SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER TISCH **PART** 18

Justice

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DEAN POLL,

Plaintiff,

- v -

GALLAGHER'S STUD, INC.,

Defendant.

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INDEX NO. 156708/2022

MOTION DATE 03/29/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

On or about May 1, 2013, plaintiff Dean Poll and defendant Gallagher's Stud, Inc. (GSI) entered into an option agreement giving plaintiff the option to purchase defendant's 50% interest in the premises located at 228 West 52nd Street in New York, New York (premises) (see NYSCEF Doc No 2, option agreement). The premises houses Gallagher's Steakhouse restaurant in the Times Square area.

A settlement agreement dated July 11, 2018 reaffirmed the purchase option, and set forth and/or amended certain timeframes for the procedures on exercising the option (NYSCEF Doc No 3, settlement agreement). The settlement agreement contained the following relevant provisions:

- That upon the service of a "Purchase Notice" by the plaintiff, as optionee, the parties will have to appoint an appraiser (id. at ¶ 2 [B], [C]);
- The purchase price shall be one half of the property's fair market value (id. at ¶ 2 [C]);
- "Closing of the sale contemplated herein shall occur within three hundred sixty-five (365) days of the completion of the final determination of the Purchase Price" (id.); and

- "If the Optionee serves a Purchase Notice and does not complete the purchase of the Ownership Interest the Owner's sole remedy shall be to terminate the Optionee's Purchase Option" (id. at ¶ 2 [B]).

The final purchase price was determined by the arbitrator/appraiser, Hon. Helen Freedman (ret.) on June 30, 2021 in the amount of $23,500,000.00 (NYSCEF Doc No 5). Accordingly, closing must occur no later than June 29, 2022. Plaintiff's counsel wrote to defendant's counsel on January 3, 2022 to confirm the closing date, February 15, 2022, and defense counsel advised in an e-mail reply the same day that it is "adjourning closing until the rent issues are resolved" (NYSCEF Doc No 6).

Plaintiff commenced the instant action on January 21, 2022 seeking specific performance of a contract and alleging an anticipatory breach of contract. Defendant answered the complaint and asserted two counterclaims: a declaratory judgment "declaring that the Plaintiff should be equitably 'estopped' from being able to schedule any closing on the Premises until after all rent and payment obligation disputes under the lease are fully resolved between the Plaintiff and the Defendant" and a declaratory judgment "declaring that Plaintiff has breached the covenant of good faith and fair dealing and thereby has forfeited his right to purchase a fifty (50%) percent interest in the Subject Premises, and/or alternatively, declaring that the Plaintiff is prohibited from scheduling any purported closing date to purchase the Premises until after all rent and ancillary payment disputes are fully resolved between the parties" (NYSCEF Doc No 19).

Upon the foregoing documents, plaintiff moves for a mandatory preliminary injunction enjoining defendant from refusing to close on the sale of defendant's interest in the premises and defendant cross moves to consolidate this action with *Gallagher's Stud, Inc., et al. v.*

Gallagher's Famous, LLC, et ano, pending in this Court in Part 38 (Nock, J.) under Index number 653390/2021 (the 2021 matter or action).

Cross-Motion to Consolidate

"When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay" (CPLR 602[a]). "Where common questions of law or fact exist," the motion "should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (Longo v Fogg, 150 AD3d 724, 725 [2d Dept 2017]). The Court has broad discretion in determining such motion (see Megyesi v Automotive Rentals, Inc., 115 AD2d 596, 596-97 [2d Dept 1985]; see generally Cleveland-Scott v Hillside House Mgt. Corp., LLC, 19 Misc 3d 685, 690 [Sup Ct, Queens County 2008]).

Here, the Court finds that there are no common questions of law. The defendant here is a plaintiff in the 2021 action, which, along with co-plaintiffs as landlord of the premises, sued Gallagher's Famous, LLC (GF LLC) alleging breach of lease for failing to pay rent and other sums allegedly due under the lease.[1] This matter concerns the option agreement, which is a separate contract.

The Court finds defendant's feigned attempt to interject the non-payment of rent issues via its counterclaims unavailing. In attempting to make a connection between the two actions, defendant claims that its counterclaim is based on the failure "to pay rent for over one and one half years, purportedly on account of COVID shutdowns, despite the fact that the restaurant has been open and operating for over one year and despite receiving over $3 million in governmental

[1] Plaintiff here was originally named as an individual defendant in the 2021 action and the claims insofar as asserted against him were discontinued (see NYSCEF Doc No 31 in the 2021 index number).

relief money which could have been used to pay rent, constitutes a breach of the covenant of good faith and fair dealing such that plaintiff has forfeited his right to close upon the option at issue in this case or alternatively, that any closing should be adjourned until all rent disputes are resolved and paid" (NYSCEF Doc No 21, Lederman aff at ¶ 4).

Even if this Court assumed that those allegations were true and that they were legally sufficient to properly constitute a breach of the covenant of good faith and fair dealing, that breach would presumably be between defendant as landlord and GF LLC as the commercial tenant — who is not a party to this case, as noted by plaintiff in opposition to the cross motion. Indeed, plaintiff notes that there is only one party that is common to both matters, which is the defendant.[2]

In any event, the Court finds that consolidation is inappropriate. First, if the requested relief was granted to any extent, it would be for joint trial and not pure consolidation because each action contains parties not present in the other (see Longo v Fogg, 150 AD3d 724, 725 [2d Dept 2017]). Second, as the Court found above, there is no common question of law or fact that may present the risk of any inconsistent rulings. The Court fails to see how the two contracts relate to each other — if plaintiffs in the 2021 action are successful, they will receive a money judgment against GF LLC. Even considering the affidavit of Ms. Brody on behalf of GSI in support of GSI's motion for summary judgment in the 2021 action, in which GSI claims that GF LLC has a "bad faith motive to coerce a sale of the property" (see NYSCEF Doc No 21 in the 2021 index number), the Court is hard-pressed to find any relevance in how the unpaid rent

[2] Although there are examples of the parties' intermingling individuals and related corporate entities. For example, while the plaintiff and defendant are parties to the option agreement, the settlement agreement is signed by three different corporate entities and an individual, Marlene Brody, none of whom are parties here or in the 2021 action. Additionally, the arbitration award appears to be in the name of plaintiff Poll and Ms. Brody, individually (compare NYSCEF Doc Nos 2, 3, and 5).

relates to plaintiff Poll's right under the contract(s) to exercise the purchase option. At most, plaintiff's purchase of GSI's 50 % interest may affect the terms and conditions of GF LLC's tenancy going forward, but GF LLC's responsibility for rent under its lease with defendant, and any potential monetary judgment for arrears, would appear to remain unaffected.

Finally, the interests of judicial economy would not be served by a joint trial based on the difference in the procedural posture of both cases. There is a summary judgment motion pending in the 2021 action, which may very well end that case.

Preliminary Injunction

CPLR 6301 provides that a preliminary injunction may be granted:

> in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]). "The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the [trial court]" (Doe v Axelrod, 73 NY2d 748, 750 [1988]). Additionally, because a preliminary injunction is a "drastic remedy," the movant "must establish a clear right to that relief under the law and the undisputed facts" (Omakaze Sushi Rest., Inc. v Ngam Kam Lee, 57 AD3d 497, 497 [2d Dept 2008]).

Likelihood of Success

For purposes of this motion, "all that must be shown is the likelihood of success [on the merits]; conclusive proof is not required" (Ying Fung Moy v Hohi Umeki, 10 AD3d 604, 605 [2d Dept 2004]). "Where denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced" (Republic of Lebanon v Sotheby's, 167 AD2d 142, 145 [1st Dept 1990]).

"The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law" (EMF Gen. Contr. Corp. v Bisbee, 6 AD3d 45, 51 [1st Dept 2004]). Plaintiff has adequately demonstrated these elements, as set forth in the verified complaint, including defendant's anticipatory breach by refusing to close.

