

**Vargas v Drach**

2013 NY Slip Op 34228(U)

February 19, 2013

Supreme Court, Bronx County

Docket Number: 22323/12E

Judge: Alexander W. Hunter, Jr.

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 23A**

-----X  
Elida Vargas,

Index No.: 22323/12E

Plaintiff,

Decision and Order

-against-

Arie Drach, 91 E. 208<sup>th</sup> Street Tenants Corp., "John Doe" and "Jane Doe", the last two names being fictitious, said parties intended being anyone or entity claiming an interest in, or lien upon the premises described in the complaint,

Defendants.

-----X  
**HON. ALEXANDER W. HUNTER, JR.**

Plaintiff Elida Vargas' ("Vargas") motion by order to show cause for an order granting a preliminary injunction directing defendant Arie Drach ("Drach") to turn over keys to plaintiff, permitting plaintiff to reenter the subject premises, and enjoining defendant Drach from disposing of, transferring, or encumbering any ownership or equity interest in the premises known as 91 East 208<sup>th</sup> Street, Apartment 5B, Bronx, New York 10467 (the "subject apartment"), is denied. Defendant Drach's cross-motion for an order directing plaintiff to post an undertaking is hereby deemed moot.

A temporary restraining order ("TRO") was granted by Justice Wilma Guzman on October 2, 2012. By order dated December 20, 2012, this court extended the TRO granted by Justice Guzman until a decision on the preliminary injunction was rendered.

The cause of action is for specific performance of a contract of sale for the shares of the subject apartment. Plaintiff also seeks to recover damages for breach of contract, fraud in the inducement, and unjust enrichment. The purported handwritten contract, dated June 28, 2011, reads in pertinent part that "I Elida Vargas reside at 91 East 208 St. #5B, Bronx, NY 10467. Give the amount of \$25,000 to Arie Drach for the unit #5B. Sold by Arie Drach to Elida Vargas."

On or about April 23, 2010, defendant purchased 101 shares for a sum of \$18,850.00, the amount of plaintiff's then maintenance and arrears plus costs, at a foreclosure sale. On June 23, 2010, defendant 91 E. 208<sup>th</sup> Street Tenants Corp. (the "Corporation") issued Drach a new stock certificate and proprietary lease for the subject apartment. Plaintiff asserts that she never received notice of the foreclosure proceeding or notice of sale. In August 2010, plaintiff commenced a declaratory judgment action seeking a declaration that the sale of the subject apartment to Drach was a nullity. By order dated March 1, 2011, plaintiff's motion was denied.

Thereafter, Drach commenced a holdover proceeding against plaintiff. Plaintiff entered into a stipulation of settlement so ordered by Justice Paul L. Alpert, dated April 28, 2011, wherein plaintiff conceded that she no longer had the right to reside in the subject apartment. The stipulation further provided for a final judgment of possession and a warrant of eviction. On September 10, 2012, Drach served Vargas with a Notice of the Eviction and Warrant of Eviction.

Plaintiff alleges that on June 28, 2011, she and Drach entered into a contract of sale for the shares of the subject apartment for the sum of \$25,000.00. Plaintiff avers that this was an all cash transaction. The parties further agreed that until the proprietary lease and stock certificates were transferred to plaintiff, Vargas would pay Drach the monthly maintenance fee of \$905.00 plus an additional \$50.00. Plaintiff submits copies of cancelled checks in the amount of \$955.00 payable to defendant from July 2011 to August 2012. She further asserts that Drach agreed to discontinue the holdover proceeding and vacate the judgment of eviction. She contends that she has been ready, willing, and able to proceed with the closing, however, Drach has failed to take the necessary steps to effectuate the transfer of the proprietary lease and stock certificates to Vargas.

Plaintiff asserts that pending the litigation, granting a preliminary injunction to maintain the status quo by allowing plaintiff to reenter and remain in the subject apartment is warranted. Vargas maintains that the subject apartment is unique and she has spent in excess of \$10,000.00 for renovations on the subject apartment. Plaintiff argues that she will suffer irreparable harm if the injunction is not granted. She also argues that she is likely to succeed on the merits and it would be inequitable to force her to relocate from her home. Moreover, plaintiff argues that Drach will suffer no harm since she has already paid him the agreed upon price of \$25,000.00 and he will continue to receive monthly payments in the amount of \$955.00 until specific performance is granted.

Defendant Drach cross-moves for an order directing plaintiff to post an undertaking pursuant to C.P.L.R. 6312(b). Between 2008 and the date of defendant's counsel's affirmation, November 29, 2012, plaintiff has made multiple motions in multiple litigations with defendants. In numerous court orders, the court determined that plaintiff 1) did not prove that the Corporation failed to provide her with a notice to cure, notice of termination and notice of sale; 2) could not prevent the Corporation from charging her maintenance; 3) was obligated to pay the maintenance arrears; 4) could not set aside the foreclosure sale to defendant; 5) could not cancel the issuance of the stock certificate and proprietary lease to defendant; 7) could not cancel the issuance of the stock certificate and proprietary lease to defendant; and 8) signed a stipulation agreeing to a possessory judgment and a date by which she would vacate the subject apartment. Defendant avers that plaintiff is now collaterally estopped from maintaining the instant action. Drach also argues that plaintiff has failed to meet her burden for the granting of preliminary injunctive relief.

Defendant Drach denies ever entering into a contract of sale for the subject apartment and he asserts that plaintiff never paid him the sum of \$25,000.00. Instead, Drach contends that plaintiff committed a fraud by altering a handwritten receipt for \$2,500.00. Defendant notes that despite possessing an alleged contract of sale for the subject apartment since June 28, 2011,

plaintiff has yet to submit an application to the Corporation seeking its approval. Moreover, pursuant to C.P.L.R. 6312(b), the preliminary injunction should be denied unless plaintiff posts an undertaking in an amount representing the damages she is causing to defendant. Drach asserts that should an injunction be granted, plaintiff should be directed to deposit the sum of at least \$121,920.00 with the court or in escrow with defendant's counsel. This figure represents the value of the subject apartment according to plaintiff's complaint (\$99,000.00) plus two years of monthly maintenance payments ( $\$22,920.00 = \$955.00 \times 24$  months).

In his affidavit, defendant asserts that on June 28, 2011, plaintiff asked him if he would sell the subject apartment to her niece. Defendant avers that he and plaintiff discussed a purchase price of \$65,000.00 with a \$25,000.00 down payment and for the balance to be financed with a \$40,000.00 purchase money interest only balloon mortgage to be paid in three years. Drach asked plaintiff for a \$2,500.00 good faith payment to hold the subject apartment to give her niece the time to enter into a contract of sale. Months later, the deal with plaintiff's niece fell through. Thereafter in July or August 2012, plaintiff asked defendant Drach if he would sell the subject apartment to her boyfriend. In late August 2012, after plaintiff's boyfriend informed defendant Drach that he was no longer interested in buying the subject apartment, defendant asked the city marshal to serve the warrant of eviction. Defendant further avers that he never would have sold the subject apartment to anyone for \$25,000.00 as he bought the property for \$18,850.00 and spent an additional \$20,000.00 in litigation costs.

Plaintiff argues that she has met her burden of establishing that she is entitled to a preliminary injunction during the pendency of this action. Plaintiff also contends that she has made a prima facie showing for specific performance. She also argues that there is no need for an undertaking because she has already given defendant \$25,000.00 as payment and she will continue to make monthly maintenance payments in the amount of \$955.00.

In reply, defendant avers that plaintiff has lost her right to claim that the subject apartment is her home and that she has no legal right to ownership or possession. Defendant further notes that assuming arguendo that a valid contract exists, the contract does not give plaintiff the right to possession until closing. Therefore, defendant maintains that plaintiff has no right to occupy the subject apartment pending litigation. Defendant also stresses that plaintiff has made no showing of a \$25,000.00 payment to substantiate her claims and she has stopped making monthly maintenance payments.

It is well settled that a preliminary injunction "is an extraordinary provisional remedy to which a plaintiff is entitled only on a special showing." **Margolies v. Encounter, Inc.**, 42 N.Y.2d 475, 479 (1977); **see also, Uniformed Firefighters v. Ass'n of Greater New York v. City of New York**, 79 N.Y.2d 236 (1992); **Non-Emergency Transporters of New York, Inc. v. Hammons**, 249 A.D. 124 (1<sup>st</sup> Dept. 1988). In an application for the granting of a preliminary injunction pursuant to C.P.L.R. Article 63, the moving party must prove: 1) the likelihood of success on the merits; 2) the likelihood of irreparable harm; and 3) a balancing of equities in the moving party's favor. **Doe v. Axelrod**, 73 N.Y.2d 748 (1988). Moreover, the movant must furnish an appropriate undertaking sufficient to compensate the enjoined party's damages and

costs if it is later determined that the movant is not entitled to the injunction. C.P.L.R. 6312(b) and (c).

General Obligations Law § 5-703(2) requires contracts for the sale of real property to be in writing, express the amount of the consideration, and to be subscribed by the party to be charged. A contract which omits a material element is unenforceable. See, Willmott v. Giaraputto, 5 N.Y.2d 250 (1959); Ashkenazi v. Kelly, 157 A.D.2d 578 (1<sup>st</sup> Dept. 1990); Dutchess Development Co., Inc. v. Jo-Jam Estates, Inc., 134 A.D.2d 748 (2<sup>nd</sup> Dept.1987); Tetz v. Dexter, 133 A.D.2d 79 (2<sup>nd</sup> Dept. 1987). Moreover, the contract of sale must include the names of the parties, state all of the essential terms of the contract (see, Pentony v. Saxe, 2 A.D.3d 1076 (3<sup>rd</sup> Dept.2003)), and “describe the property involved with such definiteness and exactness as will permit it to be identified with reasonable certainty.” Barber v. Stewart, 275, 429, 430 (3<sup>rd</sup> Dept. 1949). Here, the alleged contract is signed by both parties, states the amount of the consideration, and sufficiently describes the property. Since this was supposedly an all cash transaction, any language about financing is not essential. This writing satisfies the statute of frauds.

However, where it is shown that there was no meeting of the minds concerning the nature and extent of the contract, there is no valid and enforceable contract. Manhattan Theatre Club, Inc. v. Bohemian Benev. & Literary Assn. of City of New York, 64 N.Y.2d 1069 (1985); Winiarski v. Duryea Assocs., LLC, 14 A.D.3d 697 (2<sup>nd</sup> Dept. 2005); King Real Estate, Ltd. v. DePalma, 306 A.D.2d 445 (2<sup>nd</sup> Dept. 2003); Harper v. Rodriguez, 272 A.D.2d 372 (2<sup>nd</sup> Dept. 2000). Given the conflicting affidavits describing markedly different versions of events surrounding the formation of the contract, it is clear that there was no meeting of the minds between the parties. It cannot be said that plaintiff is likely to succeed on the merits.

“The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits.” Icy Splash Food & Beverage, Inc. v. Henckel, 14 A.D.3d 595, 596 (2<sup>nd</sup> Dept. 2005). “Where the plaintiffs can be fully compensated by a monetary award, an injunction will not issue because no irreparable harm will be sustained in the absence of such relief.” Mar v. Liquid Mgt. Partners, LLC, 62 A.D.3d 762, 763 (2<sup>nd</sup> Dept. 2009). Plaintiff has failed to show that she will suffer irreparable harm should this court deny her this preliminary injunction. Although plaintiff asserts that she has spent \$10,000.00 in renovations, there is no evidence in the record to show that she spent that amount in renovations. If at the conclusion of this action plaintiff is successful, then she will be entitled to monetary damages. Allowing plaintiff to occupy the subject premises and enjoining defendant from disposing of, transferring, or encumbering any ownership or equity interest in the subject apartment will disturb, not maintain, the status quo. See, Dupree v. Scottsdale Ins. Co., 100A.D.3d 467 (1<sup>st</sup> Dept. 2012); Morris v. Port Auth. of N.Y. & N.J., 290 A.D.2d 22 (1<sup>st</sup> Dept. 2002). Plaintiff has not shown a likelihood of irreparable harm.

The balancing of the equities also tips in defendant’s favor. Even though plaintiff asserts that she tendered \$25,000.00 for the subject apartment, there is no evidence to substantiate her claim. On the other hand, defendant has submitted proof of a \$2,500.00 deposit two days after the date of the alleged contract. It has been established that plaintiff has no possessory right to

the subject apartment. It is also important to note that despite having a contract in her possession since June 2011, plaintiff has yet to apply for the Corporation's approval.

Based on the foregoing, this court finds that plaintiff has failed to establish any grounds to vacate the judgment of eviction, dated April 28, 2011, the warrant of eviction, dated September 10, 2012, and for a preliminary injunction. Accordingly, plaintiff's motion for a preliminary injunction pending the litigation is denied. Defendant Drach's cross-motion for an order directing plaintiff to post an undertaking is hereby deemed moot as plaintiff's motion for a preliminary injunction is denied. The TRO granted by Justice Wilma Guzman on October 2, 2012 is hereby vacated.

Plaintiff is directed to serve a copy of this order with notice of entry upon all parties by certified mail (return receipt not required) and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: February 19, 2013

ENTER:

  
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J.S.C.  
**ALEXANDER W. HUNTER JP**