2023-08-23

501 WEST 143rd STREET HDFC v. PARK

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART F

501 WEST 143rd STREET HDFC

Petitioner,

-against-

OLIEVER PARK ET AL

Respondents.

Index No. LT-306518-21/NY

DECISION/ORDER

Motion Sequence 2

HON KAREN MAY BACDAYAN, JHC

David A. Kaminsky & Associates, PC (David Adam Kaminsky, Esq.), for the petitioner
Northern Manhattan Improvement Corporation (Jessica Baus Watson, Esq., Andrew Louis Goodman, Esq.), for the respondent

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc Nos: 51-101.

PROCEDURAL POSTURE AND BACKGROUND

This is a holdover proceeding commenced against Oliever Park ("respondent") by the 501 West 143rd Street HDFC, a low- to moderate-income cooperative corporation, and the purported "landlord" of the apartment. (NYSCEF Doc No. 1, petition ¶ 1.) Petitioner claims that respondent is not a shareholder, but, rather, a licensee of Gavin Park ("Park"), "the former superintendent of the building . . . who was the occupant of the Premises as a condition of his employment as superintendent, or a licensee of the [p]etitioner. . . . In the event [r]espondents claim a license from *Gavin Park*, the former occupant of the [p]remises permitting [r]espondents to occupy the [p]remises, such license expired upon Gavin Park's permanent vacatur from the [p]remises." (*Id.* ¶¶ 5-6.) In the alternative, petitioner pleads respondent is a licensee of *petitioner* whose license has been revoked pursuant to a 10-day Notice to Quit. (NYSCEF Doc No. 1 at 5, 10-day Notice to Quit.) The 10-day Notice to Quit states that "pursuant to letters addressed to [respondent] dated August 26, 2019, October 8, 2019, and December 4, 2019, the HDFC requested that [respondent] provide proof of the issuance of Shares of Stock and/or Proprietary Lease referable to the Apartment in Gavin Park's name, and that [respondent] has failed to provide such proof." (*Id.*) Prior to commencing this proceeding, having received no stock certificate or proprietary

lease from respondent, the board of directors ("Board") passed a resolution in July 2021, which allowed that "unless [respondent] provides Shares of Stock and/or the Proprietary Lease referable to the Apartment in her name and/or Gavin Park's name by a date to be determined," the Board would stake steps to "issue Shares of Stock and Proprietary Lease referable to Apartment 65 of the Building to 501 West 143 Street Housing Development Fund Corporation forthwith." (NYSCEF Doc No. 37, petitioner's exhibit K, at 3.) Immediately thereafter, petitioner transferred the shares to itself. (NYSCEF Doc No. 83, respondent's exhibit DD, ACRIS document.) Petitioner commenced this proceeding on September 22, 2021.

Respondent now moves for summary judgment dismissing this licensee holdover proceeding, and to impose sanctions on petitioner and its counsel pursuant to 22 NYCRR § 130-1 (c) (3), "for frivolously commencing and maintaining this proceeding, and to award [r]espondent reasonable attorney's fees." (NYSCEF Doc No 52, motion [sequence 2] respondent's attorney's affirmation [motion sequence 2] ¶ 1.) Numerous documents were produced by petitioner pursuant to this court's discovery order, which in large part form the basis for respondent's motion. Respondent also submitted a sworn affidavit, in which respondent claims that she and Park, to whom she was married at the time, began residing together in Apartment 65 in April 1994, after Park began working for petitioner. (NYSCEF Doc No. 53, Oliever Park affidavit ¶¶ 1-2; NYSCEF Doc No. 55, respondent's exhibit B, new employee announcement.) Park took occupancy first and was joined "a few months later" by respondent and their children. (NYSCEF Doc No. 53, Oliever Park affidavit ¶ 3.) Shortly thereafter, respondent avers that she and Park "jointly purchased shares of Apartment 65." (*Id.* ¶ 4.) This sale occurred after the treasurer of the Board inquired of their attorney regarding the legality of the sale of shares to a superintendent. (NYSCEF Doc No. 56, respondent's exhibit C, responsive letter from attorney dated May 8, 1996.) The attorney advised, "[i]t is legal, provided at least 2/3 majority of board of directors approve the sale and it is ratified by a majority of shareholders." (*Id.* ¶ 1.) At a shareholder's meeting held on June 14, 1996, a ballot was distributed asking shareholders to vote "yes" or "no" to the following statement: "I agree, Mr. Gavin Park, our Superintendent, may purchase his apartment . . . ." (NYSCEF Doc No. 57 at 2, respondent's exhibit D, paper ballot.) The resolution "passed by an overwhelming majority." (*Id.* at 3.) As evidenced by Park's employment contracts, there was a shift between his status as an employee who was permitted in 1994 to occupy "Apartment #65 rent free as long as he is an employee of corporation," and in 1998, when "Apartment #65 *maintenance* [would] be automatically deducted from [his] paycheck." (NYSECF Doc No. 67, respondent's exhibit N, 1994

employment contract; NYSCEF Doc No. 68, petitioner's exhibit O, 1998 employment contract.) Respondent also attaches a copy of an empty envelope produced by petitioner through discovery which on its face is written, "Olivia (sic) Park, # 65, Stock Certificate # 41." (NYSCEF Doc No. 58, respondent's exhibit E.)

Respondent ascended to the vice presidency of the Board following the purported joint purchase of shares. (NYSCEF Doc No. 59, respondent's exhibit F, mem to shareholders dated July 19, 1996; NYSCEF Doc No. 62, respondent's exhibit I, election announcement dated August 20, 1996.) The bylaws at Article VIII (Directors) allow that "any *shareholder* who is at least 18 years of age shall be eligible to be elected as [d]irector (emphasis added)." (NYSCEF Doc No. 63, respondent's exhibit J, bylaws.) Numerous other documents refer to respondent as a director and suggest that Park and respondent jointly held the shares to Apartment 65. (NYSCEF Doc No. 64, respondent's exhibit K, managing agent affidavit; NYSCEF Doc No. 65, respondent's exhibit L, 1998 rent roll; NYSCEF Doc No. 69, respondent's exhibit P, 2012 shareholder list; NYSCEF Doc No. 70, respondent's exhibit Q, shareholder spreadsheet). In 1999, Park "moved out of the apartment, and (he and respondent) were divorced." (NYSCEF Doc No. 53, Oliever Park affidavit ¶ 6.)

Finally, and significantly, respondent has provided an email dated February 26, 2023 – one and a half years after this proceeding was commenced -- which was inadvertently sent by petitioner's agent to respondent's lawyer. Pursuant to the Rules of Professional Conduct (22 NYCRR 1200.0) rule 4.4 (b), respondent's attorneys notified petitioner's agent of their receipt of same. The email, which also included petitioner's lawyer, David Kaminsky, Esq., and other members of his firm, states, "we have now found evidence that Oliever Park and Gavin Park may have jointly purchased this apartment. . . . Presuming Oliever &/or Gavin Park want to transfer their ownership to whomever lives in the apartment[,] [w]hat do we do about them not actually having a share certificate evidencing who owns shares for the apartment[?] . . . How do you propose we proceed with regard to this?" (NYSCEF Doc No. 54, respondent's exhibit A at 2, email dated February 26, 2023, on behalf of the Board to David Kaminsky, Esq. et al.)[1] A responsive email is not in the record before the court; however, after sending the email to their attorney, petitioner continued with this litigation, contending that respondent is a mere licensee of either petitioner or Park, whose employment was terminated. It is reasonable to deduce that petitioner was advised by its attorneys to continue its course.

[1] Petitioner has not objected to respondent's submission of this email, and the document was discussed at length during oral argument without any objection.

Respondent argues that the evidence produced by petitioner itself "overwhelmingly proves that [r]espondent is the shareholder of the subject premises, and not a licensee as alleged –a fact that [p]etitioner's officers themselves have admitted (internal citation to NYSCEF document omitted)." (NYSCEF Doc No. 52, respondent's attorney's affirmation ¶ 2; NYSCEF Doc No. 54, respondent's exhibit A at 2, email dated February 26, 2023, on behalf of the Board to David Kaminsky, Esq. et al.) Respondent seeks sanctions against petitioner's and their attorney on the basis that "[p]etitioner never performed the 'thorough search of its books and records,' on which all of the allegations against [r]espondent were premised, or any meaningful investigation before misappropriating [r]espondent's shares and commencing this proceeding." (NYSCEF Doc No 52, respondent's attorney's affirmation ¶ 3 [internal citations to NYSCEF document omitted].) Pointing to two prior licensee holdover proceedings brought against other shareholders in the building by petitioner (represented by a different attorney), respondent claims petitioner's behavior in this case "is not an isolated incident." (*Id.* ¶ 4.) Stock certificates were discovered during the course of those proceedings; one of the proceedings was discontinued;[2] and one remains undisposed due to pending motions.

In opposition, petitioner maintains that only a stock certificate or proprietary lease would conclusively prove that respondent is a shareholder. In opposition to respondent's prior discovery motion, petitioner cast the blame for failure to discover evidence that respondent may be a shareholder *prior to commencing* this proceeding on "[t]he previous managing agent . . . [who] was often inaccurate and incompetent in performing their duties, and mistakenly placed both Mr. Gavin Park and the [r]espondent on a list of shareholders." (NYSCEF Doc No. 25, motion [sequence 1], Cheng affidavit ¶ 9.) Petitioner also faults the former management company and members of the previous Board for their inability to locate documents *after the commencement of this proceeding*, but *prior to the discovery order* on the former board of directors and previous management company, who "failed to carry out their duties through mismanagement and poor decision-making." (NYSCEF Doc No. 85, Hoberman-

[2] Petitioner commenced holdover proceedings in 2016 for two apartments in the same building: Apartment 42, *501 W. 143rd St. Hous. Dev. Fund Corp. v Herriot*, et al., Civ Ct., New York County, index No. LT-070014-16/NY, and Apartment 24, *501 W. 143rd St. Hous. Dev. Fund Corp. v Berry*, Civ Ct., New York County, index No. LT-070016-16/NY. On September 13, 2017, after commencement of the proceedings, petitioner passed two resolutions, whereby it alleged to have performed a thorough search of its books and records, found no proof of any shares referable to the apartments, and issued shares referable to the apartments to itself. NYSCEF Doc No. 73, petitioner's exhibit T, September 13, 2017 resolution for Apartment 42; NYSCEF Doc No. 79, petitioner's exhibit Z, September 13, 2017 resolution for Apartment 24. During the course of those proceedings, the respondents produced stock certificates for both apartments. NYSCEF Doc No. 75, respondent's exhibit V, stock certificate; NYSCEF Doc No. 82, respondent's exhibit CC, stock certificate. The *Herriot* proceeding was discontinued without prejudice on March 23, 2023, while the parties' respective motions in the *Berry* proceeding are pending.

Kelly affidavit ¶ 6.) "Information, records, and books of the Coop were missing, misplaced, damaged, and/or destroyed," which made it "difficult to verify certain occupancies and shareholders in the building . . . ." (*Id.* ¶ 7.) Critically still missing, petitioner argues, are the "conclusive and direct documents proving the shareholder status of the respondent . . . including a stock certificate or proprietary lease." (*Id.* ¶ 29.) Petitioner avers that it spent "years" searching for evidence to clarify the issue of ownership both before "issuing or reissuing the [u]nsold shares of [s]tock to the [p]etitioner" and before commencing this holdover proceeding. (*Id.* ¶¶ 24-25.)

In reply, respondent argues that she has proven through circumstantial evidence that she is entitled to summary judgment dismissing the petition, and petitioner "does not even attempt to offer alternative theories as to how the evidence presented by [r]espondent could exist absent her being a shareholder of the subject premises, let alone provide any evidence to support an alternative theory." (NYSCEF Doc No. 100, respondent's attorney's reply affirmation ¶ 7.) Respondent points to the cooperative's bylaws at Article V, Section 7 to support her proposition that the remedy for a lost stock certificate is to be provided another one, "not to strip the shareholder of their status." (*Id.* ¶ 9.) In respondent's opinion, petitioner's own opposition papers support her motion for sanctions. It is clear, respondent argues, that petitioner relied on respondent to prove or disprove petitioner's cause of action. Respondent points to numerous statements in petitioner's affidavit describing the steps taken to determine whether respondent was a shareholder, *all of which*, respondent argues, demonstrate that petitioner placed the burden on a *pro se* respondent to prove she is a shareholder, rather than conducting a diligent investigation to determine if respondent was in fact a licensee before commencing this case. Respondent contends that it was only in response to a court order that petitioner made an investigation and produced the documentation that proves respondent is a shareholder.[3] Respondent maintains that "[h]ad petitioner actually performed a search of its own records . . . it would have discovered the documents" – which respondent asserts demonstrate that respondent is not a mere licensee – *prior* to commencing the proceeding. (*Id.* ¶¶ 19-22). Moreover, respondent maintains that petitioner persisted in prosecuting this proceeding even *after* "its lack of legal or factual basis was apparent," both of which actions violate 22 NYCRR § 130-1.1 (c). (*Id.* ¶ 38.)

DISCUSSION

[3] Petitioner avers that it "*spent many hours complying with the discovery order* and did an exhaustive search of the books and records, including archived files (emphasis added)." NYSCEF Doc No. 85, Hoberman-Kelly affidavit ¶ 27.

RPAPL 713 (7) states that a summary eviction proceeding may be maintained against an individual who "is a licensee of the person entitled to possession of the property at the time of the license, and (a) his license has expired, or (b) his license has been revoked by the licensor, or (c) the licensor is no longer entitled to possession of the property[.]" "Absent a surrender of possession by the tenant, the lessor must obtain a judgment of possession against the lessee pursuant to RPAPL 711 and may not proceed directly against the undertenant, whether licensee, subtenant or occupant, pursuant to RPAPL 713 (internal citations omitted)." (*170 W. 85th St. Tenants Assoc. v Cruz*, 173 AD2d 338, 339 [1st Dept 1991].)

The authenticated documents demonstrate, and the parties do not dispute, that at one time, Gavin Park was petitioner's superintendent. It is also not disputed that he no longer resides in the apartment. However, the documents also establish that a board resolution passed upon the advice of an attorney overwhelmingly passed to allow Park to purchase the apartment, and that he later contracted to have "maintenance" removed directly from his paychecks for his duties as superintendent. That respondent served on the Board strengthens the inference that she, or at least her husband at the time, was a shareholder who was eligible to serve on the Board pursuant to the bylaws.

Importantly, the Board, after reviewing a letter from their attorneys, questioned how to move forward now that it had "found evidence that Oliever Park and Gavin Park may have jointly purchased this apartment." (NYSCEF Doc No. 54, respondent's exhibit A at 2, email dated February 26, 2023, on behalf of the Board to David Kaminsky Associates, P.C. [Ani Tchelidze, Esq.].) Believing that respondent's "children and grandchild" live in the apartment and that both Park and respondent have vacated, the Board correctly surmised that "it doesn't seem like we can offer shareholder status to someone unless the 'owner' requests that." (*Id.*) The Board "presume[es] Oliever &/or Gavin Park want to transfer *their ownership* (emphasis added) . . . ." (*Id.*) At least at this juncture in the litigation, petitioner knew what it should have discovered prior to commencement – that Park and respondent may very well be "owners" of the subject apartment. Thereafter the parties appeared in court four times to discuss, schedule, and argue the instant motion.

Respondent's motion and the documents produced through discovery raise numerous issues of fact regarding the rightful owner of the shares allotted to the apartment. While there is overwhelming circumstantial evidence that Park was more than a superintendent, and, in fact, was likely a shareholder who paid maintenance, the evidence does not eliminate any question of fact as to who the actual owner of shares and signatory to the proprietary lease is. It is unfortunate that respondent's affidavit is lacking

in detail regarding the closing on the property, who exactly signed the proprietary lease, details regarding her marriage and divorce and the disposition of the unit as a result, what she believes may have happened to a stock certificate or proprietary lease, and whether she requested replacements. (NYSCEF Doc No. 53, Oliever Park affidavit.) However, respondent has not sought summary judgment declaring respondent the owner of the shares to the apartment, nor could this court order same. (*See e.g. Murphy v Baldari*, 2003 NY Slip Op 50754 [U], *2-3 [App Term, 2nd Dept 2003]; *Hampton v Hampton*, 66 Misc 3d 1219 [A] [Civ Ct, Kings County 2019].) Respondent seeks only "summary judgment dismissing the petition," on the basis that petitioner cannot prove an essential element of a licensee holdover proceeding – that petitioner is the person or entity rightfully "entitled to possession." (NYSCEF Doc No. 51, notice of motion [sequence 2]; RPAPL 713 [7].)

The documentary evidence produced by petitioner through discovery that points to Park's and/or respondent's status as owner(s) of shares and proprietary lessee(s), compelling and unexplained, defeats petitioner's cause of action. The evidence evinces that petitioner developed a strong belief that some other course of action was appropriate based on the discovered documents, and that petitioner sought the advice and counsel of its attorneys as to how to proceed with transferring the shares to respondent's family members should they want to do so. Petitioner's attorney acknowledges that it "does not have direct evidence clarifying the fact that the [r]espondent is not a licensee but is a shareholder." (NYSCEF Doc No. 86, petitioner's attorney's affirmation in opposition ¶ 11.) But neither does it have direct evidence, that respondent *is* a licensee because she is *not* a shareholder. Petitioner has produced no evidence to support that Park's employment was terminated, when it was terminated, or any explanation as to why Park lived "rent free" as a superintendent in 1994, but negotiated a contract in 1998, whereby his "maintenance" would be deducted from his salary as an employee. Nor has petitioner produced any evidence that it is the rightful owner of the shares, and thus the "landlord" of respondent as pleaded in the petition; it has only produced a self-serving Board resolution approving the transfer of shares to itself which was passed as the basis to maintain this proceeding.

To be clear, the basis for this proceeding – that Park's "license" to occupy the premises was revoked upon his termination of employment – is *nowhere supported*; petitioner produces no evidence of Park's termination of employment; nor does petitioner state the date of termination. The only documents produced indicate that Park likely retains occupancy rights greater than that of a terminated superintendent, even if petitioner could prove its allegation that it terminated Park's employment. Moreover, in this court's estimation, Park, who is not a party to this proceeding, would have a more

robust case than respondent had he been properly named herein, given the strong evidence that he retained rights to the subject apartment after he was allegedly terminated from his job as superintendent. If Park is the owner of shares as petitioner now suspects, NYSCEF Doc No. 54, respondent's exhibit A at 2, email dated February 26, 2023, on behalf of the Board to David Kaminsky Associates, P.C. (Ani Tchelidze, Esq.), then petitioner must first seek possession as against Park, not against respondent. (*Cruz*, 173 AD2d at 339; *Ivy 49-96 Co-op. Joint Venture v Danberg*, 134 Misc 2d 523, 524 [Civ Court, New York County 1987] ["A decision as to whether to remove an occupant . . . lies only with the proprietary lessee."]) Egregiously, having vigorously opposed a motion for discovery on the basis that it could find no documents, and *then* having discovered facts directly adverse to its allegations pursuant to a court order, petitioner persisted in prosecution of this proceeding.

As for the Board resolution to transfer the apartment's shares to itself, this does not conclusively give petitioner standing to maintain this proceeding. The resolution was passed on July 30, 2021 pursuant to a purported thorough investigation, and provided at least ostensible support this proceeding. However, the resolution appears to have been the result of an effort to conveniently dispense with a complicated situation without having first diligently searched for the documents which have now been produced pursuant to court order.[4]

"Because the gravamen of a summary proceeding is the present right to possession, where 'any legal or equitable defense, or counterclaim' overcomes the assertion of title as determinative of the question of petitioner's standing to evict respondent, the court must consider its merits, even if the court's jurisdictional limitations means that its findings are not res judicata but merely an 'incidental disposition' of the matter to adjudicate the summary proceeding (internal citations omitted)." (*Murphy v Baldari*, 2003 NY Slip Op 50754 [U], *2-3 [App Term, 2nd Dept 2003]; *Hampton v Hampton*, 66 Misc 3d 1219 [A] [Civ Ct, Kings County 2019] ["It is well settled that title cannot be determined in the context of a Housing Court summary proceeding, but that the Court is empowered with the jurisdiction

[4] The court also notes that the Board resolution determined "that the HDFC shall issue Shares of Stock and *Proprietary Lease* referable to Apartment 65 of the Building to 501 West 143 Street Housing Development Fund Corporation forthwith (emphasis added)." (NYSCEF Doc No. 37, Board Resolution, at 3.) However, petitioner did not produce a proprietary lease in response to the court-ordered discovery despite the language of the resolution. (NYSCEF Doc No. 37, petitioner's exhibit K.) Nor has petitioner provided the "Note and Security Agreement," the terms of which must be satisfied prior to any transfer of shares, including unsold shares. Thus, the court cannot determine whether, even if the shares are not held by Park and/or respondent, petitioner followed the proper procedure for transferring the shares to itself. (NYSCEF Doc No. 22, bylaws, Article V, Sections 1 [b], 2.)

to determine any legal or equitable defense for purpose of determining a right to possession [internal quotation marks omitted].") Accordingly, petitioner has not demonstrated that is a "person who may maintain this proceeding" either as the owner, landlord, or licensor pursuant to RPAPL 721, and has no other evidence which could be presented at trial to sustain its case at trial as "Petitioner further represents that the documents produced on January 31, 2023 represent a full and complete production of documents responsive to [r]espondent's Notice to Produce . . . ." (NYSCEF Doc No. 49, March 13, 2023 stipulation ¶ 3.)

Sanctions

22 NYCRR 130-1.1 (a) states:

> "The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part[.]"

22 NYCRR 130-1.1 (c) states in relevant part:

> "Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and *whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party* (emphasis added)."

"Section 130–1.2 permits a court to award costs or impose sanctions, or both, only upon a written decision setting forth sanctionable conduct, the reasons why the court found the conduct to be frivolous and the reasons why the court found the amount awarded or imposed to be appropriate." (*Yenom Corp. v 155 Wooster St., Inc.*, 33 AD3d 67, 74 [1st Dept 2006].)

While petitioner has maligned the former managing agent as being incompetent, this does not explain why -- as in previous licensee holdover proceedings involving shareholders in the HDFC from which a lesson could have been learned -- [5] it commenced this proceeding prior to undertaking a more diligent search for records. Nor may petitioner absolve itself of the necessity of a thorough investigation

[5] *See* n 2, *supra*.

prior to commencing a proceeding by requiring respondent to undertake the burden of proving she is not a licensee. It is petitioner's *prima facie* burden to demonstrate that it is entitled to possession of the premises. The compelling circumstantial evidence here, for which no possible alternative theory is offered, obliges the court to find *not* that respondent is a shareholder, but, rather, that petitioner must either first properly regain possession from Park, or, at the very least, establish an alternative theory to rebut the documents produced by petitioner itself through discovery. (*Access Cap., Inc. v DeCicco*, 302 AD2d 48, 53 [1st Dept 2002] [finding summary judgment based on circumstantial evidence for which no explanation for "these remarkable coincidences" was provided].) "[I]f a landlord does not have concrete facts to support its claims, then it must refrain from commencing litigation until after it has conducted a thorough investigation. The court is not a place to throw claims against a wall just to see what sticks." (*E. Vill. Re Holdings, LLC v McGowan*, 53 Misc 3d 1201 [A], 2016 NY Slip Op. 51304 [U], *3, *affd as modified*, 57 Misc 3d 155 [A] [App Term, 1st Dept 2017].) The discovery of documents post-litigation in prior proceedings, together with the fact that significant documents were produced after a discovery order was issued in this proceeding, raise serious questions about the thoroughness of the alleged pre-litigation investigation that petitioner avers was conducted.

Critical to this decision, petitioner's attorney offers nothing to explicate why, upon discovery of documents that respondent and Park likely jointly purchased the shares to the subject apartment and were issued stock certificate #41 (as reflected by the envelope produced through discovery), petitioner was advised to continue litigating this licensee holdover proceeding. (NYSCEF Doc No. 58, respondent's exhibit E, envelope; NYSCEF Doc No. 54, respondent's exhibit A at 2, email dated February 26, 2023, on behalf of the Board to David Kaminsky, Esq. et al.) Once petitioner formed a belief that respondent and Park jointly owned the shares to the subject premises and inquired of its attorney how to "proceed to transfer *their* (Oliever and Gavin Park's) *ownership*" to family members in the absence of a share certificate, *id.*, petitioner should have withdrawn this proceeding and/or petitioner's attorney should have counseled petitioner to chart a different course; however, such advice was not forthcoming. The continued prosecution of this proceeding under an obvious cloud regarding the person or entity entitled to possession appears to be an attempt to regain possession of the premises in the simplest and most expedient way possible. While this is a summary proceeding, petitioner's attorneys remain subject to the Rules of Professional Conduct.

Frivolous proceedings and unnecessary motion practice results in less time for serious, substantive issues, and more time spent writing decisions to dispose of unnecessary motion practice. As one commentator aptly observed:

> "The bringing and/or continued pursuit of baseless lawsuits imposes a needless burden on both the court system's financial resources and the financial resources of the opposing party. *Such activities also waste precious time that the overloaded court systems need to remedy actual wrongs.* According to paragraph one of the Preamble to the Model Rules of Professional Conduct, an *attorney is an officer of the legal system and a public citizen having special responsibility for the quality of justice.* In light of such concerns, prompt *dismissal of an action is required when an attorney becomes aware that it lacks merit* or is frivolous (emphases added, internal quotations and footnotes omitted)." (G. Wayne Merchant, II, *At What Point Does an Attorney Have A Duty to Dismiss A Lawsuit That May Be A Meritless Claim?*, 27 J Legal Prof 233, 236 [2003].)

Respondent's attorneys seek sanctions against petitioner and its attorneys in the form of attorney's fees for frivolously commencing *and* continuing to litigate this proceeding after discovery. Giving petitioner and its attorneys the full benefit of the doubt, the court finds that sanctions are not warranted for commencing this proceeding. However, sanctions are warranted as of February 26, 2023, when petitioner discovered compelling evidence through compliance with a discovery order adverse to its claim; and sought advice from its attorneys regarding how to proceed.

Housing Court is a high-volume, high-stakes court overburdened with people facing the loss of their homes. Calendars in New York County Housing Court average on any given day from 60 – 100 cases (sometimes more). Respondent is fortunate to have retained an attorney through the Universal Access to Legal Services Act. These legal services providers are a valuable legislated resource for litigants in Housing Court. A 2021 report found that "84 percent of households represented by a Right to Counsel lawyer able to remain in their homes."[6] However, the inundated providers are unable to take on cases in desperate need of representation. When required to expend their valuable resources to defend against proceedings long after it has become clear that petitioner cannot sustain its burden to demonstrate, prima facie, that it has a valid cause of action and that the facts pleaded in the petition are true, other eligible respondents at risk of eviction are deprived of the benefit of counsel.

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[6] *See* The Official Website of the City of New York, available at https://www.nyc.gov/office-of-the-mayor/news/769-21/new-york-city-s-first-in-nation-right-to-counsel-program-expanded-citywide-ahead-schedule#:~:text=The%20data%20shows%20that%20the%20overwhelming%20majority%20of,Counsel%20lawyer%20able%20to%20remain%20in%20their%20homes, last accessed August 23, 2023.)

The volume of cases also generates copious motion practice. Most filed motions are valid and welcomed in order to sharpen issues, interpret the law and legislation, and add to the jurisprudence involving important concerns for both landlords and tenants. Needless to say, each fully-briefed motion requires a decision. Court attorneys ideally assist in the function of writing decisions; but, whereas Housing Court Judges in resolution parts were formerly provided with two court attorneys, now many judges do not have even one court attorney. There is no time for either a judge or a court attorney -- unless done before or after hours or on weekends -- to write decisions. The expenditure of time on unnecessary motion practice, detracts from the time available to write decisions related to "actual wrongs." (*Id.*)

Here, sanctions are calculated upon consideration of the waste of judicial and court resources. It is not because of any inconvenience to the court that sanctions are assessed; rather it is because of decreased availability of representation for those in need, and the depreciation of the quality of justice that inures to the public when time is needlessly spent by attorneys and judges in and out of the courtrooms on unnecessary motion practice after the infirmities of the cause of action have become clear.

The court awards sanctions in the amount of $3,063.00 which is the amount that the Human Resources Administration proposes to pay legal services providers for each full representation case in the next fiscal year.[7] This award should not be taken as this court's valuation of the worth of legal representation in Housing Court which is, in this court's humble opinion, priceless. The court finds this amount to be judicious, and a fair estimation of sanctions under the facts and circumstances of this case with which there can be no quarrel.

CONCLUSION

Accordingly, it is

ORDERED that respondent's motion to dismiss this proceeding is GRANTED as set forth above; and it is further

ORDERED that the respondent's motion to sanction David A. Kaminsky & Associates, P.C. pursuant to 22 NYCRR 130-1.1 is GRANTED to the extent as set forth above; and it is further

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[7] Emma Whitford, August 11, 2023, CITYLIMITS Newsletter, *'Woefully Insufficient': Future Right-to-Counsel Terms Met With Protest*, and Legal Aid Society "protest letter" dated August 11, 2023 embedded therein, available at https://citylimits.org/2023/08/11/woefully-insufficient-future-right-to-counsel-terms-met-with-protest/, last accessed August 23, 2023.

ORDERED that, within 10 days of service of a copy of this order together with notice of entry upon any party to all other parties, the Court orders David A. Kaminsky & Associates, P.C. to deposit $3,063.00 the Lawyer's Fund for Client Protection at 119 Washington Avenue, Albany, New York 12210, pursuant to 22 NYCRR 130-1.3; and it is further

ORDERED that David A. Kaminsky & Associates, P.C. provide the Court and the parties proof of payment within five days after doing so by filing same on NYSCEF.

This constitutes the decision and order of this court.

Dated: August 23, 2023
New York, NY

So Ordered:

Karen May Bacdayan

HON. KAREN MAY BACDAYAN
Judge, Housing Part