Moreira v Faltz
2007 NY Slip Op 32392(U)
July 26, 2007
Supreme Court, Kings County
Docket Number:
Judge: Laura Lee Jacobson
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At an IAS Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of July, 2007

PRESENT:

HON. LAURA LEE JACOBSON,
Justice.

- X

CESAR MOREIRA,

Plaintiff(s),

- against -

Index No. 10640/07

RONALD FALTZ, et.ano,

Defendant(s).

- X

The following papers numbered 1 to 15 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 8
Opposing Affidavits (Affirmations)	9 - 11
Reply Affidavits (Affirmations)	12 - 15
______ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Cesar Moreira moves for an order: (1) enjoining and restraining defendants Ronald Faltz and Jacquelyn Todaro from selling, assigning, transferring, pledging, renting, encumbering or otherwise disposing of the property located at 99 Dupont Street in Brooklyn (the Property); (2) enjoining and restraining defendants and any one acting on their behalf from cancelling, rescinding or otherwise terminating the contract of sale between plaintiff and Faltz for the Property; and (3) enjoining and restraining

defendants and any one acting on their behalf from renting or otherwise alienating the Property. Defendants cross move for an order: (1) enjoining plaintiff from representing himself to be the owner of the Property, collecting rents and/or entering into leases with tenants; (2) directing plaintiff to pay retroactive and prospective use and occupancy; (3) dismissing the complaint, pursuant to CPLR 3211(a)(8), for lack of personal jurisdiction; (4) dismissing the complaint, pursuant to CPLR 3211(a)(1) and (7), on the ground that it fails to state a cause of action; and (5) cancelling the notice of pendency filed by plaintiff.

By order dated May 8, 2007, entered on consent, it was agreed that defendants' eviction action was stayed until June 19, 2007, or further order of the court; that plaintiff would pay use and occupancy in the amount of $5,500 per month, along with all outstanding arrears; that plaintiff would take no action to rent out any apartment, absent a written agreement or further order of the court; and that defendants consented to the jurisdiction of the court.

Facts and Procedural Background

Plaintiff and his family reside in the Property, which is a house that has three apartments. On February 9, 2006, Moreira sold the Property to Faltz in order to save it from foreclosure. At the time of the sale, the parties entered into a one page agreement which, as is relevant herein, provides that:

> "Seller has the absolute right to repurchase the property for the sum of $670,000 plus any closing costs involved by February 9, 2007 from the Buyer.

> "From the mortgage proceeds, Seller authorizes the sum of $67,000 to be held in escrow for one year's payment of principal and interest, real state [sic] taxes and insurance. Escrow will be held by Jacquelyn Todaro as attorney. . . .
>
> "If Seller cannot buy the premises by February 9, 2007. They have the unilateral right to remain in the premises until August 9, 2007 at a use and occupancy rate to cover the cost of the monthly mortgage taxes and insurance."

(the Repurchase Agreement). Todaro is Faltz's wife.

On February 9, 2007, plaintiff's attorney sent a letter to Faltz requesting that he schedule a closing. By letter dated February 14, 2007, Todaro responded, advising counsel that Faltz was ready, willing and able to deliver title and scheduled a closing for March 14, 2007, with time being of the essence. In a second letter of the same date, Todaro told counsel that neither Moreira nor Acevedo had requested that a closing be scheduled, but she agreed to allow plaintiff to purchase the property for $700,000, plus seller's closing costs, by February 20, 2007; an accounting for the escrowed funds was attached. By letter dated March 7, 2007, Todaro reminded counsel of the March 14, 2007 closing and advised him that his client's failure to purchase the Property on that date would be deemed a breach of the Repurchase Agreement. In a second letter of the same date, Todaro advised counsel that should his client fail to purchase the Property, he would be required to make monthly rental payments sufficient to cover interest, taxes and insurance, or $5,500. By letters dated March 13 and 14, 2007, counsel for plaintiff rejected the letter making time of the essence in scheduling the closing and requested a more complete contract, 30 additional days to procure

a mortgage and the substitution of plaintiff's relative as purchaser of the Property. By letter dated March 13, 2007, Todaro denied plaintiff's request for an additional 30 days in which to close, advised counsel that the March rent of $5,500 remained unpaid and requested that he advise his client to stop holding himself out as the owner of the premises in an effort to rent the apartments at the Property. Faltz, Todaro and a title closer appeared at the closing on March 14, 2007; plaintiff did not.

By letter dated March 26, 2007, Todaro advised counsel that although plaintiff was in default under the terms of the Repurchase Agreement, Faltz would enter into a new contract of sale, provided that plaintiff paid the March and April rent by March 28, 2007; that a closing was scheduled on or before April 30, 2007, with time being of the essence; and that plaintiff cease his attempts to rent any portion of the Property. Plaintiff did not respond.

On April 13, 2007, plaintiff commenced the instant action. On May 4, 2007, defendants served plaintiff with a termination notice seeking possession of the premises.

Plaintiff's Contentions

Plaintiff alleges that when he defaulted on his mortgage, he contacted Ian Katz, a mortgage broker, in an attempt to refinance the Property. Katz introduced him to Faltz and "sold" him on the repurchase deal. Plaintiff further alleges that after he signed the Repurchase Agreement, he attempted to obtain a standard formal contract of sale from Faltz that he could present to his mortgage broker, as he was advised that no conventional bank would consider a loan to him based upon the vague, one page Repurchase Agreement.

Plaintiff contends that for months, Todaro refused to send him a signed contract, telling him that defendants would not resell the premises to him. Acevedo also submits an affidavit in which he alleges that in July 2006, Traes Fauss wrote to plaintiff on behalf of Katz, advising him that he would assist in repairing plaintiff's credit; Acevedo further asserts that Fauss failed to return their phone calls.

Plaintiff accordingly concludes that defendants frustrated his ability to repurchase the Property, both by drafting the Repurchase Agreement so that it is too vague to be used to obtain financing and by refusing to provide him with a contract of sale.

Defendants' Contentions

In affidavits submitted by Todaro, Faltz, Katz and Loraine Barasch, defendants allege that Acevedo sold the Property to plaintiff in order to avoid making child support payments. Within the first year of his ownership, plaintiff defaulted on his mortgage payments. Accordingly, as alleged by Katz in his affidavit, Moreira asked him if he could recommend an investor who would purchase the Property and sell it back to him in a year. In his affidavit, Faltz similarly alleges that Katz contacted him to ask if he would be interested in investing in the Property; he agreed and was paid $20,000. Neither purchaser nor seller were represented by counsel at the closing and the Repurchase Agreement was drafted by Katz.

In his affidavit, Katz further alleges that although he worked with Moreira during the year after the sale, Moreira was unable to obtain financing, as he continually failed to pay his monthly bills on time and his assets and income were insufficient. In his affidavit, Fauss

alleges that although he tried to contact plaintiff and/or Acevedo for several months after February 2006, his calls were never returned. In her affidavit, Barasch alleges that she was the title closer at the February 9, 2006 sale to Faltz, that all parties appeared to understand the terms of the agreements and that neither buyer nor seller was represented by counsel.

Defendants further allege that in November 2006, Acevedo reached out to them in an attempt to repurchase the Property; he advised Todaro that neither he nor Moreira had sufficient funds, credit, assets or income to obtain financing. Accordingly, in December 2006, Acevedo requested that defendants prepare and forward to him a contract of sale naming Charles Acevedo as the purchaser. Defendants contend that the contract was prepared, but was never returned by plaintiff. Thereafter, defendants did not hear from plaintiff until the letter of February 9, 2007 was received. During that month, Todaro also alleges that she was contacted by John Defalco, who told her that he was seeking to obtain a mortgage for Acevedo's father, since neither Moreira nor Acevedo could qualify for a mortgage, and requested that defendants list the Property for $900,000, so that he could show that a down payment of $200,000 had be made; defendants declined to participate in this scheme. Despite the communications that followed in which Todaro advised plaintiff that Faltz would extend Moreira's time to repurchase the Property on the condition that he pay the carrying costs, plaintiff has failed to appear at a closing; is continuously in default in paying use and occupancy; and continues to hold himself as the owner of the Property for the purpose of renting the third unit and collecting the rent.

