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Wyche v Haywood-Diaz
2021 NY Slip Op 30684(U)
March 8, 2021
Supreme Court, Kings County
Docket Number: 519060/2018
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 8 day of March, 2021.

PRESENT: HON. LOREN BAILY-SCHIFFMAN

JUSTICE

DEITRA WYCHE and MARIE DAVIS, Individually and as Officers of THE 78-88 PACIFIC STREET HOUSING DEVELOPMENT FUND CORPORATION

Petitioners,

FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES

- against -

TASHON HAYWOOD-DIAZ, LETTIE EDGERTON and PHYLISS MURDAUGH, Individually and as de facto Officers of THE 78-88 PACIFIC STREET HOUSING DEVELOPMENT FUND CORPORATION

Respondents.

ELVIS DIAZ and FLOR CABRERA

Third-Party Petitioners,

- against -

78-88 BROOKLYN AVENUE/1378-84 PACIFIC STREET HOUSING DEVELOPMENT FUND CORPORATION,

DEITRA WYCHE and MARIE DAVIS, individually and as Officers of 78-88 BROOKLYN AVENUE/1378-84 PACIFIC STREET HOUSING DEVELOPMENT FUND CORPORATION,

Third-Party Respondents.

Index No.: 519060/2018

Motion Seq. # 5

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Affirmation in Opposition to Cross-Motion	2
Petitioner's Reply Affirmation, Affidavit and Exhibits	3

Upon the foregoing papers Deitra Wyche and Marie Davis, individually and as Officers of the 78-88 Pacific Street Housing Development Fund Corporation (“Third-Party Respondents”), move this Court for an Order (a) pursuant to CPLR § 3212 dismissing the Third-Party Petition of Elvis Davis and Flor Cabrera; (b) vacating the stay contained in the Order to Show Cause dated August 30, 2019 and any other stays; (c) awarding 78-88 Brooklyn Avenue/ 1378-84 Pacific Street use and occupancy in the amount of \$560.36 per month pendente lite; (d) awarding 78-88 Brooklyn Avenue/1378-88 Pacific Street Housing Development Corporation a money judgment in the sum of \$7,868.12 representing all unpaid use and occupancy to date and directing the Third-Party Petitioners to pay same within five (5) days of an Order issued by this Court; (e) granting costs and attorneys’ fees for the preparation of this motion as well as any Court appearances necessitated by the same; and (f) for such other, further and/or different relief as this Court may deem just, proper and equitable.

Background

This case involves the membership of the Board of 78-88 Brooklyn Avenue/1378-88 Pacific Street Housing Development Corporation, an HDFC. Previous to August 21, 2018, Tashon Haywood-Diaz, Lettie Edgerton and Phyllis Murdaugh acted as directors. On August 21, 2018, the HDFC conducted an election, whereby Petitioners/Third Party Respondents Deitra Wyche and Marie Davis were elected Board members. By Order dated January 31, 2019, this Court validated the August 21, 2018 Board election.

By Order dated October 31, 2019, this Court granted leave to intervene to Elvis Diaz and Flor Cabrera (“Third-Party Petitioners”). Third-Party Petitioners are the current occupants of Apartment 1-A of the HDFC. In this motion, the ownership of Apartment 1-A is called into

question. The previous owners of the shares of Apartment 1-A, John Galbrieth and Yvonne Johnson (an unmarried couple), purchased the shares in 1985. John Galbrieth died in 2000, and Third-Party Respondents believe that no Estate was ever created for John Galbrieth. Yvonne Johnson affirmed that she owns half the shares of Apartment 1-A. Yvonne Johnson's son Ronald Johnson affirmed that his mother transferred her shares of Apartment 1-A to him. Yvonne Johnson disputes this transfer ever occurred and affirms that Ronald Johnson was given power of attorney.

Apartment 1-A purportedly had leaks that the Board refused to repair. Additionally, the shareholder of Apartment 1-A (whomever they are) did not make maintenance payments. Due to the leaks, the arrears and alleged threats and harassment, Ronald Johnson transferred the shares of the apartment to the HDFC. Third-Party Respondents allege that Elvis Diaz is the brother-in-law of Tashon Haywood-Diaz. Third-Party Respondents also contend that Elvis Diaz purchased Apartment 1-A from the HDFC. Petitioners assert that the apartment was purchased for an undervalued amount in what amounts to a sweetheart deal.

Discussion

Dismissing Third-Party Petition for Failure to Name Necessary Parties

Third-Party Respondents move for summary judgment, dismissing the Third-Party Petition for failure to name the Estate of John Galbrieth, Yvonne Johnson and Ronald Johnson. "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." CPLR § 1001. "Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice." CPLR § 1003.

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. **CPLR 3212 (b); *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).** On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. ***Spinelli v. Procassini*, 258 A.D.2d 577 (2d Dep't 1999); *Tassone v. Johannemann*, 232 A.D.2d 627, 628 (2d Dep't 1996); *Weiss v. Garfield*, 21 A.D.2d 156, 158 (3d Dep't 1964).** The movant must therefore offer sufficient evidence in admissible form to eliminate all material questions of fact. ***Alvarez v. Prospect Hosp*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York*, supra at 562; *Friends of Animals, Inc v. Associated Fur Mfrs, Inc*, 46 N.Y.2d 1065 (1979).**

The instant case is replete with questions of fact as to who the owners of Apartment 1-A are and what interest they own. Whether or not the Estate of John Galbrieth, Yvonne Johnson and Ronald Johnson are necessary parties to this litigation, is predicated on the unresolved questions of fact about Apartment 1-A's ownership. Summary judgment is, therefore, denied.

Third-Party Petitioners contend that this motion sounds in a motion to dismiss, pursuant to CPLR § 3211(a)(10). Under CPLR § 3211(a)(10), a party may move to dismiss a cause of action where "the court should not proceed in the absence of a person who should be a party." In the present case, the Courts finds that the Estate of John Galbrieth, Yvonne Johnson and Ronald Johnson could be inequitably affected by this action if they are not parties to it. Specifically, the Third-Party Petition's Third Cause of Action requests a declaratory judgment declaring Third-Party Petitioners the rightful owner of the apartment in question. However, the Court does not

find that dismissal is necessary under these circumstances but finds possible owners of Apartment 1-A should be joined as parties to the Third-Party Petitioner. See *Petti v. Town of Lexington*, 92 A.D.3d 1111, 1115 (3d Dep't 2012). Accordingly, the motion is granted to the extent that Third-Party Petitioners have 30 days from the issuance of this Order to amend the Third-Party Petition to include the Estate of John Galbrieth, Yvonne Johnson and Ronald Johnson and serve the Third-Party Petition on them. Failure to do so will result in the dismissal of the Third-Party Petition.

Vacating Stay

On August 30, 2019, Hon. Richard Velasquez signed an Order to Show Cause which temporarily enjoined and restrained Third-Party Respondents from commencing any action, lawsuit or proceeding to remove, eject or evict Third-Party Petitioners from Apartment 1-A. As there remain questions of facts surrounding the ownership of Apartment 1-A, the branch of the motion to vacate this stay is denied.

Future Use and Occupancy

By Interim Order dated November 19, 2020, this Court ordered Elvis Diaz and Flor Cabrera to pay \$560.36 per month for use and occupancy, to the HDFC. The same relief is requested in this motion. The Interim Order dated November 19, 2020 is continued.

Past Use and Occupancy

Third-Party Respondents move for a judgment for \$7,868.12 against Third-Party Petitioners for arrears arising out of unpaid past use and occupancy or maintenance. Third-Party Respondents do not explain how this amount was calculated. Accordingly, the branch of

the motion requesting past use and occupancy or maintenance is denied with leave to resubmit with an analysis of how the amount of arrears was calculated.

Costs and Attorneys' Fees

Third-Party Respondents move for costs and attorneys' fees for the preparation of this motion. However, Third Party Respondents do not delineate what costs were incurred, the hours required to prepare this motion or the rate at which the attorney should be paid. Accordingly, the branch of the motion requesting attorney's fees is denied with leave to renew on proper papers.

For the foregoing reasons, it is HEREBY

ORDERED that the branch of the motion for summary judgment and/or dismissal is granted to the extent that Elvis Diaz and Flor Cabrera have 30 days from the issuance of this Order to amend the Third-Party Petition to include the Estate of John Galbrieth, Yvonne Johnson and Ronald Johnson and serve the Third-Party Petition on them; and it is further

ORDERED that the branch of the motion seeking to vacate the stay contained in the Order to Show Cause dated August 30, 2019 and any other stays is DENIED; and it is further

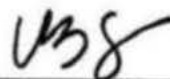
ORDERED that the Interim Order of this Court dated November 19, 2020 is continued; and it is further

ORDERED that the branch of the motion seeking a judgment for past use and occupancy or maintenance is DENIED with leave to renew; and it is further

ORDERED that the branch of the motion for costs and attorney's fees is DENIED.

This is the Decision and Order of the Court.

ENTER



HON. LOREN BAILLY-SCHIFFMAN