

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

D21623
C/hu

_____AD3d_____

Argued - November 18, 2008

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

2007-06268

DECISION & ORDER

Vladimir Sudit, d/b/a VS International, respondent,
v Schneuer Z. Schapiro, et al., appellants, et al.,
defendants.

(Index No. 29209/05)

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

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

In an action, inter alia, to foreclose a mortgage, the defendants Schneuer Z. Schapiro, Chana Shapiro, and Wells Fargo Bank appeal, as limited by their 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 them 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.

ORDERED that the amended order is reversed insofar as appealed from, on the law, with costs to the appellants, and those branches of the plaintiff's motion which were for summary judgment against the appellants and for the appointment of a referee to compute, and 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, are denied.

December 30, 2008

Page 1.

SUDIT, d/b/a VS INTERNATIONAL v SCHAPIRO

The Supreme Court erred in granting, on condition, those branches of the plaintiff's motion which were for summary judgment against the appellants, Schneuer Z. Schapiro and Chana Shapiro, the owners of the subject condominium unit, and Wells Fargo Bank (hereinafter Wells Fargo), which had issued a mortgage on the subject condominium unit and for the appointment of a referee to compute.

In opposition to the plaintiff's prima facie showing of entitlement to summary judgment, and for the appointment of a referee to compute, the appellants 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]).

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 the appellants (*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