Defendants' Motion to Dismiss the Complaint

The Court will first address defendants' motion to dismiss the complaint, since dismissal of the action will render plaintiff's demands for relief moot.

Specific Performance

The Parties' Contentions

In his first cause of action, plaintiff seeks to obtain specific performance of the Repurchase Agreement. In his fifth cause of action, plaintiff seeks an order directing defendants to provide him with an executed contract of sale.

In seeking dismissal of these claims, defendants contend that they have fully complied with the terms of the Repurchase Agreement in that they have been ready, willing and able to sell the Property to plaintiff, but that plaintiff has been unable to obtain financing and has failed to appear at the scheduled closings. In opposition, plaintiff and Acevedo argue that defendants frustrated their attempts to close by refusing to cooperate with their mortgage brokers and by refusing to provide a contract of sale.

The Law

"Before specific performance of a contract for the sale of real property may be granted, a buyer must demonstrate that he or she was ready, willing, and able to perform under the contract regardless of any alleged anticipatory breach by the defendant (*McCabe v Witteveen*, 34 AD3d 652, 653 [2006], citing *Internet Homes v Vitulli*, 8 AD3d 438, 439 [2004]; *Johnson v Phelan*, 281 AD2d 394, 395 [2001]; *accord Manzo v Gross*, 19 AD3d 379,

379-380 [2005], *appeal denied* 5 NY3d 714 [2005] [plaintiffs were entitled to specific performance of a contract for the sale of real property where the evidence established that purchasers were ready, willing, and financially able to perform their obligations even though their tender of performance was excused by the seller's anticipatory breach]; *accord 28 Props. v Akleh Realty*, 22 AD3d 432, 432 [2005], *lv denied* 2006 NY App Div LEXIS 1793 [2006] [that defendants may have anticipatorily breached the contract did not excuse plaintiff from a timely tender of its performance if the contract was to be specifically enforced]). Where the evidence establishes that a plaintiff is not ready, willing, and able to satisfy his obligations under a purchase option, recovery is barred under the theories of both specific performance and breach of contract (*see e.g. Stojowski v D'Sa*, 28 AD3d 645 [2006]).

As is also relevant to the instant dispute, a plaintiff's failure to produce a mortgage application or commitment, or other proof confirming that he or she obtained the necessary financing, will result in dismissal of the complaint seeking specific performance (*Djukanovic v D'Amico*, 40 AD3d 576, 576 [2007]). In this regard, it has been held that a plaintiff's unsubstantiated assertions that a line of credit could be secured or that a closely related corporation would supply the funds and the conclusory allegation that it was ready, willing, and able to perform were insufficient to satisfy its burden (*Internet Homes*, 8 AD3d at 439; *accord Fridman v Kucher*, 34 AD3d 726,726 [2006] [when a purchaser submitted no documentation or other proof to substantiate that it had the funds necessary to purchase the property, it could not prove, as a matter of law, that it was ready, willing, and able to close];

Aliperti v Laurel Links, 27 AD3d 675, 676 [2006] [unsubstantiated assertions that the funds necessary to perform could be secured, or conclusory assertions that the plaintiff was ready, willing, and able to perform, were insufficient to satisfy the burden of establishing entitlement to specific performance]).

Finally, "[t]he determination whether to grant or deny the equitable remedy of specific performance lies within the discretion of the court, and the right to such relief is not automatic" (*Roland v Benson*, 30 AD3d 398 [2006], citing *McGinnis v Cowhey*, 24 AD3d 629 [2005]).

Discussion

Herein, plaintiff fails to demonstrate that he was ready, willing, and able to perform pursuant to the Repurchase Agreement. More specifically, plaintiff fails to submit any evidence that he had the necessary financing in place to purchase the Property. In fact, he argues that he was unable to secure financing without a signed contract of sale and defendants' affidavits establish that he requested that other purchasers be substituted in his place and be permitted to purchase the Property, since he could not obtain financing. Even assuming, however, that defendants improperly cancelled the Repurchase Agreement when they refused to tender a signed contract, plaintiff still bore the burden of establishing that he had the financial capacity to purchase the property (*Internet Homes*, 8 AD3d at 439), so that he failed to tender performance by his failure to do so, or that tender was excused under the circumstances of this case (*see e.g. Tsabari v Haye*, 13 AD3d 360, 360 [2004]).

Hence, plaintiff is not entitled to specific performance of the Repurchase Agreement or to an order directing defendants to provide him with a signed copy of contract of sale. Having so held, the factual issue of whether defendants provided plaintiff with a contract of sale need not be resolved.

Accordingly, plaintiff's first and fifth causes of action are dismissed.

Frustration of Purpose

The Parties' Contentions

In his second cause of action, plaintiff alleges that Faltz intentionally drafted the Repurchase Agreement so that it was devoid of specificity; that he was not represented by an attorney and did not understand the terms of the agreement; and that Faltz was represented by counsel. Defendants allege that these allegations fail to state a cause of action.

The Law

"'[F]rustration of purpose refers to a situation where an unforeseen event has occurred, which, in the context of the entire transaction, destroys the underlying reasons for performing the contract, even though performance is possible, thus operating to discharge a party's duties of performance'" (*Sage Realty v Omnicom Group*, 183 Misc2d 574, 579 [2000], citing *Matter of Fontana D'Oro Foods*, 122 Misc 2d 1091, 1096 [1983], *mod on other grounds* 107 AD2d 808 [1985], *affd* 65 NY2d 886 [1985]; *Pettinelli Elec. Co. v Board of Educ.*, 56 AD2d 520, 521 [1977], *affd* 43 NY2d 760 [1977]; *accord Rebell v Trask*, 220 AD2d 594 [1995]; *Fifth Ave. of Long Island Realty Associates v KMO-361 Realty Assocs.*,

211 AD2d 695 [1995], *lv denied* 85 NY2d 811 [1995]). Stated differently, the general principle underlying the doctrine is that:

> "where the purpose of a contract is completely frustrated and rendered impossible of performance by a supervening event or circumstance which was not within the contemplation of the parties and which could not have been anticipated and guarded against, the contract is discharged. But where the purpose of the contract is not completely frustrated and performance is not rendered impossible, or where the supervening event or circumstance was within the contemplation of the parties and might have been anticipated and guarded against, the contract is not discharged (*Matter of Kramer & Uchitelle, Inc.*, 288 NY 467, 472; *Robitzek Investing Co. v Colonial Beacon Oil Co.*, 265 App Div 749, 753, *motion for leave to appeal denied* 291 NY 830; *Raner v Goldberg*, 244 NY 438, 441-442; *Canadian I. A. Co. v Dunbar M. Co.*, 258 NY 194, 198-199; *State Mut. Life Assur. Co. v Gruber*, 269 App Div 170, 172-173; *Farlou Realty Corp. v Woodsam Associates*, 49 NYS2d 367, *affd* 268 App Div 975, *affd* 294 NY 846; 6 Williston on Contracts [Rev. ed.], §§ 1938, 1939, 1955; Restatement, Contracts, §§ 288, 458)."

(*119 Fifth Ave. v Taiyo Trading Co.*, 190 Misc 123, 124-125 [1947], *affd* 275 App Div 695 [1949]; *accord Beagle v Parillo*, 116 AD2d 856, 857 [1986] [frustration of performance is no defense when provision could have readily been made for what actually occurred]). The doctrine:

> "is a narrow one which does not apply 'unless the frustration is substantial' (*Rockland Develop. Assoc. v Richlou Auto Body*, 173 AD2d 690, 691 [1991]). In order to invoke this defense, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense (*see* Restatement [Second] of Contracts § 265 [1981])."

(*Crown IT Servs. v Koval-Olsen*, 11 AD3d 263, 265 [2004]).

Discussion

As the above discussion reveals, the doctrine of frustration of purpose is not available to plaintiff. In the first instance, the doctrine is generally employed as a defense, to discharge an obligation. Herein, plaintiff is seeking to rely upon the doctrine to obtain affirmative relief. Even were such a use permitted, however, plaintiff completely fails to allege facts that would support his demand for relief. Most significantly, he has not alleged that any unexpected event occurred that rendered performance of the Repurchase Agreement impossible. Further, to the extent that he is relying upon defendants' alleged failure to provide him with a more formal contract of sale, it is self evident that the Agreement could have so provided. To the extent that plaintiff claims that his performance was not possible because he was unable to obtain financing, he cannot claim that his inability was not foreseeable, since he alleges that he sold the Property to Faltz because the house was in foreclosure. Finally, the court notes that the factual premises for this cause of action, i.e., that plaintiff did not understand the terms of the transaction and that Faltz was represented by counsel at the closing, are refuted by Faltz, Todaro, Katz and Barasch.

Hence, plaintiff' second cause of action is dismissed as lacking in merit.

Fraudulent Misrepresentation

The Parties' Contentions

In his third cause of action, plaintiff alleges that although Faltz promised him that he would be able to repurchase the property, the Repurchase Agreement was drafted in such an

irregular fashion that repurchase was not possible. Further, since he would not have sold the property without the right to repurchase, he relied upon Faltz's representation. More specifically, plaintiff asserts that Faltz should have know that plaintiff would be unable to repurchase the property without a mortgage, that a standard contract of sale would be necessary to obtain a mortgage, and that defendants prevented plaintiff' ability to repurchase the property by failing to provide a contract of sale, failing to cooperate with his mortgage broker and by delaying the sale until the time set out in the Repurchase Agreement expired.

In support of their motion to dismiss this cause of action, defendants contend that plaintiff fails to plead his claim with the specificity required pursuant to CPLR 3013, which provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." In addition, CPLR 3016(b) provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

The Law

To establish a prima facie claim of fraud, the complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury (*see e.g. Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]; *Hernandez v New York City Law Dept. Corp. Counsel*, 258 AD2d 390 [1999], *appeal*

dismissed 93 NY2d 957 [1999], *cert denied* 529 US 1090 [2000]). Moreover, plaintiff must show not only that he actually relied on the misrepresentation, but also that such reliance was reasonable (*see e.g. Oko v Walsh*, 28 AD3d 529, 529 [2006] citing *Stuart Silver Assoc. v Baco Develop.*, 245 AD2d 96, 98 [1997]).

As is also relevant herein, it is well established that "[a] cause of action alleging fraud will not lie where the only claim of fraud relates to a breach of contract, and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud" (*Mendelovitz v Cohen*, 37 AD3d 670, 671 [2007] [internal citations omitted]; *accord Marshel v Farley*, 21 AD3d 935 [2005], *lv denied* 6 NY3d 710 [2006] [no cause of action to recover damages for fraud will arise when the only fraud charged relates to a breach of contract]). "In order to state a cause of action to recover damages for fraud, a plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties" (*Weitz v Smith*, 231 AD2d 518, 519 [1996], citing *Americana Petroleum v Northville Indus.*, 200 AD2d 646, 647 [1994]; *accord Lee v Matarrese*, 17 AD3d 539, 540 [2005] [a cause of action will be found to sound in tort rather than contract only when the relations binding the parties were created by the utterance of a falsehood, with fraudulent intent and reliance thereon, and the cause of action is entirely independent of contractual relations between the parties]).

