Fowley v James

2023 NY Slip Op 31903(U)

June 6, 2023

Supreme Court, New York County

Docket Number: Index No. 154054/2023

Judge: Arlene P. Bluth

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

----------X

CHRISTINE FOWLEY, MARY FOUTZ, MARY WADE, SHARON TORRES,

Petitioners,

- v -

LETITIA JAMES, BOARD OF DIRECTORS OF CADMAN TOWERS, INC.,

Respondents.

INDEX NO. 154054/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Petitioners' motion for a preliminary injunction is denied.

Background

This case arises out of a dispute regarding converting a Mitchell-Lama cooperative to an HDFC cooperative. Petitioners are shareholders and residents at Cadman Towers, a cooperative in Brooklyn. In 2021, respondent Board of Directors of Cadman Towers ("Cadman Towers") filed an application with the Attorney General seeking an exemption from the requirement that they file an offering plan in connection with the proposal to convert the cooperative. That application included a proxy statement and exhibits that claimed to have informed shareholders about the conversion.

On February 15, 2023, the Attorney General issued a no-action letter permitting the Board to proceed to a shareholder vote on the conversion plan. Petitioners challenge this

determination, alleging that the Board should have been required to file an offering plan, as this conversion would allegedly be the first Mitchell-Lama cooperative to be converted to an HDFC cooperative. Petitioners claim that the determination issued by the Attorney General was contrary to applicable law and that the determination was arbitrary and capricious. They now file this Article 78 petition seeking to halt the vote. The Court granted temporary relief halting the vote scheduled for June 7, 2023.

Petitioners now move for a preliminary injunction prohibiting the Board from moving forward with the vote on the conversion pending the resolution of this proceeding. Petitioners contend they are likely to succeed on the merits of their claim as, pursuant to 13 NYCRR § 18.9(a)(3), no-action letters "shall not be issued where the offering involves more than 10 residential units[.]" This co-op has 421 units.

Moreover, petitioners also claim that the issuance of the no-action letter upon a proxy statement that does not accurately apprise shareholders of the nature and risks of the conversion is arbitrary and capricious. Petitioners argue that the information in the proxy statement is contradictory, unclear, and silent as to crucial terms of the conversion. Finally, petitioners contend there is no prejudice facing the respondents should a preliminary injunction be issued. Instead, prejudice to petitioners would be significant as the shareholders would have to vote without adequate information and uncertainty as to whether the vote would be reversed.

In opposition, respondent Cadman Towers argues that the procedure for a conversion has always been to produce a proxy statement as this is not a public offering or sale; it is an internal democratic vote to determine whether to convert from one type of co-op to another. Cadman Towers contends that pursuant to General Business Law §352-e, an offering plan is not required for an internal vote. Cadman Towers also contends that the proxy statement was provided to all

the shareholders, and this petition represents the concerns of less than 1% of all the shareholders. Cadman Towers maintains the 99% of shareholders will be prejudiced and unable to continue with debate regarding the conversion if a preliminary injunction is put in place. Furthermore, if the vote is conducted and shareholders vote to remain a Mitchell-Lama co-op, this whole proceeding will be moot.

Respondent Attorney General does not oppose this motion but reserves the right to oppose the petition as a whole.

Discussion

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing. Accordingly, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party" (*1234 Broadway LLC v W. Side SRO Law Project*), 86 AD3d 18, 23, 924 NYS2d 35 [1st Dept 2011] [citation omitted]).

In 2013, the New York Attorney General issued a memorandum providing that a conversion from a Mitchell-Lama cooperative to an HDFC cooperative "is governed by New York General Business Law ("GBL") § 352-e and 13 NYCRR Part 18" (Department of Law, *Requirement for Exemption Application For Conversions of PHFL Article II Cooperatives to PHFL Article XI Cooperatives* [June 20, 2013]). The memo further provided that "Notwithstanding, a ML Cooperative proposing to convert to an HDFC Cooperative may provide shareholders with a Proxy Statement in lieu of an offering plan, so long as the minimum disclosure requirements set forth herein are met" (*id*.).

Pursuant to General Business Law (GBL) § 352-e states that "It shall be illegal and prohibited for [anyone]… to make or take part in a *public offering or sale*…in real estate…unless and until there shall have been filed with the department of law…a written statement or statements, to be known as an 'offering statement,' or 'prospectus'" [emphasis added]. The statute also provides that "the circulation or dissemination of a non-firm offer (including circulation or dissemination of a preliminary prospectus). . . shall not constitute making or taking part in a public offering" (*id*.).

The Court denies the motion. Petitioners rely on 13 NYCRR § 18.9(a)(3), which provides that "A no-action letter shall not be issued where the offering involves more than 10 residential units or the property was acquired by all the offerees as tenants in common, sole shareholders of the corporate owner or sole partners in a partnership holding title to the property less than two years prior to submission of the application."

Here, the fact is that Cadman Towers decided to proceed with the conversion via a proxy statement instead of with an offering plan. As alleged by petitioners, that route was approved by the Attorney General, as evidenced by the issuance of a no-action letter. The choice to pursue the conversion via a proxy statement instead of with an offering plan compels the conclusion that the regulation limiting when no action letters can be issued has no applicability here. Simply put, that limitation applies only to public offerings, which is not the case here.

Cadman Towers is proposing a shareholder vote to convert from a Mitchel-Lama co-op to an HDFC. Neither party contends that Cadman Towers has engaged in a public offering and it is undisputed that the action at issue is a conversion process. The General Business Law does not require that changing the classification of a building requires that there be an offering plan. In fact, the statute is clear that an offering plan is necessary only in a "public offering or sale."

Because there is no public offering at issue, no offering plan was required for the Attorney General to review.

Cadman Towers filed a 249-page proxy statement with the Attorney General. Petitioners contend the proxy statement is inadequate, but cite to requirements of an offering plan under 13 NYCRR § 18.3, an inapplicable regulation. Instead, according to Cadman Towers, the proxy statement complies with the requirements of a 'prospectus' as provided in General Business Law § 352-e (b). Cadman Towers was under no obligation to comply with the requirements of an offering plan.

Petitioners had the burden of demonstrating they had a likelihood of success on the merits, but the statutory scheme indicates Cadman Towers, in seeking to convert the co-op from one form to another and having nothing to do with the general public, acted appropriately when they did not utilize an offering plan in their application for a no-action letter.

The Court observes that "it is well settled that the ordinary 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" (*Spectrum Stamford, LLC v 400 Atl. Tit., LLC*, 162 AD3d 615, 616, 81 NYS3d 5 [1st Dept 2018]). As noted by respondent, the conversion will go before the shareholders for a vote. This vote could approve the conversion, or after thorough debate, could fail, granting petitioners their preferred outcome without further judicial involvement. Besides, if there are problems with the vote, or if petitioners prevail on this Article 78, the vote can be nullified.

Moreover, petitioners have not shown the balance of the equities weighs in their favor. To grant the preliminary injunction would prevent all shareholders from the ability to debate the merits of the conversion and cast their votes.

Accordingly, it is hereby

ORDERED that petitioners' motion for a preliminary injunction is denied; and it is further

ORDERED that the temporary relief granted in the Order to Show Cause dated May 8, 2023 is vacated. The vote may go forward.

The Court observes that the petition was adjourned by the parties to July 13, 2023 (NYSCEF Doc. No. 24).

6/6/2023
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE