

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

JEAN M. GATH,  
Plaintiff,

Index No.: 101255/12

Motion Date: 04/20/12

- v -

Motion Seq. No.: 01

PHILIP MICALI,  
Defendant.

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 2 were read on this motion for a preliminary injunction.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_

1

Answering Affidavits - Exhibits \_\_\_\_\_

**FILED**

Replying Affidavits - Exhibits \_\_\_\_\_

Cross-Motion:  Yes  No

AUG 09 2012

Upon the foregoing papers,

NEW YORK  
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Plaintiff seeks a preliminary injunction restraining defendant from selling the shares associated with the cooperative apartment which was under contract to be sold to the plaintiff.

Defendant pro se opposes the motion.

Plaintiff brings this suit seeking specific performance of a contract of sale dated June 7, 2011 and executed by the parties concerning a cooperative apartment owned by the defendant. Plaintiff alleges that defendant's attempt to terminate the contract is improper and a breach of defendant's obligations.

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Plaintiff's complaint alleges that the plaintiff has been and continues to be ready, willing and able to purchase the apartment and states that the transaction has been approved by the cooperative board. Plaintiff asserts that defendant's former counsel on the transaction continues to hold plaintiff's \$74,000.00 deposit in escrow.

By letter dated January 16, 2012, defendant stated that under the section of the contract of sale entitled "Seller's Inability" the defendant was unilaterally terminating the contract due to issues involving the release of liens by the IRS upon the property. Plaintiff and plaintiff's counsel subsequently responded to defendant's letter and to the attempt by defendant's former counsel to return the escrow by reiterating plaintiff's intent to purchase the apartment pursuant to the terms of the contract of sale and by returning the attempted redemption of the escrow. Plaintiff has now initiated this lawsuit to compel defendant to sell the apartment pursuant to the contract.

The current application sees the plaintiff attempt to enjoin the defendant from selling or leasing the premises during the pendency of this action. As stated by the Court, when considering whether to grant an injunction under the circumstances presented here, "[t]he three prerequisites for obtaining a preliminary injunction are likelihood of success on

the merits, irreparable injury in the absence of such injunctive relief, and balancing of the equities." Seitzman v Hudson River Associates, 126 AD2d 211, 213 (1<sup>st</sup> Dept 1987).

Plaintiff here has demonstrated a likelihood of prevailing on the breach of contract claim. Defendant has sought to terminate the contract on the basis of being unable to remove an IRS lien upon the shares/apartment in a timely manner. Defendant attempts to invoke Section 16 of the Contract of Sale which states

- 16.1 If Seller shall be unable to transfer the items set forth in ¶2.1 in accordance with this Contract for any reason other than Seller's failure to make a required payment or other willful act or omission, then Seller shall have the right to adjourn the Closing for periods not exceeding 60 calendar days in the aggregate, but not extending beyond the expiration of Purchaser's Loan Commitment Letter, if ¶1.20.1 or 1.20.2 applies.
- 16.2 If Seller does not elect to adjourn the Closing or (if adjourned) on the adjourned date of Closing Seller is still unable to perform, then unless Purchaser elects to proceed with the Closing without abatement of the Purchase Price, either Party may cancel this Contract on Notice to the other party given at any time thereafter.
- 16.3 In the event of such cancellation, the sole liability of Seller shall be to cause the Contract Deposit to be refunded to Purchaser and to reimburse Purchaser for the actual costs incurred for Purchase[r's] lien and title search, if any.

The submissions on this motion assert that defendant attempts to invoke Section 16 of the Contract of Sale on the grounds that he was unable to deliver the premises free of liens as required by Section 4 of Contract of Sale. As quoted above, Section 16

allows either party to cancel the contract if defendant was unable to transfer clear title for any reason other than a willful act or omission on his part except where the plaintiff elected to proceed to closing without an abatement of the purchase price.

The letter of plaintiff's counsel dated January 19, 2012 to defendant states that "[t]he Purchaser expects to purchase the co-op apartment in accordance with the terms of the Contract, and the Purchase[r] remains ready, willing and able to do so." Thus a factfinder could reasonably conclude that the plaintiff elected to consummate the sale without any abatement or diminution of the purchase price pursuant to the contract and that the contractual remedy of specific performance is available. Contrast Stansky v Shermet, 79 AD2d 536, 537 (specific performance not available where buyer refuses to take property with liens in place). Therefore the plaintiff has demonstrated a likelihood of success on the merits of the claim for breach of contract.

Plaintiff demonstrates that she would suffer irreparable injury absent a grant of injunctive relief where a contract of sale, as is the case here, contains language that "provides that purchaser shall have such remedies as he is entitled to at law or in equity, including but not limited to specific performance because the Apartment and possession thereof cannot be duplicated." Seitzman v Hudson River Associates, 126 AD2d 211,

214 (1<sup>st</sup> Dept 1987). Finally, "a balancing of the equities favors the plaintiff[] herein. Although an injunction will prevent defendant from reaping an immediate return by selling the apartment to a third party, had [he] not breached [the] implied covenant of good faith, the closing would have taken place . . . and defendant would have already received [] compensation." Id.

The court shall set the statutorily required undertaking to be an amount equal to the deposit held by defendant's former counsel and shall direct that the deposit be held in escrow until further order of this court.

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction is GRANTED; and it is further

ORDERED that defendant, his agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts: (1) selling, contracting to sell, or transferring the shares in the apartment that is the subject of this litigation to anyone other than Plaintiff; (2) leasing the premises to any person or entity; and (3) taking or attempting to take any action with respect to the deposited

funds held in escrow by the escrow agent under the Contract of Sale; and it is further

ORDERED that an undertaking is fixed in the sum of \$74,000.00 and any other amounts held in escrow under the Contract of Sale conditioned that the plaintiff, if it is finally determined that she is not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that the parties are directed to attend a preliminary conference on September 6, 2012, at 11:00 A.M. in IAS Part 59, Room 103, 71 Thomas Street, New York, New York 10013.

This is the decision and order of the court.

Dated: August 1, 2012

ENTER:

**FILED**

AUG 09 2012

NEW YORK  
COUNTY CLERK'S OFFICE  
J.S.C.

*Debra A. James*  
**DEBRA A. JAMES**