Discussion

In the first instance, plaintiff's claim of fraud and/or misrepresentation must be dismissed for failure to state the circumstances of the alleged fraud in detail, in accordance

with the requirement of CPLR 3016 (b) (*see e.g. Linden v Moskowitz*, 294 AD2d 114, 115 [2002], *lv denied* 99 N.Y.2d 505 [2003]). In this regard, it is also significant to note that there is no fiduciary relationship between the parties that would impose any duty on Faltz (*see generally Jana L. v. W. 129th St. Realty*, 22 AD3d 274 [2005]). More specifically, plaintiff fails to establish that Faltz was under a duty to act for, or to give advice for plaintiff's benefit, so that no a fiduciary relationship was created in this arm's length business transaction (*see generally Dembeck v 220 Cent. Park S.*, 33 AD3d 491, 492 [2006]).

In the alternative, plaintiff's cause of action sounding in fraud must be dismissed on the ground that the only fraud alleged by plaintiff relates to breach of contract; he does not allege breach of any duty collateral to the failure to perform the Repurchase Agreement.

Accordingly, plaintiff's third cause of action must be dismissed.

Overreaching

The Parties' Contentions

In this fourth cause of action, plaintiff contends that defendants' actions constitute overreaching. In support of their request for dismissal of this claim, defendants argue that plaintiff fails to offer any factual support for his contentions, since he merely alleges, in one sentence, that defendants overreached.

Discussion

In considering plaintiff's cause of action, the court finds that plaintiff need not repeat all of the allegations in his complaint in this cause of action. Nonetheless, when viewed in

their entirety, plaintiffs allegations do not support a claim of overreaching. Plaintiff admits that the property was in foreclosure at the time that Faltz agreed to purchase it. Faltz was under no obligation to grant plaintiff an option to repurchase the property, nor was plaintiff under an obligation to sell to Faltz. Both had the opportunity to retain counsel and chose not to do so. Hence, this was merely a routine business transaction. "[R]eal estate contracts are probably the best examples of arm's length transactions. Except in cases where there is a real risk of overreaching, there should be no need for the courts to relieve the parties of the consequences of their contract" (*Maxton Builders v Lo Galbo*, 68 NY2d 373, 382 [1986]). The fact that plaintiff had to sell the property or forfeit it in a foreclosure action will not be deemed to constitute overreaching on the part of the purchaser.

Accordingly, plaintiff's fourth cause of action must be dismissed.

Accounting/Return of Escrow Money

The Parties' Contentions

In his sixth cause of action, plaintiff demands an accounting of the $67,000 that was held in escrow at the closing, along the return of said funds. In opposition, defendants contend that an accounting has already been provided and that plaintiff is not entitled to a return of any funds.

Discussion

It is beyond dispute that Todaro, as an attorney, is obligated to account to plaintiff for the funds on deposit in the escrow account established pursuant to the Repurchase

Agreement (*see* 22 NYCRR 1200.46; *see generally In re Bernstein*, ___ AD3d ___, 2007 NY Slip Op 3084 [2007]; *In re Comas*, 40 AD3d 168 [2007]; *In re Martinez*, 37 AD3d 103 [2006]). In this regard, defendants do not deny that they are so obligated, but instead argue that an accounting was provided.

Under the circumstances of this case, the court finds the accounting provided by Todaro to be sufficient. As a threshold issue, plaintiff cites no authority for his assertion that the accounting is insufficient on the ground that it is handwritten. Moreover, a review of the accounting reveals monthly payments of $4,869.60, which Todaro alleges represent payment of the mortgage. These payments exhausted the escrow fund. Even if this were not the case, the funds belong to defendants, as proceeds of the sale, and not to plaintiff. In addition, the intent of the escrow provision in the first instance was to secure payment of carrying costs on the property during the year that plaintiff was allowed to continue in occupancy and plaintiff offers no proof that the funds were not so utilized.

Accordingly, plaintiff's sixth cause of action is dismissed.

Defendants' Demand for Use and Occupancy

The Parties' Contentions

In support of that branch of their cross motion seeking an award of use and occupancy, defendants argue that plaintiff should not be permitted to continue to reside at the premises without paying rent. In response, plaintiff alleges, in reply papers, that he should be able to rent the third unit in the premises, or that defendants should be ordered to

do so, and the rental income should be applied to offset the payment of use and occupancy.

Discussion

It is well established that courts will condition continued occupancy, during the pendency of an action, upon the payment of an appropriate amount of use and occupancy (*see generally* Real Property Law § 220; *Wasserman v Gordon*, 24 AD3d 201, 202-203 [2005]; *Chase Manhattan Mortg. v Murphy*, 2 AD3d 559 [2003]; *Luna v Lower E. Side Mut. Hous. Assn.*, 293 AD2d 307 [2002]; *Goldman v Segal*, 278 AD2d 74 [2000]). From this it follows that defendants, as owners of the Property, are entitled to recover use and occupancy, in the amount of $5,500 per month, as determined was appropriate by this court in the order issued on May 8, 2007, until such time as plaintiff delivers the vacant premises to them.

Defendants' Demand for Injunctive Relief

Defendants' request for an injunction prohibiting plaintiff and/or anyone acting on his behalf from holding himself or herself out as the owner of the Property or seeking to rent units therein is granted. Inasmuch as Faltz is the owner of the Property; the Repurchase Agreement did not give plaintiff the right to rent the other apartments or to apply any rental so received to offset his payment of use and occupancy; and it has been determined herein that plaintiff is not entitled to specific performance of the Repurchase Agreement, defendants are entitled to the relief sought.

Defendants' Demand for Summary Judgment on Their Counterclaims

In their reply affirmation, defendants allege that since plaintiff failed to respond to

their counterclaims by June 12, 2007, as he was directed, all statements should be deemed admitted and they should be awarded summary judgment. This demand for relief, however, is not properly before the court and will not be addressed herein, since it is not raised in a motion or cross motion (*see generally* CPLR 2214 and 2215; *Chun v North American Mort. Co.*, 285 AD2d 42 [2001] [the court was without jurisdiction to grant the relief afforded to defendants where there was an absence of a notice of cross motion or any other notice to plaintiff that she would be required to respond to a motion to dismiss]; *Bauer v Facilities Develop.*, 210 AD2d 992 [1994] [affidavits submitted in opposition to defendants' motions were insufficient to constitute a cross motion]; *Guggenheim v Guggenheim*, 109 AD2d 1012 [1985] [it is not sufficient to demand relief in opposing affidavits or memoranda; an outright notice is required to avoid surprise to the original movant]; *Braver v Nassau County Office of Administrative Servs.*, 67 Misc 2d 120 [1971] [an affidavit in opposition to a motion is not sufficient to constitute a cross motion]).

Plaintiff's Demands for Relief

Having held that plaintiff's complaint must be dismissed in its entirety, his request for a preliminary injunction enjoining defendants from selling or otherwise disposing of or encumbering the Property, enjoining defendants from cancelling the Repurchase Agreement and/or enjoining defendants from leasing, renting or conveying the property is denied. Similarly, plaintiff is not entitled to rent the third unit or to have the rent collected for the apartment offset his obligation to pay use and occupancy, as discussed above in ordering

plaintiff to pay use and occupancy. In the alternative, as noted with regard to defendants' request for summary judgment on their counterclaims, defendant's request for this relief is denied inasmuch as they did not make the demand in a motion or cross motion.

Conclusion

Plaintiff's motion is denied in its entirety. Defendants' cross motion is granted in its entirety, i.e., plaintiff's complaint is dismissed; plaintiff is enjoined from representing himself as the owner of the premises, collecting rent, entering into leases or otherwise holding himself out as the owner of the premises; the lis pendens filed against the Property is cancelled; and plaintiff is ordered to pay retroactive and prospective use and occupancy at the rate of $5,500 per month. Defendants' counterclaims are severed and shall continue. All stays previously issued herein are vacated.

The foregoing constitutes the order and decision of this court.

E N T E R,

J. S. C.

HON. LAURA JACOBSON