

**Berman v 283 Washington Ave., LLC**

2009 NY Slip Op 31572(U)

July 14, 2009

Supreme Court, New York County

Docket Number: 101706-09

Judge: Judith J. Gische

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. JUDITH J. GISCHE

PART 10

Index Number : 101706/2009

**BERMAN, BRIAN**

VS.

**283 WASHINGTON AVENUE LLC**

SEQUENCE NUMBER : 001

STAY PROCEEDINGS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

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

**FILED**

JUL 17 2009

COUNTY CLERK'S OFFICE  
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

*and PC scheduled for  
9/10/09 @ 9:30 am in Part 10*

Dated: JUL 14 2009

*JJG*  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

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

-----X  
Brian Berman,

Plaintiff (s),

**-against-**

283 Washington Avenue, LLC and  
Hannah Vining, as *escrow agent*,

Defendant (s).  
-----X

**DECISION/ ORDER**  
Index No.: 101706-09  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

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

**FILED**  
JUL 17 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

<b>Papers</b>	<b>Numbered</b>
Def 283 Washington n/m (stay) w/JHM affirm, exhs	1
Pltf's opp w/LBMcC affirm, exhs	2

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

Plaintiff Brian Berman ("plaintiff") is the purchaser of condominium Unit 4 at the Washington Court Condominium in Brooklyn, New York ("the apartment"). Defendant 283 Washington Avenue, LLC is the sponsor of the condominium conversion of the building and the seller of the apartment ("defendant" or "seller"). Defendant Hannah Vining, Esq., is the escrow agent of plaintiff's \$54,950 down payment for the purchase of the apartment ("down payment"). Issue has not been joined in this case by either defendant.

The court presently has before it the seller's motion for an order staying this action, pending the resolution of the complaint plaintiff has filed with the New York State Attorney General's Office. Seller contends this case and complaint before the Attorney

General are for the same relief.

Plaintiff opposes any stay of this case. The escrow agent has not taken any position on the relief sought.

Initially, the court addresses the issue of whether this motion should be denied (as plaintiff argues) because it is procedurally defective. The seller has moved for a "stay" pursuant to CPLR § 3211 (a) (5). That statute, however, requires the dismissal of an action based upon *inter alia* principles of collateral estoppel or res judicata.

Here, defendant is not actually seeking the dismissal of this case, but a stay because the plaintiff filed a complaint with the Attorney General's office before he brought this plenary action. Under CPLR 3211 (a) (4), a court can stay itself pending the trial of a "prior action" between the same parties where there are overlapping issues and the determination of the prior action may dispose of or limit the issues in the case the motion court has before it. Buzzell v. Mills, 32 A.D.2d 897 (1<sup>st</sup> Dept 1969).

All that has occurred is that plaintiff filed a complaint with the Attorney General's office. That complaint may trigger an investigation which could then result in legal action being taken by the Attorney General. There is, however, no "action" pending at this time and, therefore, CPLR § 3211 (a) (4) is also inapplicable.

It appears that what the seller is asking for is a permissive stay under CPLR § 2201. CPLR § 2201 allows the court to stay itself pending the outcome of another action where the decision in that other action will dispose of the controversy the court has before it, or an administrative body has primary jurisdiction with respect to the disputes, or in the interest of juridical economy. Since plaintiff has substantively addressed all of defendants' arguments as to why a stay should be imposed, the court

will decide whether there is any basis for a discretionary stay.

### **Arguments presented**

The purchase agreement between plaintiff and the seller dated August 27, 2008 ("purchase agreement") is for the purchase of Unit 4 at a purchase price of \$549,000. Plaintiff made a 10% down payment which the seller then put into escrow with the escrow agent. The seller is the sponsor of the conversion and the plan has not yet been approved by the Attorney General.

As per paragraph 9 of the purchase agreement, plaintiff had thirty (30) days in which to obtain a mortgage commitment for the purchase. If he did not receive a commitment within that time, he could cancel the purchase agreement, provided he notified the seller that he had been declined for financing. That notification had to be made within Five (5) business days from the date he was declined, etc.

Plaintiff applied for and obtained mortgage commitments from two banks on August 13, 2008. He then applied to a third bank. The first two banks wanted proof that 50% of the units were in contract because the offering plan had not yet been approved. Since there are five units in this building, excluding plaintiff's unit, plaintiff would have to show that two other units were in contract.

Plaintiff contends that the sponsor had previously made oral representations that two units (besides his) were in contract. According to plaintiff when he told the seller his banks needed proof of the other purchase contracts, the seller assured him that they would be going to contract "soon." Plaintiff contends these statements were false and that he relied upon in deciding whether to proceed or cancel his purchase agreement. He also claims the seller delayed in providing other necessary information

to his banks and that now his commitments for financing have expired.

According to plaintiff, had he known he was the only purchaser, he would have backed out of the deal while he could do so as of right. Plaintiff has since learned that the other four (4) condominium units are being offered as rentals because apparently they cannot be sold. Plaintiff alleges that the seller breached its contract by not providing the banks with the information they needed (i.e. signed contracts by other purchasers) and that he does not have financing for the apartment. Furthermore, he claims it is a breach of contract for the seller to make him wait many more months to get back his down payment.

Before commencing this action, plaintiff filed a complaint with the Attorney General's office. He contends that any decision by the Attorney General is not final, because it is purely administrative, and therefore not binding, presumably because it is subject to a challenge under Article 78 of the CPLR.

The seller denies it made any promises to plaintiff other than those contained in their written purchase agreement. Seller argues plaintiff knew it was possible that his mortgage commitments could expire before the offering plan was approved, or other purchase agreements signed, because of the specific language in the purchase agreement containing the following warning:

"Purchasers should note that financing commitments for the purchase of Units may have expiration dates prior to the actual Closing Date, unless the commitment is extended. If such extension is granted, or another commitment issued, no guarantee can be made that the terms will be the same as in the expire commitment . . ."

Seller also contends that not only was the foregoing flagged as a "special risk," in

the purchase agreement, but paragraph 50 of the purchase agreement notifies the purchaser of the following:

"The Sponsor anticipates the First Closing will occur on or about November 1, 2008. If the closing date is delayed beyond October 1, 2009, purchasers will be offered rescission."

Thus, seller contends that plaintiff could have cancelled his agreement when he had the chance to do so, as of right, but instead decided to wait the process out and now regrets his decision. The seller denies it breached their contract and therefore argues it has the right to enforce it, requiring plaintiff to proceed to closing - with or without financing. According to defendant, plaintiff does not have any right to the return of his down payment before October 1, 2009 when he will be offered the right to rescission.

### **Discussion**

Plaintiff's complaint before the Attorney General is brought pursuant to sections 352-e and 352-h of Article 23-A of the General Business Law, more commonly known as the "Martin Act." The statutes comprising the Martin Act are disclosure laws in connection with the offering and sale of securities. Council for Owner Occupied Housing, Inc. v. Koch, 119 Misc 2d 241 *judgment affirm by* 61 NY2d 942 (1983).

Under the Martin Act, the Attorney General is empowered to make suitable rules and regulations as needed in connection with condominiums and other investments. This is to protect the investing public as a whole and to redress harm suffered by individual investors because of misleading or fraudulent practices in connection with the promotion or sale of securities. *see* State v. 7040 Colonial Road Associates Co., 176

Misc.2d 367, 369 (1998) (*citing People v. Landes*, 192 AD2d 1, 4 *affd* 84 NY2d 655).

GBL § 352-h is a general provision pertaining to escrow accounts and trust funds. It requires that down payments be held in escrow and provides that such requirement is non-waivable. GBL § 352-e (2-b) authorizes the Attorney General to adopt rules and regulations determining when money held in such funds may be released. GBL § 353 sets forth a broad range of remedies that the Attorney General can seek from the Supreme Court, including a permanent injunction, damages and restitution to the individual investor.

Under the Martin Act, the Attorney General bears sole responsibility for the implementation and enforcement of how securities are marketed and sold. Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership, 12 N.Y.3d 236 (2009). There is no private right of action under the Martin Act (Fryberg v. Weissman, 145 AD2d 531 [2<sup>nd</sup> Dept 1988]) and only the Attorney General can pursue and enforce its provisions [Whitehall Tenants Corp. v. Estate of Qlnick, 213 AD2d 200 [1<sup>st</sup> Dept 1995]]. A plaintiff is not, however, precluded from commencing a common law cause of action for breach of contract or fraud which is distinct from a claim under the Martin Act. Kerusa Co., LLC v. W10Z/515 Real Estate Ltd. Partnership, *supra.*; W.E. Residents Corp. v. Coronet Properties Co., 220 AD2d 305 (1<sup>st</sup> Dept 1995).

In the action at bar, plaintiff is not claiming the seller made fraudulent misrepresentations or omissions in the offering plan or marketing materials. *compare*, Kerusa Co., LLC W10Z/515 Real Estate Ltd. Partnership, *supra.* (or omissions from). Rather, plaintiff claims that he spoke with the seller directly and the seller made statements to him that he relied upon to his detriment not only in signing the contract,

but forbearing on his right to cancel it when he had a chance to. These facts sufficiently distinguish plaintiff's claims in this plenary action from those he made before the Attorney General. The Attorney General cannot adjudicate the plaintiff's breach of contract dispute which is not subject to Martin Act regulations, but pertain to a private dispute. Whether plaintiff's claims will survive a dispositive motion after issue has been joined remains to be decided. However, at this time, accepting plaintiff's facts, they support a common law action for breach of contract. Having done so, plaintiff has defeated defendants' motion for a stay based upon the Attorney General having primary jurisdiction over this matter.

Defendant's time to answer is hereby extended in accordance with CPLR § 3211 (f). The preliminary conference is hereby scheduled for **SEPTEMBER 10, 2009 at 9:30 a.m. in Part 10.**

### Conclusion

Defendant's motion for a stay is denied for the reasons stated. Defendant's time to answer is hereby extended. This case is scheduled for a preliminary conference on **SEPTEMBER 10, 2009 at 9:30 a.m. in Part 10.** No further notices will be sent.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
July 14, 2009

So Ordered.

Hon. Judith J. Gische, J.S.C.

