

36 W. 35th Apt. Corp. v Oliveira

2023 NY Slip Op 33844(U)

October 24, 2023

Supreme Court, New York County

Docket Number: Index No. 656567/2022

Judge: Louis L. Nock

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
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK **PART** **38M**

Justice

-----X

36 WEST 35TH APARTMENT CORP.,

Plaintiff,

- v -

MONICA OLIVEIRA and GLORIA OLIVEIRA,

Defendants.

-----X

INDEX NO. 656567/2022

MOTION DATE 04/19/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 40

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, the motion is granted for the reasons set forth in the moving papers (NYSCEF Doc. Nos. 20, 27, 32) and the exhibits attached thereto, in which the court concurs, as summarized herein.

In this action for unpaid assessments and maintenance, plaintiff, a co-operative corporation, seeks a declaratory judgment that defendants, the residents of an apartment within the co-op, are the owners of 107 shares in the co-op by virtue of their purchase of the apartment in June 2004. Plaintiff also alleges claims for breach of contract for defendants' failure to pay maintenance and special assessments pursuant to the proprietary lease and seeks to recover its reasonable attorneys' fees as a result of defendants' failure to pay. Defendants assert that they are not required to pay special assessments or common charges as the shares of the co-op have been misallocated based on the size of their apartment, that the special assessments are being used to cover the cost of personal litigation instigated by a former president of the co-op's Board of Directors against a company owned by two other former presidents, and that the managing

agent for the co-op is not properly licensed to collect fees. Before the court is plaintiff's motion for summary judgment.

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

As an initial matter, the court denies the motion with respect to defendant Gloria Oliveira. Nowhere in the record is there any evidence that she is a record owner of shares in the co-op. Indeed, the deed of sale names only defendant Monique Oliveira as a buyer (deed, NYSCEF Doc. No. 24). While defendants answer the complaint and oppose the motion collectively, the court does not view this as an admission of joint ownership, especially where the documentary evidence is plainly to the contrary and defendants are unrepresented laypersons.

Plaintiff has established prima facie entitlement to summary judgment on its first cause of action for a declaratory judgment as to the number of shares owned by defendants by submission of a copy of the offering plan (offering plan, NYSCEF Doc. No. 34). The offering plan sets forth that Apartment 6E, owned by defendant Monique Olivera (“Owner”), was allocated 107 shares in the co-op (*id.* at 10). In addition, owner admitted in the answer that she is the owner of 107 shares, and that she received a certificate stating the same (answer with counterclaim, NYSCEF Doc. No. 15, ¶¶ 3, 7). Owner does not raise a triable issue of fact regarding the allocation of shares, nor does she provide any basis for the court to order that the shares be reallocated. To the extent that Owner argues that the offering plan is itself flawed, cooperative offering plans are governed by the Martin Act (General Business Law § 352-e), which does not create a private right of action (*Matter of People v Credit Suisse Sec. [USA] LLC*, 31 NY3d 622, 632 [2018]).

Plaintiff has also established prima facie entitlement to summary judgment on its claims for failure to pay maintenance and special assessments. Plaintiff submits the offering plan and proprietary lease (NYSCEF Doc. No. 34), the affidavit of its President, Ryan Idrogo-Lam, which sets forth Owner’s obligations under the proprietary lease and the amount of arrears (Idrogo-Lam aff., NYSCEF Doc. No. 27, ¶¶ 6-14), the affidavit of its Managing Agent, which lays a foundation for plaintiff’s ledger (Naor aff., NYSCEF Doc. No. 32, ¶¶ 4-6), and the ledger, which confirms the outstanding balance (ledger, NYSCEF Doc. No. 35) (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [“The elements of such a claim include the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages”]). In opposition, Owner fails to raise a triable issue of fact. Owner’s allegations that the special assessments are for an improper purpose are unsupported by any

documentary evidence,¹ and, in any case, Owner cites no authority allowing her to stop fulfilling her obligations under the proprietary lease and house rules of the co-op because she disagrees with the assessments. Similarly, the allegation that plaintiff's managing agent is not a licensed real estate broker is unsupported. Owner cites "the Real Estate License Law of November 2014," but does not provide any specific provisions thereof, or indeed, any provisions of the Real Property Law that would allow her to stop paying maintenance or special assessments even if the managing agent were unlicensed.

Accordingly, it is hereby

ORDERED that the motion is granted as to defendant Monique Oliveira, and denied as to defendant Gloria Oliveira; and it is further

ADJUDGED and DECLARED that defendant Monique Oliveira owns 107 shares of plaintiff 36 West 35th Apartment Corp.; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Monique Oliveira in the amount of \$51,027.11, with interest thereon at the statutory rate from January 1, 2022,² through entry of judgment, as calculated by the Clerk, and continuing to accrue thereafter through satisfaction of judgment, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff is entitled to its reasonable attorneys' fees pursuant to the terms of the proprietary lease (proprietary lease, NYSCEF Doc. No. 34 at 203, ¶ 28), and the issue of

¹ "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]).

² "Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date" (CPLR 5001[b]; *Kachkovskiy v Khlebopros*, 164 AD3d 568, 572 [2d Dept 2018]).

the amount of such fees is severed and set down for a further hearing before the undersigned; and it is further

ORDERED that the parties shall appear for said hearing in Room 1166, 111 Centre Street, New York, New York, on November 21, 2023, at 2:15 PM; and it is further

ORDERED that the action is severed and continued as to defendant Gloria Oliveira to the extent that limited discovery shall go forward on the narrow issue of said defendant's relationship, or non-relationship, to the co-op that is the subject of this action, and that a status conference shall be convened in regard thereto, at the Courthouse, 111 Centre Street, Room, 1166, New York, New York, on December 20, 2023, at 10:00 a.m.

This constitutes the decision and order of the court.



<u>10/24/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE