

Charles Rutenberg LLC v Wallace
2018 NY Slip Op 31718(U)
July 20, 2018
Supreme Court, New York County
Docket Number: 152732/2017
Judge: Robert R. Reed
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43**

-----X

CHARLES RUTENBERG LLC,
Plaintiff,

-against-

Index No. 152732/2017
DECISION and ORDER

ELAINE WALLACE and CARL A. HUSBANDS, ESQ.
Defendants.
-----X

Robert R. Reed, J.:

Plaintiff, Charles Rutenberg LLC (“Rutenberg”), a licensed real estate broker, brings this action asserting claims based on breach of contract, tortious interference with business relations, and breach of fiduciary duty against defendants Elaine Wallace (“Wallace”), the owner of a property located at 221 West 137th Street, New York, New York (“221 West”), and Carl A. Husbands, Esq. (“Husbands”), a licensed New York State attorney representing Wallace in the sale and closing on 221 West.

Background

Rutenberg claims it had an exclusive listing agreement with Wallace to sell 221 West and that it performed all duties necessary and appropriate in marketing, showing and selling the property. According to the complaint, Husbands negotiated the contract of sale for the property, but failed to notify Rutenberg of the closing date details. Rutenberg, through a series of phone calls, learned of the closing date and, subsequently, requested 6% commission of the \$105,300.00 sale price – the commission amount allegedly required pursuant to the “exclusive” listing agreement with Wallace. The complaint alleges that Husbands refused to pay the commission fee, claiming additional brokers were responsible for brokering the property’s sale and not plaintiff. The proceeds of the sale are currently in an escrow account held by Husbands.

Nonparty, Highline Residential, LLC (“Highline”), now moves to intervene in this action, pursuant to CPLR 1012(a) and/or 1013, and for a temporary restraining order and preliminary injunction, pursuant to CPLR 6301, 6311 and 6313, enjoining Wallace and Husbands from releasing the money

currently held in escrow. Rutenberg, Wallace and Husbands all oppose this motion to intervene, each agreeing that Highline has no colorable claim to bring.

Intervention

Upon a timely motion, a party is permitted to intervene in an action as of right when "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment" (*see* CPLR 1012 (a)(2)). Additionally, the court, in its discretion, may permit a party to intervene "when the person's claim or defense and the main action have a common question of law or fact" (*see* CPLR 1013). In exercising its discretion under CPLR 1013, "the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party" (*see Wells Fargo Bank, N.A. v. McLean*, 70 AD3d 676; *see also*, CPLR 1013). In examining the timeliness of the motion, courts do not engage in mere mechanical measurements of time but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party (*see, e.g., Yuppie Puppy Pet Products, Inc. v. Street Smart Realty, LLC*, 77 AD3d 197). Whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013, is of little practical significance since a timely motion for leave to intervene should be granted, in either instance, where the intervenor has a real and substantial interest in the outcome of the proceedings" (*see Wells Fargo Bank, N.A. v. McLean*, *supra*).

In support of its motion, Highline attaches, as an exhibit, a contract between Wallace and Highline indicating an exclusive listing agreement for 221 West. Both Rutenberg and Husbands oppose the motion to intervene arguing that two exclusive agreements are not possible and that Highline's purported exclusive listing agreement with Wallace is a forgery. Additionally, Dixon Advisory USA, Inc., the purchaser of 221 West, also submits an affidavit in opposition to the motion to intervene, asserting that it did not work with Highline as the exclusive agent on 221 West.

Highline's motion to intervene will not delay the action. There has been no preliminary conference or discovery order in this action. Neither plaintiff nor defendants will suffer prejudice as a

result of the intervention. Additionally, Highline has a real and substantial interest in the outcome of the proceedings, if they are, in fact, entitled to the commission fee of the sale proceeds. Accordingly, Highline's motion to intervene is granted.

Preliminary Injunction & Temporary Restraining Order

Proceeds from the sale of 221 West are currently held in an escrow account managed by Husbands. Highline seeks to enjoin Wallace and Husbands from releasing or paying any portion of these funds.

Preliminary injunctions may, in certain circumstances, be proper with respect to the release of funds in escrow where necessary to preserve the status quo during the pendency of the litigation (*see Bashein v. Landau*, 96 AD2d 479). However, in general, a party seeking the drastic remedy of a preliminary injunction must demonstrate (1) a likelihood of success on the merits; (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see CPLR 6301; see also Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 NY3d 839, 840, 800 N.Y.S.2d 48, 833 N.E.2d 191 [2005]).

Here, movant fails to satisfy the second prong regarding irreparable injury. Even assuming Highline was to prevail on the merits, there has been no showing that Highline could not be adequately compensated by money damages (*see e.g., Mr. Dees Stores, Inc. v. A.J. Parker, Inc.*, 159 AD2d 389). Typically, "damages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable harm for purposes of determining whether party is entitled to preliminary injunction" (*see Sports Channel America Associates v. National Hockey League*, 186 AD2d 417). Highline has not demonstrated on this motion any unique factual circumstances that would compel this court to deviate from the application of the general rule. Accordingly, Highline's motion for a preliminary injunction enjoining Wallace and Husbands from releasing or paying any portion of these funds is denied.

Accordingly, it is hereby

ORDERED that Highline’s motion for leave to intervene as a third-party plaintiff is granted; and it is further

ORDERED that the third-party complaint, in the proposed form annexed to the moving papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that all parties shall answer the third-party complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that Highline is directed to purchase a third-party index number; and it is further

ORDERED that this action shall now bear the following caption:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43**

-----X
CHARLES RUTENBERG LLC,

Plaintiff,

-against-

Index No.
152732/2017

ELAINE WALLACE and CARL A. HUSBANDS, ESQ.
Defendants.

-----X
HIGHLINE RESIDENTIAL, LLC

Third-Party Plaintiff,

-against-

Third-Party
Index No.

CHARLES RUTENBERG LLC, ELAINE WALLACE and
CARL A. HUSBANDS, ESQ.

Third-Party Defendants.

-----X

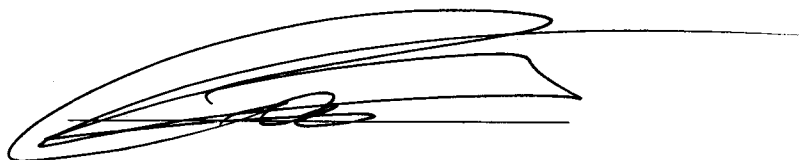
and it is further

ORDERED that movant shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that Highline's motion seeking a preliminary injunction and temporary restraining order seeking to enjoin Wallace and Husbands from releasing the proceeds of the sale of 221 West is denied; and it is further

ORDERED that all parties shall appear by their counsel for a preliminary conference in Part 43 of this court at 111 Centre Street, Room 581, New York, New York at 11:00 a.m. on Thursday, September 27, 2018.

Dated: July 20, 2018



J.S.C.