

NYCTL 1998-2 Trust v Quadrozzi Realty Corp.

2007 NY Slip Op 30230(U)

March 14, 2007

Supreme Court, Queens County

Docket Number: 0015746

Judge: David Elliot

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payment continued for a period of 30 days, and, therefore, they elected to foreclose the tax liens.

Defendant Quadrozzi Realty Corp. (Quadrozzi Realty) served an answer admitting that it is the owner of the subject property and denying the material allegations of the complaint. It asserts an affirmative defense based upon its claim that the amount set forth in the tax lien is excessive and greater than the real estate taxes allegedly owed. Defendant/third-party plaintiff Quadrozzi Realty also interposed third-party claims as against third-party defendants Kenneth Tully, Sr., Richard A. Grace, Vincent A. DeIorio Law Firm, and Vincent A. DeIorio, individually and as executor of the Estate of Anthony Grace alleging, among other things, that third-party defendants Tully and Grace breached an agreement to indemnify Quadrozzi Realty for outstanding real estate taxes and tax liens in the amount of \$2,713,470.81, by failing to pay a real estate tax lien.

Defendant KGP Holding Corp. (KGP), a holder of a mortgage on the property, served an answer denying allegations of the complaint, asserting various affirmative defenses, including the pendency of tax certiorari proceedings, and interposing a counterclaim for a stay of the foreclosure action pending a determination of the tax certiorari proceedings.

Defendants New York City Department of Finance and New York State Department of Taxation and Finance served notices of appearance in the action and waived service of various papers.

Plaintiffs have determined that Quadrozzi Concrete Corp. is the actual name of defendant "John Doe No. 1," and that the remaining fictitious defendants, named "John Doe No. 2" through "John Doe No. 100," are unnecessary parties to this action. Defendants York Properties, Ltd. and Quadrozzi Concrete Corp. s/h/a "John Doe No. 1" are in default in appearing and answering the complaint.

Plaintiffs move for summary judgment in their favor and against defendants Quadrozzi Realty and KGP, to strike the answers of defendants Quadrozzi Realty and KGP, for leave to appoint a referee to ascertain and compute the sums due and owing plaintiffs, and to examine and report whether the liened property can be sold in one or more parcels, to substitute Quadrozzi Concrete Corp. (Quadrozzi Concrete) for defendant "John Doe No. 1" and for leave to amend the caption reflecting the substitution and deleting reference to defendants "John Doe No. 2" through "John Doe No. 100." Defendant/third-party plaintiff Quadrozzi Realty opposes the motion by plaintiff and cross-moves for summary judgment in its favor on its third-party claims against third-party defendants. Defendant KGP opposes the cross motion.

At the outset, the court shall address the fourth affirmative defense based upon lack of subject matter jurisdiction raised by defendant KGP in its answer. Such defense is without merit (see NY Const, art VI, § 7[a]; Administrative Code of the City of New York § 11-335; see also Security Pacific

Nat. Bank v Evans, 31 AD3d 278 [2006])). That branch of the motion by plaintiffs seeking to dismiss the fourth affirmative defense asserted by defendant KGP in its answer is granted.

That branch of the motion by plaintiffs for leave to amend the caption substituting Quadrozzi Concrete Corp. in the place and stead of defendant "John Doe No. 1" and deleting references to defendants "John Doe No. 2" through "John Doe No. 100" is granted.

With respect to that branch of the motion by plaintiffs for summary judgment as against defendants Quadrozzi Realty and KGP, it is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980])).

Plaintiffs have submitted evidentiary proof of default by submitting the affidavit of Albert Fiorello, assistant vice-president of Xspand, Inc., the servicing agent for plaintiffs, who states that defendants failed to pay any interest on the tax liens which accrued against the premises (see NYCTL 1996-1 Trust v Orit Diagnostic Center, Inc., 19 AD3d 668 [2005]; NYCTL 1996-1 Trust v Westmoreland Associates, 2 AD3d 811 [2003])).

Plaintiffs, therefore, have made a prima facie showing of entitlement to summary judgment as against defendants Quadrozzi

Realty and KGP (see NYCTL 1996-1 Trust v Orit Diagnostic Center, Inc., 19 AD3d at 668). The burden shifts to defendants Quadrozzi Realty and KGP to establish a triable issue of fact (see Zuckerman v City of New York, 49 NY2d at 557; First Nationwide Bank, FSB v Goodman, 272 AD2d 433 [2000]).

The sixth affirmative defense asserted by defendant KGP is based upon lack of proper service. Defendant KGP failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of its answers, and as a consequence, the defense is deemed waived (CPLR 3211[e]; Wade v Byung Yang Kim, 250 AD2d 323 [1998]; Fleet Bank, N.A. v Riese, 247 AD2d 276 [1998]). That branch of the motion by plaintiffs seeking to dismiss the sixth affirmative defense raised by defendant KGP is granted.

To the extent defendant KGP asserts that plaintiffs' claims are barred by the statute of limitations, such assertion is without merit. An action to foreclose a City tax lien is not subject to a time limitation. The City Charter expressly states that all tax shall "become liens on the real estate affected thereby ... and shall remain such liens until paid" (New York City Charter § 1519[2]; see Real Property Tax Law § 102[21]). Section 11-301 of the New York City Administrative Code likewise provides that all real estate taxes and assessments are liens upon the real estate and "shall continue to be, until paid."

Plaintiffs Trust and Bank of New York, as the owner and

holder of the tax lien certificate, respectively, stand in the same position as the City of New York with respect to their rights and remedies (Administrative Code of the City of New York §§ 11-332[a]; 11-335; NYCTL 1996-1 Trust v 209 Holding Corp., 269 AD2d 580 [2001]; Matter of Maspeth 5718 Assocs. Inc. v City of New York, 292 AD2d 453 [2002]). Thus, their remedy of foreclosure is not subject to a statute of limitations (see NYCTL 1996-1 Commercial Reo, LLP v El Pequeno Restaurant Food Corp., 1 Misc 3d 574, 577 [2003]).

In addition, because the tax is a perpetual claim (see L.K. Land Corp. v Gordon, 1 NY2d 465, 467-471 [1956], cert denied sub nom Greenfield v L.K. Land Corp., 352 US 989 [1957]; see also Russell v City of New York, 22 AD2d 706 [1964], affd 16 NY2d 641 [1965]; Matter of Ploss v Board of Assessors, 17 Misc 2d 283, 284 [1959], appeal dismissed 13 AD2d 498 [1961]), laches is not a defense to a tax lien foreclosure proceeding (see generally New York State Mtge. Loan Enforcement & Admin. Corp. v North Town Phase II Houses, Inc., 191 AD2d 151 [1993]; see also Wesselman v Engel Co., 309 NY 27 [1955]).

That branch of the motion by plaintiffs seeking to dismiss the third and seventh affirmative defenses asserted by defendant KGP based upon the expiration of the statute of limitations and the doctrine of laches is granted.

To the extent defendant KGP asserts lack of capacity to sue as a first affirmative defense, the doctrine of legal

capacity concerns a litigant's power to appear and bring its grievance before the court (see Community Bd. 7 of Borough of Manhattan v Schaffer, 84 NY2d 148, 155 [1994]). Legal capacity to sue often depends on the litigant's status, such as that of an infant, an adjudicated incompetent, a trustee, certain governmental entities or a business corporation (see Security Pacific Nat. Bank v Evans, 31 AD3d 278 [2006]). Defendant KGP has failed to allege a basis for its objection to plaintiffs' status, and thus, its affirmative defense is insufficient (see Glenesk v Guidance Realty Corp., 36 AD2d 852 [1971]).

Furthermore, to the extent defendant KGP is, in fact, questioning the standing of plaintiffs, plaintiffs have standing to maintain this action (see Administrative Code of the City of New York §§ 11-332, 11-335; NYCTL 1996-1 Trust v 209 Holding Corp., 269 AD2d at 580; NYCTL 1996-1 Trust and Bank of New York v Railroad Maintenance Corp., 266 AD2d 39 [1999], lv to appeal dismissed 94 NY2d 899 [2000]). That branch of the motion by plaintiffs seeking to dismiss the first affirmative defense asserted by defendant KGP is granted.

The second affirmative defense asserted by defendant KGP is based upon failure to state a cause of action. That branch of the motion by plaintiffs seeking to dismiss such affirmative defense is granted (see Propoco, Inc. v Birnbaum, 157 AD2d 774 [1990]; Bentivegna v Meenan Oil, Inc., 126 AD2d 506 [1987]; Glenesk v Guidance Realty, 36 AD2d 852 [1971]).

