

39 College Point Corp. v Transpac Capital Corp.

2003 NY Slip Op 30002(U)

June 5, 2003

Supreme Court, Queens County

Docket Number: _400031/2722

Judge: Duane A. Hart

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA PART 18
Justice

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39 COLLEGE POINT CORP.	Index Number <u>31272</u> 2002
- against -	Motion Date <u>April 23,</u> 2003
TRANSPAC CAPITAL CORP., et al.	Motion Cal. Number <u>28</u>

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The following papers numbered 1 to 15 read on this motion by defendant Transpac Capital Corp. for, inter alia, summary judgment on its counterclaim to recover on a promissory note and on this cross motion by plaintiff 39 College Point Corp. for an order pursuant to CPLR 3211(a)(1) dismissing the counterclaims asserted by defendant Transpac.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits	1-6
Notice of Cross Motion - Affidavits - Exhibits ...	7-12
Answering Affidavits - Exhibits	13-15

Upon the foregoing papers it is ordered that the motion and the cross motion are denied. (See the accompanying memorandum.)

Dated: June 5, 2003

Duane A. Hart
J.S.C.

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
 IA PART: 18

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 39 COLLEGE POINT CORP.

INDEX NO.: 31272/02

- against -

BY: HART, J.

TRANSPAC CAPITAL CORP., et al.
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DATED: JUNE 5, 2003

Defendant Transpac Capital Corp. has moved for, inter alia, summary judgment on its counterclaim to recover on a promissory note. Plaintiff 39 College Point Corp. has cross-moved for an order pursuant to CPLR 3211(a)(1) dismissing the counterclaims asserted by defendant Transpac.

The plaintiff acquired title to property known as 133-04 39th Avenue, Flushing, New York on January 4, 1996. In 1996, the plaintiff gave a mortgage on the subject property to defendant Asia Bank. The plaintiff alleges that Yu Ju Su, purporting to act as its president, fraudulently gave a mortgage on the subject property to defendant Transpac Capital Corp. which was erroneously backdated to December 21, 1995, a date prior to the plaintiff's acquisition of the property. The plaintiff denies in its complaint that it received any money or consideration for the mortgage to defendant Transpac. The plaintiff alleges that Wann Lai Su served as its president from the formation of the corporation until May 8, 1998, when Thomas Fok became the president, and that Yu Ju Su never was the president of the plaintiff corporation. The plaintiff brought this action pursuant to Article 15 of the Real Property Actions and Proceedings Law for a judgment declaring that the

mortgage held by defendant Transpac is null and void.

Defendant Transpac answered the complaint and asserted counterclaims. Defendant Transpac alleges that on December 21, 1995, it loaned the plaintiff \$499,999.99. The plaintiff allegedly executed a promissory note by which the plaintiff obligated itself to pay the principal plus interest in monthly installments. Yu Ju Su signed the promissory note dated December 21, 1995 purportedly as the president of the plaintiff corporation. Defendant Transpac further alleges that on December 21, 1995, the plaintiff deposited checks from defendant Transpac amounting to \$499,999.99 into a checking account at Great Eastern Bank and that the plaintiff used the money, together with money obtained from Asia Bank, to purchase the subject property on January 4, 1996. Yu Ju Su allegedly also signed the note and mortgage in favor of Asia Bank. The plaintiff allegedly made 55 payments of interest due under the promissory note for the period January, 1996 to July 31, 2000 amounting to \$280,729. The plaintiff defaulted on the payments due on and after November 13, 2000. On August 8, 2000, defendant Transpac recorded a mortgage over the subject property allegedly given by the plaintiff. The plaintiff sold the subject property in or about March, 2003, paid the mortgage held by Asia Bank, and created an escrow account with Lawyers Title Insurance Corp. sufficient to pay the debt owed to Transpac. The first counterclaim is to recover the principal and interest due on the note. The second counterclaim, alleging that the plaintiff purchased 133-04 39th Avenue, Flushing, New York with the proceeds of the note, that the

plaintiff gave a mortgage on that property in favor of defendant Transpac, and that the plaintiff sold the subject property without repaying the loan, seeks to impose a constructive trust over the escrowed funds held by the title company.

Those branches of the motion by defendant Transpac which are for summary judgment on its first counterclaim and for an order permitting defendant Transpac to enforce its judgment against funds held by a title company are denied. Summary judgment is not warranted where, as in the case at bar, there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) Thomas Fok, currently the president of the plaintiff corporation, swears that while defendant Transpac admits receiving payments on the note into the year 2000, his company made no payments after May 8, 1998, after Wann Lai Su resigned as president and Fok became president. Fok alleges that payments made to defendant Transpac after May 8, 1998 apparently were made by Wann Lai Su individually. In view of these allegations and the plaintiff's denial that it received the proceeds of the loan, in view of allegations by the plaintiff corporation that Yu Ju Su was never its president, and in view of evidence of a back-dated mortgage, there are issues of fact pertaining to whether Yu Ju Su had actual or apparent authority to execute a promissory note on behalf of the plaintiff corporation and whether the plaintiff corporation actually received the money lent by defendant Transpac.

That branch of motion by defendant Transpac which is for a preliminary injunction, inter alia, prohibiting the plaintiff and

the title company from releasing escrowed funds is denied. Defendant Transpac failed to demonstrate that, under all of the circumstances of this case, the uncontrolled disposition of assets by the plaintiff would render ineffectual any final judgment which defendant Transpac may obtain on its counterclaims. (See, CPLR 6301; Ma v Lien, 198 AD2d 186; Zonghetti v Jeromack, 150 AD2d 561.)

That branch of the plaintiff's cross motion which is for an order pursuant to CPLR 3211(a)(1) dismissing the first counterclaim asserted by defendant Transpac is denied. CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1.a defense is founded on documentary evidence***." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***." (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700,702; Vanderminden v Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.) The documentary evidence in this case does not conclusively show that defendant Transpac itself committed any fraud in this case relating to the promissory note, nor does the documentary evidence establish that fraud, if any, committed in the execution of the mortgage also tainted the execution of the promissory note. Indeed, there is documentary evidence in this case permitting the inference that the plaintiff corporation

actually received a loan amounting to \$499,999.99 from defendant Transpac. Moreover, the documentary evidence alone in this case is not conclusive on the issues of Yu Ju Su's actual or apparent authority, i.e., whether there was misleading conduct of the principal which reasonably caused Transpac to believe that Yu Ju Su was authorized to act in behalf of the principal with respect to the transaction in question. (See, Rice v N.A.A.C.P., 103 AD2d 801.)

That branch of the plaintiff's cross motion which is for an order pursuant to CPLR 3211(a)(1) dismissing the second counterclaim asserted by defendant Transpac is denied. (See, Vanderminden v Vanderminden, supra; Bronxville Knolls, Inc. v Webster Town Center Partnership, supra; Fernandez v Cigna Property and Casualty Insurance Company, supra.) The plaintiff alleges that defendant Transpac is "implicated in the fraud which occurred in the backdating of the mortgage" and thus has unclean hands which bars it from recovering on an equitable lien or constructive trust over the proceeds of the sale of the property. (See, Crispino v Greenpoint Mortg. Corp., ___ AD2d ___, ___ NYS2d ___, 2003 WL 1873515.) However, the documentary evidence alone in this case does not conclusively resolve the issues created by the plaintiff's allegations.

Short form order signed herewith.

Duane A. Hart
J.S.C.