

## [Elias v. 36 E. 69 Corp.](#)

Supreme Court of New York, New York County

May 9, 2024, Decided

INDEX NO. 158469/2023

### Reporter

2024 N.Y. Misc. LEXIS 2170 \*; 2024 NY Slip Op 31641(U) \*\*

**[\*\*1]** JORGE ELIAS, Plaintiff, - v - 36 EAST 69 CORP., Defendant.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

**Counsel:** **[\*1]** Shiryak, Bowman, Anderson, Gill & Kadochnikov LLP, Kew Gardens, NY (Mark Anderson, Dustin Bowman, and Matthew J. Routh of counsel), for plaintiff.

Borah Golstein, Altschuler, Nahins, & Goidel, P.C., New York, NY (David R. Brody of counsel), and Cozen O'Connor, New York, NY (Amanda L. Nelson of counsel), for defendant.

**Judges:** PRESENT: HON. GERALD LEBOVITS, Justice.

**Opinion by:** GERALD LEBOVITS

## Opinion

### DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 were read on this motion for PRELIMINARY INJUNCTION.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 37 were read on this motion for LEAVE TO AMEND COMPLAINT.

Gerald Lebovits, J.:

This action arises from a dispute between a residential **cooperative**, defendant 36 East 69 Corp., and a co-op resident, plaintiff Jorge Elias, over Elias's nonpayment of co-op maintenance fees.

Defendant served plaintiff with a notice of termination of his lease based on his default in payment of maintenance fees. Plaintiff then brought this action. He immediately sought a preliminary injunction **[\*2]** and temporary restraining order (mot seq 001) to stay the termination of the lease and ensuing sale or transfer of the appurtenant co-op shares. (See NYSCEF No. 13 [order to show cause].) After hearing oral argument on plaintiff's request for interim relief, this court granted a TRO—noting its expectation that plaintiff would procure an applicant to buy the apartments and the co-op would "review any applicants expeditiously, with a view toward consummating a sale to the satisfaction of all parties." (*Id.* at 2.) Plaintiff has not procured a buyer or prospective buyers. (See NYSCEF 36 at 2.)

On motion sequence 001, defendant has cross-moved to dismiss plaintiff's complaint. On motion sequence 002, plaintiff moves for leave to amend his complaint to add several causes of **[\*\*2]** action. This court construes defendant's complaint as applying to plaintiff's proposed amended complaint. (See [Sage Realty Corp. v Proskauer Rose LLP, 251 AD2d 35, 38, 675 N.Y.S.2d 14 \[1st Dept 1998\]](#) [holding that the motion court properly applied the defendant's motion to dismiss to plaintiffs' amended complaint].)

Defendant's cross-motion to dismiss (mot seq 001) is granted. Plaintiff's request for a preliminary injunction (mot seq 001) and for leave to amend his complaint (mot seq 002) are denied as academic. **[\*3]**

### DISCUSSION

## I. Defendant's Cross-Motion to Dismiss (Mot Seq 001)

Under [CPLR 3211 \(a\) \(7\)](#), "the pleading is to be afforded a liberal construction [and the court will] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." ([Leon v Martinez, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 \[1994\]](#) [internal citation omitted].)

### A. Plaintiff's Declaratory-Judgment Claim (First Cause of Action)

Plaintiff's first cause of action seeks a declaratory judgment. On a [CPLR 3211 \(a\) \(7\)](#) motion, the question with respect to a declaratory-judgment claim is whether a justiciable controversy exists. (See [North Oyster Bay Baymen's Assn. v Town of Oyster Bay, 130 AD3d 885, 890, 16 N.Y.S.3d 555 \[2d Dept 2015\]](#) [noting that "where a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied"] [internal quotation marks and citations omitted].) And when plaintiff may already obtain a full and adequate remedy through another cause of action, issuing a declaratory judgment to resolve that controversy is generally not appropriate. (See [Automated Ticket Sys., Ltd. v Quinn, 90 AD2d 738, 739, 455 N.Y.S.2d 799 \[1st Dept 1982\]](#).) In that circumstance, a declaratory-judgment claim [\*4] will be dismissed as duplicative. (See [245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC, 223 AD3d 604, 607, 205 N.Y.S.3d 323 \[1st Dept 2024\]](#).)

Here, plaintiff's proposed amended complaint reflects that he is seeking a declaratory judgment about whether his lease is still in effect and whether defendant has the right to terminate his lease and sell the property by way of nonjudicial foreclosure (as opposed to allowing plaintiff to procure a buyer and sell the property himself). (See NYSCEF No. 33 at 8.) These issues, however, can be resolved through adjudication of plaintiff's other causes of action. In the second cause of action—breach of the proprietary lease and co-op by-laws—plaintiff alleges that defendant did not timely serve plaintiff with the notice of termination and therefore defendant's termination of his lease is void. (See *id.* at 5-6.) Plaintiff's third cause of action is, in substance, one for breaching the implied covenant of good faith and fair

dealing. He seeks to have his lease and shares restored to him on the ground that defendant acted in bad faith by terminating the lease, because (plaintiff alleges) he is willing and able to sell the premises to cure [\*\*3] his breach. The cause of action for declaratory judgment thus duplicates these claims, and is dismissed on that [\*5] ground.

### B. Breach of Contract (Second Cause of Action)

In his second cause of action, plaintiff alleges that defendant breached the terms of the lease and the **cooperative** by-laws by failing to terminate his lease properly. The lease requires that a notice of termination be provided to the lessee at least five days in advance of the termination date. (See NYSCEF No. 19 at ¶ 31.) Plaintiff alleges that defendant sent him the notice of termination on April 18, 2023, by certified mail, and that the notice stated that the lease would expire on April 28, 2023. (*Id.* at 5.) He contends that given this method of delivery, he was entitled to an additional five days under [CPLR 2103](#) before the notice of termination became effective (for a total of ten), and that the termination was not effective because defendant only gave him nine days, not ten. (See NYSCEF No. 33 at 5-6.)

As a matter of arithmetic, plaintiff is incorrect—excluding the date of receipt, defendant still provided plaintiff ten days advance notice of termination. In any event, as defendant argues (see NYSCEF No. 36 at 1-2), [CPLR 2103](#)'s express terms limit its applicability to "papers to be served upon a party in a pending action," rather than governing [\*6] all notices with legal effect. ([CPLR 2103 \[b\]](#).) Plaintiff was entitled under the proprietary lease to five days' notice of termination; defendant gave him ten. Plaintiff's breach-of-lease claim is dismissed.

### C. Breach of the Covenant of Good Faith and Fair Dealing (Third and Fourth Causes of Action)

As noted above, plaintiff's third cause of action and his fourth cause of action effectively overlap. Each claim is based on allegations that defendant acted in bad faith by terminating his lease, rather than permitting him to cure his default by arranging for a sale of his co-op shares. (Compare NYSCEF No. 6-7 [third cause of action], *with id.* at 7 [fourth cause of action].) The claims differ only in the relief sought—voiding the lease termination and restoring plaintiff's shares, on the one hand, and money damages of at least \$1 million, on the other. (See *id.* at 7.) Given their common underpinning,

the court considers these two claims together. The court agrees with defendant that they should both be dismissed for failure to state a cause of action.

The covenant of good faith and fair dealing is an implied obligation "that neither party shall do anything which will have the effect of destroying or injuring [\*7] the right of the other party to receive the fruits of the contract." ([111 W. 57th Inv. LLC v 111 W57 Mezz Inv. LLC, 220 AD3d 435, 435, 198 N.Y.S.3d 521 \[1st Dept 2023\]](#) [internal quotation marks omitted].) This covenant "cannot negate express provisions of the agreement, nor is it violated where the contract terms unambiguously afford [a party] the right to exercise its absolute discretion to withhold the necessary approval." ([Transit Funding Assoc., LLC v Capital One Equip. Fin. Corp., 149 AD3d 23, 29, 48 N.Y.S.3d 110](#) [internal citation omitted] [1st Dept 2017].)

The proprietary lease provides that if the plaintiff defaults on a lease covenant, defendant may serve a termination notice, following which plaintiff would have to surrender the apartment [\*4] and the certificate of shares appurtenant to his lease.<sup>1</sup> (NYSCEF No. 19 at 23, 26-27 [lease ¶¶ 31, 32 [c].]) The lease and by-laws also provides that assignment of the lease and transfer of the appurtenant shares will only be effective upon the consent of a majority of the members of the co-op **board**, or 65% of all co-op lessees, to the assignment. (See *id.* at 11 [lease ¶ 16 [a] [v]; *id.* at 48 [co-op bylaws art 5 § 4].) And "no limitation" exists "on the right of Directors or lessees to grant or withhold consent, for any reason or for no reason, to an assignment" of the lease and transfer of the appurtenant shares. (*id.* at 12 [lease ¶ [\*8] 16 [c].])

In other words, as defendant contends, it has the absolute discretion—absent a unlawful discriminatory motive, which plaintiff has not alleged—to withhold consent to the sale of defendant's apartment. Plaintiff has not alleged a basis on which defendant's choice to exercise that discretion, and to terminate plaintiff's lease upon default rather than permit him to sell, violated the implied covenant of good faith and fair dealing. Plaintiff's third and fourth causes of action are dismissed.<sup>2</sup>

<sup>1</sup> Even if plaintiff were to fail to deliver the certificate, defendant would still be entitled to issue a new lease for the apartment and a new certificate for the shares. (See NYSCEF No. 19 at 26-27 [lease ¶ 32 [c].])

<sup>2</sup> On reply, plaintiff argues that the evidence defendant submits in support of its motion—an affidavit from defendant's property

## II. Plaintiff's Motions for Preliminary Injunction and to Amend His Complaint

Given the court's conclusion that the causes of action in plaintiff's proposed amended complaint are subject to dismissal, plaintiff's motions for a preliminary injunction (mot seq 001) and for leave to amend his complaint (mot seq 002) are denied as academic.

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction (mot seq 001) is denied; and it is further

ORDERED that defendant's cross-motion to dismiss plaintiff's complaint under [CPLR 3211 \(a\) \(7\)](#) (mot seq 001) is granted, and the complaint is dismissed, with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill [\*9] of costs; and is it further

ORDERED that plaintiff's motion for leave to amend his complaint under [CPLR 3025](#) (mot seq 002) is denied; and it is further

ORDERED that that defendant serve a copy of this order with notice of its entry on defendant and on the office of the County Clerk (by the means set forth in the court's e-filing [\*5] protocol, available on the e-filing page of the court's website, <https://ww2.nycourts.gov/courts/1jd/supctmanh/E-Filing.shtml>), which shall enter judgment accordingly.

**5/9/2024**

**DATE**

/s/ Gerald Lebovits

**HON. GERALD LEBOVITS**

**J.S.C.**

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manager—is inadmissible hearsay. (See NYSCEF No. 25 at ¶¶ 16-18.) The court is skeptical that the documents plaintiff contends to be inadmissible are, in fact, hearsay—*i.e.*, out-of-court statements offered to prove the truth of the matter asserted. Regardless, plaintiff's allegations are insufficient to state a cause of action without taking into account the disputed affidavit or other evidence defendant submitted.