

**Board of Mgrs. of the Spencer, Condominium v
Hazan**

2019 NY Slip Op 32354(U)

August 2, 2019

Supreme Court, New York County

Docket Number: 154149/2012

Judge: Eileen A. Rakower

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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: PART 6

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BOARD OF MANAGERS OF THE SPENCER,
CONDOMINIUM,

Plaintiff,

Index No.
154149/2012

- against -

ELIZABETH HAZAN, RAYMOND HOULE AND 9221-0228 QUEBEC, INC., REAL ESTATE HOLDING GROUP, LDC, AND "JOHN DOE" No. 1 through "JOHN DOE" No.15, the true name of said defendants being unknown to Plaintiff, the parties intended to be those persons having or claiming an interest in the mortgaged premises described in the complaint by virtue of being tenants, occupants, or judgment-creditors, or lienors of any type or nature in all or part of said premises,

**DECISION
and ORDER**

Mot. Seq. #11

Defendants.
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HON. EILEEN A. RAKOWER, J.S.C.

This foreclosure action of a residential condominium unit arose out of the unpaid maintenance payments. About four years ago the parties entered into the Confidential Stipulation of Settlement resolving the above-captioned action and the related action filed under index no. 159254/2013 (the "Agreement").

Presently before the Court is Plaintiff Board of Managers of the Spencer Condominium's ("Plaintiff") motion to enforce the Agreement.

Additionally, as set forth in the Affirmation of Plaintiff's counsel, Tracy Peterson, Esq., Plaintiff is seeking an Order: (a) requiring Defendants Elizabeth Hazan ("Hazan"), 9221-0228 Quebec, Inc., Raymond Houle, and Real Estate Holdings Group, LDC (collectively "Defendants") to immediately engage a licensed real estate broker associate with Douglas Elliman (the "Broker") to appraise 1 East 62nd Street, Unit 1A, New York, New York's (the "Apartment") rental and sale values and then list and market the Apartment for rent and/or sale at process

determined by the broker in its sole discretion, without influence or direction from Defendants; (b) requiring that Defendants share with the Broker that portion of the Agreement mandating that the Broker reduce the rental price for the Apartment, in its sole discretion without influence or direction from Defendants, if no offers are received with the first sixty days of listing; (c) requiring Defendants to accept an offer to rent or buy the Apartment in the amount deemed by the Broker to be in accordance with the Apartment's fair market value; and (d) setting a hearing date for the determination of reasonable attorney's fees and costs incurred by Plaintiff.

In the alternative, Plaintiff is requesting an Order: (a) reforming the Agreement to permit Plaintiff to engage a licensed real estate broker, at Defendants' sole cost and expense, to appraise the Apartment's rental and sale value and then list and market the Apartment for rent and sale; (b) permitting Plaintiff to share with the Broker that portion of the Agreement mandating that the Broker reduce the rental price for the Apartment, in its sole discretion, without influence or direction from Defendants, if no offers are received with the first sixty days of listing; (c) reforming the Agreement to permit Plaintiff to determine whether to accept an offer, on the Defendants' behalf, to rent or purchase the Apartment in an amount deemed by the Broker to be in accordance with the Apartment's fair market value; and (d) setting a hearing date for the determination of reasonable attorney's fees and costs incurred by Plaintiff.

Defendants submit opposition.

Plaintiff's Contentions

Plaintiff argues that Defendants "failed to diligently market the Apartment for sale or rent" pursuant to the Agreement. Plaintiff asserts that reformation is appropriate because Defendants fraudulently induced Plaintiff into believing that Defendants would undertake good faith efforts to get the Apartment either rented or sold to meet their financial obligations. Plaintiff contends that in the past four years, Defendants have failed to sell or rent the Apartment.

In opposition, Defendants argue that Plaintiff's motion should be denied because it "does not specify any relief requested beyond 'enforcing' the stipulation of settlement". (Defendants' Aff. in Opp. at 2). Defendants assert that it is improper for Plaintiff to seek relief not requested in the Notice of Motion but by "some other document". Defendants argue that Plaintiff failed to comply with a condition precedent in the Agreement, specifically "the parties agreed to 'meet and confer

regarding any dispute prior to seeking judicial intervention” (Defendants’ Aff. in Opp. at 3). Defendants assert that Plaintiff has not attempted “to meet and confer” prior to bringing this motion.

Moreover, Defendants contend that Hazan’s bankruptcy matter has concluded and a discharge was issued on December 6, 2018. Defendants argue that Plaintiff participated in Hazan’s bankruptcy proceeding and agreed to a plan of reorganization, therefore, if there was non-compliance with the Agreement, Plaintiff should have contacted Hazan’s counsel for the bankruptcy proceeding. Defendants assert that the plan of reorganization limits Plaintiff’s sum to \$109,554.06, and Plaintiff cannot seek an additional amount or attorney’s fees.

Defendants argue that the motion should be denied because Plaintiff frustrated Defendants’ performance. Defendants assert that Plaintiff “and its agents have refused to open the door for showings, turned off electricity breakers to the apartment in the basement preventing the showing of the apartment, preventing a cleaning crew access, preventing broker showings, and made the process of renting the unit so difficult as to compel the retained real estate agent to quit” (Defendants’ Aff. in Opp. at 4). Defendants contend there has not been a material breach of the Agreement. Defendants argue that the Agreement states Defendants “may satisfy their obligations to pay the judgment” by either selling or leasing the Apartment. Defendants assert that there is no material breach because the language in the Agreement say “may” and not “shall”.

Defendants assert that Plaintiff is seeking relief beyond the Agreement. Defendants contend that the parties “sought to maintain the highest confidentiality of the agreement” and that the relief seeking the parties to provide the Broker with the Agreement goes against the intent of the parties. Defendants argue that they cannot be compelled to sell the Apartment and that the “fair market value” is irrelevant because it could exceed the liabilities at closing. Defendants assert that Plaintiff failed to “meet and confer” and therefore Plaintiff is not entitled to attorney’s fees. Additionally, Defendants argue that Plaintiff’s request to reform the Agreement goes against the private Agreement between the parties. Defendants contend that there is no material breach and the Court should order a hearing to determine if a material breach did occur. Defendants assert that if the Court determines there is a lapse in the listing agreements renewal, Defendants should have the opportunity to cure the lapse.

Legal Standards

“A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake”. *Greater New York Mut. Ins. Co. v. United States Underwriters Ins. Co.*, 36 A.D.3d 441, 443 [1st Dept. 2007]. “[I]n the case of unilateral mistake, it must be alleged that one party to the agreement fraudulently misled the other, and that the subsequent writing does not express the intended agreement” *Id.* “A bare, conclusory claim of unilateral mistake, which is unsupported by legally sufficient allegations of fraud, fails to state a cause of action for reformation”. *Id.* “The essential elements of a claim of fraud are misrepresentation of a material fact, falsity, scienter and deception”. *Id.*

Discussion

Plaintiff’s counsel brought an ACRIS document to oral argument stating there was a transfer of the Apartment, but Defendants’ counsel was not aware of any transfer and could not provide any information. In the face of a transfer, the Court cannot enforce the Settlement Agreement as requested. Additionally, assuming there was a transfer of the Apartment, then Plaintiff has failed to join a necessary party. In light of the fact that Plaintiff brought the transfer to the attention of the Court, there is no need for a hearing.

Wherefore, it is hereby,

ORDERED that Plaintiff’s motion is denied in the entirety.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: AUGUST 2, 2019



Eileen A. Rakower, J.S.C.