

Aflalo v Post

2005 NY Slip Op 30253(U)

September 12, 2005

Supreme Court, New York County

Docket Number: 0601996/2005

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

Justice

PART 10

AFLALO, PENNY

INDEX NO.

601996/05

- v -

MOTION DATE

7/21/05

JAMES POST, JR.

MOTION SEQ. NO.

01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for PT

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
SEP 15 2005
NEW YORK
COUNTY CLERKS OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: September 12, 2005

[Signature]

J.S.G.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X

PERLA AFLALO,

Plaintiff,

-against-

JAMES POST, SENNESH PROPERTY
SERVICES, LLC, 338 WEST 19TH STREET
INCORPORATED, STEVEN T. GEE and
STEVEN T. GEE, P.C.,

Defendants.

-----X

DECISION/ORDER

Index No.: 601996/05

Seq. #: 001

Present:

Hon. Judith J. Gische

J.S.C.

FILED
SEP 15 2005
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Plf's OSC, w/PA affid, MMA affirm, exhs	1
Def Sennesh Opp w/JS affid	2
Def Post Opp w/GT affirm, exhs	3
Pltf's reply w/MMM affirm	4
Def Post verified answer (sep back)	5
Stip so-ordered 6/16/05	6
Order (JJG) 6/16/05	7
Stip so-ordered 7/7/05	8

Upon the foregoing papers, the decision and order of the court is as follows:

The underlying action is for specific performance of a contract to sell a certain cooperative apartment. This is plaintiff's motion for a preliminary injunction to prevent the defendants selling, leasing, or otherwise encumbering the cooperative apartment that is the subject of the parties' dispute, pending determination of the underlying action. CPLR § 6301. The court granted plaintiff a temporary restraining order against

defendants when it signed her Order to Show Cause on June 3, 2005. CPLR § 6311. That TRO was later extended on consent on July 7, 2005, and again on July 21, 2005. It remains in effect pending the court's decision on this motion.

By stipulation so-ordered June 16, 2005, the parties agreed that all cross or counter claims against Steven T. Gee, Esq and Steven T. Gee, P.C. [the "Gee defendants"] would be severed and dismissed, and that their names would be removed from the caption. By separate court order dated June 16, 2005, the Clerk was directed to amend the caption, as reflected above.

The parties have further stipulated that the Gee defendants would turn over plaintiff's down payment to defendant James Post's attorney (John Lee, Esq.), and that Attorney Lee would hold the money in escrow, without prejudice, pending further order of the court, or agreement.

Discussion

Plaintiff Perla Aflalo and Defendant James Post ["Post"] are coop shareholders in 338 West 19th Street Apartment Inc., a cooperative corporation and a named defendant in this action [the "coop corporation"]. Plaintiff owns apartment 1B at 338 West 19th Street whereas Post owns apartments 3A and 3C.

Plaintiff and Post have a fully executed contract dated September 28, 2004. The contract is for the sale of apartment 3A by Post to plaintiff. It is undisputed that the contract is valid, as it has been executed, the down payment has been made, and each party received a fully executed copy of it. Nor is it disputed that steps were already underway to obtain board approval of the sale when plaintiff learned that defendant

Post had a problem with his bank, Washington Mutual.

Washington Mutual Bank holds a mortgage that is secured by the shares and proprietary lease appurtenant in both apartments Post owns (i.e. apartment 3A and 3C). That mortgage was made in November 2000. In August 2004, shortly before the parties executed the subject contract of sale, Post borrowed \$43,000 from a private lender. He signed a promissory note that is also secured by the shares and proprietary lease for both apartments 3A and 3C. Subsequently, Post fell in arrears on the Washington Mutual mortgage and the bank started a foreclosure action against both apartments. Post brought the mortgage payments current, stopping the foreclosure.

Washington Mutual Bank refuses to release its lien on apartment 3A, apparently concerned that one apartment is insufficient collateral for its mortgage, particularly in view of the new promissory note secured by the same apartments. Based upon the position taken by his bank, Post claims that it is "impossible" for him to perform his obligations under the contract, which is to proceed to closing and sell the apartment. Post returned the down payment with a letter purporting to cancel the contract. Plaintiff refused to accept the refund, and the money is now in escrow with Post's attorney (Mr. Lee).

Yet another development is Post's decision to sublease apartment 3A to a tenant, apparently without board approval, and notwithstanding the parties' unresolved dispute over the contract. In its TRO the court restrained defendant Sennesh Property Services (the managing agent) from taken any further action on Post's application for approval to sublease the apartment.

Paragraph 7.2 of the contract provides that the seller shall deliver the apartment "subject to the current tenancy." At the time the contract was made, there was no tenant in apartment 3A. Based upon this emergent situation, and Post's claim that the contract was "cancelled" by him because of impossibility of performance, plaintiff seeks to enjoin all the defendants from encumbering the apartment in any manner, including establishing new tenancies (e.g. subleasing) it, pending the trial or final resolution of this action.

On a motion for a preliminary injunction, the movant must prove the likelihood of ultimate success on the merits, that she will suffer irreparable harm unless the relief is granted, and a balance of the equities in her favor. Paine v. Chriscott v. Blair House Associates, 70 AD2d 571 (1st dept. 1979); Aetna Insur. Co. v. Capasso, 75 NY2d 860 (1990). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. Moy v. Umeki, 10 AD3d 604 (2nd dept. 2004). "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required. Thus even where there are facts in dispute, the court may, in its discretion, order such relief pendente lite to maintain the status quo. Moy v. Umeki, supra at 605.

In opposition to the motion, Post claims that it is "impossible" for him to perform the contract since Washington Mutual will not release its lien. Alternatively, he argues that complete relief cannot be had by plaintiff in this case since Washington Mutual is an interested party, but not named in this case. Both arguments are lacking.

An indispensable or necessary party is someone who should be a party "if complete relief is to be accorded between the persons who are parties to this action or

who might be inequitably affected by judgment in the action.” CPLR § 1001.

Washington Mutual is not a necessary party to afford relief between the parties. Post can, of course, sell both apartments, or refinance his loan with Washington Mutual, or satisfy his mortgage with them through other arrangements, and extinguish the lien they have. The bank has no interest in this contract between Aflalo and Post. The bank's only concern is that its mortgage is properly collateralized and secure. If it is paid off, there is no lien. Thus, Post's problem is with his bank and relates to his own obligations as mortgagor to the bank (as mortgagee) for the money he borrowed from them. While the contract for apartment 3A may present a financial dilemma for him that he may not have considered or anticipated when he decided to sell the apartment, the facts as presented do not support his argument that it is “impossible” for him to perform.

Compare: Ellis v. Salomon, 57 AD2d 118 (2nd dept. 1901) [defect in title]; Baldo v. Ferrar, 223 AD2d 494 (4th dept. 1958) [no title to property].

Post's other argument, that coop shares are personalty, not realty, therefore they cannot be restrained, misses its mark entirely. Plaintiff seeks an order restraining Post (and the other defendants) from taking any steps to in any way encumber the apartment because it would erode her rights under the contract, and impact the “deal” she made with Post. The contract firmly supports this argument, since she is entitled to an apartment that is not encumbered with tenancies that did not exist at the time the contract was made. There was no tenant when the contract was made (except Post under the proprietary leasehold), therefore no further tenancies/occupancies should be created or tolerated at this time until the parties' dispute is resolved. Plaintiff is buying the apartment so that her daughter can live there, not someone else.

Plaintiff easily meets her burden on this motion for a preliminary injunction upon application of CPLR § 6301. She has established a likelihood of success on the merits and that she may be entitled to specific performance of the contract. More precisely, that if the court orders Post to perform his contractual obligations, it will not be a "vain judgment." See: Saperstein v. Mechanics' & Farmers' Savings Bank of Albany, 228 NY 257 (1920). Plaintiff has further shown that were defendants permitted, allowed or tolerated to encumber the subject apartment with tenancies, occupancies, etc., or in any other manner, she will "less" of an apartment than she bargained for. Finally, the equities weigh heavily in her favor given Post's unilateral actions notwithstanding their signed contract for the sale of this apartment to her without tenancies.

Plaintiff's motion is granted. Pending the trial or other final resolution of this case, defendants (each one and collectively) are hereby STAYED, RESTRAINED and ENJOINED from alienating, transferring, selling, conveying, assigning, exchanging, mortgaging, pledging, granting, hypothecating, leasing, renting, subleasing, encumbering, or otherwise transferring any right or interest in or relating to the cooperative apartment known as Unit 3A at 338 West 19th Street, New York, New York.

In particular, defendants are each restrained from further proceeding with Post's application to sublease Unit 3A at 338 West 19th Street, New York, New York, and it is returned unprocessed to Post.

Conclusion

Plaintiff's motion for a preliminary injunction is granted in all respects. This matter is scheduled for a compliance conference on December 1, 2005 at 9:30 a.m. in


Part 10, Room 122 at 80 Centre Street.

Any relief not expressly addressed herein has nonetheless considered by the court and is denied.

This shall constitute the Decision and Order of the Court.

Dated: New York, New York
September 12, 2005

SO ORDERED:



HON. JUDITH J. GISCHE, J.S.C.

FILED
SEP 15 2005
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COUNTY CLERK'S OFFICE