

**Shaw-Roby v Styles**

2015 NY Slip Op 32046(U)

July 7, 2015

Supreme Court, New York County

Docket Number: 100986/12

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: HON. PAUL WOOTEN**  
*Justice*

**PART 7**

**DAPHNE K. SHAW-ROBY and  
MINDY G. NORVELL,**  
*Plaintiffs,*

INDEX NO. 100986/12

- against -

MOTION SEQ. NO.

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**YON ALLYN STYLES, TANYA J. BURKE,**  
*Defendant.*

The following papers were read on this motion by the plaintiffs.

**FILED**

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo)

JUL 09 2015

Cross-Motion:  Yes  No

**NEW YORK  
COUNTY CLERK'S OFFICE**

The herein motion in this action (Action No. 1) is decided together with Motion Sequences 001 and 002 in a related action entitled, *Hitech Homes, LLC v Daphne K. Shaw-Roby and Mindy G. Norvell*, Index No. 159820/13 (Action No. 2).

In Action No. 1, the owners of a building at 217 West 123<sup>rd</sup> Street in New York City seek partition. In Action No. 2, a potential buyer of the same building seeks specific performance of a contract of sale.

In Action No. 2, Daphne K. Shaw-Roby (Shaw-Roby) and Mindy G. Norvell (Norvell) (plaintiffs in Action No. 1 and defendants in Action No. 2) move to consolidate the two actions (motion sequence 001). In Action No. 2, the plaintiff, Hitech Homes, LLC (Hitech) moves: 1) for summary judgment on its specific performance claim; 2) to strike defendants' answer; 3) for a declaratory judgment that defendants are in default under the contract of sale; and 4) for an injunction permanently restraining defendants from transferring or making an agreement to transfer the property in any way (motion sequence 002).

In Action No. 1, Shaw-Roby and Norvell move by Order to Show Cause (OSC): 1) to

vacate a So-Ordered stipulation dated October 13, 2013; 2) to authorize the sale of the property to Hitech; and 3) to place \$50,000.00 of the sale proceeds in escrow pending determination of expenses on the property, and to appoint a referee to determine the correct amount of the expenses (motion sequence 004). Yon Allyn Styles and Tanya J. Burke, defendants in Action No. 1, support consolidation and the appointment of a referee to determine expenses, and oppose vacating the stipulation.

#### BACKGROUND

Shaw-Roby and Norvell, plaintiffs in Action No. 1, are tenants-in-common (hereinafter, the tenants-in-common), each owning one-third of the property. Styles and Burke, defendants in Action No. 1, are joint tenants (hereinafter, the joint tenants) owning the remaining one-third. In Action No. 1, the partition action, the parties agreed to sell the property, but were not able to agree on a buyer or a price. The tenants-in-common proposed selling the property to nonparty Festive Homes, Ltd, but the joint tenants objected on the ground that a higher offer was forthcoming. According to the tenants-in-common, no such higher offer was ever made. In July 2013, the tenants-in-common made a contract to sell their part of the property to Hitech, a sister company of Festive Homes, for \$630,000.00. The joint tenants obtained a preliminary injunction in Action No. 1 restraining the sale.

On October 13, 2013, all four owners entered into a so-ordered stipulation with the following provisions. The joint tenants would find a buyer who would pay the tenants-in-common \$680,000.00 for their share of the property. The buyer had to agree to close on or before October 31, 2013. If the buyer refused to close by that date, the tenants-in-common could sell their interests to a buyer of their choice, and the other owners could not object.

Pursuant to the July 2013 sale contract, Hitech made a down payment of \$30,000.00, which the attorney for the tenants-in-common holds in escrow. Hitech alleges that the tenants-in-common refused to sell, and as a result Hitech commenced Action No. 2 on October 25, 2013, seeking specific performance. On October 24, 2013, Hitech's attorney had sent the

attorney for the tenants-in-common a time of the essence notification to close on October 29, 2013. The sellers did not appear.

The tenants-in-common made the instant motion to vacate the so-ordered stipulation in Action No. 1, Hitech made its instant motion for summary judgment in Action No. 2, and the tenants-in-common made the instant motion in Action No. 2 to consolidate the actions.

To obtain specific performance, the putative buyer must show that it substantially performed its obligations under the contract, that it was ready, willing, and able to buy the property, that the seller was able to convey the property, and that buyer has no adequate remedy at law (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004]; *Piga v Rubin*, 300 AD2d 68, 69 [1st Dept 2002]). A court has the discretion to deny specific performance where it would be unduly harsh or unjust (*Concert Radio v GAF Corp.*, 108 AD2d 273, 278 [1st Dept 1985], *affd* 73 NY2d 766 [1988]; *EMF*, 6 AD3d at 52). However, where there is no evidence that a serious injustice will result, the court will grant specific performance; to deny it would constitute an abuse of discretion as a matter of law (*Da Silva v Musso*, 53 NY2d 543, 547-548 [1981]; *EMF*, 6 AD3d at 52).

Hitech has established its prima facie entitlement for specific performance and the owners do not raise any issues of fact precluding the granting of summary judgment. Although the tenants-in-common oppose Hitech's motion, they want to sell their part of the property to Hitech, and they do not claim any injustice or harshness.

Hitech seeks a declaratory judgment declaring that the tenants-in common are in default under the sale contract. When the tenants-in-common entered into the stipulation with the other owners, they had already entered into the sale contract with Hitech. Hitech avers that by signing the stipulation agreeing to sell to another buyer, the tenants-in-common violated the sale contract with Hitech. The tenants-in-common allege that the so-ordered stipulation prevented them from selling to Hitech. Assuming the truth of that argument, after the stipulation expired on October 31, 2013, there was no longer an impediment to close on the

sale to Hitech. Hitech set a time is of the essence closing date of October 29, 2013, which was two days before the stipulation expired. Even if the sale could not have closed on October 29, it could have closed shortly after that date. The Court concludes that after October 31, 2013, the tenants-in-common were not prevented from proceeding with the sale to Hitech, and that they are in default under the sale contract. Nonetheless, a declaratory judgment is not necessary.

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001). A declaratory judgment action thus "requires an actual controversy between genuine disputants with a stake in the outcome," and may not be used as "a vehicle for an advisory opinion" (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3001:3; see *Long Island Lighting Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253 [1st Dept 2006]). Equally well settled is the principle that a declaration is appropriate if it has an immediate practical effect on the parties' conduct (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 530 [1977]; *M&A Oasis v MTM Assocs.*, 307 AD2d 872, 872 [1st Dept 2003]). A declaratory judgment is unnecessary and inappropriate when the party seeking it has an adequate, alternative remedy in another form of action, such as breach of contract (*Apple Records, v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988]; see also *Spitzer v Schussel*, 48 AD3d 233, 234 [1st Dept 2008]).

In this case, specific performance affords an adequate resolution of the parties' legal rights. A declaration will not have a greater practical effect on the parties' conduct than the order of specific performance. At the same time, however, and despite the fact that the sellers want to sell to Hitech, the Court believes that an injunction should issue, to ensure that nothing prevents the sale.

To be entitled to a permanent injunction, a plaintiff is required to establish irreparable harm and an absence of an adequate legal remedy (*McDermott v City of Albany*, 309 AD2d 1004, 1005 [3d Dept 2003]). "Irreparable injury, for purposes of equity, has been held to mean

any injury for which money damages are insufficient” (*L & M Franklyn Ave., LLC v S. Land Dev., LLC*, 98 AD3d 721, 722 [2d Dept 2012] [internal citation and quotation marks omitted]). “Generally, the equitable remedy of specific performance is routinely awarded in contract actions involving real property, on the premise that each parcel of real property is unique . . .” (*EMF*, 6 AD3d at 52). The unique nature of real property has led courts to hold that there is no adequate remedy at law when an action is premised upon a contract for the sale of real property (see e.g. *Lezell v Forde*, 26 Misc 3d 435, 445 [Sup Ct, Kings County 2009]).

It follows then that money damages will not be sufficient and that Hitech will be irreparably injured if it is not permitted to finalize the contract for the real property. Hitech’s request for a permanent injunction preventing the tenants-in-common from transferring or alienating their interest in the property until the sale goes through is granted. This injunction will assure the efficacy of the order for specific performance.

Hitech moves to strike the answer of the tenants-in-common. As there is no merit to the answer, which contains the affirmative defenses of lack of jurisdiction due to improper service and failure to state a cause of action, it is dismissed, although a motion to strike is not the proper way to dismiss the answer in this case. In general, a motion to strike is directed at “scandalous or prejudicial matter unnecessarily inserted in a pleading” (CPLR 3024[b]) or historically at sham material (*Chase Bank USA, N.A. v Barber*, 30 Misc 3d 1239[A], 2011 NY Slip Op 50404[U], \*3 [Sup Ct, Kings County 2011]). Also, a court may order a party’s pleadings to be struck out as a penalty for refusing to participate in disclosure (CPLR 3126). Hitech’s motion is more properly a motion to dismiss a defense, pursuant to CPLR 3211(b), or a summary judgment motion.

Regarding the OSC brought by the tenants-in-common to vacate the So-Ordered stipulation and to authorize the sale of the property to Hitech, the stipulation does not have to be vacated, since it expired by its own terms on the last day of October 2013. The sale is authorized by the grant of specific performance. As such, this portion of the motion is denied

as moot.

The OSC also requests placing \$50,000.00 of the sale proceeds in escrow and appointing a referee to determine the expenses incurred in maintaining the property and which owner should pay for how much. By expenses, the tenants-in-common seem to mean taxes, as well as other kinds of expenses. They allege that the back taxes on the property amount to more than \$56,000.00 and that the joint tenants are responsible for at least some of this amount. The joint tenants allege that they paid all the expenses of the property without any assistance from the tenants-in-common.

The dispute over expenses does not involve Hitech. The sale contract provides that, on the closing date, the tenants-in-common must show that they have paid their percentage of interest (two-thirds) of the taxes, water charges, sewer rents, and other assessments on the property or must reduce the sale price by the amount of assessments. The tenants-in-common must fulfill the sale contract. After the sale closes, the attorney for the tenants-in-common should hold \$50,000.00 of the proceeds in escrow until there is a determination as to how much each set of owners owes for expenses, which shall be referred to a Special Referee to hear and determine. Accordingly, the request to have the matter determined by a referee is granted.

The tenants-in-common submit what purports to be a cross-motion seeking dismissal of Hitech's claims, pursuant to CPLR 3211(a)(7) and (8). The Court does not regard the submission as a cross-motion, as the papers are not in the proper form for a cross-motion, as there is no notice of motion. In addition, even if there was a proper motion, it would not be granted. Hitech's complaint states a valid cause of action, so it could not be dismissed pursuant to CPLR 3211(a)(7). Nor could the complaint be dismissed due to lack of jurisdiction over defendants, pursuant to CPLR 3211(a)(8). In their answer to Hitech's complaint, the one-third owners interpose an affirmative defense of improper service. Such a defense "is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time

upon the ground of undue hardship” (CPLR 3211[e]). The one-third owners did not move on that ground within the allotted time. In addition, neither one submits an affidavit about how she was served.

The motion by the tenants-in-common to consolidate is denied. After specific performance, Action No. 2 will be over, and in Action No. 1, the owners will divide the expenses on the property. As such this motion is denied.

Additionally, the Court finds that attorneys’ fees for Hitech are not warranted, as the sale contract does not authorize them (*see Mount Vernon City School Dist. v Nova Cas. Co.*, 19 NY3d 28, 39 [2012]).

### CONCLUSION

In conclusion, it is

ORDERED in Action No. 1, index No. 100986/12, that the OSC by plaintiffs Daphne Roby-Shaw and Mindy G. Norvell (motion sequence 004):

- to vacate a stipulation signed on October 13, 2013 is denied as moot;
- to authorize the sale of the property to Hitech Homes, LLC is granted;
- for an order placing \$50,000.00 of the sale proceeds in escrow is granted, and said amount shall be held in escrow by plaintiffs’ attorney until such time that a determination is made as to the expenses incurred in maintaining the property and how much each owner should pay;

-for an order appointing a referee to determine the expenses incurred in maintaining the property and which owner should pay for how much is granted; and it is further,

ORDERED that the issue of the amount of expenses incurred in maintaining the property, including, but not limited to, taxes and other expenses, and which owner should pay for how much is hereby referred to a Special Referee to hear and determine; and it is further,

ORDERED in Action No. 2, index No. 159820/13, that the motion by defendants Daphne K. Shaw-Roby and Mindy G. Norvell to consolidate Actions Nos. 1 and 2 is denied (motion

sequence 001); and it is further,

ORDERED in Action No. 2, index No. 159820/13, that the motion (motion sequence 002) by plaintiff Hitech Homes, LLC:

- seeking summary judgment granting specific performance of its July 2013 sale contract with defendants Daphne K. Shaw-Roby and Mindy G. Norvell is granted, and these parties shall proceed to close the sale as soon as possible;

- to dismiss defendants' answer is granted;

- for a declaratory judgment is denied; and

- for a permanent injunction is granted, and defendants are enjoined from selling, transferring, or encumbering their interest in the property in any way until the sale to Hitech Homes, LLC is closed; and it is further,

ORDERED that counsel for Hitech is directed to serve a copy of this Order with Notice of Entry upon all parties, and upon the Clerk of the Court who is directed to enter judgment accordingly; and it is further,

ORDERED that counsel for plaintiffs shall serve a copy of this order with Notice of Entry on the Clerk of the General Clerk's Office to arrange a date for the reference to a Special Referee.

This constitutes the Decision and Order of the Court.

Dated: 7/7/15

**FILED**  
JUL 09 2015  
*[Signature]*  
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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