

Twin Holdings of Del. LLC v CW Capital, LLC

2010 NY Slip Op 31266(U)

May 10, 2010

Sup Ct, Nassau County

Docket Number: 005193/09

Judge: Stephen A. Bucaria

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TWIN HOLDINGS OF DELAWARE LLC,
HERALD SQUARE OF DELAWARE LLC
and PAUL SOHAYEGH,

Plaintiffs,

-against-

CW CAPITAL, LLC, CW CAPITAL ASSET
MANAGEMENT, LLC, CW CAPITAL
MORTGAGE SECURITIES IV LLC and
CADIM NOTE INC.,

Defendants.

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 005193/09

MOTION DATE: April 6, 2010
Motion Sequence #006, 007, 008

The following papers read on this motion:

Order to Show Cause.....	X
Notice of Motion.....	XX
Affirmation/Affidavit in Opposition.....	XXX
Affirmation in Support.....	X
Memorandum of Law.....	XXXXXX
Reply Memorandum of Law.....	XXX

Motion by plaintiff to consolidate the New York County foreclosure action with the present action and to stay the foreclosure action is **denied**. Motion by plaintiff for leave to file a second amended complaint is **denied**. Motion by defendants to transfer venue to New York County is **denied**.

This is an action for breach of a loan agreement. On March 20, 2007, plaintiffs Twin

Holdings of Delaware, LLC and Herald Square of Delaware, LLC entered into a contract to purchase a commercial building located at 29 West 35th Street in Manhattan from defendant CW Capital LLC or its predecessor entity. The purchase price for the building was \$30 million. The agreement provided that defendant would extend short term financing for plaintiffs to acquire title and to renovate the property.

At the closing on July 16, 2007, plaintiffs issued a "gap note" in the amount of \$13,830,000, payable to CW Capital LLC. It appears that the gap note represented the difference between the amount of the new note and the total outstanding balance on the original notes. In any event, plaintiffs also issued a new promissory note, consolidating the gap note with the original notes issued by plaintiffs' predecessors in title. According to the terms of the new note, plaintiffs promised to pay CW Capital \$29,200,000. In the note, plaintiffs acknowledged that the portion of the loan advanced as of July 16, 2007 was \$25,100,000. The note provided that the borrower had the right to receive additional advances in an amount not to exceed \$4.1 million. \$2 million of the additional advances could be used for debt service payments, and \$2.1 million could be used for "tenant improvement and leasing commission obligations."

The note provided for a floating interest rate of 2.1% above the LIBOR rate. While the maturity date of the note was August 9, 2009, the borrower had the option to extend the note for two consecutive one year periods upon payment of an extension fee. If the borrower extended the note, it was also required to provide the lender with funds sufficient to allow the lender to purchase a "replacement interest rate cap agreement."

The note provided that the borrower was to comply with certain "minimum performance criteria," i.e. ratios of cash flow to debt service payment. The borrower's cash flow was to be calculated by the lender based upon the "trailing 12 month period." The debt service payment was to be calculated based upon an "8.5% loan constant." For the period August 9, 2008 to February 8, 2009, the ratio of cash flow to debt service was to be .7:1. From February 9, 2009 to August 8, 2009, the ratio was to be .9:1. Beginning August 9, 2009, the ratio was to be 1:1. If the borrower failed to generate sufficient cash flow, it was obligated to make a "balancing prepayment" of principal to maintain the required ratio of cash flow to debt service payment. Upon any prepayment of principal, the borrower was also to pay an "exit fee" of .5%.

The note was guaranteed by plaintiff Paul Sohayegh. In order to secure the indebtedness represented by the note, plaintiffs granted CW Capital a mortgage on the

property.

On February 27, 2009, CW Capital wrote to plaintiffs advising them that they had not achieved the required ratio of cash flow to debt service payment as of February 9, 2009. CW Capital calculated the ratio based upon plaintiffs' operating statements for the "trailing 4 month period" ending January 31, 2009. Based upon the income and expense figures shown in those reports, CW Capital determined that plaintiffs had achieved a ratio of only .72:1 and were required to make a balancing prepayment, including exit fee, of \$5,203,589. CW Capital further stated that plaintiffs' failure to make the balancing payment by March 6, 2009 would constitute a default on the note. On March 11, 2009, CW Capital transferred the servicing of the loan to a special servicer, defendant CW Capital Asset Management, LLC, based upon plaintiffs' failure to make the required payment.

This action was commenced on May 29, 2009. Plaintiffs allege that defendants breached the loan agreement by calculating the required ratio based on a 4 month operating period, as opposed to the 12 month period provided by the contract. Plaintiffs further allege that defendants breached the loan agreement by calculating the debt service ratio based upon an 8.5% loan constant, rather than an interest rate of LIBOR plus 2.1%. Plaintiffs allege that defendants breached the loan agreement by refusing to advance additional sums to reimburse plaintiffs for improvements to the building unless plaintiffs made the demanded balancing payment. Plaintiffs allege that they have expended substantial sums to renovate the building and have succeeded in leasing 9.5 of the 12 floors of commercial space. Plaintiffs allege that because of defendants' wrongful conduct they are unable to continue renovating the building and offering space to prospective tenants.

