

**Dermot Co., Inc. v 200 Haven Co.**

2006 NY Slip Op 30096(U)

August 7, 2006

Supreme Court, New York County

Docket Number: 0060109/2006

Judge: Marcy S. Friedman

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: HON. MARCY S. FRIEDMAN  
*Justice*

PART 57

DeLmon B.

INDEX NO.

601098/06

- v -

200 Hanes B.

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED
<u>1/19/16</u>
<u>2/22/16</u>
<u>3</u>

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

Answering Affidavits — Exhibits

Replying Affidavits Hanes of Laws 8/1, 11, 12

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion & cross-motion are

**DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.**

*DeLmon*  
*Affidavit of Walter Stangin, sworn to on 8/2/06, is rejected as unauthorized.*

COUNTY CLERK'S OFFICE  
NEW YORK  
AUG 16 2006

**FILED**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_

Dated: 8/7/06

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x

THE DERMOT COMPANY, INC.,

*Plaintiff,*

- against -

200 HAVEN COMPANY,

*Defendant.*

Index No.: 601098/06

DECISION/ORDER

\_\_\_\_\_ x

In this action, plaintiff The Dermot Company, Inc. (“Dermot”) seeks declaratory and injunctive relief precluding defendant 200 Haven Company (“Haven Co.”) from enforcing time of the essence notices or terminating a contract of sale, dated January 11, 2005, under which Haven Co. agreed to sell to Dermot a property located at 166-200 Haven Avenue in Manhattan. In a prior related action between the parties (Supreme Court, New York County, Index No. 105566/05) (“prior action”), this court rendered a decision, dated December 14, 2005, determining that the contract of sale was in full force and effect and that plaintiff was entitled to specific performance. This decision was reduced to a judgment dated December 21, 2005 and entered on January 24, 2006, which ordered Haven Co. “to specifically perform the Contract of Sale and to convey the Premises to Plaintiff in accordance with the terms and provisions thereof.”

The prior related action arose out of a dispute between Dermot and Haven Co. over whether 200 Haven LLC (“Haven LLC”), a general partner of Haven Co., was entitled, under the

Haven Co. partnership agreement, to match Dermot's bid and thereby to purchase the property. Haven Co. had terminated the contract of sale with Dermot based on a matching bid by Haven LLC and, in the prior action, Haven Co. opposed Dermot's claims and sought summary judgment on its counterclaim for a declaratory judgment determining that its contract of sale with Dermot was void based on Haven LLC's matching bid. Haven LLC, but not Haven Co., has a pending appeal from the judgment in Dermot's favor in the prior action.

In the instant action, Dermot claims that as a result of Haven LLC's appeal, Haven Co. is unable to convey good, marketable title, and that it is therefore unable to obtain financing for the purchase of the property, as contemplated by the contract of sale. Dermot seeks to preclude Haven Co. from enforcing time of the essence notices which Haven Co. served after determination of the prior action, and from terminating the contract of sale. Dermot now moves for a preliminary injunction for such relief. Although Dermot does not expressly so state, it apparently seeks to stay Haven Co. from noticing a closing and from terminating the contract of sale, pending resolution of the Haven LLC appeal. Haven Co. cross-moves to dismiss plaintiff's action, pursuant to CPLR 3211(a)(1) and (a)(7), for failure to state a cause of action.

It is well settled that a preliminary injunction is a drastic remedy which will be granted "only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted and a balance of equities in the movant's favor (Grant Co. v Srogi, 52 NY2d 496, 517; McLaughlin, Piven, Vogel, Inc. v Nolan & Co., 114 AD2d 165, 172, lv denied 67 NY2d 606)." (Chernoff Diamond & Co. v Fitzmaurice, Inc., 234 AD2d 200, 201 [1<sup>st</sup> Dept 1996].) "The movant has the burden of establishing a right to this equitable remedy." (McLaughlin, Piven, Vogel, 114 AD2d at 172.)

Dermot has met its burden of establishing entitlement to a preliminary injunction. In arguing that Dermot does not demonstrate a likelihood of success on the merits, Haven Co.'s principal argument is that even assuming arguendo that it is unable to convey good title, Dermot's sole remedy under the contract of sale is to retain its down payment. Paragraph 35 of the contract provides in pertinent part: "In the event of Seller's default, Purchaser shall be entitled to all legal remedies, including specific performance, except as otherwise provided herein. However, if Seller shall be unable to convey title in accordance with the terms of this agreement, the sole remedy of Purchaser is to terminate this contract and the sole obligation of Seller shall be to refund purchaser's down payment made hereunder." Haven Co. claims that Dermot is bound by the limitations of paragraph 35 and may not obtain equitable relief in excess of that provided by that paragraph. (Haven Co. Memo. Of Law at 14.)

