

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

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 6

**BOARD OF MANAGERS OF THE SPENCER
CONDOMINIUM,**

**INDEX NO. 154149/2012
MOTION DATE
MOTION SEQ. NO. 12
MOTION CAL. NO.**

Plaintiff,

- against-

**ELIZABETH HAZAN, RAYMOND HOULE AND 9221-
0228 QUEBEC, INC., REAL ESTATE HOLDING
GROUP, LDC, AND “JOHN DOE” No. 1 through “JOHN
DOE” No.15, the true name of said defendants being
unknown to Plaintiff, the parties intended to be those
persons having or claiming an interest in the mortgaged
premises described in the complaint by virtue of being
tenants, occupants, or judgment-creditors, or lienors of any
type or nature in all or part of said premises,**

Defendants.

The following papers, numbered 1 to _____ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answer — Affidavits — Exhibits _____
Replying Affidavits

PAPERS NUMBERED

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█
█

Cross-Motion: X Yes No

This foreclosure action of a residential condominium unit arose out of the unpaid maintenance payments. On March 20, 2015, the parties entered into the Confidential Stipulation of Settlement resolving the above-captioned action and the related action filed under Index No. 159254/2013 (the “Agreement”).

Presently before the Court is Plaintiff Board of Managers of the Spencer Condominium’s (“Plaintiff”) motion seeking an Order:

- a. directing all parties hereto to e-file all papers submitted to the Court in connection with this application;
- b. pursuant to CPLR §1001(a) and CPLR Rule 3025(b) permitting Plaintiff to amend the summons and complaint to add 1 East 62nd Street Apt 1A NYC New York 10065

LLC (“1 East I”) and 1 East 62nd Street Apt 1A LLC (“1 East II”) as defendants to this action;

c. lifting the stay of this action (effectuated by so-ordered stipulation dated March 24, 2015 and e-filed as NYSCEF Doc. No. 230) for the limited purpose of voiding the transfers of Unit 1A (the “Unit”) in the condominium apartment building located at 1 East 62nd Street, New York, New York (the “Building”);

d. voiding the transfer of the Unit from Defendant Real Estate Holdings Group LDC (“REHG”) to 1 East I, by deed dated January 2, 2018 and recorded on March 13, 2019, on the grounds that such transfer violated: (i) the Order issued by this Court on November 26, 2013 enjoining “Defendants from transferring ownership of [the Unit] by any means and in any manner during the pendency of the within Action,” which Order is e-filed as NYSCEF Doc. No. 176; (ii) the express terms of the Confidential Settlement Agreement entered into by the parties hereto in March 2015 (the “Settlement Agreement”); and (iii) the express provisions of the By-Laws of the Spencer Condominium (the “Condominium”);

e. voiding the transfer of the Unit from 1 East I to 1 East II, by deed dated March 7, 2019 and recorded on March 14, 2019, on the ground that the transfer to 1 East I was improper such that 1 East I never lawfully acquired title to the Unit and that such transfer violated the express terms of the Condominium’s bylaws;

f. upon the voiding of the above-referenced transfers, requiring Defendants to comply with the terms of the Settlement Agreement;

g. awarding Plaintiff’s attorney’s fees and costs as provided for in paragraph 24 of the Settlement Agreement; and

h. pursuant to N.Y. Judiciary Law §753 and 22 N.Y.C.R.R. §130-1.1, imposing sanctions against REHG for its blatant disregard for this Court's Order of November 26, 2013 by transferring the Unit during the pendency of this action.

Defendants Elizabeth Hazan ("Hazan"), 9221-0228 Quebec, Inc., Raymond Houle ("Houle"), and REHG (collectively "Defendants") submit opposition and cross move seeking the Court to Order all motion documents and responses, and future filings to be sealed pursuant to Part 216 of the Uniform Rules for the Trial Courts.

Parties' Contentions

Plaintiff asserts that 1 East I and 1 East II should be brought into this action and the conveyances to these two entities be voided in order for Plaintiff to realize the benefit of the bargain it obtained by entering into the Settlement Agreement. Moreover, Plaintiff argues that the Court should direct the parties to e-file all papers in connection to Motion Sequence 12. Plaintiff contends that Paragraph 32 of the Settlement Agreement requires the parties to keep its terms confidential, but in the event of a Material Breach "any Party may disclose this Agreement and its terms for all necessary purposes." Plaintiff argues that REHG materially breached the Settlement Agreement by transferring the Unit to 1 East I without express approval of Plaintiff. Plaintiff argues that 1 East I and 1 East II are necessary parties and should be brought into the action "because [Plaintiff] cannot be afforded complete relief - i.e., an order compelling [Defendants] to specifically perform under the terms of the Settlement Agreement - without ownership of the Unit reverting to REHG." (Plaintiff's Memo of Law at 14). Plaintiff asserts that 1 East II is aware of this action and has been in contact with Plaintiff. Plaintiff contends that Houle signed the documents transferring the Unit from REHG to 1 East I.

Plaintiff asserts that the transfer of the Unit from REHG to 1 East I and the transfer from 1 East I to 1 East II must be declared void because it was in violation of the Bylaws, the Settlement Agreement (Section 7.1, 7.2, and 7.7) and the Order. Plaintiff avers that Section 7.1 of the Settlement Agreement deems a sale voidable if the sale was conducted in contravention of the Bylaws. Plaintiff contends that Section 7.2 of the Settlement Agreement affords Plaintiff the right of first refusal. Plaintiff contends that Section 7.7 of the Bylaws states that a unit owner cannot convey his property unless he has paid all Common Charges and Special Assessments to Plaintiff and have satisfied all unpaid liens other than the

mortgages. Plaintiff argues that it was never notified of the transfer and Defendants did not pay any money of the combined Judgment Amount and Settlement Sum after the transfer. Plaintiff asserts that Defendants' violation of the Settlement Agreement constitutes a material breach and therefore has rendered the Settlement Agreement worthless.

Furthermore, Plaintiff argues that the Court must issue an Order enjoining further transfer of the Unit and should issue sanctions against REHG for "flagrant contempt of the Order" pursuant to Judiciary § 753(A)(3). Plaintiff asserts that the Settlement Agreement must be enforced per its terms. Plaintiff contends that after the Court deems the transfers null and void and the Unit reverts to REHG, an Order should require:

- (a) [Defendants] to arrange for a licensed real estate broker associated with Douglas Elliman, with experience in selling and renting condominium apartments on the Upper East Side of Manhattan (the "Broker"), to list the Unit for rent and sale at fair market value, which fair market value is to be determined by the Broker in his/her sole discretion;
- (b) [Defendants] to disclose the Settlement Agreement to the Broker in order to allow the Broker to attain a full understanding of his/her obligations in connection with the sale or rental of the Unit; and
- (c) [Defendants] to comply with all other terms and conditions contained in the Settlement Agreement pertaining to the sale and rental of the Unit. (Plaintiff's Memo of Law at 24).

In opposition, Defendants argue that all documents should be filed under seal. Defendants assert that Plaintiff's motion should be dismissed because Plaintiff has failed to comply with a condition precedent prior to seeking judicial intervention. Defendants assert that Plaintiff has not attempted "to meet and confer" prior to bringing this motion. Defendants argue that the Court should deny any relief to Plaintiff because the Settlement Agreement only provided for a way for Defendants to pay down the agreed upon arrears. Defendants argue that "[a]ll obligations as to rental and sale are directed at REHG" and "Hazan is not mandated to take any specific action."

Defendants assert that Plaintiff's motion for contempt should be denied because it is procedurally and fatally defective pursuant to Judiciary Law § 756. Defendants argue that "New York Courts have long held that failure to include both statutorily required notice and warning provisions on the face of civil contempt

motions are fatally defective and, when raised in timely manner, warrant dismissal of the motion.” (Defendants’ Aff. in Opp. at 5). Defendants assert that the motion is procedurally defective because the November 26, 2013 Order “prevented Defendants and non-parties from transferring ownership of unit 1A during the pendency of the within action” but shortly thereafter, the Court allowed the amendment of the pleadings to include REHG, therefore it is not clear who the “Defendants” were referring to. Defendants argue that Plaintiff failed to demonstrate frivolously conduct of the Defendants.

Moreover, Defendants argue that Plaintiff’s motion should be denied because a necessary party has not been joined. Defendants contend that “U.S. Bank alleges to hold a first priority mortgage lien on the premises in the sum of approximately \$3,000,000.00.” (Defendants’ Aff. in Opp. at 10). Defendants argue that the Court should not lift the stay of this action because Plaintiff “cannot have it both ways – litigate the case, amend pleadings, make new claims, and at the same time, claim that the case is closed and that the Settlement Agreement controls.” (Defendants’ Aff. in Opp. at 11).

Defendants assert that the Court should deny Plaintiff’s motion seeking to amend the pleadings to add 1 East I and 1 East II because “Plaintiff failed to include in their application a proposed amended pleading clearly showing the changes or additions to be made to the pleading” and failed to demonstrate that there was no delay. (Defendants’ Aff. in Opp. at 11). Furthermore, Defendants argue that the Court should deny leave to amend the pleadings because Plaintiff has not filed a recent lien which can be foreclosed on and the remaining claims are insufficient. Defendants argue that “to void the legitimate transfers of real property pursuant to D.C.L § 270, et als. to show a ‘fraudulent conveyance,’ Plaintiff must first demonstrate that it is a creditor which it has failed to do so.” (Defendants’ Aff. in Opp. at 15). Defendants further argue that Plaintiff has failed to “show that a conveyance was made by the debtor without fair consideration and (1) the debtor was insolvent, (2) the conveyance rendered the debtor insolvent, (3) the debtor was left with unreasonably small capital, or (4) the debtor intended or believed that it would not be able to pau the debt after the transfer.” (Defendants’ Aff. in Opp. at 15).

Defendants argue that the relief sought by Plaintiff that constitutes final relief in the amended complaint should be denied because no amended pleading has been filed. Defendants assert that Plaintiff’s request to enforce the Settlement Agreement is premature and should be denied because the Court first needs to address Plaintiff’s request to amend the pleadings. Defendants contend that the Court should order a hearing to determine whether a material breach occurred. Defendants assert that they

have complied with the Settlement agreement by listing the Unit for rent. Additionally, Defendants argue that the Court should not order service on 1 East I and 1 East II at the offices of Marzec Law Firm PC because the firm does not represent them.

Discussion

1. Seal Documents

Paragraph 32 of the Settlement Agreement requires the parties thereto to keep its terms confidential, and permits a party to seek legal recourse from a disclosing party. However, Paragraph 32 of the Settlement Agreement further states that “[i]n the event of a Material Breach of this Agreement, allowing for the restoration of Action Nos. 1, 2 or 3 as set forth herein, any Party may disclose this Agreement and its terms for all necessary purposes free from any remedy set forth in his paragraph 32.” REHG materially breached the Settlement Agreement by transferring the Unit to 1 East I without the express approval of the Board. Therefore, the parties are directed to e-file all papers submitted to the Court in connection with Motion Sequence 12.

2. Amend Complaint

“CPLR 3025(b) authorizes the court freely to grant leave to amend pleadings upon such terms as may be just.” *Ruskay v. Bennett*, 73 AD2d 519, 519 [1st Dept 1979]. “CPLR 3025 allows liberal amendment of pleadings absent demonstrable prejudice.” *Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000].

“Under CPLR 1001(a), necessary parties to an action or proceeding fall into two distinct categories: persons ‘who ought to be parties if complete relief is to be accorded between the persons who are parties to the action,’ or ‘who might be inequitably affected by a judgment in the action.’” *27th St. Block Ass’n. v. Dormitory Auth. of State of New York*, 302 AD2d 155, 160 [1st Dept 2002]

Here, Plaintiff is entitled to amend its Verified Complaint to add 1 East I and 1 East II as defendants and to add a cause of action to address the transfers of the Unit to the two parties. 1 East I and 1 East II have been or are currently the holder of the deed of the Unit. 1 East I and 1 East II are necessary parties because Plaintiff cannot be afforded complete relief without ownership of the Unit reverting back to REHG. Moreover, if the Court voids the transfers from REHG to 1 East I and from 1 East I to 1 East II, then the rights of 1 East I and 1 East II will be adversely affected.

There is nothing in the record indicating that any prejudice will result from amendment. 1 East I and 1 East II were aware of the proceeding and had the opportunity to at oral argument to respond to the motions. Additionally, at oral argument Defendants stated on the record that they do not object to adding 1 East I and 1 East II as defendants to the action.

3. Voiding Transfer of Unit

Section 7.1 of the Bylaws states: “no Residential Unit Owner may sell ... his Residential Unit except in compliance with the applicable provision of this Article 7, [a]ny purported sale ... consummated in default of the applicable terms hereof shall be voidable at the sole discretion of the [Board].”

Section 7.2 of the Bylaws states:

Promptly after any [] contract of sale or lease [of a unit in the Condominium] shall be fully executed, the Residential Unit Owner executing same ... shall send written notice thereof to the [] Board by certified or registered mail, return receipt requested, which notice shall be accompanied by a fully executed, original counterpart of the contract of sale or lease...

Section 7.7 of the Bylaws (as amended in 2013) states:

No Residential Unit Owner shall be permitted to convey ... its Unit unless it shall have paid in full to the Condominium Board all unpaid Common Charges and Special Assessments and any other charges due on a conveyance ... of a Unit theretofore assessed against such Unit and shall have satisfied all unpaid liens, other than that of Permitted Mortgages, levied against such Unit.

Paragraph 18 of the Settlement Agreement states:

Notwithstanding the November 8, 2013 Decision and Order in Action No. 1, at any time after the conclusion of the Initial Marketing Period, the Board shall consider and review any *bona fide*, “arm’s length” for-consideration sale of the Apartment to a party/parties unaffiliated with the Unit Owner Parties, pursuant to the terms of the

Condominium's governing documents. The Board shall have the right to review the purchase application and to conduct due diligence to ensure that any prospective purchaser is not affiliated with any of the Unit Owner Parties and that the transfer is a *bona fide*, arm's-length for-consideration sale. A mandatory condition of any transfer or refinance of the Apartment shall be that the Judgment Amount and Settlement Sum be paid in full by the date of the closing of the transfer or refinance. In addition to the payment of the Judgment Amount and the Settlement Amount, any sale or refinance by any of the Unit Owners Parties must be in full compliance with the Declaration and By-Laws of the Spencer Condominium, as well as in compliance with the terms and conditions of this Agreement.

REHG's transfer of the Unit to 1 East I was in violation of the Bylaws and the Settlement Agreement. Plaintiff was never notified of the transfer of the Unit and afforded the opportunity to review 1 East I as a prospective purchaser and confirm that the transfer was "arm's length" pursuant to Paragraph 18 of the Settlement Agreement. Moreover, Defendants have still not paid the \$815,358.40 constituting the combined Judgment Amount and Settlement Sum was paid upon such transfer. Furthermore, the transfer was in violation of the Order issued by the Court on November 26, 2013. REHG was added as a defendant and stated that all Defendants are enjoined "from transferring ownership of Unit 1A located at 1 East 62nd Street, New York, NY, by any means and in any manner during the pendency of the within Action." The action is currently stayed and is pending Defendants' fulfillment of their financial obligations under the Settlement Agreement.

Furthermore, the transfer from 1 East I to 1 East II must be voided because 1 East I did not have a valid title to convey the Unit. Additionally, 1 East I's transfer of the Unit to 1 East II was in violation of the Bylaws and the Settlement Agreement. Plaintiff was not notified of the transfer of the Unit and was not given the opportunity to review purchase. At oral argument Defendants stated on the record that they do not object to adding 1 East I and 1 East II as defendants to the action. Therefore, the transfers from REHG to 1 East I and 1 East I to 1 East II are voided.

4. Sanctions

New York Judiciary law 753(A)(3) states "a court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other

misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in... for any other disobedience to a lawful mandate of the court..” *See 188-190 Hous. Dev. Fund, Corp. v. Viola*, 2019 N.Y. Slip Op. 33564[U], 3 [N.Y. Sup Ct, New York County 2019].

To succeed on a motion to punish for civil contempt, the moving party must show that the alleged contemnor violated a clear and unequivocal court order and that the violation prejudiced a right of the party to the litigation. *See* Judiciary Law § 753(a)(3). Contempt is a drastic remedy that should not be granted unless it is established “with reasonable certainty.” *Usina Costa Pinto, S.A. v. Sanco Sav Co. Ltd.*, 171 A.D. 2d 487 [1st Dept. 1991]. Civil contempt requires clear and convincing evidence that a clear and unequivocal court order was knowingly disobeyed. *Simens v. Darwish*, 104 A.D. 3d 465 [1st Dept. 2013].

REHG transferred the Unit in violation of the Order, the Bylaws and the Settlement Agreement. However, Plaintiff is not prejudiced by the transfer because the transfer is declared void and the Unit is reverted back to REHG’s ownership. The Settlement Agreement is still in effect.

Wherefore, it is hereby,

ORDERED that Plaintiff’s motion is only granted to the extent that the parties are directed to e-file all papers submitted to the Court in connection with Motion Sequence 12; that the summons and complaint is amended to add Defendants 1 East 62nd Street Apt 1A NYC New York 10065 LLC and 1 East 62nd Street Apt 1A LLC; that the stay is lifted for the limited purpose of voiding the transfers of Unit 1A in the condominium apartment building located at 1 East 62nd Street, New York, New York; that the transfer of Unit 1A from Defendant Real Estate Holdings Group LDC to 1 East 62nd Street Apt 1A NYC New York 10065 LLC is voided; and that the transfer from 1 East 62nd Street Apt 1A NYC New York 10065 LLC to 1 East 62nd Street Apt 1A LLC is voided; all other relief in Plaintiff’s motion is denied and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendants Elizabeth Hazan, 9221-0228 Quebec, Inc., Raymond Houle, and Real Estate Holdings Group LDC’s cross-motion is denied and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: August 18, 2020

ENTER: 
J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION