

Mendez v One Sunset Park Condominium

2024 NY Slip Op 33560(U)

September 20, 2024

Supreme Court, Kings County

Docket Number: Index No. 526936/19

Judge: Kerry J. Ward

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At an IAS Term, Part 9 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 20th day of September, 2024.

P R E S E N T:

HON. KERRY J. WARD,

Justice.

-----X
NYDIA RIVERA MENDEZ, MARIA N VALDEZ FLORES,
DAINA E. SANATANA, VICTORIA ANGEL TORRES,
IVETTE DAVILA-RICHARDS, RONALD ROSARIO,
BOZEK KRZYSTYNA, MARCELA SALAZAR, SEDINA
ROSAS, DAVID MARRERO AND DEPARTMENT OF
HOUSING PRESERVATION AND DEVELOPMENT OF
THE CITY OF NEW YORK,

Plaintiffs,

- against -

Index No. 526936/19

ONE SUNSET PARK CONDOMINIUM, MATT LEVI,
PAUL KLAUSNER AND 4401 SUNSET HOLDINGS, LLC.

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations)_____

188 189-191

Opposing Affidavits (Affirmations)_____

192

Reply Affidavits (Affirmations)_____

194-195

Upon the foregoing papers in this proceeding regarding the 54-unit condominium building located at 702 44th Street in Brooklyn (Building), Petitioner Department of Housing Preservation and Development of the City of New York (HPD) moves (in motion sequence [mot. seq.] six) for an order, pursuant to Title 27, Chapter 2 of the Administrative

Code of the City of New York, the Housing Maintenance Code (HMC), and the Multiple Dwelling Law of the State of New York (MDL)¹: (1) “directing respondents to correct all violations and conditions which violate the HMC and MDL at the [Building] within the time provided by law”; (2) the imposition of “a judgment for civil penalties against respondents for the failure of respondents to make timely repairs at the [Building]”; (3) “directing respondents to comply with Petitioner’s Order to Repair/Vacate Order issued for the above-stated [Building]”; and (4) “directing respondents to give access to the inspectors of the [HPD] for the purpose of conducting inspections of repairs of fire damage at the [Building]”² (NYSCEF Doc No. 188).

Respondent One Sunset Park Condominium (Condominium) moves (in mot. seq. seven) for an order: (1) dismissing the petition, pursuant to CPLR 3211 (a) (1), (a) (7) and (a) (10) or, alternatively, (2) “staying this proceeding for no less than six months so that the unit owners of the subject premises may exercise their rights under New York Real Property Law 339-cc, holding the portion of the motion seeking dismissal in abeyance pending exercising of such rights, and allowing Respondents to serve and file an answer in the event dismissal is not granted” (NYSCEF Doc No. 189).

¹ By order dated February 20, 2020, this court (Silber, J.) consolidated a Civil Court action (bearing Index no. 2282/19) brought by petitioner HPD for the relief sought herein with a plenary action in this court brought by rent-controlled tenants against the Condominium and others for, among other things, violations of the Martin Act, constructive eviction and negligence for failing to maintain the premises in good condition and for failing to procure and maintain adequate insurance. The then pending motions in Civil Court were then transferred to this court for resolution.

² This branch of the Petition has been rendered moot, since the Condominium consented to provide HPD and the Department of Buildings (DOB) access to inspect the damage at the Building (NYSCEF Doc No. 212).

Background

On April 3, 2019, there was a devastating fire in the Building which required the removal of all occupants from their condominium units. There were fifty-four (54) apartments in the Building and the structure was declared unsafe for habitation.

On October 10, 2019, HPD filed its petition, verified by counsel, against the Condominium as “Owner” of the Building, Paul Klausner, as an “[o]fficer of owner” and Matt Levi, as “managing agent” alleging that it “is the municipal department charged with enforcement of proper housing maintenance standards” (NYSCEF Doc No. 188 at ¶¶ 1 and 5). The petition alleges that “[e]ach respondent is an owner of the premises . . . and, as such, is obligated to keep the premises in good repair and to correct all violations . . . pursuant to HMC Section 27-2005 (a) and (b)” (*id.* at ¶ 6).

The petition asserts the following four claims: (1) an “Order to Correct” the violations set forth in Exhibit 1, HPD’s “Open Violation Summary Report” listing violations from 2008 through 2019, including lead-based paint hazards, posting of requisite notices, repairing wood flooring and porcelain in bathrooms, abating mice infestations and several April 5, 2019 violations directing to “abate the nuisance consisting of fire damage . . .”; (2) a claim for civil penalties for failure to correct “immediately hazardous” and “non-hazardous” violations related to the fire damage by April 19, 2019, the date set by HPD; (3) an order to comply with HPD’s Vacate Order/Order to Repair the fire damage, which took effect on April 22, 2019; and (4) an order granting HPD access to inspect the fire damage at the Building.

Respondents' Dismissal/Stay Motion

On or about October 31, 2019, the Condominium filed a pre-answer dismissal motion, pursuant to CPLR 3211 (a) (1), (a) (7) or (a) (10), or, alternatively, seeking a stay of the proceedings as set forth above.

The Condominium submits an attorney affirmation explaining that the subject Building was practically destroyed by the April 2019 fire and annexes the report of the Condominium's architect, Howard L. Zimmerman Architects (Zimmerman Report)³ (NYSCEF Doc No. 189 at ¶ 4). Defense counsel explains that more than 75% of the Building was destroyed in the April 2019 fire, so Zimmerman was hired "to ascertain what had to be undertaken to rebuild the building" (*id.* at ¶¶ 8-9). Counsel notes that the accompanying Zimmerman Report determined that "the building requires a complete 'gut renovation' from the cellar level to the roof" (*id.* at ¶ 10). Defense counsel asserts that RPL 339-cc was triggered, which provides:

"[e]xcept as hereinafter provided, damage to or destruction of the building shall be promptly repaired and reconstructed by the board of managers, using the proceeds of insurance, if any, on the building for that purpose, and any deficiency shall constitute common expenses; provided, however, that if three-fourths or more of the building is destroyed or substantially damaged and seventy-five per cent or more of the unit owners do not duly and promptly resolve to proceed with repair or restoration, then and in that event the property or so much thereof as shall remain, shall be subject to an action for partition at the suit of any unit owner or lienor as if owned in common, in which event the net proceeds of sale, together with

³ The defense also submits an expert affidavit from Joseph Nevins of Zimmerman Architects regarding the Zimmerman Report (NYSCEF Doc No. 189).

the net proceeds of insurance policies, if any, shall be considered as one fund and shall be divided among all the unit owners in proportion to their respective common interests, provided, however, that no payment shall be made to a unit owner until there has first been paid off out of his share of such fund all liens on his unit” (emphasis added).

Defense counsel asserts that this language is “mirrored” in the Condominium’s by-laws, a copy of which is included in the record (*id.* at ¶ 12).

Based on RPL 339-cc and the Condominium’s by-laws, defense counsel asserts that “the choice of whether or not to rebuild the subject premises lay solely at the feet of the unit owners individually” and “[n]either the board of managers, the managing agent, nor the head officer, has any authority to unilaterally rebuild the building and the units that are the subject of this proceeding” (*id.* at ¶¶ 14-15). Defense counsel asserts that the court and HPD must “simply must defer to the unit owners . . .” (*id.* at ¶ 18).

Defense counsel argues that “[t]he Petition, seeks relief from this Court against Respondents that simply cannot be granted” because “[a]bsent an affirmative vote of seventy five percent of the unit owners, there can be no rebuilding of the subject premises” (*id.* at ¶¶ 19 and 21). Counsel asserts that the procedure set forth in RPL 339-cc and the Condominium’s by-laws “binds the Court, Petitioner, and all of the relevant governmental agencies” (*id.* at ¶¶ 22 and 24). Defense counsel further contends that: “[t]he Court cannot impose civil penalties on Respondents, as the[y] are not responsible for rebuilding the subject premises . . .”; “[t]he HPD violations placed are in fact a nullity as currently no one can reside at the premises, and there is currently no obligation to rebuild the premises”; and “[t]he court cannot direct Respondents to vote to rebuild the premises, and certainly

cannot direct Respondents to correct any conditions at the premises, especially when they lack the authority to do so” (*id.* at ¶¶ 25-27).

Defense counsel asserts that dismissal of the petition is warranted, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action because “[g]iven that the building is so substantially decimated (over seventy five percent), and that RPL 339-cc has been triggered, the relief requested by Petitioner’s Petition . . . does not fit into any cognizable legal theory” (*id.* at 32). Defense counsel emphasizes that: “[w]ithout an **affirmative** action by seventy five percent of the unit owners, there is no obligation on behalf of any of the respondents to be made responsible for, or be compelled to perform, or be enjoined from acting in relation to, any of the relief sought by Petitioners” (*id.* at ¶ 36). Defense counsel also argues that dismissal, pursuant to CPLR 3211 (a) (10), is also warranted because the relief sought by the petition is impossible without the explicit consent of the unit owners (*id.* at ¶¶ 47-57).

Alternatively, defense counsel argues that this proceeding should be stayed pending a vote of the unit owners of the Condominium, pursuant to RPL 339-cc and the by-laws, and the dismissal motion held in abeyance (*id.* at 13-14).

HPD’s Opposition

HPD, in opposition, submits an attorney affirmation asserting that RPL 339-cc requires that the board of managers “shall” repair the Building, yet ignores that portion of the statute requiring a vote of unit owners if more than 75% of the Building is destroyed and providing for a partition action if the unit owners decide not to restore the Building

(NYSCEF Doc No. 192 at ¶¶ 5-6). HPD’s counsel also argues that “managing agents of the Board, Board of Managers or the Condominium Association or the Cooperative Association are owners as defined by the HMC and have a nondelegable duty to keep the premises in good repair” (*id.* at ¶ 11).

The Partition Action

On January 14, 2020, while the Condominium’s dismissal/stay motion was pending, the Condominium unit owners held a meeting to determine whether or not the Building should be restored. At the meeting, 72.45% of the unit owners voted to not restore the Building, but to sell the burnt-out shell and distribute the sale proceeds and the Condominium’s insurance among the unit owners, pursuant to a partition action, as required by RPL 339-cc. That partition action, which was commenced by the unit owners on May 20, 2020, is currently pending before this court (*Shepherd v Wong, et al.*, Kings County index No. 508641/20). In the partition action, a referee has been appointed to market the remains of the Building, which will presumably result in a gut renovation of the Building by the new owner.

Discussion

“When a party moves to dismiss a [pleading] pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action” *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2010]). “In considering such a motion, the court must ‘accept the facts as alleged in the [pleading] as

true, accord the p[etitioner] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 1181).

Here, the relief sought by the petition (i.e., a “gut” renovation of the fire damage at the Building) cannot be obtained from the named defendants, who have no authority under the RPL and the Condominium’s by-laws to proceed with such an undertaking without the explicit consent of the unit owners. Under RPL 339-cc, a partition action was commenced after the unit owners voted not to rebuild, since more than 75% of the Building was destroyed by fire and water damage. HPD’s petition fails to state a cause of action against the named respondents, who demonstrated that they have no authority regarding the restoration of the fire-decimated Building under either the applicable statute or the Condominium’s by-laws. Accordingly, it is hereby

ORDERED that the petition (mot. seq. six) is denied; and it is further

ORDERED that the Condominium’s dismissal motion (mot. seq. seven) is granted to the extent that the petition is dismissed, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action against respondents.

This constitutes the decision and order of the court.

E N T E R,



A. J. S. C.