As a general rule, where it is undisputed that a seller of real property is unable to convey good title on the closing date, the buyer's remedies will be limited to those provided in a "restricted remedies clause" like that at issue, and the buyer will not be entitled to seek specific performance. (See S.E.S. Importers v Pappalardo, 53 NY2d 455, 467 [1981]; 101123 LLC v Solis Realty LLC, 23 AD3d 107 [1<sup>st</sup> Dept 2005].) However, a contractual limitation of remedies "contemplates the existence of a situation beyond the control of the parties and implicitly requires the seller to act in good faith." (Sevilla v Valiotis, \_\_\_ AD3d \_\_\_, 815 NYS2d 229, 230 [2d Dept 2006] [internal quotation marks and citations omitted]; Naso v Haque, 289 AD2d 309, 310 [2d Dept 2001].) Thus, the limitation of remedies will not be applied where the seller's default was willful or where the seller failed to make a good faith effort to cure the title defects. (Naso, 289 AD2d at 310.) In the instant case, while Haven Co. argues that any inability to

convey good title was caused by Haven LLC, over which it has no control, this argument ignores that Haven Co. accepted Haven LLC's position that it, rather than Dermot, is entitled to purchase the premises. Indeed, Haven Co. cancelled the contract of sale, thus precipitating the litigation by Dermot against it. Under these circumstances, the court finds that Haven Co.'s inability to convey good title is self-created and therefore willful.

The court further finds that a preliminary injunction is appropriate to preserve the status quo, pending Haven LLC's prosecution of its appeal which, indisputably, affects Haven Co.'s ability to convey good title. In actions involving real property, notwithstanding the existence of disputes as to ownership or rights to the property, the appellate courts have repeatedly upheld preliminary injunctions to preserve the status quo and to prevent any subsequent judgment from being rendered ineffectual as a result of transfer of, or other exercise of control over, the property. (See Elizabeth St. Inc. v 217 Elizabeth St. Corp., 301 AD2d 481 [1<sup>st</sup> Dept 2003]; Terrell v Terrell, 279 AD2d 301 [1<sup>st</sup> Dept 2001]; Board of Mgrs. of 193 Second Ave. Condominium v End Real Estate Corp., 253 AD2d 587 [1<sup>st</sup> Dept 1998]; Moy v Umeki, 10 AD3d 604 [2d Dept 2004]; Blake v Biscardi, 52 AD2d 834 [2d Dept 1976].)

In addition, plaintiff demonstrates irreparable harm, based on the unique nature of the realty (see Vincent v Seaman, 152 AD2d 841 [3d Dept 1989]), and a balance of the equities in its favor, based on the fact that this court previously determined that Haven Co. was not entitled to terminate the contract of sale, and that Dermot is entitled to specific performance of the contract.

While Dermot is entitled to a preliminary injunction, its posting of an undertaking is mandatory. (See CPLR 6312[b]; Moy v Umeki, 10 AD3d at 605; Hightower v Reid, 5 AD3d 440 [2d Dept 2004].) The amount of the undertaking "is a matter within the sound discretion of the

court \* \* \*. However, the amount of the undertaking must be rationally related to the amount of the [movant's] potential liability if the preliminary injunction later proves to be unwarranted.”

(Lelekakis v Kamamis, 303 AD2d 380[2d Dept 2003].)

The court holds that plaintiff's undertaking should be fixed in the amount of two million dollars. It is undisputed that the contract of sale between the parties required Dermot to make a down payment in this amount; that Haven Co. returned Dermot's down payment when it purported to terminate the contract of sale; and that, since this court's prior judgment in Dermot's favor determining that it is entitled to specific performance of the contract of sale, Dermot has not replaced the down payment. Paragraph 54 of the contract of sale provides for Haven Co.'s retention of the down payment in the event of Dermot's default in the performance of the contract. If Dermot were to fail to close (assuming Haven LLC's appeal is unsuccessful and Haven Co. is able to convey good title), Haven Co. would sustain substantial damages, absent an undertaking in the amount of the down payment.

Turning to the cross-motion to dismiss the action, Haven Co. seeks dismissal primarily on the ground that Dermot is limited to the remedies provided for under the contract of sale, and is not entitled to equitable relief staying the closing. The court has rejected these contentions on consideration of the preliminary injunction motion. To the extent that Haven Co. also seeks to dismiss plaintiff's claim for delay damages based on res judicata, this claim is denied due to Haven Co.'s failure to annex the pleadings in the prior related action or to submit adequate legal authority on the issue.

It is accordingly hereby ORDERED that plaintiff's motion is granted to the following extent: 1) Defendant 200 Haven Company and its agents and employees are hereby enjoined and

restrained, pending final determination of Haven LLC's appeal to the Appellate Division, First Department of the judgment in the prior action, from enforcing time of the essence notices or terminating the contract of sale, dated January 11, 2005, between plaintiff and defendant 200 Haven Company, for sale to plaintiff of a property located at 166-200 Haven Avenue in Manhattan; and 2) the injunction set forth in paragraph 1 is on conditioned upon plaintiff's posting, within five days of service of a copy of this order with notice of entry, of an undertaking by cash or surety company bond in the amount of two million dollars.

This constitutes the decision and order of the court.

Dated: New York, New York  
August 7, 2006

  
MARCY FRIEDMAN, J.S.C.

**FILED**  
AUG 16 2006  
COUNTY CLERK'S OFFICE  
NEW YORK