

Novello v 215 Rockaway, LLC

2009 NY Slip Op 30915(U)

April 17, 2009

Supreme Court, Nassau County

Docket Number: 22426-07

Judge: Anthony L. Parga

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.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA
Justice

-----X **PART 10**
JOHN NOVELLO and DAVID STEINER,

Plaintiffs,

INDEX NO. 22426/07
X X X

-against-

MOTION DATE: 3/10/09
SEQUENCE NO. 004. 005. 006

215 ROCKAWAY, LLC.,

Defendant.

-----X

Notice of Motion, Affs. & Exs.....	<u>1</u>
Order to Show Cause, Affs. & Exs.....	<u>2</u>
Notice of Cross-Motion, Affs. & Exs.....	<u>3</u>
Affirmation In Opposition & Exs.....	<u>4</u>
Reply Affirmation & Exs.....	<u>5-6</u>
Supplemental Affirmation & Exs.....	<u>7</u>
Plaintiff's Memoranda of Law.....	<u>8-9</u>

Upon the foregoing papers, it is ordered that the branch of the motion by plaintiffs John Novello and David Steiner seeking an order granting leave to amend the ad damnum clause of the complaint to allege damages caused by defendant's breach of contract is denied. The branch of plaintiffs' motion seeking a hearing to determine the option price of real property which is the subject of this action for specific performance pursuant to a formula provided in a lease rider dated August 18, 1998 is granted. This matter is referred to the Calendar Control Part ("CCP"), for said hearing to be held on May 27, 2009 at 9:30 A.M. The plaintiffs shall file and serve

a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she may deem appropriate. Failure to serve and file the Note of Issue as directed herein will result in the dismissal of the action.

The motion by way of order to show cause by defendant 215 Rockaway, LLC for an order pursuant to CPLR 5519 fixing the amount of an undertaking to be filed by defendant in support of a stay of this action pending the hearing and determination of an appeal of this court's order dated August 13, 2008⁶ is deemed one pursuant to CPLR 5519(c) for a stay by court order, and a limited stay is granted pending determination or dismissal of the appeal, provided that the status quo is maintained. In the event that the status quo is altered, the stay is subject to further court order. The stay shall not include the hearing directed above to determine the option price of the subject premises nor production of a contract of sale, but the limited stay shall stay execution thereof.

The cross-motion by plaintiffs to direct defendant to comply with CPLR 5519(a)(5), as well as CPLR 5519(a)(6) is denied.

Plaintiffs John Novello and David Steiner commenced this action seeking a declaration that they validly exercised an option to purchase leased premises pursuant to Article 6 of a certain lease rider dated August 18, 1998 with defendant 215 Rockaway LLC, and for an order directing specific performance at the option price set forth in Article 6(C), requiring 215 Rockaway LLC to convey the premises in accordance with the option.

By order dated August 13, 2008 this court awarded summary judgment to plaintiffs, finding that plaintiffs properly exercised the purchase option. The order awarded plaintiffs specific performance, and directed defendant "to specifically perform by providing a formal contract of sale for 215 Rockaway Turnpike, Lawrence, New York as set forth in Article 6(E) of the rider to the . . . lease agreement".

Defendant 215 Rockaway LLC has filed a notice of appeal and by order to show cause seeks the fixing of an undertaking pursuant to CPLR § 5519 (a)(6) for an automatic stay. Subdivision (a) provides for a stay without court order and states that service upon the adverse party of a notice of appeal stays all proceedings to enforce the order appealed from pending the appeal where:

"6. the appellant or moving party is *in possession or control* of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that *the appellant or moving party will not commit* or suffer to be committed *any waste* and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, *the appellant or moving party shall pay the value of the use and occupancy of such property . . . from the taking of the appeal until the delivery of possession of the property . . . (emphasis supplied) "*

Thus, the automatic stay of subdivision (a)(6) excerpted above requires the movant or appellant to be in "possession or control" of the subject premises, and to post an undertaking in order to retain possession during an appeal. The apparent purpose of the undertaking is to prevent one who retains possession during the stay from committing waste, and to provide compensation for the value of use and occupancy to a prevailing out of possession party in the event that the appeal is lost or dismissed. The prevailing party is thus protected and compensated for the period

the order directing possession was stayed. Here it is not appellant who is in possession of the premises and while plaintiffs are in possession they need not be compensated for possession, nor be protected against waste of the premises which they occupy.

Notwithstanding that the out of possession defendant is not entitled to a stay pursuant to CPLR 5519(a)(6), a provision for a court ordered stay under § 5519(c) states:

"The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal in a case not provided for in subdivision (a) or subdivision (b) *or may grant a limited stay* . . ." (emphasis supplied).

As the appeal concerns a direction which will result in a transfer real property, and as plaintiffs are protected by a preliminary injunction enjoining defendant from transferring the premises during the pendency of this action, the motion is granted and a limited stay is granted to the extent directed above.

Turning to the main motion by plaintiffs, the purchase or option price of the premises shall be determined forthwith in order to prevent further delay in the event that the appeal is unsuccessful. Insofar as plaintiffs seek to amend the ad damnum clause to recover damages for breach of contract, a breach of contract cause of action is not pleaded. Nor is a breach of contract "implied" as plaintiffs contend. Plaintiffs complaint seeks specific performance and a declaration of rights, both equitable remedies. No action at law is pleaded alternatively.

Plaintiffs state that they do not seek to raise a breach of contract claim, asserting that they merely wish to amend the ad damnum clause on the "implied" breach of contract. Such an ingenuous claim is erroneously premised upon *Thomas*

v. Laustrup (34 AD3d 1115 [3d Dept 2006]). In *Laustrup* the plaintiff asserted causes of action for specific performance and breach of contract, based upon a repudiation. The plaintiff neglected however to include a demand for money damages. The Supreme Court dismissed the claim for specific performance but “held open” the claim for money damages. The Appellate Division affirmed and thereafter the plaintiff cross-moved to amend the ad damnum clause “to assert a claim for money damages based upon the alleged breach of contract”. Upon a denial of the cross-motion the plaintiff appealed. The Appellate Division reversed, stating: “We discern no . . . prejudice. The amendment does not seek to add a new cause of action or a new party; it merely changes the ad damnum clause by asserting a legal remedy. As to its merit, the basis for the preclusion of the specific performance claim does not impact upon the breach of contract claim predicated upon an anticipatory repudiation.

Accordingly, there is no authority for allowing the ad damnum clause to request damages for a cause of action not pleaded.

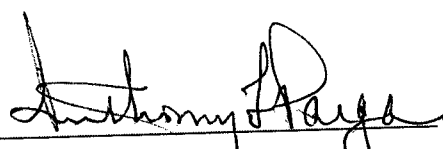
Insofar as plaintiffs cross-motion seeks to hold defendants to the automatic stay requirements of CPLR 5519(a)(5), the motion is denied. CPLR 5519(a)(5) states that a stay without a court order may be had pending appeal where:

“the judgment or order directs the execution of any instrument, and the instrument is executed and deposited in the office where the original judgment or order is entered to abide the direction of the court to which the appeal is taken;”

This court’s order dated August 13, 2008 did not direct the execution of the contract of sale. Defendant was directed to produce a contract of sale pursuant to the purchase option. The parties are not in agreement upon the option price and a hearing is required to determine the said option price before the contract of sale may

be drafted for production. Accordingly, CPLR 5519(a)(5) is not applicable. An order directing execution, if any, shall await the outcome of the appeal.

Dated: April 17, 2009.



Anthony L. Parga, J. S. C.

ENTERED
APR 21 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE