

**Wunderlich v Liberty Meadows, LLC**

2017 NY Slip Op 33338(U)

October 16, 2017

Supreme Court, Suffolk County

Docket Number: Index No.: 611937/2016

Judge: William G. Ford

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SHORT FORM ORDER

INDEX NO.: 611937/2016

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 38 - SUFFOLK COUNTY

**PUBLISH**

**PRESENT:**

HON. WILLIAM G. FORD  
JUSTICE of the SUPREME COURT

Motion Submit Date: 07/27/17  
Motion Seq #: 003 - MD

ALAN WUNDERLICH,

Plaintiff,

-against-

PLAINTIFF'S COUNSEL:

Law Offices of James A. Prestiano, P.C.  
By: James A. Prestiano, Esq.  
631 Commack Road, Suite 2A  
Commack, NY 11725

LIBERTY MEADOWS, LLC., DEMETRIUS  
TSUNIS & ENRICO SCARDA,

Defendants,

and

DEFENDANTS' COUNSEL:

Esseks Hefter Angel Di Talia & Pasca, LLP.  
By: Anthony C. Pasca, Esq.  
108 E Main Street, P.O. Box 270  
Riverhead, NY 11901

THE HOWARD O. WUNDERLICH  
REVOCABLE LIVING TRUST, THE  
ADELINE E. WUNDERLICH REVOCABLE  
LIVING TRUST & ADELINE E.  
WUNDERLICH,

Nominal Defendants.

In connection with plaintiff's motion pursuant to CPLR 2221(d) seeking leave to reargue, the Court has considered the following in reaching its determination:

1. Plaintiff's Notice of Motion, Affirmation in Support dated May 2, 2017 and supporting papers;
2. Defendant's Affidavits in Opposition dated May 17, 2017, Defendant's Counsel's Affidavit dated May 18, 2017 and supporting papers;
3. Plaintiff's Reply Affirmation in Further Support dated May 31, 2017; it is

**ORDERED** that plaintiff's motion seeking leave to reargue a prior decision of this Court is denied in accord with the discussion below.

Presently pending before the Court is plaintiff's application made pursuant to CPLR 2221(d) seeking leave to reargue its motion previously denied by the Court in a short-form order dated March 3, 2017 wherein the Court *inter alia* denied plaintiff's motion for a preliminary injunction.

### Factual Background

As the facts underlying the parties' dispute have been thoroughly examined and detailed in the Court's prior order, the parties' familiarity with which is presently assumed, they will not be again detailed herein unless material and necessary for the disposition of plaintiff's motion.

Plaintiff Alan Wunderlich ("plaintiff" or "Wunderlich") brought a breach of contract action seeking the equitable remedy of specific performance against defendants Liberty Meadow, LLC., a real estate development entity owned or operated by individual defendants Enrico A. Scarda and Demetrius A. Tsunis ("defendants"). The action arises out of an unconsummated real estate transaction whereby Wunderlich maintains he was the purchaser entitled to title to a specific, unique and piece of realty more commonly known to the parties as the Alan Condo Unit in the Village Vista Condominium community located in the Village of Port Jefferson, Town of Brookhaven, County of Suffolk, New York.

As relevant and germane to his pending motion, Wunderlich has maintained that he was a party and signatory to the purchase/sale agreement for the condo unit that called for conveyance or delivery of the unit to him on or before an unsuccessful "time of the essence" closing April 21, 2016.<sup>1</sup> When the property did not close, plaintiff sought by Order to Show Cause a temporary restraining order which was granted by Special Term (Molia, J.) on August 3, 2016, which was subsequently extended by order of this Court dated October 3, 2016.

Since then pursuant to this Court's directive, plaintiff posted an undertaking in the amount of \$100,000.00 effective October 22, 2016. The Court heard oral argument in connection with plaintiff's motion pursuant to CPLR 6310 & 6311 for a preliminary injunction and defendants' cross-motion to dismiss pursuant to various sections of CPLR 3211 on March 1, 2017. Thereafter this Court rendered its decision by short-form order dated March 3, 2017 finding triable questions of fact on whether plaintiff had standing to sue for breach of contract and seek specific performance of the Alan Condo Unit purchase agreement. Thus, this Court denied plaintiff's motion for preliminary injunction, but also denied defendants' motions to dismiss.

### Summary of the Parties' Positions & Arguments

Plaintiff bases his motion arguing that the Court has made several misstatements or misapprehensions of key and material fact, which he believes negatively affected the outcome of his prior motion for preliminary injunction. Specifically, plaintiff takes issue and finds fault with the Court's failure to appreciate that he was a signatory to Alan Condo Unit purchase agreement. From this, plaintiff thus argues that the Court's analysis and determinations that plaintiff did not specifically demonstrate his standing to warrant issuance of an injunction. Wunderlich in essence argues that as a party to the agreement and signatory, he clearly would have standing to litigate breach of the agreement and seek legal or equitable remedies.

<sup>1</sup> It is undisputed that originally closing was set to occur in a separate contractual agreement by and between plaintiff's parents, the nominal defendants herein Adeline E. Wunderlich and her husband's revocable living trust, in a 2010 agreement which has been referred by the parties and this Court as the "Master Agreement." However, in a short-form order dated March 28, 2016 Supreme Court, Suffolk County (Baisley, J.) dismissed plaintiff's action, awarding defendants' summary judgment for plaintiff's failure to make closing "time of the essence."

Therefore plaintiff claims that in addition to his prior arguments in the alternative to being an assignee of his parents' rights under the 2010 Master Agreement to seek money damages on personal guarantees made by defendants as mortgagors, or straight monetary recovery on a \$500,000.00 promissory note; or lastly to seek specific performance for failure to timely deliver the Alan Unit to plaintiff; or that of an intended or third-party beneficiary, he has direct personal and firsthand rights to litigate his present claim.

In response however, defendants make two separate and distinct arguments. At the outset, defendants contend that this Court need not consider the merits of plaintiff's application since it has been rendered moot or academic due to the occurrence of subsequent but superseding events. Defendants note that approximately a month after entry of this Court's prior order denying plaintiff his injunction, the Alan Unit was sold and conveyed to a third-party, the Ferentino Enterprises LLC Series Six for a purchase price of \$800,000.00 on April 10, 2017. Thereafter, the property apparently has again sold and changed hands to an individual named Michael Napolitano. Thus, defendant argues that since the realty subject to plaintiff's prior motion has been sold and defendants no longer retain title to that property, the question of whether plaintiff has standing to litigate a claim for specific performance has been rendered moot. Rather defendants maintain that plaintiff's sole remaining remedy is now to proceed against them for damages.

Arguing on reply and in further support of his motion, plaintiff charges that the two subsequent sale transactions of the property were fraudulent or sham transactions. In support of this allegation, counsel submits a series of unauthenticated photographs in support of his argument that the property appears in substantially the same condition is has circa May 2017 that it did in January 2017. Wunderlich argues that this is significant because despite having sold the condo unit, defendants maintain a sales office and model viewing unit on premises.

In response by sur-reply, defendants have tendered both the deed and a handwritten lease agreement for the proposition of establishing both the validity of the transaction and for the notion that defendants were permitted until June 30, 2017 to lease the premises from the new owners in the same form or fashion as it was previously used.

### Discussion

A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Elder v. Elder*, 21 AD3d 1055, 1055, 802 NYS2d 457; see *Matter of Allstate Ins. Co. v. Liberty Mut. Ins.*, 58 AD3d 727, 872 NYS2d 146). It must be based upon new facts, not offered on the original application, "that would change the prior determination" (CPLR 2221[e][2]; see *Matter of Korman v. Bellmore Pub. Schools*, 62 AD3d 882, 884, 879 NYS2d 194). The new or additional facts must have either not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion (see *Cole-Hatchard v. Grand Union*, 270 AD2d 447, 705 NYS2d 605). However, in either instance, a "reasonable justification" for the failure to present such facts on the original motion must be presented \*787 (CPLR 2221 [e][3]). The determination of what constitutes a "reasonable justification" is within the Supreme Court's discretion (*Heaven v. McGowan*, 40 AD3d 583, 586, 835 N.Y.S.2d 641; *Dervisevic v Dervisevic*, 89 AD3d 785, 786-87, 932 NYS2d 347, 348-49 [2d Dept 2011]).

The Second Department has made clear that motions for reargument are “addressed to the sound discretion of the court” and properly lie “on a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision” (*Vaccariello v Meineke Car Care Ctr., Inc.*, 136 AD3d 890, 892, 26 NYS3d 139, 141–42 [2d Dept 2016]).

“Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy” (*Matter of Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172, 746 NYS2d 429 [2002]; *Citineighbors Coalition of Historic Carnegie Hill ex rel. Kazickas v New York City Landmarks Preserv. Com'n*, 2 NY3d 727, 728–29 [2004]).

“Generally, courts are precluded ‘from considering questions which, although once live, have become moot by passage of time or change in circumstances’ ”(*Matter of Brianna L. Marie A.J.*, 103 AD3d 181, 185, 956 NYS2d 518, *Olga L.M.A. v Ronald A.B.M.*, 135 AD3d 741, 742, 24 NYS3d 129, 131 [2d Dept 2016]).

Having reviewed all of the parties’ submission and arguments, this Court agrees with plaintiff in part. The Court’s prior order did omit reference to plaintiff being a signatory to the Alan Condo Unit’s purchase agreement. However, this revelation does not carry the day, nor materially affect the Court’s prior determination or analysis. Contrary to plaintiff’s claims, this Court’s prior determination found that the 2010 Master Agreement, and particularly its election of remedies provision residing at paragraph 3(b)(iii) to be dispositive and controlling on the proper remedies for breach of defendants’ obligations to tender, convey or deliver the Alan Condo Unit to plaintiff on or before April 2012.

Plaintiff did not then, and has not now persuaded this Court that his status as a party or signatory to the purchase agreement was sufficient to separately and independently warrant Wunderlich standing to sue for breach and seek specific performance as his remedy. Instead, as previously stated, the 2010 Master Agreement between the nominal defendants and defendants, notably not including plaintiff, controlled the recoverable categories of damages defendants could be liable for in the event of breach: \$500,000.00 money damages; extension of time to close title on the Alan Condo Unit; or an action for specific performance. Here, the nominal defendants have not yet seen fit to seek performance, nor have they appeared in this action or participated in any way.

At any rate, apart from plaintiff’s application falling short on its merits, this Court agrees with defendants that the application has been rendered academic or moot by the development of subsequent events. Moreover, this Court does not believe that plaintiff’s claims warrant invocation of the exceptions to the mootness doctrine as presently presented since the issue is not likely to recur between the parties in the future in the same factual context, nor is the instant issue one of a “substantial and novel” issue of law of statewide importance in need of clarification (*Field v Stamile*, 85 AD3d 1164, 1165, 926 NYS2d 307, 308 [2d Dept 2011]). It is well settled that where during the pendency of a litigation where the subject real property has subsequently sold to a nonparty, plaintiff’s remedy seeking title is rendered academic (*Asher v Gigante*, 21 AD3d 916, 917, 800 NYS2d 642 [2d Dept 2005]).

**Conclusion**

Thus in accordance with all of the foregoing this Court finds that plaintiff's application has been rendered moot by the property's subsequent sale and divestiture of title from the defendants to third and non-parties to this action. Further, this Court is not persuaded that its omission of the fact that plaintiff Alan Wunderlich was a signatory and party to the condominium unit purchase agreement with defendants was such a significant or material omission as to have altered the Court's prior analysis or determinations to warrant revisiting or modifying the prior order denying issuance of a preliminary injunction.

Thus, it is accordingly

**ORDERED** that plaintiff Alan Wunderlich's motion pursuant to CPLR 2221(d) for leave to reargue is hereby **denied**; and it is further

**ORDERED** that plaintiff is hereby directed to serve a copy of this decision and order with notice of entry on counsel for the defendants forthwith.

The foregoing constitutes the decision and order of this Court.

Dated: October 16, 2017  
Riverhead, New York



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**WILLIAM G. FORD, J.S.C.**

\_\_\_ FINAL DISPOSITION

X  NON-FINAL DISPOSITION