

Metropolitan Lofts of NY, LLC v Metroeb Realty 1, LLC

2020 NY Slip Op 32334(U)

July 15, 2020

Supreme Court, Kings County

Docket Number: 503441/2012

Judge: Larry D. Martin

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
COMMERCIAL PART 12**

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METROPOLITAN LOFTS OF NY, LLC,

Plaintiff(s)

Index no. 503441/2012

-against-

DECISION/ORDER

**METROEB REALTY 1, LLC, REDSKY
CAPITAL, LLC and REDSKY JZ ROEBLING, LLC.,**

Defendant(s)

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Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion for the appointment of a receiver, a preliminary injunction and the cross motion for sanctions

PAPERS	NUMBERED
Order to Show Cause and Affidavits Annexed	1
Notice of Cross Motion and Affidavits in Support	2
Affidavits in Support	3 & 4
Answering Affidavits	5 & 6
Replying Affidavits	7
Notice of Cross Motion and Affidavits Annexed	8
Answering Affidavits	9 & 10
Reply Affidavits	11

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff moves for the appointment or a temporary receiver over real property located at 143-157 Roebling Street, Brooklyn, New York and for a temporary restraining order and preliminary injunction during the pendency of this action barring defendants from transferring, conveying, or otherwise encumbering the Property, or any title company from insuring the transfer or encumbrance. The defendants cross move for sanctions.

As the parties are well aware, the matter comes before this court on a somewhat unusual posture, upon remittal from the Appellate Division. Plaintiff’s action for specific performance was tried non-jury in the Spring of 2014. The trial court determined that plaintiff did not have an enforceable contract because there was no meeting of the minds between the plaintiff and the defendant. Shortly after defendant entered into the contract with the plaintiff, defendant had entered into a second contract with Redsky Capital, LLC. Redsky Capital, LLC. intervened in this

action prior to trial and was a participant in the trial and the appeal. It is also relevant that for reasons that are idiosyncratic to plaintiff's contract, plaintiff was unable to file a Notice of Pendency in the action.

After the trial court found against the plaintiff, plaintiff made a number of attempts to stay the trial court's determination pending appeal. Two attempts to stay that determination were denied by the Supreme Court and two attempts to stay that determination were denied by the Appellate Division. Shortly after the last of those denials, on July 14, 2014, Redsky JZ Roebing LLC was formed and, there being no Notice of Pendency or injunction against it, by deed dated July 30, 2014, Metroeb conveyed the property to Redsky JZ Roebing, LLC.

It is important to note that this conveyance is in violation of the specific terms of the judgment entered in the action. The judgment signed by the Hon. Lawrence Knipel on June 6, 2014, provided "that Metroeb shall convey the Roebing Property to Redsky in accordance with the terms of the contract between them within ninety days of service of a copy of the Decision with notice of entry..." Redsky had previously been identified in the judgment as the designation for Redsky Capital LLC.

By Decision and Order dated April 4, 2018, the Appellate Division reversed the trial court and found that the plaintiff's contract was valid and enforceable. The Appellate Division directed that "the matter is remitted to the Supreme Court, Kings County, for further proceedings to determine what remedy is available to the plaintiff, and thereafter, for the entry of an amended judgment, inter alia, declaring that the contract executed on May 4, 2012, between the plaintiff and the defendant Metroeb Realty I, LLC, for the sale of the subject real property is valid and enforceable."

The Appellate Division noted that Redsky Capital, LLC had argued on the appeal that the Court could "not grant specific performance to the plaintiff because, after judgment was entered, the property was transferred to it as a good faith purchaser for value..." As previously noted, this is not accurate as the property was never conveyed to Redsky Capital, LLC. Be that as it may, the Appellate Division declined to reach the issue as it was dehors the record.

Plaintiff filed an Amended Complaint dated December 18, 2018 that named Redsky JZ Roebing, LLC as a party and asserted joint and several liability on the two Redsky defendants. The Amended Complaint sought, inter alia, a declaration that the deed to Redsky JZ Roebing, LLC was null and void and restoring title to Metroeb in order for the specific performance claim to be enforced. Without setting forth its reasoning, in a decision and order dated May 22, 2019, the Supreme Court granted the motion to dismiss the Amended Complaint to the extent that it asserted claims to void the deed to Redsky JZ Roebing, LLC. That decision is currently being appealed.

Finally, on August 30, 2019, Redsky JZ Roebing, LLC gave U.S. Real Estate Credit Holdings III-A, LP, a mortgage to secure an additional \$8,500,000 worth of borrowing against the property. The parties have represented that there is now approximately \$60,000,000 of mortgages outstanding on the title of the property, while the contract plaintiff seeks specific performance on has a purchase price of \$30,000,000.

The instant motion was brought by Order to Show Cause filed on November 21, 2019. The plaintiff seeks, inter alia, to enjoin any further encumbrances of the property or any transfers of title.

It is entirely well settled that “[t]o be entitled to a preliminary injunction, a movant must establish (1) a probability of success on the merits, (2) a danger of irreparable injury in the absence of an injunction, and (3) a balance of the equities in the movant's favor (see CPLR 6301; Coby Group, LLC v. Hasenfeld, 46 A.D.3d 593, 595, 847 N.Y.S.2d 239).” (Herczl v. Feinsilver, 153 A.D.3d 1338, 61 N.Y.S.3d 303, 2017 N.Y. Slip Op. 06529 [2d Dept. 2017]).

Defendants primary assertion is that plaintiff can not succeed on the merits as a matter of law based on *Da Silva v. Musso*, 76 N.Y.2d 436 [1990]. *Da Silva* holds that under circumstances similar to those of the instant case, a good faith purchaser for value takes title to property free of the outcome of an appeal if there is no valid Notice of Pendency on the record at the time of the transfer. *Da Silva* stands for the proposition that actual notice of the litigation and the appeal does not negate the good faith of the purchaser. (*Id.*, at 443).

DaSilva v. Musso involves the operation of a Notice of Pendency. A Notice of Pendency is specifically directed at providing notice of the litigation to third parties. (*Matter of Sakow*, 97 N.Y.2d 436, 767 N.E.2d 666, 741 N.Y.S.2d 175, 2002 N.Y. Slip Op. 02294 [2002]). Persons and entities with actual knowledge stand on a somewhat different footing.

DaSilva v. Musso is not without exceptions. On similar facts the Second Department found that it did not bar enforcement against a subsequent conveyance. (*Marcus Dairy v Jacene Realty Corp.*, 298 A.D.2d 366, 751 N.Y.S.2d 237, 2002 N.Y. Slip Op. 07127 [2d Dept. 2002]); see also: *Serota v Power House Realty Corp.* 274 A.D.2d 427, 711 N.Y.S.2d 778 (Mem), 2000 N.Y. Slip Op. 06851 [2nd Dept. 2000]).

In this matter, however, there may be somewhat more than mere knowledge of the litigation and appeal. *Redsky Capital, LLC* was a party to the action and the appeal. It is bound by the determination of the Appellate Division in the action. The creation of *Redsky JZ Roebing, LLC* and the transfer of title to it may have been a deliberate attempt to defeat the plaintiff's rights if the result of the appeal was not favorable to defendants.

There is a serious issue as to whether the transfer to *Redsky JZ Roebing, LLC* in disregard of the specific terms of the judgment was valid and raises issues as to whether *Redsky JZ Roebing, LLC* is a good faith transferee. The Amended Complaint alleges that *Redsky Capital, LLC* was the managing member of *Redsky JZ Roebing, LLC* and, as noted, asserts joint and several liability against the two LLCs. At this juncture it cannot be said that *Redsky JZ Roebing, LLC* is a good faith purchaser for value.

The transfer to *Redsky JZ Roebing, LLC* in disregard for the terms of the specific terms of the judgment is evidence that the two LLCs were deemed to be the same entity by the parties to the deed. The inaccurate representation to the Appellate Division that *Redsky Capital LLC* held

title is also evidence that the Redsky defendants themselves do not view them as two entities separate and independent entities.

If plaintiff can establish that the two LLCs are intertwined and that Redsky JZ Roebing, LLC was formed to defeat plaintiff's rights in the event the plaintiff was successful on the appeal, then a grant of specific performance as against Redsky JZ Roebing, LLC would not be such a drastic or harsh remedy that it would result in an injustice. (*Union Temple of Brooklyn v. Seventeen Development, LLC, et al.*, 162 A.D.3d 710, 79 N.Y.S.3d 194, 2018 N.Y. Slip Op. 04023 [2d Dept 2018], citing *Da Silva v Musso*, 53 NY2d 543, 547 [1981]).

For the foregoing reasons, the Court finds there is a reasonable likelihood that plaintiff will prevail on the merits. There is no question that the plaintiff would be irreparably injured if the defendants were permitted to transfer title or increase the security interests against the title to the property, which is already twice the amount of the purchase price that plaintiff agreed to pay. Moreover, the balance of equities weighs toward the plaintiff, who was found by the Appellate Division to have a valid and enforceable contract.

For the foregoing reasons, the plaintiff's motion for an injunction is granted to the extent that the defendants are enjoined from transferring or further encumbering the property during the pendency of this action.

To the extent that plaintiff sought to enjoin the lender and title insurer the motion must be denied. As they are not parties to the litigation the court lacks the authority to grant this relief. "[T]he plain language of CPLR 6301 makes clear, "[t]he pendency of an action is an indispensable prerequisite to the granting of a preliminary or temporary injunction" (*Tribune Print. Co. v. 263 Ninth Ave. Realty*, 88 A.D.2d 877, 879, 452 N.Y.S.2d 590, *affd.* 57 N.Y.2d 1038, 457 N.Y.S.2d 785, 444 N.E.2d 35; see *Uniformed Firefighters Assn. of Greater N.Y. v. City of New York*, 79 N.Y.2d 236, 581 N.Y.S.2d 734, 590 N.E.2d 719). (*Lynn v. Sterling National Bank*, 151 A.D.3d 1049, 54 N.Y.S.3d 864 (Mem), 2017 N.Y. Slip Op. 05215 [2d Dept 2017]; see also: *Town of Cicero v. Lakeshore Estates, LLC*, 152 A.D.3d 1168, 60 N.Y.S.3d 730, 2017 N.Y. Slip Op. 05524 [4th Dept. 2017]).

To the extent the plaintiff moves for a temporary receiver for the property, the motion is denied. At this juncture, the submissions on the motion do support a finding that the defendants are not properly managing the property.

The cross motion for sanctions is denied. The submission of a media story regarding possible financial difficulties involving a distinct and different property owned by defendant, while irrelevant and unreliable, does not arise to a level of frivolous conduct. Moreover, it played no part in this Court's consideration of the motion.

Finally, pursuant to CPLR 6312(b) the court must fix the amount of the undertaking to be posted in connection with the issuance of a preliminary injunction. The parties are directed to make submissions as to the appropriate amount of the bond to be posted by the plaintiff.

For the foregoing reasons, the plaintiff's motion for a preliminary injunction against defendants transferring or encumbering the property during the pendency of the action is granted

and plaintiff's motion is otherwise denied. The cross motion for sanctions is denied. The parties are directed to make submissions as to the appropriate measure of the bond to be fixed by the court.

Dated: July 15, 2020

LDM

HON. LARRY D. MARTIN
J.S.C