

Schlanger v Harloff
2023 NY Slip Op 30383(U)
February 7, 2023
Supreme Court, New York County
Docket Number: Index No. 161505/2021
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

PRESENT: <u>HON. ARLENE P. BLUTH</u> <i>Justice</i> -----X DREW SCHLANGER, JEFFREY SCHLANGER Plaintiff, - v - AMY L HARLOFF, Defendant. -----X	PART 14 INDEX NO. <u>161505/2021</u> MOTION DATE <u>N/A</u> MOTION SEQ. NO. <u>004</u> DECISION + ORDER ON MOTION
--	--

The following e-filed documents, listed by NYSCEF document number (Motion 004) 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for REARGUMENT/RECONSIDERATION .

Plaintiffs' motion to reargue is decided as described below.

Background

In this disposed action concerning the sale of an apartment, the Court previously granted plaintiffs' motion for a default judgment on default (NYSCEF Doc. No. 23). Plaintiffs sought specific performance of defendant's obligation to complete the sale of the subject apartment. The Court initially denied plaintiffs' motion for the appointment of a receiver to conduct the sale in motion sequence 001 but later granted that relief in motion sequence 003 (NYSCEF Doc. No. 57).

Plaintiffs argue that they still want to complete the contract of sale for the subject apartment but do not want to suffer potential unlimited liability for the monthly maintenance and other fees while the defendant apparently refuses to vacate the apartment. They demand that the Court modify its previous order to afford the receiver the additional power to hold 30 months of maintenance in escrow for the apartment to be paid to the plaintiffs after they receive legal

possession of the apartment. Plaintiffs also seek an award of legal fees from defendant for their actual damages incurred as a result of having to bring the instant lawsuit as well as costs and fees for plaintiffs' transactional counsel. They seek, in the alternative, an order that they be returned their down payment.

Plaintiffs observe that the Court's previous order suggests that if plaintiffs were to close, then they would have to commence a holdover proceeding to get legal possession as defendant is still in the apartment. Plaintiffs complain that they do not want to pay the monthly maintenance while they pursue an eviction of defendant from the premises. Plaintiffs point out that there is a pending nonpayment proceeding against defendant commenced by the co-op.

Discussion

As plaintiffs correctly point out, the clear issue is that the contract of sale requires that the apartment be provided to the buyer (plaintiffs) as a vacant unit. However, the purpose of appointing a receiver was solely to facilitate the paperwork for the closing. The Court deliberately did not give the receiver expansive powers to deliver a vacant unit to plaintiffs. Plaintiffs acknowledge in their papers the exact reasons for this decision, including that the co-op is pursuing its own case against defendant for failure to pay maintenance and the defendant apparently refuses to leave the apartment. The Court observes that plaintiffs did not seek an ejectment cause of action in their pleading (or move to amend to add such a claim) and the Court declines to grant a receiver the powers to do so. In their papers, plaintiffs demonstrated that they are well aware of the procedures to seek an eviction (a holdover proceeding) and admit they do not want to pursue that route.

Plaintiffs, understandably, do not want to pay maintenance while they (or the co-op) attempt to evict defendant. But that is an obligation of taking title to the apartment and

completing the sale of the apartment under the circumstances present here. Plaintiffs insist they still want the apartment; unfortunately, plaintiffs cannot obtain title (the entire purpose of appointing a receiver) and also avoid the responsibilities of shareholder in a co-op. Therefore, the Court grants the motion to reargue, and upon reargument, the Court rescinds the appointment of the receiver. On these papers, it is abundantly clear that plaintiffs (for good reason) do not want to take title to the property and so there is no longer any reason to have a receiver in this matter.

The Court, however, is unable to grant the request by plaintiff in the alternative for the return of its down payment. The complaint in this action only demanded specific performance, legal fees, and the appointment of a receiver. It did not request the return of plaintiffs' down payment and, in fact, plaintiff received a default judgment on its claims for specific performance. Of course, plaintiffs would not be entitled to both specific performance under the contract and the return of the down payment. To be clear, nothing prevents plaintiffs from bringing another case for the return of the down payment.

Plaintiffs' request for legal fees is granted and the Court will hold a hearing on reasonable legal fees on April 27, 2023 at 10 a.m. in person. The Court cannot find, without holding a hearing, that the over \$20,000 requested by counsel for plaintiffs constitutes reasonable legal fees in a case where defendant never appeared or answered. Counsel should be prepared to argue how certain claimed expenses, such as the fees incurred by transactional attorneys, or the demand for a receiver which is now a nullity, are included in a legal fees provision that provides for fees "arising from the defense of any claim and enforcement or collection of a judgment under this indemnity" (NYSCEF Doc. No. 66 at 4).

Summary

The court recognizes the difficult scenario presented to plaintiffs. They entered into a contract with defendant who refused to close. Plaintiffs chose, as was their right, to seek specific performance of the contract instead of a return of the down payment. After plaintiffs got a default judgment, the Court then appointed a receiver to facilitate the closing. Plaintiffs got what they sued for but now, on these papers, they don't want to take the steps to enforce that relief.

When plaintiffs made the motion for a receiver, they were well aware that defendant has refused to vacate the apartment and the co-op is pursuing its own claim against defendant; plaintiffs were even aware of the requests, here and in housing court, for a guardian ad litem for defendant. Still, plaintiffs demanded the appointment of a receiver to execute the closing documents. Now, having gotten what they demanded, plaintiffs no longer want to expend the resources necessary to evict defendant. They do not want the burden of ownership. Clearly, plaintiffs are no longer interested in taking title to the apartment and, as stated above, the Court declines to permit plaintiffs to get title without also incurring the obligations of a shareholder in the co-op.

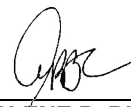
Requiring that the receiver hold the sale proceeds in escrow in order to pay the maintenance would only create more confusion. What are the forecasted sale proceeds? If there is an outstanding mortgage (or two) on the shares to be paid off from the sale proceeds, then there may be little left to pay ongoing maintenance for the next few years (plaintiffs ask for 30 months of maintenance to be set aside). In the event that there is no mortgage, at the very least, the co-op is pursuing its own claim for unpaid maintenance previously incurred by defendant. That may have to be paid out from the sale proceeds as well. Certainly, the co-op should not, and this Court would not order, the transfer of title (and the issuance of a new proprietary lease)

without a resolution of the outstanding maintenance. Plaintiffs cannot shift the burden to defendant to cover these fees while also getting title to the shares.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to reargue is granted only the extent that upon reargument, the Court rescinds its order appointing a receiver and the appointed receiver, Elaine Shay, Esq. is hereby discharged as receiver; and it is further

ORDERED that plaintiffs' demand for reasonable legal fees is granted to the extent that there shall be an in-person hearing on April 27, 2023 to determine the reasonable legal fees due to plaintiffs incurred in connection in this action.

<u>2/7/2023</u> DATE			 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	☒	CASE DISPOSED	☐
	☐	GRANTED ☐ DENIED	☒
APPLICATION:	☐	SETTLE ORDER	☐
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐
			☒
			☐
			☐
			☐