

Louzon v Roslyn Heights Mtge. Corp.

2016 NY Slip Op 32124(U)

April 7, 2016

Supreme Court, Queens County

Docket Number: 705811/15

Judge: Carmen R. Velasquez

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

-----x
AMIT LOUZON,

Index No. 705811/15

Plaintiff,

Motion

-against-

Dated: September 24, 2015

ROSLYN HEIGHTS MORTGAGE CORP.,
et al.,

m# 3

Defendants.

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The following papers numbered EF 66 - EF 77 read on this Order to Show Cause on by the plaintiff for an order restoring its prior Order to Show Cause and allowing him to serve opposition to the defendants' cross motion.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits	EF 66-77
Notice of Cross Motion - Affidavits - Exhibits....	
Affirmation in Opposition - Exhibits.....	
Replying Affirmation.....	

Upon the foregoing papers it is ordered that this Order to Show Cause by the plaintiff is decided as follows:

At the outset, the court notes that the branch of the Order to Show Cause to restore the application for a preliminary injunction is unopposed. Therefore, the court will consider the underlying application for a preliminary injunction and the cross motion by defendants New York Community Bank and Roslyn National Mortgage Corp. to dismiss the action.

Defendants Francisco F. Garcia and Fidelina Rivas Garcia executed and delivered to defendant Roslyn National Mortgage Corp., ("Roslyn") a subsidiary of defendant New York Community Bank("NYCB"), a cooperative fixed rate note and loan security agreement securing 599 shares of stock of 35-21 79th Street

Tenants Corp. and a proprietary lease regarding premises located at 35-21 79th Street, Jackson Heights, Apartment 1J, New York, on September 16, 1999. The Garcia defendants subsequently defaulted in payment of their obligations under the note and security agreement. A foreclosure sale for the premises was held on September 12, 2014 pursuant to Article 9 of the Uniform Commercial Code. East Fork Funding, LLC ("East Fork") was the successful bidder at the foreclosure sale. Plaintiff is a member of East Fork. East Fork tendered a deposit in the sum of \$10,400. Thereafter, East Fork signed a Memorandum of Sale, which memorialized its successful bid. On December 24, 2014, East Fork assigned its bid to the plaintiff.

Following the sale, counsel for the Coop Board for the premises asserted that it never received the required notice of the foreclosure sale. As a result, a new foreclosure sale was scheduled for January 23, 2015. Before the sale could be held, the Garcia defendants tendered sufficient funds to reinstate the loan and cure their default. East Fork, however, refused to accept a refund of its deposit. Plaintiff argued that Roslyn/NYCB had no legal right to permit the Garcia defendants to redeem their interest in the shares after the first auction sale had occurred.

Plaintiff commenced the instant action, which alleges causes of action sounding in specific performance, breach of contract, breach of duty of good faith and fair dealing, unlawful grant of a right of redemption in violation of UCC § 9-623(c)(2), declaratory judgment, tortious interference with a contract, preliminary and mandatory injunction, misrepresentation and fraudulent inducement and fraud and collusion. Plaintiff now moves for a preliminary injunction enjoining the transfer of the shares and the lease with respect to the subject premises. Plaintiff maintains that the debtors' right to redeem the shares was extinguished after the property was sold at the auction. According to plaintiff, the Memorandum of Sale and assignment of bid provide evidence of plaintiff's interest in the shares. Plaintiff further states that he is ready, willing and able to pay the balance of the purchase of the price. Defendants Roslyn and NYCB cross move to dismiss the action on the ground of lack of standing and failure to state a cause of action.

The court will first address the cross motion by defendants Roslyn and NYCB to dismiss the action.

Defendants contend that plaintiff is not a proper party and lacks standing to maintain this action. Defendants maintain that the plaintiff is not a party to the Terms of Sale or Memorandum

of Sale which were executed following the auction. The court finds this argument to be without merit. Plaintiff has annexed an assignment of bid dated December 24, 2014, executed by the plaintiff and East Fork. The assignment specifically states that "[f]or ten dollars and other valuable consideration, East Fork Funding, LLC hereby assigns its right, title, interest and bid in and to 599 shares of 35-21 79th Street Tenants Corp. (the 'Shares') appurtenant to unit 1J at 35-21 79th St., Jackson Heights, NY to AMIT LOUZON." Thus, plaintiff clearly has standing to maintain this action.

Defendants also seek to dismiss the complaint on the ground of failure to state a cause of action pursuant to CPLR 3211(a)(7). "A motion to dismiss made pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 37 [2d Dept 2006]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Behar v Glickenhau Westchester Dev. Inc.*, 122 AD3d 784, 785 [2d Dept 2014].) The standard on such a motion is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010].)

The first cause of action in the complaint for specific performance is sufficiently pled. The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its obligations, that the defendant was able to convey the property and that there was no adequate remedy at law. (*E & D Group, LLC v Vialet*, 134 AD3d 981, 982 [2d Dept 2015]; *EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [1st Dept 2004].) The first cause of action sets forth all of the above elements, and, thus, this cause of action is properly pled.

The complaint also sufficiently pleads a cause of action for breach of contract. The essential elements to recover damages for breach of contract are the existence of a contract, plaintiff's performance pursuant to the terms of the contract, defendant's breach of its contractual obligations and damages resulting from the breach. (*Legum v Russo*, 133 AD3d 638, 639 [2d Dept 2015]; *Canzona v Atanasio*, 118 AD3d 837, 838 [2d Dept 2014].) The complaint alleges all the required elements for a cause of action for breach of contract. The complaint asserts that the defendants failed to comply with its obligations under

the Memorandum of Sale and acted in violation of the Memorandum by attempting to re-sell the shares at a second auction.

The third cause of action alleges that defendants breached the duty of good faith and fair dealing by permitting the Garcia defendants to redeem the shares. Within every contract there is an implied covenant of good faith and fair dealing. (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 68 [1978].) In order to state a cause of action for breach of the duty of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent the performance of the contract or to withhold its benefits from the plaintiff. (*Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 513-514 [2d Dept 1999].) A reading of the third cause of action herein establishes that all the elements for a breach of duty of good faith and fair dealing are validly pled.

The fourth cause of action alleges that defendants violated Uniform Commercial Code §9-623(c)(2) by unlawfully granting the debtors the right to redeem their shares. Although UCC § 9-623(c)(2) provides that a debtor may redeem collateral any time before a secured party has disposed of the collateral or has entered into a contract for its disposition, there is no indication that this statute provides a private right of action. (see *Ahmad v Nassau Health Care Corp.*, 8 AD3d 512, 513 [2d Dept 2004].) Thus, the fourth cause of action fails to state a proper cause of action, and is dismissed.

In the fifth cause of action plaintiff seeks a declaratory judgment that the debtors' right to redeem their shares was extinguished once the auction was held and a contract was entered into between the plaintiff and defendants Roslyn/NYCB. Defendants, in support of this branch of the motion, fail to demonstrate that the declaratory judgment cause of action does not present a justiciable controversy sufficient to invoke the Supreme Court's power to render a declaratory judgment. (see *Indymac Venture, LLC v Nagessar*, 121 AD3d 945, 946 [2d Dept 2014].)

The sixth and seventh causes of action allege that the Garcia defendants and defendant 35-21 79th St. Tenants Corp. tortiously interfered with the plaintiff's contract. "Tortious interference with a contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (*Lama Holding Co. v Smith Barney*, 88 NY2d

413, 424 [1996]; *Foster v Churchill*, 87 NY2d 744, 749 [1996]; *Miller v Theodore-Tassy*, 92 AD3d 650, 651 [2d Dept 2012]; *Monex Fin. Servs., Ltd., v Dynamic Currency Conversion, Inc.*, 76 AD3d 515, 515 [2d Dept 2010].) Here, the allegations set forth in these causes of action are sufficient to state a cause of action for tortious interference with a contract. The complaint asserts that the defendants knew about the Memorandum of Sale and made efforts to have defendants Roslyn/NYCB rescind the Memorandum. These claims further assert that Roslyn/NYCB refused to consummate the transaction in accordance with the Memorandum.

The cross movant does not address the remaining causes of action in the complaint.

The court will now address the Order to Show Cause for a preliminary injunction.

The decision to grant a preliminary injunction is a matter ordinarily committed to sound discretion of the court hearing the motion. (*Dixon v Malouf*, 61 AD3d 630, 630 [2d Dept 2009]; *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1072, 1073 [2d Dept 2008].) In order to demonstrate entitlement to a preliminary injunction, the movant must establish (1) a probability of success on the merits, (2) the danger of irreparable injury in the absence of injunctive relief and (3) a balancing of the equities in favor of the movant. (*Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Mangar v Deosaran*, 121 AD3d 650, 650 [2d Dept 2014].) The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. (*1650 Realty Assocs., LLC v Golden Touch Mgt., Inc.*, 101 AD3d 1016, 1018 [2d Dept 2012]; *Ying Fung Moy v Hoho Umeki*, 10 AD3d 604, 604 [2d Dept 2004].) This is true even in situations where a factual dispute exists. (*Melvin v Union Coll.*, 195 AD2d 447, 448 [2d Dept 1993].)

In the case at bar, the court finds that plaintiff has satisfied the requirements for a preliminary injunction. If a preliminary injunction was not granted herein, any interest that the plaintiff has in the premises may be lost. Thus, plaintiff may sustain irreparable harm, particularly since he seeks specific performance of the contract. (see *Vincent v Seaman*, 152 AD2d 841, 844 [3d Dept 1989].) Further, the court may ultimately find that the plaintiff is entitled to the property. Indeed, without an injunction, a later judgment in the plaintiff's favor could be rendered ineffectual if the shares are subsequently transferred again.

Accordingly, this Order to Show Cause by plaintiff to restore this matter is granted, without opposition.

Upon restoration, the underlying Order to Show Cause by the plaintiff for a preliminary injunction is granted to the extent that defendants Roslyn National Mortgage Corp., New York Community Bank 35-21 79th St. Tenants Corp., Francisco F. Garcia and Fidelina Rivas Garcia are enjoined from selling, transferring, conveying and/or disposing of any of the shares of stock and the proprietary lease pertaining to the premises known as apartment 1J at 35-21 79th Street, Jackson Heights, New York.

The foregoing is conditioned upon the filing of an undertaking in accordance with CPLR 6312 in the amount of \$104,000.00 in the Office of the Clerk of the County of Queens, together with a copy of this order with notice of entry.

The underlying cross motion by the defendants Roslyn National Mortgage Corp. and New York Community Bank is granted solely to the extent that the fourth cause of action alleging unlawful grant of a right of redemption in violation of UCC 9-623(c)(2) is dismissed.

In all other respects the cross motion is denied.

Dated: April 7, 2016

CARMEN R. VELASQUEZ, J.S.C.