The fifth affirmative defense asserted by defendant KGP is based upon its claims that plaintiffs failed to plead performance of conditions precedent to suit and to join Quality Concrete Corp. as a necessary party defendant. The performance of contractual conditions precedent to suit, however, need not be pleaded (CPLR 3015).

To the extent defendant KGP asserts that Quality Concrete Corp. is a necessary party defendant to this tax lien foreclosure case, plaintiffs have been granted leave to amend the caption substituting Quality Concrete Corp. for "John Doe No. 1" and have joined it as a defendant by service of a copy of the summons and complaint (see supra at 4). Under such circumstances, that branch of the motion by plaintiffs seeking to dismiss the fifth affirmative defense asserted by defendant KGP is granted.

Defendant KGP asserts as its ninth and eleventh affirmative defenses that this action must be held in abeyance pending, and subject to, the determination of a certiorari proceeding, and payment and discharge of the tax liens. Defendant Quadrozzi Realty asserts as its first affirmative defense that the amount claimed in the tax lien is excessive and greater than the amount allegedly owed for real estate taxes.

"The proper method for challenging real estate tax assessments which allege that the assessment is 'excessive ...' is by bringing a Real Property Tax Law article 7 proceeding (RPTL

706; [citations omitted])....” (NYCTL 1996-1 Trust v Westmoreland Assoc., 2 AD3d 811 [2003]). Defendants KGP and Quadrozzi Realty have failed to demonstrate that they commenced any tax certiorari proceeding relative to the real estate taxes forming the basis for the subject liens. To the extent either defendant did so, they have failed to allege the present status of such proceeding. Furthermore, defendants KGP and Quadrozzi Realty have made no showing that they paid the real estate taxes underlying the subject liens (see generally W.T. Grant Co. v Srogi, 52 NY2d 496, 515-516 [1981]; Brookmar Corp. v Tax Commr. of City of New York, 13 Misc 3d 772, 778 [2006] [“Where the taxpayer elects not to pay the disputed revenue charges while disputing the taxes in a RPTL article 7 proceeding, it runs the risk of the loss of the property through tax foreclosure prior to a determination of its overassessment claim and a possible tax reduction”]). That branch of the motion seeking to dismiss the ninth and eleventh affirmative defenses asserted by defendant KGP, and the first affirmative defense asserted by defendant Quadrozzi Realty, is granted.

To the extent defendant KGP asserts as an eighth affirmative defense that plaintiffs incorrectly and unlawfully computed the amount and value of the lien, including the principal tax amount owed and the rate of interest accrued on the tax owed, the existence of a dispute as to the exact amount owed on the tax lien may be resolved after a reference pursuant to

RPAPL 1321, and does not preclude the granting of summary judgment on the issue of liability (see Crest/Good Mfg. Co. v Baumann, 160 AD2d 831 [1990]). That branch of the motion by plaintiffs seeking to dismiss the eighth affirmative defense asserted by defendant KGP is granted.

As a tenth affirmative defense, defendant KGP asserts that this action constitutes an unlawful taking in violation of the Fifth Amendment of the United States Constitution. Such assertion is without merit (see Nelson v City of New York, 352 US 103 [1956]). That branch of the motion by plaintiffs to dismiss the tenth affirmative defense asserted by defendant KGP is granted.

Under the circumstances, defendants Quadrozzi Realty and KGP have failed to come forward with any evidence showing the existence of a triable issue of fact with respect to any defense. Plaintiffs are entitled to summary judgment as against them (see NYCTL 1996-1 Trust v Orit Diagnostic Center, Inc., 19 AD3d 668 [2005]; NYCTL 1996-1 Trust v Westmoreland Assoc., 2 AD3d at 811).

That branch of the motion by plaintiffs for leave to appoint a referee to ascertain and compute the sums due and owing plaintiffs and to examine and report whether the property can be sold in one or more parcels is granted.

The cross motion by third-party plaintiff Quadrozzi Realty seeking summary judgment in its favor and against third-party defendants on its third-party complaint is denied.

Third-party plaintiff Quadrozzi Realty has failed to demonstrate that issue has been joined with any named third-party defendant (see CPLR 3212[a]). The copies of the answers provided to the court in support of the cross motion do not relate to the third-party complaint herein and refer to index numbers of other actions.

Submit order.

J.S.C.