

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: HON. CAROLYN E. WADE, JSC

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SCHOLES RESIDENCE LLC,

Index No. 513564/2024

Plaintiff,

-against-

DECISION AND ORDER

KATRINA SILANDER CLARK and
JOHN DOE 1-100,

MS# 1,2.

-and-

THE NEW YORK STATE OFFICE OF THE
ATTORNEY GENERAL and 13 SCHOLES
STREET HOUSING DEVELOPMENT FUND
CORPORATION,

KINGS COUNTY CLERK
FILED
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Nominal Defendants.

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Nominal Defendant New York State Office of the Attorney General (“OAG”) moves to dismiss the Plaintiff Scholes Residence LLC’s (“Plaintiff”) complaint, pursuant to CPLR § 3211(a)(7), for failure to state a cause of action and, pursuant CPLR § 3211(a)(4), on the basis that the ejectment cause of action is sufficiently similar and arises from the same subject matter as the pending Housing Court case, *Scholes Residence LLC v. Katrina Silander Clark et al.* (Kings County Civil Court, Index No. LT-300540-24/KI) (Mot. Seq. #1).

Defendant Katrina Clark (“Clark”) similarly moves to dismiss the complaint, pursuant to CPLR § 3211(a)(7), based on Plaintiff not pleading an ownership interest in the property and under CPLR § 3211(a)(4), based on the pending proceeding in Housing Court (Mot. Seq. #2).

Upon a reading of the motions and after oral argument, both motions to dismiss the complaint are **granted**, and the complaint is dismissed for the reasons that follow.

I. Background

OAG has an ongoing investigation into fraud and potential theft of title to the building located at 13 Scholes Street, Brooklyn, NY 11206 (“the premises”), which is owned by Defendant 13 Scholes Housing Development Fund Corporation (“HDFC”), a limited equity cooperative. The Attorney General has authority under Section 63(12) of the New York Executive Law to conduct such an investigation. Plaintiff, a New York limited liability company formed in January 2017, claims that it is the tenant of the premises by way of a lease agreement entered into in 2017 by Plaintiff and one shareholder of the HDFC, Albert Rivera. Appended to the 2017 lease agreement is a contract of sale, giving GB Properties NYC LLC (which is not named in the instant action) the option to purchase the premises. The OAG is investigating, *inter alia*, whether the lease agreement and contract of sale were the result of fraud or illegality.

In January 2024, Plaintiff sued Katrina Silander Clark and John and Jane Does 1-5 in Housing Court, alleging that Plaintiff was the tenant of the premises and that Defendants were unlawfully in possession of the premises (*see Scholes Residence LLC v. Katrina Silander Clark et al.* [Kings County Civil Court, Index No. LT-300540-24/KI] (“Illegal Lockout proceeding”)). In the Illegal Lockout proceeding, which is still pending, Plaintiff seeks, among other relief, issuance of a warrant of eviction in favor of Plaintiff and against Clark and the John and Jane Does. On March 8, 2024, the OAG filed an Order to Show Cause seeking a stay of the Illegal Lockout proceeding, pursuant to Section 756-a of the Real Property Actions and Proceedings Law, based on a pending, good faith investigation into the theft or fraud of the title to the premises. On April 10, 2024, Judge Hannah Cohen of the Housing Court issued a stay of the Illegal Lockout proceeding, finding the OAG had shown that it has a pending, good faith investigation. That stay is still in effect.

Despite the stay entered in Housing Court, Plaintiff commenced the instant action by summons and complaint the following month, in May 2024. The complaint pleads two causes of action: (1) a declaratory judgment stating, in sum and substance, that there was no fraud regarding the deed or title of the premises, and the 2017 lease and contract are valid; and (2) a judgment of ejectment against Defendant Clark and the John Does as well as a writ of assistance to evict them.

II. Findings

A. The Declaratory Judgment Cause of Action

On a motion to dismiss a complaint, pursuant to CPLR § 3211(a)(7), the court must afford the complaint a liberal construction, “accept the facts as alleged in the complaint as true, accord the 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 [1994]). In order to be amenable to declaratory relief, “[t]he dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination” (*Matter of Enlarged City School Dist. of Middletown v. City of Middletown*, 96 AD3d 840, 841 [2d Dept 2012] [citations omitted]). A plaintiff seeking declaratory relief must establish that it has suffered a prejudice that is “present, rather than hypothetical, contingent or remote” (*Waterways Dev. Corp.*, 28 AD3d at 540).

Dismissal is warranted under CPLR § 3211(a)(7) because the Plaintiff failed to state a cause of action in its complaint for declaratory relief under CPLR § 3001. The complaint fails to plead any dispute between Plaintiff and the OAG that is ripe for judicial adjudication; therefore, it is fatally flawed as against the OAG. The complaint alleges merely that the OAG is undertaking an investigation. At this stage, the OAG has not concluded its investigation into

whether there was any fraud or illegality in the transaction at issue, and it has made no determination with respect to Plaintiff.

Plaintiff explains that it named the OAG as a “nominal defendant” in the complaint because the OAG would be affected by a declaratory judgment concerning whether there was fraud in connection with the lease and contract of sale, as that is the very issue the OAG is investigating. It is clear from this explanation that the litigation was commenced to obstruct the OAG’s investigation by bringing the very issues it is investigating to this court before the investigating agency has made a finding one way or another. This is impermissible coercion and cannot give rise to a declaratory judgment cause of action (*see State v. Wolowitz*, 96 AD2d 47, 56 [2d Dep’t 1983] [citations omitted]). The Legislature has granted the Attorney General authority under the Executive Law to conduct investigations into fraud and illegality, and there is no basis for this court to interfere with such authority at the behest of a subject of an investigation.

As to the dispute between Plaintiff and Defendant Clark, the complaint only pleads one purported dispute: that Clark has alleged fraud “[i]n response to the Illegal Lockout proceeding,” (Compl. at ¶ 52), and that Plaintiff denies that there was fraud. In other words, the only “controversy” found in the four corners of the complaint is that which is currently being litigated in the Housing Court. There is no basis for Plaintiff to remove allegations made in the context of another litigation and re-plead them in the instant complaint, styled as an action for declaratory judgment (*see Liebert v. TIAA-CREF*, 34 AD3d 756, 757 [2d Dept 2006] (“The plaintiff may not avoid litigating the issues raised in [one action] by commencing a separate action seeking primarily declaratory relief in [another court].”).

B. The Ejectment Cause of Action

Under CPLR § 3211(a)(4), a cause of action is subject to dismissal if “there is another action pending between the same parties for the same cause of action in a court of any state or the United States.” Under this provision, “the two actions must be ‘sufficiently similar,’ and the relief sought must be ‘the same or substantially the same’” (*Simonetti v. Larson*, 44 AD3d 1028, 1029 [2d Dept 2007], quoting *Liebert v. TIAA-CREF*, 34 A.D.3d 756, 757 [2d Dept 2006]). Critical in this analysis is “whether both suits arise out of the same subject matter or series of alleged wrongs,” (*Jadron v. 10 Leonard St., LLC*, 124 AD3d 842, 843 [2d Dept 2015]), though they need not share the same “precise legal theories,” (*id.*, quoting *Matter of Willnus*, 101 AD3d 1036, 1037 [2d Dept 2012]). A court has broad discretion when disposing of an action under this provision of the CPLR (*Simonetti*, 44 AD3d at 1028-29).

New York courts consistently recognize a strong public policy against forum shopping (*see, e.g., Liebert*, 34 AD3d at 757 (“The plaintiff may not avoid litigating the issues raised in [one action] by commencing a separate action seeking primarily declaratory relief in [another court].”); *see also Certain Underwriters at Lloyd’s, London v. Hartford Acc. & Indem. Co.*, 16 AD3d 167, 168 [1st Dept 2005] (“Inasmuch as it was plain that this action was motivated simply by plaintiffs’ wish to gain a tactical advantage through forum shopping,” dismissal was appropriate.)).

Further, courts of general jurisdiction regularly remove cases to Housing Court when they seek ejectment or other landlord-tenant related matters (*see, e.g., 1770 E. 14th St. Assocs. v. Harris*, 209 AD2d 390 [2d Dept 1994] (affirming that an ejectment action is best resolved in Housing Court); *3054 Godwin Terrace Realty Co. v. Armstrong*, 190 AD2d 617 (1st Dept 1993). Housing Court is the strongly preferred forum for resolving landlord-tenant disputes (*See*

Friedman Residence LLC v. Denson, 2021 WL 4352700, 2021 NYLJ LEXIS 1316 [Sup Ct, NY County 2021]; *Prado v. Muniz*, 2023 NY Misc LEXIS 15477 [Sup Ct, Bronx County 2023]; *Tremada 201 E. 17th LLC. v. Korn*, 2021 NYLJ LEXIS 690 [Sup Ct, NY County 2021]).

Here, the ejectment cause of action is sufficiently similar to the Illegal Lockout proceeding and the relief sought by both actions is substantially the same. This renders the complaint deficient as a matter of law. It is clear that Plaintiff has engaged in forum shopping in an attempt to evade the stay order from Housing Court entered by Judge Hanna Cohen and have this Court decide the very same issues pending before the Housing Court. In the interest of comity, this court will not interfere.

Accordingly, it is hereby

ORDERED that Nominal Defendant OAG’s motion (Mot. Seq. 1) dismissing the proceeding pursuant to CPLR § 3211(a)(4) and (7) is **granted**, Defendant Clark’s motion (Mot. Seq. 2) is **granted** for the reasons recited herein, and the complaint is dismissed.

This constitutes the decision and order of the court.

ENTER



Hon. Carolyn E. Wade, J.S.C.

**HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT**

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FILED

12/6/2024