

**Mareb 99¢ Plus Enters., Inc. v 101-09 W. 115th St.  
Hous. Dev. Fund Corp.**

2016 NY Slip Op 32292(U)

October 31, 2016

Supreme Court, New York County

Docket Number: 162170/15

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

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MAREB 99¢ PLUS ENTERPRISES, INC. and  
VARIETY CITY INC.,

Plaintiffs,

-against-

**DECISION AND ORDER**

Index No. 162170/15

Mot. Seq. No. 005

101-09 WEST 115<sup>th</sup> STREET HOUSING  
DEVELOPMENT FUND CORPORATION and  
HALSTEAD PROPERTY, LLC,

Defendants.

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**KATHRYN E. FREED, J.S.C.**

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
ORDER TO SHOW CAUSE AND AFFS. ANNEXED	1-2 (Exs. A-J)
AFFIRMATION IN OPPOSITION	3 (Exs. A-H)
REPLY AFFIRMATION	4 (Exs. A-D)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

This action by plaintiffs Mareb 99¢ Plus Enterprises, Inc. (“Mareb”) and Variety City Inc. (“Variety”) seeking injunctive relief as well as damages for breach of contract and fraud was dismissed by this Court as against defendant 101-09 West 115<sup>th</sup> Street Housing Development Fund Corporation (“HDFC”) by order dated May 25, 2016. Ex. I<sup>1</sup> HDFC now moves, by order to show cause, for an order sanctioning plaintiffs’ law firm, Ginsburg & Misk LLP for willfully violating this

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<sup>1</sup>Unless otherwise noted, all references are to the exhibits annexed to the affirmation of Gloria Goldenberg, Esq. submitted in support of the instant motion.

Court's order dated January 21, 2016 on the ground that it released escrow funds to itself so that its fee could be paid, and directing Ginsburg & Misk to restore the escrow funds until further order of this Court. After oral argument, and upon reviewing the parties' papers and the relevant statutes and case law, the motion is **denied**.

**FACTUAL AND PROCEDURAL BACKGROUND:**

In July of 2004, HDFC, as landlord, and Mareb, as tenant, entered into a lease agreement pursuant to which Mareb rented a ground floor store located at 107 Lenox Avenue, New York, New York ("the premises"). The lease expired on July 31, 2011, after which time Mareb continued in possession of the premises as a month-to-month tenant.

By correspondence dated May 28, 2015, HDFC advised Mareb that its month-to-month tenancy was to be terminated. However, in lieu of terminating the tenancy, HDFC began negotiating a new lease with Mareb. Pursuant to proposed new lease, the premises were to be renovated and converted from a discount store to a retail variety store. Ex. B to HDFC's Mot. To Dismiss, at p. 1 of 20. The proposed lease was for a 7 year term commencing on August 1, 2015. Id. The principals of Mareb formed a new corporate entity, Variety, which was to be the tenant under the lease. Id. at p. 1 of 20. The proposed lease required Variety to pay two months security (\$7,730.90) (Ex. B to HDFC's Mot. To Dismiss, at p. 1 of 20, p. 3 of 20) and to maintain commercial general liability insurance with minimum coverage of \$1 million. (Id., at p. 6 of 20). The proposed lease was sent to Mark Saleh, a principal of Mareb and Variety, on August 10, 2015. Ex. B to HDFC's Mot. To Dismiss.

On or about August 27, 2015, Variety's attorneys returned the unsigned proposed lease to

HDFC along with a proposed addendum thereto. Ex. C to HDFC's Mot. To Dismiss. Neither HDFC nor Variety ever executed the proposed lease and HDFC never approved Variety's proposed addendum. Nevertheless, Variety began renovating the premises without either HDFC's approval or any permits required by the New York City Department of Buildings ("DOB"). Nor did Variety pay HDFC any security or procure insurance prior to the commencement of its renovations.

On October 7, 2015, Variety's attorneys were notified that the offer to lease was withdrawn due to its failure to execute the lease and because it had commenced renovation of the premises without DOB approval. A termination notice was sent on November 30, 2015 terminating Mareb's tenancy and Variety's occupancy.

On or about November 24, 2015, plaintiffs commenced the captioned action against HDFC, alleging as a first cause of action a claim for breach of contract; alleging as a second cause of action fraud; and alleging as a third cause of action a claim for temporary and permanent injunctive relief. Ex. A to HDFC's Mot. To Dismiss.

On or about December 14, 2015, Mareb and Variety were served with a holdover petition in the proceeding styled *101-09 West 115<sup>th</sup> Street Housing Development Fund Corporation v Mareb 99c Plus Enterprises, Inc., Variety City Inc. And "John and/or Jane Doe"* (hereinafter "the holdover action"), currently pending in the Civil Court of the City of New York, County of New York ("Civil Court") under Index Number 85407/15.

On or about December 23, 2015, HDFC moved (motion sequence 001), pursuant to CPLR 3211 (a) (7), to dismiss the complaint due to plaintiffs' failure to state a cause of action.

On January 21, 2016, plaintiffs moved (motion sequence 003), pursuant to CPLR 6301, for a preliminary injunction enjoining HDFC from evicting them from the premises; pursuant to CPLR

2201, for a stay of the holdover action; and pursuant to CPLR 602, removing and consolidating the holdover action with the captioned action. During a colloquy that day, this Court directed that plaintiffs place into escrow two months' use and occupancy (at the higher monthly rate of the lease they claimed existed between Variety and HDFC, as opposed to the monthly rate Mareb had paid for the premises) plus a security deposit, for a total of \$15,461.80. Ex. C, at pp. 14-20. This Court then issued an interim order stating as follows:

Plaintiffs' application for a [temporary restraining order] ["TRO"] is granted, hereby staying the matter pending in [Civil Court] under Index # 85407/15. Plaintiffs shall deposit \$15,461.80 into escrow pending a determination as to lost rent and pending determination in the instant action, within 2 weeks from today. Proof of such deposit shall be provided to [defendant] upon deposit. [Defendant] shall provide opposition to the [order to show cause] on or before February 26, 2016. Ex. A.

On February 4, 2016, Variety deposited \$10,261.80 into escrow. Ex. B. On February 10, 2016, after the expiration of the two-week period set forth in the order of January 21, 2016, Variety deposited an additional \$5,200 into escrow, bringing the total to \$15,461.80. Ex. B.

By order dated May 25, 2016, this Court denied plaintiffs' motion and granted defendant's motion, thereby dismissing the complaint. NYSCEF Docs. 80-82. In so holding, this Court held, inter alia, that the complaint failed to state claims for breach of contract, fraud, or injunctive relief and determined that there was no valid lease between Variety and HDFC. Id. The order also vacated all stays issued by this Court. Id.

On June 9, HDFC's attorney wrote to counsel for plaintiffs advising that, although the complaint had been dismissed and all stays were vacated, plaintiffs' attorneys were required to "maintain the escrow pending a determination of lost rent." Ex. H. The same day, plaintiffs'

counsel wrote to HDFC's attorney advising that the escrow was released to his firm immediately upon the dismissal of the action "for payment of legal fees." Ex. H. Plaintiffs' counsel further stated that HDFC's claim for use and occupancy could be pursued in the Civil Court action now that all stays had been vacated. Id.

On June 21, 2016, HDFC brought the instant order to show cause for an order sanctioning and holding in contempt plaintiffs' law firm, Ginsburg & Misk LLP for willfully violating this Court's order dated January 21, 2016 on the ground that it released the escrow to itself so that its fee could be paid, and directing Ginsburg & Misk to restore the escrow funds until further order of this Court.

On June 24, 2016, the Civil Court entered a judgment in favor of HDFC and against plaintiffs in the amount of \$30,833.70. Ex. D to Reply Aff.

#### **POSITIONS OF THE PARTIES:**

HDFC argues that the TRO was issued on the condition that plaintiffs pay use and occupancy and deposit into escrow with their attorneys \$15,461.80 "pending a determination of lost rent and this action." Goldenberg Aff., at par. 3. It asserts that, after it received this Court's May 25, 2016 order dismissing plaintiffs' complaint, it advised plaintiffs' counsel that the escrow was to be maintained until there was a determination of lost rent. Ex. H. HDFC maintains that the dismissal of the complaint did not allow plaintiffs' counsel to release the escrow and that the representation by plaintiffs' counsel that plaintiffs would pay use and occupancy during the stay was made in bad faith.

In opposition, plaintiffs argue that the money placed in escrow was solely to cover two months' rent plus the security deposit for the premises under the new proposed lease between Variety and HDFC, provided the said lease was deemed valid by this Court. Plaintiffs maintain that, since this Court held that the lease was not valid, there never came a time at which the escrow money was to be released to HDFC. Plaintiffs further assert that, since the TRO was vacated simultaneously with the dismissal of the action, the escrow money was properly released. Further, plaintiffs claim that, since this Court's jurisdiction over the parties terminated with the dismissal of the action, HDFC's claim regarding the escrow money is not properly before this Court.

In reply, HDFC argues, *inter alia*, that by holding that there was no lease between Variety and HDFC, this court effectively determined that Mareb was liable for rent for the months of August through November of 2015 since its tenancy was ended as of November 30, 2015 by a notice to terminate. Ex. C to Reply Aff. HDFC further asserts that the distinction between "rent" and "use and occupancy" is "classic form over substance." Reply Aff., at par. 13.

#### **LEGAL CONCLUSIONS:**

HDFC's motion is denied in all respects. This action was dismissed by order dated May 25, 2016, at which time the matter was marked "disposed". Ex. I. The order of dismissal also vacated all stays, including the stay of the Civil Court proceeding. *Id.* With the exception of a renewal or reargument motion pursuant to CPLR 2221, once the matter was marked disposed, this Court was no longer able to entertain any further motions in connection therewith. Given the termination of the action and lifting of all stays, plaintiffs' counsel was entitled to release the escrow monies deposited. Further, there is nothing in this Court's orders of January 21 or May 25, 2016 which

prevented plaintiffs' counsel from collecting their fees from the escrow deposited by plaintiffs.

Curiously, HDFC brought the instant motion on June 21, 2016, after the dismissal of the Supreme Court action. At the same time HDFC was moving in Supreme Court, it was simultaneously pursuing its rights in Civil Court, as evidenced by the judgment in the amount of \$30,833.70 which it obtained against plaintiffs in that court on June 24, 2016. Ex. D to Reply Aff. Given the judgment it obtained in its holdover proceeding against plaintiffs in the proper venue of Civil Court, HDFC has clearly obtained the remedy to which it is entitled. Given that the Civil Court has jurisdiction over, and has determined the matter of, the payments to be made by plaintiffs, there is thus no reason for this Court to entertain any further requests by HDFC to enforce payments by plaintiffs.

Although HDFC insists that plaintiffs' attorney violated the terms of the January 21, 2016 order by releasing the escrow money, this Court disagrees. The January 21, 2016 order, drafted by counsel for the parties, is regrettably ambiguous. Ex. A. As noted above, the order states, inter alia, that "plaintiffs shall deposit \$15,461.80 into escrow pending a determination as to lost rent and pending determination in the instant action." Id. However, a transcript of the proceedings on the day the order to show cause was signed reflects that the monies to be paid into escrow were for use and occupancy. Ex. C at pp. 15-20. Further, the January 21, 2016 order likely should have read "pending determination of the instant action" rather than "pending determination in the instant action," meaning that the monies would not need to be held in escrow once the matter was dismissed. Even given this apparent error in drafting the order, however, there is no evidence of any willful wrongdoing by plaintiff's counsel which would warrant the imposition of sanctions.

Pursuant to 22 NYCRR 130-1.1(a) and (b), the court, in its discretion, may award sanctions as a result of frivolous conduct. Such sanction may not exceed \$10,000 (22 NYCRR 130-1.2). “Frivolous conduct” encompasses 1) conduct completely without merit in law, which cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; 2) conduct undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; and 3) the assertion of material factual statements that are false. 22 NYCRR 130-1.1 (c). Having considered the foregoing factors, this Court concludes that HDFC failed to establish that plaintiffs or their counsel engaged in frivolous conduct. Indeed, HDFC does not even address these factors in its motion. Thus, this Court declines to impose sanctions pursuant to 22 NYCRR 130-1.1 et. seq.

Finally, as plaintiffs argue, the cases cited by HDFC are distinguishable. For example, in *Greenapple v Capital One, N.A.*, 92 AD3d 548 (1<sup>st</sup> Dept 2012), the Appellate Division, First Department held that plaintiff stated a cause of action for breach of fiduciary duty against an escrow agent where the latter violated the terms of an escrow agreement. No such agreement existed here. In *Miller v J.A. Keefe, P.C.*, 276 AD2d 757 (2d Dept 2000), the Appellate Division held that, where an attorney acts as an escrow agent and the terms of the escrow agreement do not provide for legal fees to be paid from the escrow, the payment of such fees from the escrow constitutes conversion. Here, however, where no escrow agreement existed, these cases do not apply.


Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant 101-09 West 115<sup>th</sup> Street Housing Development Fund Corporation is denied in all respects; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: October 31, 2016

ENTER:



KATHRYN E. FREED, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT