

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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C/hu

_____AD3d_____

Argued - November 18, 2008

ROBERT A. SPOLZINO, J.P.
MARK C. DILLON
EDWARD D. CARNI
JOHN M. LEVENTHAL, JJ.

2007-06266

DECISION & ORDER

Vladimir Sudit, d/b/a VS International, respondent,
v Eli Eliav, et al., appellants, et al., defendants.

(Index No. 33333/05)

Albanese & Albanese, LLP, Garden City, N.Y. (Barry A. Oster of counsel), for
appellant Eli Eliav.

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains, N.Y.
(Frank J. Haupel and Michael J. Schwarz of counsel), for appellant Bank of
America, N.A.

Solomon Rosengarten, Brooklyn, N.Y., for respondent.

In an action, inter alia, to foreclose a mortgage, the defendant Eli Eliav appeals, as limited by his brief, from so much of an amended order of the Supreme Court, Kings County (Hinds-Radix, J.), dated April 4, 2007, as granted, on condition, those branches of the plaintiff's motion which were for summary judgment against him and for the appointment of a referee to compute, and granted that branch of the plaintiff's motion which was to consolidate the action with two related actions entitled *Ezagui v Sudit*, pending under Kings County Index No. 17038/01, and *Sudit v Lefferts Homes, Inc.*, pending under Kings County Index No. 22592/01, to the extent of directing that the actions shall be tried jointly, and denied his cross motion for summary judgment dismissing the complaint insofar as asserted against him or, in the alternative, to compel disclosure pursuant to CPLR 3124, and the defendant Bank of America, N.A., separately appeals, as limited by its brief, from so much of the same amended order as granted, on condition, those branches of the plaintiff's motion which were for summary judgment against it and for the appointment of a referee to compute and granted that branch of the plaintiff's motion which was to consolidate the action with the two related actions to the extent of directing that the actions shall be tried jointly.

December 30, 2008

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ORDERED that the amended order is modified, on the law, by deleting the provisions thereof granting, on condition, those branches of the plaintiff's motion which were for summary judgment against the defendants Eli Eliav and Bank of America, N.A., and for the appointment of a referee to compute, and granting that branch of the plaintiff's motion which was to consolidate the action with two related actions entitled *Ezagui v Sudit*, pending under Kings County Index No. 17038/01, and *Sudit v Lefferts Homes, Inc.*, pending under Kings County Index No. 22592/01 to the extent that the actions shall be tried jointly, and substituting therefor provisions denying those branches of the plaintiff's motion; as so modified, the amended order is affirmed, with one bill of costs to the appellants.

The Supreme Court erred in granting, on condition, those branches of the plaintiff's motion which were for summary judgment against the appellant Bank of America, N.A. (hereinafter Bank of America), which had issued a mortgage on a condominium unit in the subject building in April 2005, and the appellant Eli Eliav, the owner of a condominium unit in the subject building, and for the appointment of a referee to compute.

In opposition to the plaintiff's prima facie showing of entitlement to summary judgment, both Bank of America and Eliav raised a triable issue of fact as to whether the 1997 mortgages had been orally modified, whether there had been part performance of the alleged oral agreement, and whether such part performance was unequivocally referable to the alleged oral agreement (*see Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235-236; *Anostario v Vicinanza*, 59 NY2d 662, 664; *Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344; *Luft v Luft*, 52 AD3d 479, 480-481; *Travis v Fallani & Cohn*, 292 AD2d 242, 244; *Sarcona v DeGiaino*, 226 AD2d 1143; General Obligations Law § 5-703; § 15-301[1], [2]).

Eliav's cross motion for summary judgment dismissing the complaint insofar as asserted against him was properly denied, as Eliav failed to establish, as a matter of law, that a discontinuance of an action regarding the condominium unit owned by him was with prejudice (*cf. North Shore-Long Is. Jewish Health Sys., Inc. v Aetna US Healthcare, Inc.*, 27 AD3d 439, 440; *Singleton Mgt. v Compere*, 243 AD2d 213, 216).

In light of our determination, a joint trial of the instant action with the two related actions would be inappropriate, as it would result in prejudice to a substantial right of Eliav and Bank of America (*see Skelly v Sachem Cent. School Dist.*, 309 AD2d 917, 917-918).

The parties' remaining contentions either have been rendered academic in light of our determination or are without merit.

SPOLZINO, J.P., DILLON, CARNI and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court