

**Breskin v Salcedo**

2024 NY Slip Op 32545(U)

July 3, 2024

Supreme Court, Kings County

Docket Number: Index No. 503972/2014

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3<sup>rd</sup> day of July, 2024.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

STEPHEN BRESKIN and 1525 GREENE AVE LLC,

Plaintiffs,

- against -

Index No. 503972/14

ELISA SALCEDO, as Art. 81 Guardian for Saturnina Gomez Moranta a/k/a Saturnina Gomez Moranto,

Defendant.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion/Affidavits  
(Affirmations) \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

477-490, 492 507-513  
514-519 531-539  
521-529

Upon the foregoing papers in this action for specific performance of a September 2013 Residential Contract of Sale (Contract), plaintiffs Stephen Breskin (Breskin) and 1525 Greene Ave LLC (collectively, Plaintiffs) move (in motion sequence [mot. seq.] 14) for an order, pursuant to CPLR 2221 and/or CPLR 5015 (a) (5), modifying and/or renewing this court’s October 26, 2018 order (October 2018 Order) (NYSCEF Doc No. 246) on the grounds that “various events have occurred since entry of such Order which warrant and necessitate such modification . . .” to provide that: (1) Plaintiffs’ attorneys

are authorized and directed to pay Plaintiffs the balance of the funds being held in escrow – the sum of \$393,392.17 – representing the full balance owing on the purchase price pursuant to the Sales Contract between Plaintiffs and Saturnina Gomez-Moronto (Moronto), after deducting (a) the \$50,000 down payment paid by Plaintiffs to defendant's attorney pursuant to the Contract, and (b) the sum of \$231,607.83, which was paid from escrow pursuant to the August 2, 2019 Order (Ruchelsman, J.) to satisfy defendant's then-outstanding mortgage; (2) upon presentation to them of a copy of this Order with notice of entry thereof, defendant's former attorneys, Casto F. Rodriguez-Arbelo, Esq., Peter M. Zirbes, Esq. and Stephen Holihan, Esq., are authorized and directed to pay Plaintiffs the sum of \$50,000, representing the down payment made by Plaintiffs to defendant's attorney pursuant to the Sales Contract, and currently being held in escrow; (3) upon payment of the sums directed to be made to Plaintiffs as set forth above, such sums shall be credited against the amount defendant has been ordered to pay Plaintiffs pursuant to the Court's decision and order dated February 14, 2024 (Allman, Referee), and in partial satisfaction of any judgment to be entered thereon; and (4) Plaintiffs' payment obligations to defendant pursuant to the Contract are hereby discharged and satisfied in their entirety, and Plaintiffs shall have no further payment obligations to defendant pursuant to the Contract (NYSCEF Doc No. 477).

Defendant Elisa Salcedo, as Art. 81 Guardian for Moronto (Defendant), cross-moves (in mot. seq. 15) for an order: (a) finding and adjudging Plaintiffs and their attorneys to be in contempt of the October 2018 Order; (b) imposing a fine or order of

imprisonment sufficient to compel Plaintiffs to comply with the October 2018 Order; (c) directing Plaintiffs and their attorneys to pay 9% interest on the entire purchase price from 2018 to the present; (d) imposing penal sanctions against Plaintiffs and their attorneys; and (e) awarding Defendant attorneys' fees and costs incurred in connection with this motion (NYSCEF Doc No. 507).

### **Background**

On May 5, 2014, Plaintiffs commenced this action for specific performance of their Contract with Moronto to purchase her residential property at 1525 Greene Avenue in Brooklyn (Property) and for an award of attorneys' fees, pursuant to the parties' Contract. After the conclusion of discovery, Plaintiffs moved for summary judgment, which was granted by a February 22, 2016 Decision and Order (February 2016 Order) (NYSCEF Doc No. 84). The court (Schack, J.) ordered Moronto to comply with the parties' Contract and close the sale of the Property by March 22, 2016. By a March 7, 2016 Decision and Order (March 2016 Order), the court denied reargument and ordered specific performance of the Contract by April 6, 2016 (NYSCEF Doc No. 85).

In December 2016, after Moronto failed to comply with the court's February and March 2016 Orders, Plaintiffs moved, by order to show cause (OSC), for an order holding Moronto in civil contempt and directing transfer by sheriff's deed (NYSCEF Doc No. 108). In February 2017, Plaintiffs moved for an interim award of attorneys' fees and costs (NYSCEF Doc No. 132). By a May 23, 2018 Decision and Order (May 2018 Order), the court (Baynes, J.) denied Plaintiffs' OSC, awarded Plaintiffs \$5,000.00 in attorneys' fees

and directed Moronto to tender the Property to Plaintiffs on June 15, 2018 (NYSCEF Doc No. 198). Moronto, once again, failed to comply.

