

**Eastside Units E. 73rd St. LLC v 317 E. 73rd Owners Corp.**

2022 NY Slip Op 34437(U)

December 23, 2022

Supreme Court, New York County

Docket Number: Index No. 656616/2022

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

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EASTSIDE UNITS EAST 73RD STREET LLC,

Plaintiff

Index No. 656616/2022

- against -

DECISION AND ORDER

317 EAST 73RD OWNERS CORP. and  
ADAM PLOTCH,

Defendants  
-----x

LUCY BILLINGS, J.S.C.:

I. INTRODUCTION

Plaintiff moves for a preliminary injunction restraining defendants from transferring or encumbering his cooperative shares and proprietary leases appurtenant to cooperative units 3RE, 4RE, and 5RW at 317 East 73rd Street, New York County.

C.P.L.R. §§ 6301, 6312(a). Plaintiff also seeks rescission of the foreclosure sale June 2, 2022, of those shares and leases; return of the deposit that defendant purchaser Plotch paid; an accounting of and opportunity to pay the amounts plaintiff owes to defendant cooperative corporation; and reinstatement of the shares and leases to plaintiff's ownership.

Plaintiff's managing member Mordechai Weisz attests that before he received defendant corporation's Notice of Foreclosure Sale dated April 29, 2022, claiming plaintiff's proprietary leases were terminated February 1, 2022, he never received a

notice of the termination. He further attests that, after his repeated requests beginning May 17, 2022, for the amount required to pay what plaintiff owed to defendant corporation, he did not receive that information until June 1, 2022, when the amount was \$26,287.32, over twice the \$13,000.00 in defendant corporation's May 2022 monthly statement to plaintiff. He did not receive instructions how to pay until June 2, 2022, at 2:08 p.m., when he immediately wired the \$26,287.32 to defendant as instructed, but the sale was scheduled to begin at 2:00 p.m. and already had concluded. Plaintiff acknowledges that the increased amount is attributable to defendant corporation's claim for attorneys' fees and expenses, but maintains that they were unsubstantiated.

To be entitled to a preliminary injunction, plaintiff must show a probability of success on the merits of plaintiff's claims, a danger of irreparable injury absent an injunction, and a balancing of equities in plaintiff's favor. C.P.L.R. §§ 6301, 6312(a); Uber Tech., Inc. v. American Arbitration Assn., Inc., 204 A.D.3d 506, 508 (1st Dep't 2022); Avenue A Assoc. LP v. Board of Mgrs. of the Hearth House Condominium, 190 A.D.3d 473, 473 (1st Dep't 2021); Wilder v. Fresenius Med. Care Holdings, Inc., 175 A.D.3d 406, 408 (1st Dep't 2019). For the reasons articulated below, plaintiff fails to satisfy these criteria for a preliminary injunction.

## II. IRREPARABLE INJURY

Regarding the danger of irreparable injury, plaintiff concedes that it owned the cooperative units as commercial investments. Therefore, even if plaintiff demonstrates grounds to invalidate the foreclosure sale, plaintiff fails to demonstrate irreparable harm from the sale that is not compensable by damages. Atlas MF Mezzanine Borrower, LLC v. Macquarie Tex. Loan Holder LLC, 174 A.D.3d 150, 156 (1st Dep't 2019); Broadway 500 W. Monroe Mezz II LLC v. Transwestern Mezzanine Realty Partners II, LLC, 80 A.D.3d 483, 484 (1st Dep't 2011); Lombard v. Station Sq. Inn Apts. Corp., 94 A.D.3d 717, 721 (2d Dep't 2012). See Noyack Med. Partners, LLC v. OSK IX, LLC, 206 A.D.3d 429, 430 (1st Dep't 2022); Uber Tech., Inc. v. American Arbitration Assn., Inc., 204 A.D.3d at 509-10; Medallion Financial Corp. v. Tsitirides, 203 A.D.3d 627, 628 (1st Dep't 2022); Buchanan Capital Mkts., LLC v. DeLucca, 144 A.D.3d 508, 509 (1st Dep't 2016).

## III. INJUNCTIVE RELIEF UNDER UCC § 9-625(a)

Although plaintiff need not demonstrate irreparable injury to obtain a stay of a commercially unreasonable foreclosure sale under New York Uniform Commercial Code (UCC) § 9-625(a), neither does plaintiff demonstrate that the sale is commercially unreasonable under UCC § 9-610(b). Plaintiff may demonstrate that it was ready, willing, and able to pay the amount owed once

plaintiff received the requested information to do so, that defendant corporation treated plaintiff unreasonably by ignoring his requests until the last minute, and that therefore defendant corporation was not entitled to proceed with the sale. Plaintiff fails to show, however, that the ensuing sale's timing, location, methods, or terms departed from accepted commercial practices among dealers of cooperative units purchased and sold as investments on Manhattan's Upper East Side. UCC §§ 9-610(b), 9-627(b); Shimamoto v. S&F Warehouses, 99 N.Y.2d 165, 176 (2002); Bankers Trust Co. v. Dowler & Co., 47 N.Y.2d 128, 134 (1979).

The claimed deficiencies in defendant corporation's notices may have deprived plaintiff of its rights to notice of a termination of its proprietary leases, to a 90 days pre-disposition notice of the sale of its cooperative shares, UCC § 9-611(f), or to notice of its entitlement to an accounting of its unpaid indebtedness. UCC § 613(a)(4). Such deficiencies, however, do not demonstrate that defendant corporation's notice of the sale or its advertisement of the sale was ill-designed to attract purchasers or that the timing or methods of the sale to prospective purchasers departed from recognized auction procedures or were otherwise unreasonable.

In any event, contrary to plaintiff's claims, on January 7, 2022, defendant corporation served on plaintiff a "NOTICE OF DEFAULT, FOURTEEN [14] DAYS NOTICE TO CURE AND NOTICE OF

INTENTION TO COMMENCE NONJUDICIAL FORECLOSURE PROCEEDING” regarding each of the three units. Aff. in Opp’n of Mitchell Flachner Ex. 1. This notice advised plaintiff that, if it failed to cure by paying its maintenance arrears by January 27, 2022, its proprietary leases would be terminated February 1, 2022. After plaintiff failed to cure its defaults by January 27, 2022, defendant served its notices of the sale, well more than 10 days before the sale as required by UCC § 9-612(b). The notices of sale advised plaintiff to contact defendant corporation’s attorneys to confirm the amounts due, in satisfaction of UCC § 613(a)(4). To the extent that neither the notices served January 7, 2022, nor the notices of the sale satisfied the requirement for a 90 days pre-disposition notice of the sale of plaintiff’s cooperative shares, UCC § 9-611(f) requires this notice only by lenders that possess a security interest in a borrower’s cooperative shares, not a cooperative corporation to which its shareholder owes a debt.

More significantly, plaintiff complains of unreasonably low sale prices, but concedes that an inadequate price alone does not warrant vacating the sale, absent fraud, overreaching, or mutual mistake. Guardian Loan Co., Inc. v. Early, 47 N.Y.2d 515, 521 (1979); NYCTL 2005-A Trust v. Rosenberger Boat Livery, Inc., 96 A.D.3d 425, 426 (1st Dep’t 2012). Nevertheless, in the narrow circumstances where the price is “so inadequate as to shock the

court's conscience," the court may stay a foreclosure sale based on the low amount to be recovered for the collateral. U.S. Bank N.A. v. Martinez, 162 A.D.3d 528, 528 (1st Dep't 2018); DeRosa v. Chase Manhattan Mtge. Corp., 10 A.D.3d 317, 322 (1st Dep't 2004).

Plaintiff recounts that the sale price for unit 4RE was \$70,003.00, after plaintiff entered a contract to sell the unit for \$500,000.00, which fell through when defendant failed to replace the unit's windows. Again, that failure may support a claim against defendant, and \$70,003.00 may be shockingly low for a vacant apartment on Manhattan's Upper East Side, even accounting for the need to replace the windows, but the court may not simply take judicial notice that the unit's value is so much closer to \$500,000.00 than \$70,003.00 that the latter price is shockingly inadequate. Hamilton v. Miller, 23 N.Y.3d 592, 603 (2014); People v. Alicea, 25 N.Y.2d 685, 686 (1969); Walker v. City of New York, 46 A.D.3d 278, 282-83 (1st Dep't 2007). See People v. Jones, 73 N.Y.2d 427, 432 (1989); Chasalow v. Board of Assessors of County of Nassau, 176 A.D.2d 800, 804 (2d Dep't 1991). The sale prices under \$10,000.00 for each of the other two units, even though plaintiff acknowledges that they both are occupied by rent stabilized tenants, impairing the units' viability as investments, still may be shockingly low as well, but the court may not so conclude absent any evidence of any of the units' market value in their current condition.

Even if the discrepancy between these sale prices and the units' market value does not "shock the court's conscience" so as to meet the high bar of unreasonableness, defendant corporation shares plaintiff's interest in maximizing its income from the units. As discussed below, defendant corporation simply may rescind the sale, accept plaintiff's payments, and allow plaintiff to sell the units itself at a more reasonable price closer to market value.

Since plaintiff fails to show a danger of irreparable injury absent an injunction, C.P.L.R. §§ 6301, 6312(a), and, upon this record, a probability of success in demonstrating a commercially unreasonable sale under UCC § 9-610(b) to entitle plaintiff to a stay of the sale, UCC § 9-625(a), the court denies plaintiff's motion for a preliminary injunction. This denial is without prejudice to a future showing by plaintiff that the units' sale prices are shockingly inadequate in comparison to their market value in their current condition. The court grants defendant Plotch's motion to vacate the temporary restraining order signed June 8, 2022. C.P.L.R. § 6314.

IV. DEFENDANT PLOTCH'S INTERVENTION AND MOTION TO DISMISS PLAINTIFF'S SUMMONS WITH NOTICE

Since no party opposes the intervention of Adam Plotch as a defendant and his substitution for the original defendant "John Doe" in this action, the court grants Plotch's motion for that relief. C.P.L.R. §§ 1013, 1024. Plotch was the winning bidder

at the auction June 2, 2022, and seeks to close the sale that was enjoined temporarily.

Absent a contrary agreement, Plotch's tender of the successful bid, execution of a contract of sale, and deposit of the required downpayment would give Plotch an equitable interest in the three units. Latipac Corp. v. BMH Realty LLC, 93 A.D.3d 115, 125 (1st Dep't 2012); Ray v. Ray, 61 A.D.3d 444-45 (1st Dep't 2009); Dubbs v. Stribling & Assocs., 274 A.D.2d 32, 38 (1st Dep't 2000), aff'd, 96 N.Y.2d 337 (2001). Unfortunately for the purchaser Plotch, he executed a contrary agreement: the Terms of Sale for the auction. Paragraph 9 of the Terms of Sale provides that:

In the event of a failure by the Cooperative Corporation to close this transaction, . . . Purchaser releases and discharges the Cooperative Corporation from any liability, costs and expense as a result of the Cooperative Corporation's failure to consummate this transaction. The Cooperative Corporation's sole liability will be to refund the Down Payment, without interest, to the Purchaser.

Aff. in Opp'n of Andrea J. Caruso Ex. A, at 5. Therefore defendant cooperative corporation owes no obligation to convey any of the three units to Plotch and is free to rescind the foreclosure sale, accept plaintiff's payments, and reinstate the units' shares and proprietary leases to its ownership as plaintiff seeks in this action. Defendant corporation retains the sole authority to transfer the shares and leases, leaving Plotch without recourse to enforce the sale to him. Plotch's

only interest is the return of his downpayment if plaintiff is successful in this action.

While other grounds may support dismissal of this action, Plotch's interests do not. Therefore the court denies his motion to dismiss plaintiff's summons with notice. C.P.L.R. § 3211(a). Since plaintiff has never responded to defendant corporation's demand for a complaint served July 5, 2022, plaintiff shall serve a complaint on all parties within 20 days after entry of this order. See C.P.L.R. § 3012(b). Defendants shall answer within 20 days after service of the complaint. C.P.L.R. § 3012(a).

V. CONCLUSION

In sum, as set forth above, the court denies plaintiff's motion for a preliminary injunction, C.P.L.R. §§ 6301, 6312(a), or for a stay of the foreclosure sale of the cooperative shares and proprietary leases appurtenant to cooperative units 3RE, 4RE, and 5RW at 317 East 73rd Street, New York County, UCC § 9-625(a), and grants defendant Plotch's motion to vacate the temporary restraining order signed June 8, 2022. C.P.L.R. § 6314. The court denies Plotch's motion to dismiss plaintiff's summons with notice, C.P.L.R. § 3211(a), and orders plaintiff to serve a complaint on all parties within 20 days after entry of this order, see C.P.L.R. § 3012(b), which defendants shall answer within 20 days after that service. C.P.L.R. § 3012(a). After

defendants have answered, the court will schedule a Preliminary Conference at which all parties shall appear.

DATED: December 23, 2022



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LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.