

3405 Broadway Hous. Dev. Fund Corp. v Martinez

2022 NY Slip Op 30677(U)

March 1, 2022

Supreme Court, New York County

Docket Number: Index No. 651613/2020

Judge: Arlene Bluth

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

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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3405 BROADWAY HOUSING DEVELOPMENT FUND
CORPORATION

INDEX NO. 651613/2020

Plaintiff,

DECISION AFTER INQUEST

- v -

HOMAIRA MARTINEZ,

Defendant.

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In this case, an HDFC coop sued its prior president for monetary damages (misusing coop funds) and ejection (claiming that she has no right to occupy her apartment). On April 9, 2021, the Court struck defendant’s answer for failure to respond to discovery (a motion which defendant did not oppose) and the matter was set down for an inquest (NYSCEF Doc. No. 35). Because the answer was stricken, defendant “was limited to an inquest at which [s]he could only contest the extent of plaintiff’s damages” (*Newhouse v Davis*, 171 AD3d 480, 95 NYS2d 794(Mem) [1st Dept 2019]).

The attorneys agreed to submit simultaneous closing arguments in writing (upload them on the same day). Despite several adjournments, defendant failed to submit a closing argument.

At the inquest, defendant was represented by counsel and contested damages. Plaintiff testified by its president, Stephen Valdez, who this Court found to be credible. Defendant testified and this Court did not find her credible.

OTHER ORDER – NON-MOTION

In or about 2017, the shareholders voted defendant and her fellow board members out and elected Stephen Valdez as president. This was not an orderly transition. Defendant failed to turn over books and records to the new board. She also failed to produce documents in discovery, which led to the motion to strike the answer. At the inquest, there was some discussion about another litigation which also sought the coop's historical documents, but that matter was not assigned to this part.

Consequently, the new board had to recreate the files to the best of its ability. Therefore, plaintiff's case was largely based on the documents; the checking account records and the bylaws. The bylaws (Article X section 1) prohibit board members from getting paid for their work for the building (NYSCEF Doc. No. 71 at 22). Article X, section 4 of the bylaws provides that the board may not even enter into a contract where a board member is interested, "directly or indirectly," unless there is a full board vote with the interested board member not voting (*id.* at 23-24). The documents produced at the inquest showed that the defendant, when she was president, used the coop funds as her personal piggy bank. Plaintiff showed, through the checking account records obtained from the bank, that when defendant was president and signing checks, she, her husband, a company with which her husband was affiliated, other board members and a "consultant" siphoned off and received \$162,552 from coop funds (not including the proceeds of a loan, which will be discussed later).

In opposition, defendant failed to show that those disbursements were proper. There was no cogent explanation of what that consultant (Mr. Fernandez) did for approximately \$14,000. Certainly, defendant was not entitled to the approximately \$16,000 in checks she cashed for being board president, nor were the other board members entitled to money they received for their services to the coop as board members (Brito for over \$12,000, Simet over \$15,000). Nor

was it shown exactly what defendant's husband Bernardo Martinez did to be able to receive over \$26,000.

Although there was some discussion that Red and Blue Construction, a company affiliated with Bernardo Martinez, did do some work in the building, it was unclear that what it did was necessary and benefitted the coop as a whole; there were no records of competing bids, discussions of the problems needing attention, or records showing that there was a full board vote (with defendant not participating) approving the contract as required by the bylaws. The Court finds that the \$65,876 paid to Red and Blue should be chargeable to defendant. Finally, there were \$12,531 in cash withdrawals that have no notation or back up and the Court finds that chargeable to defendant as well.

With respect to the above disbursements, defendant did not have a credible explanation to justify these actions. Either she really did not know that it was improper to pay herself, her husband and her fellow board members and consultant/friend or she was using her position to enrich herself and her acolytes. In any event, it does not matter – she was not entitled to the money under the bylaws, was not entitled to pay it out to those people and entities and is therefore liable. For the improper disbursements that were proven and not credibly rebutted at the inquest, this Court finds defendant liable for \$162,552.00.

The loan

Plaintiff claimed that the coop received a loan of \$559,999.00 while defendant was president and that the funds were never deposited into the Coop's account. Mr. Valdez, who has been president since 2017, did not testify that the lender is trying to foreclose or even that the coop is paying the loan off. He basically testified that he believes loan proceeds were distributed and he can't find them so he claimed defendant took them.

Defendant testified that the coop never got the proceeds directly but instead it was paid to HPD (so it never should or would have been deposited into the coop's account). This is a plausible theory as HDFCs are regulated by HPD. Unfortunately, because defendant never cooperated, there was no way for plaintiff to discover that, and there was no way for plaintiff to verify that information during the course of the inquest, either.

Because plaintiff could not prove that the lender is seeking to be repaid from the plaintiff, it could be that HPD received the funds on the coop's behalf and is repaying it from the loan proceeds. The point is that plaintiff did not prove that defendant took the proceeds for herself and now the coop has to repay the loan. Plaintiff cannot show it suffered damages under these circumstances.

However, nothing in this decision should be construed as an affirmative finding about this loan. If it turns out the lender pursues an action against plaintiff, or if plaintiff discovers new evidence, then plaintiff may move to renew/reopen this inquest with respect to the claim for the "missing" loan proceeds. Clearly, defendant's actions in failing to disclose any information about the loan until the inquest deprived plaintiff of the ability to investigate with HPD. It is only reasonable and fair for plaintiff to have the chance to pursue its recovery should it suffer an actual injury based on this loan.

Ejectment

Because defendant's answer was stricken, liability was already determined (*Newhouse*, 171 AD3d at 480). Therefore, the Court finds that defendant has no right to occupy apartment 2A in the building. Nevertheless, the Court permitted the parties to offer testimony on this point.

Although defendant's explanation was plausible – that the tenant of record, Nerys Walters, was "like a mother to her" and therefore wanted her on the lease, the totality of the

circumstances cannot overcome the binding case law on this point. The Court cannot re-open the issue of liability (*id.*).

Had defendant turned over records to the new board when she was voted out, or even during the course of this litigation – or the other litigation – then the “records” she produced at the instant inquest regarding her tenancy would have been given more weight. But to keep the leases to herself until this inquest and then suddenly produce documents showing that someone with a name close to hers was handwritten on the now-deceased shareholder’s lease is just too convenient to be credible. The Court also observes that the handwritten name was in a different handwriting from everything else in the lease and it was not notarized to show the date it was added.

Even the misspelling is too convenient – a well-known “trick” is to misspell one’s name in order to distance oneself from the alteration of documents (“it couldn’t have been me who wrote that – of course I know how to spell my name”). Besides, the woman “who was like a mother” to defendant should certainly know how to spell defendant’s name. In other words, there are simply too many questions about this lease for it to have any binding effect at this late date.

Moreover, Article VII section 1 of the bylaws provides that ownership of the shares entitles someone to a proprietary lease (NYSCEF Doc. No. 71 at 15). Nowhere does it provide that a person added to the lease automatically inherits the shares when that shareholder dies. Therefore, even if she was added to the lease, when Nerys Walters died, any right defendant had to occupancy or to the apartment perished as well. Defendant had the books and records of the coop, never having turned them over, and she failed to show proof that she inherited Nerys Walters’ shares. Moreover, there was no evidence submitted that defendant lost the stock

certificate (a procedure provided for in Article VII, section 7 of the bylaws). Simply put, defendant did not show she owns any shares and so plaintiff is entitled to an ejectment.

Defendant knew full well, from the complaint, that the coop claimed she was not entitled to occupancy of that apartment. Plaintiff's allegation in the complaint was that Nerys Walters was the shareholder and tenant of record, had a boarder, and she died. Then defendant moved in. If there were truly records that showed Nerys Walters put defendant on her lease *and shares* with the coop's approval before she died, then defendant should have produced those documents before the inquest. Of course, the best time would have been when she was voted out – she should have turned over the tenancy and shareholder records then. To claim over and over that she can't produce documents and doesn't know where they are and then conveniently produce the doctored-up lease irrevocably diminished the credibility of that document.

Even if the Court could consider defendant's arguments about the lease, the Court finds that the portion of the document purporting to add defendant to the lease is not entitled to any weight, as there is no proof whatsoever that it was done at the time the lease was executed or any time during the life of Nerys Walters, the shareholder. It is not notarized and so the execution date is unknown, the spelling of defendant's name is incorrect and it is in a different handwriting, showing it was probably not done at the same time that Ms. Walters' lease was prepared. Moreover, there is no proof that defendant inherited the shares of Ms. Walters, or that she was issued shares jointly with Ms. Walters, and so any leasehold interest would have terminated at Ms. Walters' death.

For all these reasons, the Court finds that defendant is not a shareholder or authorized tenant of Apartment 2A in the building and plaintiff is entitled to eject her and all occupants from said apartment.

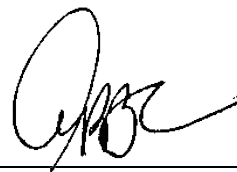
Accordingly, it is hereby

ORDERED that the Court awards a money judgment in favor of plaintiff and against defendant for \$162,552.00 plus interest from the date of the complaint along with costs and disbursements and the Clerk is directed to enter judgment accordingly upon presentation of proper papers therefor; and

ADJUDGED that plaintiff is entitled to possession of 3405 Broadway, Apartment 2A, New York, New York 10031 as against defendant Homaira Martinez, and the Sheriff (or Marshal) of the City of New York, County of New York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to eject defendant, and all persons claiming the right to possession under her, and to place plaintiff in possession of said Apartment 2A accordingly; and it is further

ADJUDGED that immediately upon entry of this Order and Judgment, plaintiff may exercise all acts of ownership and possession of 3405 Broadway, Apartment 2A, New York, New York 10031, including entry thereto, as against defendant Homaira Martinez and any person claiming entitlement under her; and it is further

ORDERED that plaintiff may make an application to renew/reopen this inquest in the event that it suffers some injury from the loan discussed above.



ARLENE BLUTH, JSC

DATE: 3/01/2022

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify _____)