### *The October 2018 Order*

On June 22, 2018, Plaintiffs moved, by OSC, to renew their prior motion for a transfer by sheriff's deed, pursuant to CPLR 5107 (NYSCEF Doc No. 216). By the October 2018 Order, this court granted Plaintiffs' OSC directing the Kings County Sheriff to transfer the Property to Plaintiffs (NYSCEF Doc No. 246). The October 2018 Order further provided in the fourth "Ordered" paragraph that:

*“upon delivery to plaintiff 1525 Greene Ave LLC of the Premises, vacant and with no tenants or occupants on the first and third floors, as provided in the Order of this Court dated February [22], 2016 and entered February 24, 2016, as reaffirmed by the Order of this Court dated March 7, 2016 and entered March 9, 2016, and provided that defendant has fully complied with the contract between the parties dated September 2013, and has not committed any waste of the Premises since execution of said contract, plaintiffs shall pay to defendant the sum of \$614,894.89, representing the full balance owing on the [\$675,000] purchase price for the Premises pursuant to said contract after deducting (a) the \$50,000 down payment paid to defendant's attorney to hold in escrow pursuant to said contract, and (b) the total sum of \$10,105.11 awarded to plaintiffs for attorneys' fees, costs, and expenses, as directed to be paid to plaintiffs from the escrowed down payment by Order of this Court dated May 23, 2018 and entered May 30, 2018” (id. at 2-3 [emphasis added]).*

Thus, the October 2018 Order was based on the court's May 2018 Order and conditioned the payment of funds to Moronto on her delivery of the Property vacant (Moronto occupied the first floor and collected rent from a tenant on the third floor), Moronto's

compliance with the Contract and provided that she did not commit waste.

The sheriff's deed was executed on December 3, 2018, at which time the Property was not vacant and Moronto still resided there (NYSCEF Doc No. 305).

***The Second Department's 2019 Decision and Order***

Meanwhile, Plaintiffs appealed from the May 2018 Order in which the court (Baynes, J.) denied their OSC for civil contempt against Moronto (NYSCEF Doc No. 201). By a May 29, 2019 Decision and Order (May 2019 Appellate Order), the Second Department reversed the May 2018 Order and determined that: (1) Moronto was in civil contempt of the February and March 2016 Orders, and (2) the trial court improvidently exercised its discretion by awarding Plaintiffs a mere \$5,000.00 for attorneys' fees (NYSCEF Doc No. 482). The Second Department remitted the matter for a hearing and a determination of the award of attorneys' fees and the appropriate punishment for Moronto's civil contempt (*id.* at 2-3).

***The Referee's February 2024 Decision and Order***

In accordance with the Second Department's May 2019 Appellate Order, this court referred the issues of attorneys' fees and Moronto's civil contempt to a referee to hear and determine. By a February 14, 2024 Decision and Order (NYSCEF Doc No. 454), issued after extensive hearings, the referee determined that: (1) as a remedy for civil contempt, Plaintiffs are entitled to an award of \$84,000.00 for use and occupancy of the Property in addition to specific performance of the Contract; (2) Plaintiffs are entitled to reimbursement of attorneys' fees in the amount of \$315,648.82, pursuant to the terms of

the Contract; (3) Plaintiffs are entitled to 9% interest on the attorneys' fee award calculated from July 29, 2019 (with a seven-month toll due to the Covid-19 pandemic) for a total of \$144,227.65; and (4) Plaintiffs are entitled to \$300 in costs and \$4,805.11 in disbursements (*id.* at 49-50). In total, the referee determined that Plaintiffs are entitled to a judgment of \$548,981.58 (*id.* at 50). A judgment has not yet been entered.

***Plaintiffs' Instant Motion to Renew  
and/or Modify the October 2018 Order***

Plaintiffs move to renew and/or modify the October 2018 Order “on the basis of events that have taken place subsequent[ly]” (NYSCEF Doc No. 478 at ¶ 1). Specifically, Plaintiffs' counsel asserts that:

“[t]hose events include, inter alia, the reversal by the Appellate Division, Second Department, of a prior order of this Court (Baynes, J.) upon which the October 2018 Order was partially based, and the recent entry of another Order of this Court determining, on remittal from the Appellate Division, the amount of money payable by defendant to plaintiffs for attorneys' fees and as a remedy for defendant's contempt of court” (*id.* [footnote omitted]).

Plaintiffs' counsel asserts that “the provision of the October 2018 Order that directed plaintiffs to pay defendant the sum of \$614,894.89 subject to certain conditions precedent . . . should now be modified as the result of the foregoing events subsequent to the Court's October 2018 Order (*id.* at ¶ 20).

Plaintiffs also request that this court modify the October 2018 Order to direct payment to Plaintiffs of amounts held by their counsel in escrow, despite the fact that the amounts due and owing to Plaintiff are explicitly addressed and detailed in the referee's

February 2024 Decision and Order, which has yet to be reduced to a judgment.

### *Defendant's Opposition*

Defendant, in opposition, submits an attorney affirmation arguing that:

“[u]nder the contract, transfer of title of the property is full compliance by the seller of all terms and conditions of the contract. Accordingly, when . . . the Premises were transferred by deed from Defendant to Plaintiff . . . seller had complied with all terms of the contract” (NYSCEF Doc No. 514 at ¶ 4).

Thus, Defendant ignores the Second Department's May 2019 Appellate Order, the referee's findings in the February 2024 Decision and Order after extensive hearings in which the defense participated and the fact that the Property transfer to Plaintiff was ultimately effectuated by sheriff's deed at the direction of the court. Essentially, Defendant failed to mention or even address the arguments in Plaintiffs' moving papers.

### *Defendant's Cross-Motion for Sanctions*

Defendant cross-moves to hold Plaintiffs and their counsel in contempt of the same payment provision of the October 2018 Order that Plaintiffs now seek to modify based on the Second Department's May 2019 Appellate Order (which reversed the May 2018 Order) and the referee's February 2024 Decision and Order.

### Discussion

CPLR 5015 (a) provides that, on motion, “[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just.” Plaintiffs now move to modify this court's October 2018 Order, in part, pursuant to CPLR 5015 (a) (5), which provides that a court may relieve a party from an order on the ground that there was a

“reversal, modification or vacatur of a prior judgment or order upon which it is based” (*Braddy v 601 Crown St. Corp.*, 282 AD2d 638, 639 [2001] [holding that “(a) court which renders a judgment may relieve a party from it, on motion of any interested party, upon the ground that a prior judgment or order upon which it is based has been reversed”]; *Dupkanicova v James*, 17 AD3d 627, 628 [2005] [same]).

Here, the Second Department held in the May 2019 Appellate Order that the trial court improvidently exercised its discretion by issuing the May 2018 Order denying Plaintiffs’ motion to hold Moronto in contempt of the February and March 2016 Orders and awarding Plaintiffs a mere \$5,000.00 in attorneys’ fees (NYSCEF Doc No. 482). This court’s October 2018 Order (a renewal motion) was based on the May 2018 Order, which was subsequently reversed on appeal. The Second Department not only reversed the May 2018 Order, but it remitted the matter back to the trial court for a hearing regarding civil contempt sanctions against Moronto and the appropriate amount of attorneys’ fees to be awarded to Plaintiffs. In accordance with the Second Department’s ruling, the referee conducted numerous hearings after which he issued the February 2024 Decision and Order determining that Plaintiffs are entitled to an award of use and occupancy and attorneys’ fees that exceed the amount currently held in escrow.

Consequently, the October 2018 Order is only modified to the extent that it is inconsistent with the Second Department’s subsequent ruling in the May 2019 Appellate Order and the referee’s February 2024 Decision and Order. Specifically, the provision in the October 2018 Order (in the fourth “Ordered” paragraph) directing Plaintiffs to pay

certain sums for the purchase price of the Property and awarding Plaintiffs attorneys' fees previously ordered in the May 2018 Order are vacated based on the May 2019 Appellate Order. Plaintiffs' request to add provisions to the October 2018 Order regarding amounts to be paid to Plaintiffs from escrow in "partial satisfaction of any judgment to be entered" is rejected as premature as any such judgment has yet to be entered. Furthermore, the court entertains this motion only for the limited purpose of vacating and annulling that portion of its prior order that was reversed by the May 2019 Appellate Order.

Defendant's cross-motion to hold Plaintiffs and their attorneys in contempt of the vacated provision of the October 2018 Order is denied. Accordingly, it is hereby

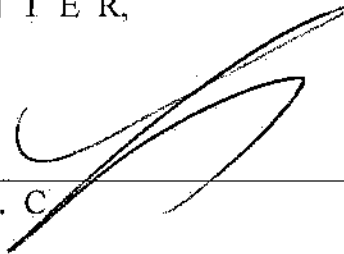
**ORDERED** that Plaintiffs' motion (mot. seq. 14) is only granted to the extent that the October 2018 Order is modified to eliminate and vacate the fourth "Ordered" paragraph directing Plaintiffs to pay Defendant certain amounts representing the purchase price of the Property and attorneys' fees; the motion is otherwise denied; and it is further

**ORDERED** that Defendant's cross-motion (mot. seq. 15) is denied; and it is further

**ORDERED** that the parties are directed to settle a judgment based on the decision and order of JHO Allman dated February 14, 2024 (NYSCEF Doc No. 454)..

This constitutes the decision and order of the court.

E N T E R,

  
\_\_\_\_\_  
J. S. C.

HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE