

**Board of Mgrs. of 150 E. 72nd St. Condominium v
Vitruvius Estates LLC**

2022 NY Slip Op 30588(U)

February 22, 2022

Supreme Court, New York County

Docket Number: Index No. 160831/2016

Judge: Margaret Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET CHAN PART 49M

Justice

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INDEX NO. 160831/2016

THE BOARD OF MANAGERS OF 150 EAST 72ND STREET CONDOMINIUM,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 007

- v -

DECISION + ORDER ON MOTION

VITRUVIUS ESTATES LLC,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 239, 252, 253, 254, 256, 257, 258, 259, 260, 261, 262

were read on this motion to/for RESETTLE ORDER

The Board of Managers of 150 East 72nd Street Condominium (plaintiff) moves, by order to show cause, for an order pursuant to CPLR 2221(a) resettling the Amended Decision and Order dated February 25, 2021 (NYSCEF # 236). Defendant Vitruvius Estates LLC, the sponsor of the condominium development (the sponsor), opposes the motion.

Background

In this action, plaintiff condominium board seeks to recover damages for inter alia, purported construction defects in its condominium building and units and for the failure to provide the required minimum reserve fund. The sponsor asserts a counterclaim alleging that plaintiff repudiated its agreement to close on the Residential Manager's Unit (RM Unit) and to pay all the amounts due for the unit, and seeks rescission, ownership of the unit, and restitution of the benefits conferred to plaintiff through its possession of the unit.

By Decision and Order dated January 8, 2021 (the January 8 Decision) Hon. O. Peter Sherwood (ret.), granted plaintiff's motion for partial summary judgment on its second cause of action alleging that the sponsor breached the provisions of the condominium Offering Plan by underfunding plaintiff's reserve fund with regard to "the commercial units issue" (NYSCEF # 217).¹ With respect to the value

¹ As noted by Justice Sherwood, his decision granting partial summary judgment on this issue was based the First Department's holding that for the purpose of calculating the reserve fund "the commercial units should be included in the calculation of the total price"

attributable to the commercial units when calculating the reserve fund, Justice Sherwood found that the commercial units' list price (\$25 million) should be used for this calculation and directed that "plaintiff shall settle an order on seven days (7) notice" (*id.*, at 3).

Plaintiff subsequently submitted a proposed judgment and order granting summary judgment on its second cause of action "to the extent that [p]laintiff shall recover of [the sponsor] the sum of \$2,715,351.00 (the amount of the underfunding of the Condominium's Reserve Fund as detailed on Exhibit A hereto), with statutory interest running from the date on which the Reserve Fund was to be funded (i.e. November 23, 2013)," and directing the Clerk enter judgment in the amount together with interest from November 13, 2015 (NYSCEF # 221). The sponsor opposed, affirming that based on Justice Sherwood's January 8 Decision, plaintiff was entitled to an award of \$500,000 in its favor as to the commercial units and not more than \$2 million, which included an award for "unoccupied" residential units for which summary judgment was not granted. (NYSCEF # 222, at 4). In addition, the sponsor asserted that Justice Sherwood directed that an order, and not a judgment and order, be settled, and that this distinction was intentional in view of the sponsor's counterclaim regarding the RM Unit, which might fully offset or exceed the \$500,000 recovered by plaintiff (*id.*, at 6). Consistent with its position, the sponsor submitted a proposed Counter-Order providing that "plaintiff is granted partial summary judgment on its second cause of action with respect to the commercial units issue, to an award of \$500,000, subject to offset with respect of [sponsor's] counterclaim, with interest to be computed in due course over the net amount owed" (NYSCEF # 223).

Justice Sherwood signed the plaintiff's proposed order and judgment on February 19, 2021 (NYSCEF # 228), and on February 23, 2021, a judgment was filed in the County Clerk's office in the amount of \$2,715,351.00, plus interest in the amount of \$1,773,607.76 for a total of \$4,488,958.76. On the date the judgment was filed, the sponsor submitted a proposed order to show cause to re-settle the order and judgment which sought interim relief pending a hearing enjoining plaintiff from executing on the judgment (NYSCEF # 230-235). By Amended Decision and Order dated February 25, 2021 (the February 25 Amended Decision), Justice Sherwood vacated the February 23, 2021 judgment and directed that "the sponsor prepare a proposed judgment consistent with the terms of the accompanying 'Counter-Order' dated February 25, 2021" (NYSCEF #236).

On February 25, 2021, Justice Sherwood signed the sponsor's Counter-Order "granting plaintiff partial summary judgment on the second cause of action to the extent that plaintiff is entitled, in respect to the commercial unit issue, to an award

(NYSCEF #217, at 2 citing *Board of Managers of 150 East 72nd Street Condominium v Vitruvius Estates, LLC*, 173 AD3d 589, 590 [1st Dept 2019][internal quotations omitted).

of \$500,000, subject to offset in respect of [the sponsor's] counterclaim, with interest in due course on the basis of the net amount owed" (NYSCEF # 236).

Plaintiff now moves for an order resettling the February 25 Amended Decision to delete the provision providing that the \$500,000 award is subject to an offset and permitting plaintiff to enter judgment in the amount of \$500,000. Plaintiff argues that the inclusion of the "offset" provision in the signed Counter-Order "was clearly an error," as it is contradicted by the language of the February 25 Amended Decision and is not based on the January 8 Decision (Pl Aff. in Support-NYSCEF #240, at 5). In support of its position, plaintiff notes that the January 8 Decision is silent as to any offset, and the February 25 Amended Decision directs that the sponsor "prepare a proposed judgment" as opposed to a proposed order (*id.*, at 4). In addition, plaintiff argues that there is no legal basis for staying the judgment on the \$500,000 award pending the determination of the sponsor's counterclaim on the RM Unit.

The sponsor counters that the February 25 Amended Decision was issued after Justice Sherwood heard argument, including regarding the offset provision (NYSCEF # 262-Tr. 5-21-21 argument, at 13). The sponsor also argues that plaintiff's claim and its counterclaim are interrelated including because the RM Unit was used as security for the reserve fund, and the court has broad discretion under these circumstances to either issue an immediate judgment or to stay execution of the judgment pending the resolution of the rest of the case (*id.*) Moreover, the sponsor notes that the January 8 Decision directed the parties to settle an order and not a judgment, and did not provide for severance and immediate execution of a judgment in favor of plaintiff.

Discussion

When partial summary judgment is granted, a court may sever the cause of action for which summary judgment is granted from any remaining causes of action, or direct the entry of summary judgment be held in abeyance pending the determination of the remaining causes of action (CPLR 3212 [e][1][2]). The courts "have wide discretion in imposing conditions upon the grant of partial summary judgment so as to avoid possible prejudice to the party against whom the judgment is granted" (*Robert Stigwood Org. v Devon Co.*, 44 NY2d 922, 923 [1978], citing CPLR 3212 [e]; see also *Kolmar Americas, Inc. v Bioversal Inc.*, 89 AD3d 493, 494 [1st Dept 2011])[finding that "the motion court's grant of partial summary judgment while directing an inquest be held after discovery was completed was a provident exercise of its wide discretion" [internal citation and quotation omitted]). At the same time, however, "[s]uch discretion is not unlimited, and is to be exercised only if there exists some articulable reason for concluding that the failure to impose conditions might result in some prejudice, financial or otherwise, against whom the partial summary judgment is granted should that party subsequently prevail on the

unsettled claims” (*Robert Stigwood Org.*, 44 NY2d at 923; *see also Lapidus v 1050 Tenants Corp.*, 138 AD3d 783, 786-787 [2d Dept 2016])[trial court erred in staying entry of judgment in plaintiff’s favor after granting summary judgment pending the resolution of the remaining causes of action and counterclaims as there was no evidence in the record that defendant would be prejudiced in the absence of a stay]).


A motion for “resettlement of an order is a procedure designed solely to correct errors or omissions as to form, or for clarification [and] may not be used to effect a substantive change in or to amplify a prior decision” (*Foley v Roche*, 68 AD2d 558, 566 [1st Dept 1979]; *see also Elson v Defren*, 283 AD2d 109, 113 [1st Dept 2001])[defendant’s motion was not one for resettlement as it did not seek “correction” of the prior order granting summary judgment against it]; *Zelman v Lipsig*, 178 AD2d 298, 298-299 [1st Dept 1991] [resettling an order was proper where it does not effect a substantive change but clarifies previous order]).

Here, the record does not support granting an order to resettle the February 25 Amended Decision. Specifically, contrary to plaintiff’s argument, it cannot be said that Justice Sherwood mistakenly included an offset provision in the February 25 Amended Decision. Although the February 25 Amended Decision directed the sponsor “to prepare a proposed judgment,” it also stated that such “judgment” should be “consistent with the terms of the accompanying ‘Counter-Order’ dated February 25, 2021,” which Counter-Order included the offset provision. Moreover, the January 8 Decision granting plaintiff partial summary judgment provides for settling an order – not a judgment – and did not otherwise indicate an intent that plaintiff should be entitled to enter judgment on the amount awarded. Under these circumstances, and as Justice Sherwood’s decision on whether to hold plaintiff’s judgment in abeyance pending the determination of the sponsor’s counterclaim is a matter of judicial discretion, no error can be implied from Justice Sherwood’s signing of the sponsor’s proposed Counter-Order. And, to the extent plaintiff maintains that Justice Sherwood’s decision in this regard was beyond his discretion, an appeal, and not a request for resettlement, is the proper avenue for relief.

In view of the above, it is

ORDERED that plaintiff’s motion for an order resettling the February 25 Amended Decision and Order is denied.

2/22/2022
DATE


MARGARET CHAN, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

SETTLE ORDER SUBMIT ORDER