

IHG Harlem I LLC v 406 Manhattan LLC

2022 NY Slip Op 34692(U)

March 1, 2022

Supreme Court, New York County

Docket Number: Index No. 161863/2015

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8

IHG Harlem I LLC

INDEX NO. 161863/2015

- v -

MOT. DATE

406 Manhattan LLC et al.

MOT. SEQ. NO. 007

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

ECFS DOC No(s).

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ECFS DOC No(s).

Previously, this court issued a decision/order dated May 18, 2020 which granted plaintiff's motion for summary judgment as to liability for breach of contract, dismissed defendants' counterclaims and noted that the issue of plaintiff's damages remained for trial.

Plaintiff now moves by order to show cause for an order extending the underlying Notice of Pendency. While plaintiff's order to show cause was pending, the Appellate Division, First Department, issued an order which modified this court's 5/18/20 decision/order to delete the language about a trial of damages and direct a return of the deposits to plaintiff as liquidated damages under the terms of the contracts and otherwise affirmed the 5/18/20 decision/order (200 AD3d 417, December 2, 2021).

The court restored motion sequence 7 to the calendar for a conference in light of the First Department's decision/order. At said conference, plaintiff's counsel maintained that the order to show cause was not rendered moot by the Appellate Divisions' decision. Therefore, the court issued an interim order dated December 21, 2021 which adjourned the motion for reply/surreply. Meanwhile, both sides have settled proposed orders and judgments. The court will consider the proposed orders/judgments first, since their disposition necessarily impacts the pending motion.

Plaintiff requests entry of a judgment against defendants in the amount of \$626,250.00 with interest from November 12, 2015 plus costs and disbursements. Defendants proposed counter judgment differs substantively from that of plaintiff's in that it directs that the escrow agent, Joseph Levin, Esq, return to plaintiff "the deposits being held in escrow pursuant to the contracts of sale" with no interest nor costs and disbursements. In support of its position, defense counsel persuasively cites J. D'Addario & Co. v. Embassy Indus., Inc. (20 NY3d at 117, and Sommer v. General Bronze Corporation (28 AD2d 981 [1st Dept 1967], aff'd, 21 N.Y.2d 775 [1968]).

Dated: 3/1/22

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [X] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

In *J. D'addario*, the Court of Appeals affirmed the First Department's decision which vacated the trial court's award of statutory interest on the return of a deposit because the parties agreed the seller would have no further rights once the down payment was paid as liquidated damages and the contract required the deposit be held in an interest-bearing account. Meanwhile, in *Sommer*, the First Department explicitly held that where a contract of sale limited liability to the amount of the down payment, money damages equivalent to the amount of the down payment or interests on that amount were not warranted. It bears noting that there was a dissent in *J. D'addario* which argued that the seller was entitled to statutory interest because the terms "sole remedy", "sole obligation" and "no further rights or causes of action" did not expressly preclude statutory interest and the purchaser's refusal to release the deposit during the four-year pendency of that litigation "effectively restrained [the seller's] use of the money ... not covered by the liquidated damages provision and prejudgment interest should have been awarded."

J. D'addario and *Sommer* are squarely on point and since this court is bound to follow its precedent, the court will sign the judgment proposed by defendants which does not award plaintiff a money judgment. This result is consistent with First Department's decision/order in this case, which expressly did not award plaintiff a money judgment nor interest thereon. As for costs and disbursements, while the First Department was silent as the provision of costs and disbursements, this court does not take that silence as a negative as to whether these amounts should be awarded to plaintiff, Plaintiff has prevailed in this litigation, which has been pending for seven years and arises from defendants' breach of contract as both this court and the First Department found. Further, while plaintiff's damages may be limited by the express terms of the underlying contracts of sale, it was only through this action that plaintiff was able to obtain a remedy. On these facts, the court finds that plaintiff is entitled to its costs and disbursements.

The court now turns to the pending motion to extend notice of pendency. CPLR § 6501 provides in relevant part as follows:

A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property. The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party.

The court rejects plaintiff's argument that this is now an action to foreclose a vendee's lien. As defense counsel points out, plaintiff has never even alleged such a cause of action. In any event, this action is now over, and the judgment which plaintiff has now obtained does not affect the title to or possession, use or enjoyment of real property (*see i.e. Highbridge House Ogden LLC v. Highbridge Entities LLC*, 48 Misc3d 976 [Sup Ct 2015] *aff'd* 145 AD3d 487 [1st Dept 2017]; *Ardi v. Martin*, 24 Misc3d 1219[A] [Sup Ct, Suff. Co 2009] *aff'd* 79 AD3d 1078 [2010]; *Rajic v. Sarokin*, 214 AD2d 663 [2d Dept 1995]). Indeed, the parties agree that the deposits continue being held in escrow pursuant to the parties' contracts of sale. Thus, plaintiff's motion to extend notice of pendency is denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence 7 is denied and the judgment proposed by defendants, with the insertion of an award of costs and disbursements in favor of plaintiff, has been signed by the court on even date.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 3/1/22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.