Irreparable Harm Absent the Injunction

Consequently, plaintiff has also established irreparable harm in the absence of the injunction and that a remedy at law would be inadequate (see generally Lesron Jr., Inc. v Feinberg, 13 AD2d 90, 93 [1st Dept 1961]). Because "each parcel of real property is unique," "the equitable remedy of specific performance is routinely awarded in contract actions involving real property" (EMF Gen. Contr. Corp. v Bisbee, 6 AD3d 45, 52 [1st Dept 2004]). Thus, as the Court finds that plaintiff has demonstrated entitlement to specific performance, it would also be entitled to this injunction because of the absence of an adequate remedy at law for the deprivation of its right to exercise the purchase option (see generally Board of Higher Educ. of City of N.Y. v Marcus, 63 Misc 2d 268, 272 [Sup Ct, Kings County 1970] ["where the rights of

parties are clear, the courts should interfere to prevent a violation of the rights, instead of allowing the rights to be violated and the wrong committed, and then remitting the party injured to a remedy at law, many times uncertain at best"]).

Balancing of Equities

"[T]he 'balancing of the equities' usually simply requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief" (Sau Thi Ma v Xuan T. Lien, 198 AD2d 186, 186-87 [1st Dept 1993]). Here, the Court finds that plaintiff will be substantially prejudiced because, according to the settlement agreement, the parties must close by June 29, 2022 and if the closing is not completed, defendant may terminate plaintiff's right to exercise the option. In opposition, defendant conclusorily argues that plaintiff will not be prejudiced if the closing is adjourned until the 2021 action is ultimately decided — without even acknowledging the obvious clock that is running on the time to close. Defendant also claims that there is no "time of the essence" clause for the closing date — also ignoring the very clear language about the time to close and the defendant's right to then terminate plaintiff's option. Further, the lack of such a clause does not mean that the Court should interpret the agreement to imply something that is not there, particularly in the context of real property transactions (see Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004]).

Although defendant also claims that plaintiff is guilty of a two-year delay caused by plaintiff bringing claims before the arbitrator, defendant does not, notably, claim that such acts were outside of the procedures that the parties agreed to in the option and settlement agreements.

The problem, however, is of course that plaintiff is admittedly requesting a mandatory preliminary injunction, i.e., "one mandating specific conduct" "by which the movant would receive some form of the ultimate relief sought as a final judgment" (Second on Second Café,

Inc. v Hing Sing Trading, Inc., 66 AD3d 255, 264 [1st Dept 2009]). Such injunctions are "granted only in 'unusual' situations, 'where the granting of the relief is essential to maintain the *status quo* pending trial of the action'" (id., quoting Pizer v Trade Union Serv., Inc., 276 AD 1071 [1st Dept 1950]). As the Court of Appeals reasoned in Bachman v Harrington:

> "[I]n an action for the specific performance of a contract for the sale of real estate the court doubtless may restrain the defendant pending the action from conveying, incumbering or in any way disposing of the subject of the suit, but an *ex parte* order that the defendant forthwith convey the premises to the plaintiff, even though phrased in the form of an injunction restraining him from refusing to forthwith make the conveyance, in my opinion would be not merely erroneous, but absolutely void" (184 NY 458, 463-64 [1906]).

However, this Court finds this matter presents one of those unusual situations. The matter of Bachman is distinguishable in that the ultimate relief sought was granted by way of an ex parte order. Here, defendant had the opportunity to present its defense(s) to plaintiff's claims and/or advise the Court of any legitimate reason for refusing to close in accordance with the agreement(s). The rent issue is entirely unrelated and does not appear to have any conceivable bearing on the purchase transaction. Without having anything left to meaningfully contest or determine in this litigation, this is not the type of injunction that would be necessary solely to preserve the "status quo" pendent lite; rather, the Court finds it appropriate to issue the relief requested at this juncture.

Accordingly, it is hereby ORDERED that defendant's cross motion is denied; and it is further

ORDERED that plaintiff's motion for an injunction is granted; and it is further

ORDERED that defendant and all persons known and unknown acting on their behalf or in concert with them in any manner or by any means, from refusing to close on the sale of

defendant's interest in the real property located at 228 West 52nd Street, New York, New York; and it is further

ORDERED the parties shall appear for a preliminary conference virtually via Microsoft Teams on **August 17, 2022**.[3]

This constitutes the decision and order of the Court.

6/13/2022
DATE

ALEXANDER TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[3] Calendar invitation containing Teams link with preliminary conference form to be sent by Part 18 Clerk (SFC-Part18-Clerk@nycourts.gov).