Defendants moved to dismiss the complaint. While the motion to dismiss was pending, plaintiffs served a first amended complaint. Pursuant to a so-ordered stipulation dated December 16, 2009, the parties agreed that defendants' motion to dismiss should be deemed as having been addressed to the first amended complaint. In the stipulation, defendants further agreed not to commence a foreclosure action until five business days after the preliminary conference scheduled for January 27, 2010. Although a preliminary conference was held on January 27, 2010, no preliminary conference order was issued.

On February 4, 2010, defendants commenced an action in New York County to foreclose the mortgage (Index No. 101523/10). In the foreclosure action, defendants alleged that plaintiffs were in default for failing to make the "maturity payment" on the maturity date.

August 9, 2009.

By order to show cause dated February 4, 2010, plaintiffs move pursuant to CPLR 602 to remove the foreclosure action to this court, consolidate it with the present case, and stay the foreclosure action. In the order to show cause, this court temporarily stayed the foreclosure action pending the determination of the motion. Plaintiff asserts that the two actions involve common questions of law and fact relating to defendants' obligation to fund the loan. Defendants argue that there are no common questions of fact or law because plaintiffs' claims in the Nassau County action are based upon plaintiffs' rights prior to the maturity of the loan.

CPLR 602(a) provides that, "When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Once the mortgagee has commenced a foreclosure action, it may not commence another action to recover any part of the mortgage debt, without leave of court (RPAPL § 1301[3]). The purpose of this provision is to "avoid multiple suits to recover the same mortgage debt and confine proceedings to collect the mortgage debt to one court and one action" (*Valley Bank v Rose*, 228 AD2d 666 [2d Dept 1996]). Nevertheless, where the mortgagor commences an action with respect to the mortgage, the mortgagee will not be barred from subsequently commencing a foreclosure action, even if the mortgagor has obtained a recovery (*Id.*).

In the present case, plaintiffs have not yet established their claims as to defendants' breach of the mortgage agreement. Moreover, as defendants assert, plaintiffs' claims appear to relate to defendants' conduct prior to plaintiffs' alleged default on the maturity date. The court concludes that there are no common questions of law or fact, and in any event consolidation is not appropriate. Accordingly, plaintiffs' motion to consolidate the New York County foreclosure action with the present action is **denied**. The stay of the foreclosure action is hereby terminated.

Defendants move to transfer the present action to New York County pursuant to CPLR § 510 on the ground that Nassau is not a proper county. On February 17, 2010, defendants served a demand to change venue to New York County pursuant to CPLR § 511(a). Defendants argue that Nassau is not a proper county because upon CPLR § 507

which provides, “The place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated.” Plaintiff argues that venue in Nassau County is proper because it is the county in which plaintiff Paul Sohayegh resides (CPLR 503[a]).

A mortgage is generally considered to be personal property (*Singh v Becher*, 249 AD2d 154 [1st Dept 1998]). Thus, an assignment of an existing mortgage does not affect the underlying real property, and an action to impose a constructive trust on the assignment of a mortgage does not have to be venued in the county where the property is located (Id). Since the contract rights which plaintiffs assert are also personal property, the present action need not be maintained in the county where the property burdened by the mortgage is situated. Defendants’ motion to transfer the action to New York County is **denied**.

Plaintiffs move pursuant to CPLR 3025(b) for leave to serve a second amended complaint. The first cause of action in the second amended complaint is for specific performance of the loan agreement and directing defendants to “acknowledge that the loan is in balance.” The second cause of action is for a declaratory judgment that the loan is in balance and plaintiffs are in compliance with the minimum performance criteria. The third cause of action is for a declaratory judgment that plaintiff Sohayegh is not personally liable for the full amount of the note pursuant to the guaranty. The fourth cause of action is for a “permanent injunction” restraining defendants from prosecuting the foreclosure action until resolution of the present action. The fifth cause of action is for breach of the loan based upon the same conduct as asserted in the first amended complaint. The sixth cause of action is for breach of the stipulation by commencing the foreclosure action. The seventh cause of action is for fraudulently inducing plaintiffs to enter the loan agreement, and the eighth cause of action is for tortious interference with tenants, brokers, and contractors. The court construes the seventh and eighth causes of action as asserting claims similar to those asserted in the first amended complaint. The ninth cause of action is for contribution or indemnification with respect to an action for brokerage commissions commenced by Newmark & Company Real Estate, Inc. in New York County. The commissions sought in that action were allegedly earned for leasing space in the building which is the subject of the present action.

CPLR 3025(b) provides that leave to amend shall be freely given upon such terms as may be just. Nevertheless, whether to grant leave is discretionary with the court (*Edenwald Contracting Co. v New York*, 60 NY2d 957 [1983]). The court notes that plaintiffs have

TWIN HOLDINGS OF DELAWARE LLC, et al

Index no. 005193/09

already amended their complaint once. Furthermore, the causes of action for specific performance, declaratory judgment, and permanent injunction are directed to the merits of the foreclosure action and risk adjudication which is inconsistent with the judgment of the New York County Supreme Court. Finally, the cause of action for contribution in the brokerage commission action appears to be unrelated to the issues before the court. For all of these reasons, plaintiffs' motion for leave to serve a second amended complaint is denied.

So ordered.

Dated MAY 10 2010


J.S.C.

ENTERED
MAY 13 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE