SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: EMILY JANE GOODMAN PART 17
Justice

Ana A. Dannemann De Azevedo and
J. Roberto David De Azevedo

- v -

Susan Angel

MOTION INDEX NO. 600304/09
MOTION DATE
MOTION SEQ. NO. 25
MOTION CAL. NO.

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits: Not accepted as it was not filed.

Cross-Motion: ☑ Yes ☐ No

Motions under sequence numbers 18, 22, 24 and 25 are consolidated for disposition.

Background

In this action involving the sale of a cooperative, specific performance was granted by Decision and Order, dated 7/13/09, and a closing was ordered to be held 8/31/09. The contract at issue was standard, except for one unusual provision—an agreement to the release of $100,000 of the buyer's $140,000 escrow deposit to the seller, prior to closing. Apparently, the provision was agreed to because, according to a prior affirmation of buyer's former attorney, the money was released to seller "to expedite her ability to find alternative lodging." However, despite multiple orders of the Court, the closing did not take place until May 24, 2011, after a Receiver to sell was appointed, pursuant to Decision and Order, dated June 21, 2010 and after seller's ejectment. [1] **As stated in the November 1, 2010 Order, the Receiver's mandate included assuring "that such liens of record (the "Record Liens") that exist at the time of transfer of ownership of the Subject Premises (the "Closing"), pursuant to this Court's order,**

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

[1] In a footnote to the Decision and Order dated June 21, 2010, the Court noted that contempt/imprisonment of a mother with two small children served no purpose, but that a Receiver should be appointed because the Court was "convinced that the seller will not voluntarily close" despite her countless promises that she would.

dated June 21, 2010, such as those identified by Receiver Brill in the October 6 Brill Affidavit...shall be satisfied at closing...such that ownership and title to the Subject Premises may be conveyed to plaintiffs free and clear of Record Liens." Despite being held hostage to a lengthy, adversarial litigation, which resulted in the buyers incurring substantial legal fees and other costs, they showed good faith throughout the litigation and even consented to the additional release from escrow of $50,000 to seller, as a further advance towards the purchase price, so seller could relocate. Yet, despite the appointment of the Receiver and the additional payment of $50,000, seller, who has consistently taken that position that she wanted to close, had to be ejected by the Sheriff on April 28, 2011. Even after the ejectment, seller corresponded with the buyers and the Court requesting that the sale be voided because she could not afford to live elsewhere.

The Receiver's motion to confirm his Report and Defendant's cross motion to reject

The motion made by the Receiver to confirm his final report, to award him a commission pursuant to CPLR 8004, in the amount of $61,833.71[2], and, out of pocket expenses of $2,033.62 (of which $1,500 was for premium on the bond), to be paid from the bank account he established under the June 2010 order at JP Morgan Chase, containing the total deposits of $387,995.99, and for a discharge from office and discharge of the bond, is granted in its entirety.[3] Contrary to Defendant's arguments,

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[2]The amount is based on five percent of the total receipts, comprised of the $848,678.23 of the purchase price disbursed by Plaintiffs at the closing and the balance from Plaintiffs (after credits) of $387,995.99, deposited into the Receiver's escrow account. Although $848,678.23 was not deposited into the Receiver's escrow account, but was paid directly to others, that amount is still properly considered in the calculation of the Receiver's commission (see Eastrich Multiple Investor Fund v Citiwide Dev. Assoc., 218 AD2d 43 [1st Dept 1996]; Coronet Capital v Spodek, 202 AD2d 20, 27 [1st Dept 1994]).

[3]At the closing the Receiver directed Plaintiffs to disburse a total of $848,678.23 of the purchase price to satisfy Defendant's obligations that were impediments to the transfer of ownership or were transfer tax obligations. The Receiver's report indicates that Plaintiffs' closing payments were disbursed to Citbank in the amount of $400,985.89; Chase Bank in the amount of $220,430.75; Judgment Liener Tiffen in the amount of $79,490.22; Judgment Liener Greenhaus in the amount of $25,842,14; Transfer Taxes and Recording Fees in the amount of $25,920; "Flip Tax" to the Cooperative in the amount of $13,500; Cooperative Maintenance in the amount of $32,802.85; and the amount reserved for the payment of the Tax Liens, which was held in escrow under the Deposit and Escrow Agreement with Preferred Abstract in the amount of $49,706.38 (after payment of the federal and state tax liens, $459.47 remained as surplus). Plaintiffs' credits towards the purchase price of 1.4 million dollars

the Receiver performed his duties extremely competently and within the scope of his authority and mandate. In fact, the Receiver's extensive efforts, expertise and abilities, spanning over a year, are the sole reason why this case has finally been brought to a close.

Defendant's cross motion to reject the Receiver's report and to disallow the $5,000 payment to the cooperative for legal fees, to reverse the $2,500 credit to Plaintiffs in the purchase price, for reimbursement of $23,808 representing that portion of the payment of a 2006 IRS tax lien which Defendant states was not a lien and was still under dispute, and to credit her with various payments (and award treble damages) regarding payments made by the Receiver, on behalf of Defendant, for May, 2011 payments for a real estate assessment, electric charges, transfer taxes and her mortgage, maintenance and home equity loan, based on the unpersuasive argument that Defendant was not in physical possession of the apartment after April 28, 2011 (although title was still in her name), is denied. The transfer of title from Defendant to Plaintiffs occurred on May 24, 2011, and until such transfer, Defendant was still legally responsible for those payments as the owner.[4] Further, her request to reverse the order of specific performance granted by Decision and Order dated 7/13/09 is denied, as having been requested by motion and denied on many previous occasions. Her request for damages based on Plaintiffs'

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totaled $204,137.09 (the $190,000 previously released to Defendant to assist in relocation, the credit of $11,637.09 granted by Order, dated May 5, 2011, for payment for one month of storage of Defendant's abandoned property to Liffey Van Lines, and fees for the locksmith and the ejectment. Further, payment of $2,250 was made from the Receiver's escrow account, at Defendant's request, pursuant to Order dated June 3, 2011 for storage for the period May 26, 2007 through June 27, 2011, and, another $2,500 was authorized by email directive, for the period June 28, 2011 through July 27, 2011.

[4]Although the Receiver had difficulties obtaining payoff figures from Defendant's banks, Defendant is under the mistaken impression that such difficulties would give her carte blanche to decline to attend a court ordered closing, as opposed to appearing, and, if at that point, the figures were unavailable, adjourning the closing for receipt of the figures. Further, Defendant's concern regarding payoff figures accounted for only one of the many reasons why she refused to close over the last two years, while simultaneously professing a willingness to do so. Other reasons included her insistence on having herself or her relative act as escrow agent, in connection with an order of Justice Drager, when the Court clearly stated in its Decision and Order dated November 23, 2009, that neither she nor her family could not do so and ordering a closing to take place by December 7, 2009 (which never occurred), her actions resulting in the resignation of her closing attorney, and, her inability to find alternative lodging.

alleged default in closing is also denied, as well as her request that the Receiver's commission (which she states should be one percent of the amount he deposited directly in his account) should be paid by Plaintiffs, which arguments are based on Defendant's steadfast, but erroneous belief, that she was not responsible for the failure to timely close on the apartment. Defendant's request for "$100,000 in damages for Mr. Brill causation of intentional pain and suffering" because he "provided information to ACS, which ACS is not entitled to" is denied. The Receiver indicated that he was approached by ACS for information regarding the eviction. In fact, Defendant confirms that on page 25 of her cross motion, paragraph 125. Defendant has not established that ACS was not entitled to information regarding her eviction status or housing plans, or, that the Receiver violated her rights by providing information to ACS attorney Raegan Johnson, or that she was damaged by the Receiver's actions, as opposed to her own.

The amount paid to the cooperative of $3,773.56 for legal fees (not $5,000 as Defendant maintains) was properly paid because the cooperative would not issue shares or a proprietary lease to Plaintiffs absent payment, because the cooperative had a basis for such payment and because that amount was paid without prejudice to Defendant litigating this payment directly with the cooperative. The check itself indicates "w/o prejudice Legal fee 2A." Thus, the payment should not be disallowed.

The $2,500 credit in the purchase price to Plaintiffs was properly granted pursuant to the February 2, 2009 agreement.

The Notice of Federal Tax Lien, attached to the Receiver's motion as Exhibit J, indicates that the lien applies to "all property and right to property belonging to this taxpayer." Although the 2008 notice indicated that the amount owed at that time was $13,250.83 (exclusive of interest and penalties), the 6/2/11 IRS payoff letter attached to the Receiver's motion as Exhibit R indicates the payoff amount of $36,934.09. Although the amount is $23,808.09 higher, there is no dispute that the payoff letter was for $36,934.09, and therefore, the Receiver was entitled to rely upon that amount and pay it. Defendant argues that $10,059 of the amount of $36,934.09 was for a 2009 tax bill, for which no notice of lien was filed. However, the 6/2/11 IRS letter clearly indicates that "The amount you need to pay to release the lien(s) is $36,934.09" for the tax period

"12/31/06".[5] That letter also refers the filing of the Notice of Federal Tax Lien "on 10/03/2008" and indicates that the lien will be released only on payment of $36,934.09. Moreover, regardless of whether the IRS might have negotiated with Defendant to reduce that amount, Defendant's failures to clear up the IRS tax issue earlier, as well as her actions which lead to the appointment of the Receiver, has created this scenario. As early as 2009, Defendant was on notice that it was in the parties' interest to close, without a receiver, and that if a receiver was appointed, the Court contemplated a provision that any amounts normally paid to seller would be deposited with the Receiver pending further order of the Court (see Decision and Order, dated March 8, 2009). Once the Receiver was appointed by the Court, Defendant forfeited the ability to dictate who would be paid, and under what terms.

Other Unsecured Creditors

The Court has declined to sign certain motions by non party unsecured creditors of Defendant. The Receiver has not made any payments to these creditors and is not authorized to do so. These creditors, none of whom possess a judgment, include Gumley Haft Kleir, a real estate broker and Berkman Bottger Newman & Rodd, LLP, matrimonial attorneys, who do not have Judgments or secured liens. The only creditors who have been paid were the two Judgment lienors, and Defendant agrees that payment was proper.

The Special Referee's Report on Damages

Defendant's motion to reject, and Plaintiffs' motion to confirm, the Special Referee's report are granted in part, and denied in part, and the report is confirmed except as to those aspects of the report concluding that $140,000 is due to Plaintiff in damages, pursuant to Paragraph 13.1 of the Contract of Sale. However, damages are awarded to Plaintiffs in the amount of $10,000 for the reasons stated below. As Defendant astutely points out, Paragraph 13.1 is inapplicable because it relates to a "default or misrepresentation by Purchaser" and here, the default is by the seller. Defendant correctly points out that the relevant provision is Paragraph 13.2, which entitles the purchaser to remedies at law, or, in equity. As Defendant again astutely points out, legal fees are generally not awarded as damages for breach of contract, and

[5]The payoff letter for the New York State tax warrants total $12,212.82 and is not challenged by Defendant.

the indemnity provision does not support an award of attorneys fees.[6]

Consequential damages are not recoverable for a breach of contract unless the damages were foreseeable and in the contemplation of the parties when the contract was made (see Panasia Estates, Inc. v Hudson Ins. Co., 10 NY3d 200, 203 [2008]). Further, the "American Rule" is that a prevailing party is not entitled to legal fees unless awarded pursuant to agreement, statute or court rule (see Baker v Heath Mgmt. Systems, Inc., 98 NY2d 80 [2002]).[7]

However, reasonable legal fees are recoverable after May 17, 2010. On April 12, 2010, when the parties agreed before the Special Referee to amend the closing date of the sale in the contract to May 17, 2010 (Transcript 4/12), damages comprised of legal fees were within the contemplation of the parties.[8] Therefore, the legal fees incurred by Plaintiffs, resulting from Defendant's failure to close on May 17, 2010[9], because her closing attorney resigned, due to her actions, are recoverable.[10]

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[6]In the March 8, 2009 Decision and Order, the Court denied Plaintiffs' motion for contempt with leave to renew, upon proper papers, because, among other deficiencies, as Defendant noted, the motion for contempt lacked the statutory warning, which had previously been noted in the Court's prior decision, dated 10/14/09. Thus, although the Court found that Defendant undeniably flouted the 11/23/09 order of the Court, that her personal difficulties were not grounds to unilaterally alter the terms of a contract of sale or to impose her personal problems upon Plaintiffs, who were prejudiced by seller's actions, the motion had to be denied. The Court noted that Defendant might bear the cost of paying for a receiver and other litigation costs under Judiciary Law 773, but the motion was never renewed.

[7]A contract to buy a cooperative apartment is governed by the Uniform Commercial Code because the contract is for a sale of securities in the cooperative (see Friedman v Sommer, 63 NY2d 788 [1984]).

[8]As early as December 14, 2009, Defendant was aware that legal fees might be sought, when she opposed a contempt motion and stated "If Mr. Aufrichtig is going to ask for me to pay legal fees, then I should not have to pay for careless/incompetent litigation."

[9]On May 12, 2010 Special Referee Lowenstein reiterated that the closing would occur on May 17, 2010, despite Defendant's statements that she would not close, unless she saw payoff figures and verified the amounts due under the mortgage (Transcript 5/12 at 9 and 21).

[10]Although the Court accepts Plaintiffs' statements that they incurred fees for lodging in New York, it does not appear that the Special Referee made any findings in this regard, nor has it been established that any evidence was taken in connection with

In resigning, Defendant's closing attorney stated in a letter that he believed that "I will not have your cooperation in facilitating a 'title and possession' Closing for May 17, 2010" (see Decision and Order dated June 21, 2010). Based on this, and Defendant's prior demonstrated refusal to close, the Court appointed the Receiver (id).[11] Accordingly, based on the Court's extensive knowledge of the motions made herein and the inordinate amount of time expended in this action, Plaintiffs are awarded $10,000 for reasonable legal fees, incurred after May 17, 2010, because such damages were in the contemplation of the parties when the agreement was made before the Special Referee.[12]

The cross motion by Defendant's closing attorney, John P. Engel, for an order directing that the Receiver to hold $27,000 in escrow pending a determination of a petition to confirm an arbitration award, under Index Number 104388/2011 is denied. Engel does not have a Judgment, nor does he allege a lien on the property (had he appeared in this litigation, he may have been entitled to a charging lien). The Court cannot delay resolution of this action, which has been pending for over two years. Engel has not established the elements for a pre judgment order of attachment, nor has he even requested an attachment. Further, after submission of the cross motion Justice Hagler dismissed the proceeding without prejudice to commencing a new proceeding by Decision and Order dated June 17, 2011 and therefore the cross motion is moot.

It is hereby

ORDERED that the motions are decided in accordance with the terms herein; and it is further

ORDERED that the Receiver's report is confirmed; and it is further

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lodging expenses. Plaintiffs Exhibit 19 in evidence includes reference to those damages, but a line is written through that entry. In addition, Plaintiffs have not established that such damages were foreseeable at the time of contract, as no evidence has been submitted indicating Defendant knew that Plaintiffs would incur such costs, especially where Defendant claims that Plaintiffs have a home an hour from New York City.

[11]By Order dated May 21, 2010, Special Referee Lowenstein adjourned the closing date to June 24, 2010, but the Court vacated that closing date by Decision and Order, dated June 21, 2010, as being in excess of the scope of the Reference, and, appointed the Receiver.

[12]The award of legal fees is on the low end but it is the amount that the Court believes is reasonable under the circumstances.

ORDERED that the Receiver is awarded a commission pursuant to CPLR 8004 in the amount of $61,833.71 and out of pocket costs expenses in the amount of $2,033.62; and it is further

ORDERED and ADJUDGED that after severing the judgment previously awarded for Specific Performance, Plaintiffs are granted a money judgment against Defendant in the amount of $10,000, which shall be satisfied upon the Receiver's release of that amount to Plaintiffs, who shall sign a satisfaction of judgment immediately thereafter; and it is further

ORDERED that the Receiver shall, forthwith, issue from his escrow account a check to Plaintiff in the amount of $10,000 for damages representing reasonable legal fees incurred after May 17, 2011, issue a check to himself in the amount of $63,867.33 for the Receiver's commission and out of pocket costs, and issue a check for the balance of the account to Defendant; and it is further

ORDERED that upon disbursement of the monies above, the Receiver is discharged from his from office and the bond is deemed discharged; and it is further

ORDERED that the Receiver submit the appropriate UCS form approving payment of his fees forthwith; and it is further

ORDERED that the Receiver serve a copy of the Decision, Order and Judgment on Plaintiffs and Defendants, with notice of entry.

This constitutes the Decision, Order and Judgment of the Court.

Dated: July 18, 2011

J.S.C
EMILY JANE GOODMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).