

Ambroise v Palmana Realty Corp.

2019 NY Slip Op 32640(U)

August 29, 2019

Supreme Court, Kings County

Docket Number: 518775/18

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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PAUL AMBROISE,

Plaintiff,

Decision and order

- against -

Index No. 518775/18

PALMANA REALTY CORP.,

Defendant,

MS # 788

August 29, 2019

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PRESENT: HON. LEON RUCHELSMAN

On April 30, 2019 the court denied the defendant's motion seeking to reargue the denial of a dismissal of the cause of action for specific performance. Further, the court held the parties must engage in discovery to determine whether the plaintiff can satisfy the elements of specific performance. Consequently, on June 11, 2019 the defendant filed a motion compelling discovery. The motion also sought "other and further relief as the Court may deem just equitable and proper under the circumstances" (see, Notice of Motion, paragraph 6). On July 9, 2019 the defendant filed a proposed order striking the complaint and in essence ending the action. On July 11, 2019 the plaintiff then moved by Order to Show Cause seeking to temporarily enjoin the court from signing that order. The court declined to sign that Order to Show Cause and signed the defendant's order seeking dismissal of the action. On July 22, 2019 the Appellate Division stayed all proceedings pending the hearing and determination of plaintiff's Order to Show Cause. That Order to Show Cause will now be considered.

Conclusions of Law

It is well settled that to obtain a preliminary injunction the moving party must demonstrate: (1) a likelihood of success on the merits, (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (Volunteer Fire Association of Tappan, Inc., v. County of Rockland, 60 AD3d 666, 883 NYS2d 706 [2d Dept., 2009]).

The Second Department has noted that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (Town of Smithtown v. Carlson, 204 AD2d 537, 614 NYS2d 18 [2d Dept., 1994]). Thus, the Second Department has been clear that the party seeking the drastic remedy of a preliminary injunction has the burden of proving each of the above noted elements "by clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Regarding the first prong, for the plaintiff to establish a likelihood of success on the merits, he typically must establish a prima facie case or cause of action (McLaughlin, Piven, Vogel, Inc., v. W. J. Nolan & Co., 114 AD2d 165, 498 NYS2d 146 [2d Dept., 1986]). In this case the basis for the injunction is grounded in the fact it is alleged the failure to grant such relief will cause harm to the plaintiff since they will lose the ability to close and in effect own the property. Of course, the defendant disputes these underlying facts supporting the

injunctive relief and indeed the allegations are heavily and fundamentally disputed. In fact, the original motion was brought by the defendant seeking discovery to discern whether facts exist establishing whether the cause of action for specific performance can be pursued. The plaintiff argues that a likelihood of success on the merits exists because the court has twice permitted the claim to survive a motion to dismiss. However, that does not mean the plaintiff has a likelihood of success on the claim, rather, under the standards that govern motions to dismiss the court held the plaintiff pled a prima facie cause of action which required discovery to support and eventually prove that claim. Indeed, the standard to succeed a motion to dismiss is far more lenient than the clear and convincing standard to obtain an injunction (JMM Sunrise Auto., LLC v. Volkswagen Group of America Inc., 49 Misc3d 1208(A), 26 NYS3d 725 [Supreme Court of Nassau County 2015]). Thus, to obtain an injunction the plaintiff must demonstrate a likelihood of success of the merits, which considering the facts of this case, consists of evidence the plaintiff was ready, willing and able to close. The plaintiff has not presented any evidence of such ability and willingness and consequently, the motion seeking an injunction is denied. To the extent the stay is already in effect, such stay is effective only until the hearing and determination of this motion. Thus, upon the hearing and determination of this motion,

the court hereby denies the continuance of any stay.

Turning to the court's authority to permit the defendant to settle an order dismissing the action, first, it must be noted the court did not dismiss the action sua sponte. As noted, the defendant asked for any equitable relief that is just and proper, which includes the right to dismiss an action if warranted. Second, the court did not dismiss the action sua sponte. Rather, the court permitted the defendant to settle an order giving the plaintiff time in which to provide discovery and negate the execution of any settled order. The plaintiff did not provide any meaningful discovery and moved to stop the signing of the order on procedural grounds instead. At this juncture, the plaintiff has still failed to provide any discovery and consequently, the order signed by the court dismissing the complaint is hereby rendered fully valid and enforceable.

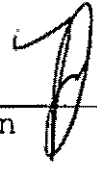
Thus, all motions by the plaintiff seeking to block the enforcement of the dismissal order are hereby denied.

So ordered.

ENTER

DATED: August 29, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC



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