

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

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

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LAWRENCE LEVY,

Plaintiff,

- v -

ESTATE OF ROBERT MAHLER, MILES ZATKOWSKY,

Defendants.

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INDEX NO. 650197/2021

MOTION DATE 01/12/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 19

were read on this motion for PREL INJUNCTION/TEMP REST ORDR.

LOUIS L. NOCK, J.S.C.

The complaint in this action alleges that plaintiff entered into a contract of sale with defendant *Estate of Robert Mahler*, deceased (the “Estate”), through its executor, defendant Miles Zatkowsky (the “Executor”), by which plaintiff was to purchase from the Estate cooperative shares allocable to two Upper West Side apartments known as 9B and 9G, 41 Central Park West, New York, New York. The complaint alleges that “[d]espite due demand, Defendants have wrongfully refused to consummate the sale of the Apartments to Plaintiff in accordance with the terms of the Contract of Sale” and that “[a]s a result of Defendants’ breach of the Contract of Sale, Plaintiff is entitled to specific performance and attorney’s fees (as expressly provided for in the Contract of Sale)” (Complaint [NYSCEF Doc. No. 2] ¶¶ 4-5).

The complaint further alleges that “[u]pon information and belief, the reason Defendants have refused to finalize the sale and close, is an internal dispute that has arisen between the

Executor of the Estate and the beneficiaries of the Estate regarding the sale of the Properties (Complaint ¶ 19).

Plaintiff has moved, by order to show cause dated January 14, 2021 (NYSCEF Doc. No. 12), for a preliminary injunction enjoining the Estate and the Executor from transferring, conveying, disposing, or encumbering the apartments pending the disposition of this action. The court granted a temporary restraining order mirroring said relief in said order to show cause pending the hearing of the motion for a preliminary injunction, which was today.

Since the filing of the order to show cause, the court has taken judicial notice of the fact that a prior-commenced proceeding is presently pending before Surrogate's Court, New York County, titled *In the Matter of the Petition Seeking to Enjoin Executor from Selling Estate Property in the Estate of Robert G. Mahler, Deceased* (File No. 2019-4004/B [Surr Ct NY County]) which involves the very apartments that are the subject of this action. In fact, that court, per Hon. Nora S. Anderson, Surrogate, issued an Order to Show Cause in that proceeding, dated October 26, 2020, in connection with a motion by alleged beneficiaries of the Estate (Joyce M. Duckles, Alison Mahler Bowie, and William Wolf) to enjoin the very sale that the plaintiff in this action is urging this court to compel.¹

Being aware of the aforesaid prior-commenced Surrogate's Court proceeding, involving the exact same *res* as the subject of this action, the only possibly prudent thing for this court to do at this time is deny the motion for a preliminary injunction, while extending the temporary restraining order to preserve the *status quo*, and to transfer this action to the Surrogate's Court forthwith so it can join, or be consolidated with, the Surrogate's Court proceedings referenced

¹ The subject apartments are located in a building bearing two street addresses – 41 Central Park West, and 1 West 64th Street – because the building lies at the corner of Central Park West and West 64th Street. The complaint in this action uses the 41 Central Park West address; the petition in the Surrogate's Court proceeding uses the 1 West 64th Street address.

above. Any other course of action would give rise to serious risks of inconsistent findings and orders, as well as unnecessary costs entailed in duplicative litigation in two separate courts (*see, e.g., Morell v Basa*, 300 AD2d 134 [1st Dept 2002]; *Hart v General Motors Corp.*, 129 AD2d 179, 186 [1st Dept], *lv denied* 70 NY2d 608 [1987]).

Accordingly, it is

ORDERED that this action is hereby transferred to the Surrogate's Court of the State of New York, County of New York, to be joined or consolidated with the proceeding titled *In the Matter of the Petition Seeking to Enjoin Executor from Selling Estate Property in the Estate of Robert G. Mahler, Deceased* (File No. 2019-4004/B [Surr Ct NY County] [Anderson, S.]); and it is further

ORDERED that this court's temporary restraining order set forth in its Order to Show Cause dated January 14, 2021 (NYSCEF Doc. No. 12), is hereby extended until further order; and it is further

ORDERED that the plaintiff's motion for a preliminary injunction, by said Order to Show Cause, is denied as moot in view of the within transfer of this action to the Surrogate's Court; and it is further

ORDERED that the Clerk of the County of New York is directed to assist and facilitate the parties in effecting the logistics of the within transfer.

This will constitute the decision and order of the court.



<u>2/16/2021</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input checked="" type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE