

**Breskin v Moronto**

2020 NY Slip Op 31192(U)

May 4, 2020

Supreme Court, Kings County

Docket Number: 503972/2014

Judge: Devin P. Cohen

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Supreme Court of the State of New York  
County of Kings

Index Number 503972/2014

Part 91

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

STEPHEN BRESKIN AND 1525 GREENE AVE LLC,

Plaintiffs,

against

SATURNINA GOMEZ MORONTO,

Respondent.

**Papers**

**Numbered**

Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u>          </u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>          </u>
Other .....	<u>          </u>

Upon review of the foregoing documents, Easy Greene 1525 LLC’s (“Easy Greene”) motion to intervene as a plaintiff in this action and to amend the caption accordingly, to substitute defendant and amend the caption accordingly, and to schedule a hearing to determine damages from defendant’s contempt and to allow Easy Greene to participate in that hearing, is decided as follows:

**Procedural History**

Plaintiffs commenced this action against defendant for specific performance to enforce a contract in which defendant agreed to sell the subject premises to plaintiffs. In addition to specific performance, plaintiffs also sought attorney’s fees and costs.

By order, dated February 22, 2016, the court (Schack, J.) granted plaintiffs summary judgment on their specific performance claim and scheduled a closing date. The order further granted plaintiffs leave to move for attorney’s fees and costs. By order, dated March 7, 2016, the court (Schack, J.) granted renewal/reargument but affirmed the prior order. The court further directed counsel for defendant, Peter Zirbes, to hold \$100,000 in escrow from the purchase price

for a possible award of attorney's fees and costs. By order, dated May 29, 2019, the Second Department affirmed the March 7, 2016 order.

By Order, dated May 23, 2018, the court (Baynes, J.): (1) awarded plaintiffs a specified sum of attorneys' fees and costs; (2) denied the motion to hold defendant in contempt; (3) denied defendant's cross-motion to vacate; and (4) directed defendant to tender the subject premises to plaintiffs on June 15, 2018. Plaintiffs appealed the portion of the order that awarded of fees and costs and the denial of contempt. The Second Department granted the appeal and reversed that portion of the court's order. In its decision, dated May 29, 2019, the Second Department held that defendant was in contempt of the courts' orders, dated February 22, 2016 and March 7, 2016, and directed the Supreme Court to hold a hearing to determine attorneys' fees.

By order dated October 26, 2018, the court (Knipel, J.) directed the Sheriff to convey the subject premises to plaintiffs and to execute and record the deed memorializing the transfer. The order further ordered that, should defendant deliver the subject premises as directed in prior orders and pursuant to the contract, defendant would receive the amount due and owing under the contract, minus the down payment and the award of attorneys' fees and costs. The Sheriff complied with the court's order and, pursuant to a deed, dated December 3, 2018, plaintiff 1525 Greene Ave LLC became owner of the subject premises.

By order, dated January 10, 2019, the court (Knipel, J.) denied defendant's motion to stay the action based on defendant's claimed incompetence. Elisa Salcedo commenced a guardianship proceeding for defendant. By order, dated April 5, 2019, the court (Ruchelsman, J.), appointed Ms. Salcedo the guardian of defendant. By order, dated August 2, 2019, Judge

Ruchelsman granted Easy Greene permission to pay off defendant's mortgage. The parties do not dispute that the mortgage was paid off.

By deed, dated February 13, 2019, Easy Greene became the owner of the subject premises. On April 1, 2019, Easy Greene commenced summary holdover eviction proceedings against defendant and Ms. Salcedo, who were purportedly the first-floor tenants of the subject premises, as well as a different third-floor tenant. Easy Greene settled the action against the third-floor tenant, who consented to a final judgment of possession and warrant of eviction. The action regarding the first floor went to trial in Kings County Housing Court. On September 26, 2019, the court (Weisberg, J.) awarded possession to Easy Greene and stayed the warrant of eviction to and including October 31, 2019.

### Analysis

Pursuant to CPLR 1018, “[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action”. In order to substitute as the real party-in-interest, the movant must establish the transfer and that it is the successor to the claim (*U.S. Bank, N.A. v Duran*, 174 AD3d 768, 769 [2d Dept 2019]).

Defendant does not dispute that Easy Greene is the new owner of the subject premises. In its proposed complaint, Easy Greene recounts the procedural history of this action. Easy Greene further alleges that, despite the court's orders and Easy Greene's undisputed ownership of the subject premises, defendant and Ms. Salcedo have refused to vacate the first floor. Based on these allegations, Easy Greene asserts a claim pursuant to RPAPL § 813, which states, “Where real property is sold by virtue of an execution, the person to whom a conveyance is executed

pursuant to the sale may maintain an action for waste, committed thereon after the sale, against the person who was then in possession of the property.” As alleged by Easy Greene, the waste in this case is lost rent caused by defendant’s and Ms. Salcedo’s refusal to vacate.

This proposed claim is unlike plaintiffs’ claims for specific performance and attorneys’ fees. Additionally, plaintiffs’ specific performance claim has been successfully adjudicated to conclusion, wherein the premises was previously transferred to plaintiffs. Moreover, Easy Greene is not entitled to the attorneys’ fees and costs that the court previously awarded to plaintiffs. Consequently, substitution is not the proper tool to address Easy Greene’s claims.

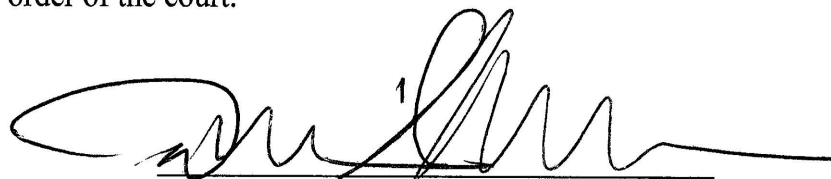
Alternatively, Easy Greene seeks to intervene pursuant to CPLR 1012[a][3], which allows intervention when “the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment”. Plaintiffs’ claims involved claims of title to the subject premises, while Easy Greene’s claim is for waste in the form of lost rent. Additionally, any judgment awarded to plaintiffs in the form of attorneys’ fees and costs will not adversely affect Easy Greene, whose claim for damages due to lost rent is entirely separate.

In addition, Easy Greene requests that this court substitute Ms. Salcedo as guardian for defendant as the proper party to this action. CPLR 1016 states that “[i]f a party is adjudicated incompetent or a conservator has been appointed, the court shall order substitution of his committee or conservator.” Defendant argues that Easy Greene cannot sue a guardian without the court’s permission. In his order, dated August 2, 2019, Judge Ruchelsman specifically granted such permission to plaintiffs and Easy Greene.

For the foregoing reasons, Easy Greene’s motion is granted to the extent that “Elisa Salcedo, as Article 81 Guardian for Saturnina Gomez Moronta a/k/a Saturnina Gomez Moronto” is substituted for defendant, and the caption is amended, accordingly. The parties shall appear on a date to be determined after the court returns to normal operations for a hearing on plaintiffs’ claim for attorneys’ fees and costs. The remainder of Easy Greene’s motion is denied, without prejudice to any right Easy Greene might have to commence its own action.

This constitutes the decision and order of the court.

May 4, 2020  
**DATE**

  
**DEVIN P. COHEN**  
Justice of the Supreme Court