years of tax returns, motor vehicle registrations, driver’s license or other documents filed with the Civil Court. Second,

she also gave Unit 14K as her voting address. Third, she has not sublet Unit 14K and lastly, for the relevant time she maintained a substantial physical nexus thereto.”

Notably, however, defense counsel acknowledges that “[w]hether a person’s residence is their primary residence is a complex mixed question of law and fact . . .”

Regarding defendant’s counterclaim for an award of attorney’s fees, pursuant to RPL 234, defense counsel asserts that “[p]ursuant to the Proprietary Lease, Olena is entitled to recovery of her legal fees against Plaintiff.”

Harway’s Opposition

Harway, in opposition, submits an affidavit from Nina Shalshina (Shalshina), a member of its Board of Directors and its President, who attests that “Defendant was required to primarily reside in Unit 14K from the time she received the 14K Mitchell-Lama Stock and through all renewal years leading up to Harway’s privatization in 2015-2016.” Shalshina annexes a November 29, 2018 letter from BayRidge Air Rights, Inc. d/b/a the “Towers of Bay Ridge,” a Mitchell-Lama Co-op at 350 65th Street in Brooklyn, which states “[p]lease be advised that Arkadiy Bakhakh and Olena Kharchenko reside in Apartment 20G at 350 65th street Brooklyn, NY 11220” (the BayRidge Letter). Shalshina further alleges that:

“The BayRidge Letter indicates that Defendant resides with her husband Archy at Unit 20G located in the Mitchell-Lama cooperative at 350 65th Street . . . Harway’s counsel, Woods Lonergan PLLC, as set forth in the Causey Affirmation, contacted BayRidge recently and **BayRidge confirmed that Defendant was a primary resident of and on the Mitchell-Lama stock for Unit 20G together with her husband Archy**

and had been tenants and joint owners since February 1, 2004.”

Shalshina also submits Department of Motor Vehicles Record Expansion Reports for defendant and her husband indicating that they reside at Unit 20G.

Shalshina further asserts that “[a]s of 2015, Defendant apparently held a beneficial interest in a private residential condominium with her husband Archy . . .” and annexes the recording and endorsement cover page for a January 28, 2015 deed to cooperative Unit B8 at 1975 83rd Street in Brooklyn in favor of defendant, as trustee.

Shalshina further avers “[u]pon [her] own personal witness” that “the persons who actually (and unlawfully) primarily resided in Unit 14K at all relevant times . . . are Ivan Kharchenko (‘Ivan’) and Khrystyna Kharchenko (‘Khrystyna’). Shalshina attests that Ivan, defendant’s son, and his wife, Khrystyna, resided in Unit 14K, a one-bedroom apartment, both before and after Harway’s privatization in 2015-2016. Shalshina submits a copy of Ivan’s birth certificate as evidence that he is defendant’s biological son. Shalshina also submits a Department of Motor Vehicles Record Expansion Report for Ivan that indicates that he resides at Unit 14K and a copy of a December 2, 2018 letter addressed to Khrystyna at Unit 14K, which was “found abandoned in the lobby mailroom of the Harway building . . .” Shalshina alleges, upon information and belief, that Ivan and Khrystyna moved out of Unit 14K in 2018 or 2019, at which time a “paintjob request” for Unit 14K was submitted to Harway’s management and defendant’s husband sought to be added to the 14K privatized stock.

Shalshina asserts that defendant's evidence of residency at Unit 14K is "self-serving" and is entirely comprised of "self-reporting documents" and that Harway's evidence submitted in opposition raises a triable issue of fact as to whether defendant primarily resided in Unit 14K for purposes of participating in Harway's privatization. Shalshina contends that the branch of defendant's motion seeking summary judgment on her counterclaim for attorney's fees should be denied because "this Action does not arise out of her proprietary lease nor does it relate to her proprietary lease or to Defendant's alleged current tenancy in Harway."

Harway also submits an attorney affirmation from Annic E. Causey (Causey) of Woods Lonergan PLLC, who affirms that she contacted BayRidge on February 11, 2021 and spoke with Galina Antipina, the author of the BayRidge Letter and the bookkeeper for the BayRidge cooperative. According to Causey, during that telephone call:

"Antipina confirmed to your undersigned that Defendant had resided in the 20G Mitchell-Lama cooperative unit since February 1, 2004 and, further, that Defendant is the joint owner of the Mitchell-Lama stock appurtenant to Unit 20G . . . which was issued to Defendant and her husband . . . on February 1, 2004."

Causey further asserts that "[t]he documents included with Defendant's affidavit on this Motion have never been produced in this Action" and claims that defendant "has yet to provide one single document" responsive to Harway's 2019 and 2020 discovery requests or responses to Harway's outstanding interrogatories. Causey also seeks deposition testimony from residents of the units adjoining Unit 14K and from Ivan and Khrystyna.

Defendant's Reply

Defense counsel, in reply, submits an affirmation asserting that defendant satisfied her prima facie burden of proving that Unit 14K was her primary residence by submitting substantial documentary evidence. Defense counsel claims that Harway, in contrast, “comes before this Court with hearsay documents, hearsay within hearsay, self serving documents and conclusory claims.”

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Here, while defendant produced documentary evidence of her residence at Unit 14K, Harway has raised triable issues of fact regarding defendant's primary residence during the relevant time period that preclude summary judgment in defendant's favor. Harway produced affidavit testimony from Shalshina with documentary evidence that defendant resided at Unit 20G at the Towers of BayRidge, another Mitchell-Lama cooperative, since 2004. Shalshina further attested that Ivan and Khrystyna, defendant's son and daughter-in-law, were the actual residents of Unit 14K, a one-bedroom apartment, and provided documentary proof of that assertion. The documentary and testimonial evidence produced by Harway in opposition to summary judgment, combined with the fact that there has been limited to no discovery regarding defendant's primary residence during the relevant time-frame, warrants denial of defendant's summary judgment motion. Accordingly, it is hereby

ORDERED that defendant's summary judgment motion (mot. seq. one) is denied.

This constitutes the decision and order of the court.

E N T E R,



 J. S. C.

2021 OCT -4 PM 9:29
 Kings County Clerk
 1000 Broadway
 New York, NY 10003