

Lazic v St. Joseph's Hous. Corp.

2007 NY Slip Op 31067(U)

May 4, 2007

Supreme Court, Albany County

Docket Number: 0017062/0071

Judge: Joseph C. Teresi

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publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

MARGARITA LAZIC and HELEN LAZIC
EACKER,

Plaintiffs,

-against-

DECISION and ORDER
RJI NO.: 01-07-088808
INDEX NO.:1706-07

ST. JOSEPH'S HOUSING CORPORATION,
NEW YORK, STATE COMMISSIONER OF
TAX AND FINANCE, STATE FARM FIRE
AND CASUALTY CO., CRISAFULLI BROS.
PLUMBING AND HARDWARE, INC., PETER
PHELAN, MARIAN BANKER, THE PEOPLE
OF THE STATE OF NEW YORK, ALEX PEREZ,
JR., DONALD W. BOYAJIAN, MICHAEL REILLY,
JOHN P. HICKS, JOHN DOE and JANE DOE, the
last two names being fictitious and unknown to
Plaintiffs, the persons or parties intended being the
person or parties, if any, having or claiming an interest
in or lien upon the mortgaged premises described
in the complaint,

Defendants.

Albany County Supreme County All Purpose Term April 18, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Patrick T. Morphy, Esq.
Martin, Shudt, Wallace. DiLorenzo & Johnson
Attorneys for Plaintiffs
279 River Street
Troy, New York 12180

Allen J. Goodman, Esq.
Attorney for Defendant
47 Route 17k
Newburgh, NY 12550

TERESI, J.:

Defendant, Alex Perez, Jr., brings this motion pursuant to CPLR § 213(4) to dismiss the complaint in its entirety. Plaintiffs, Margarita Lazic and Helen Lazic Eacker, oppose the motion.

After fully reviewing the record, this Court will deny the motion.

On June 28, 1995 Plaintiffs sold 7 & 8 St. Joseph's Terrace (hereinafter the parcel) to St. Joseph's Housing Corporation (hereinafter SJHC) for \$270,000. As part of the purchase, SJHC executed a \$60,000 note to Plaintiffs secured by a mortgage on the parcel. The mortgage required SJHC to make monthly interest only payments from August 1, 1995 until July 31, 2005 and principal payments of \$7,000 on July 31, 1999 and \$6,000 on July 31, 2001 and 2003. The final payment of both interest and principal was due on July 31, 2005. SJHC failed to make a single payment on the principal and last made an interest payment on May 1, 2003 for an installment that was due on November 5, 2003. On August 30, 2004, the Hudson River Bank and Trust Company foreclosed on a second mortgage on the parcel without naming Plaintiffs in the action or serving Plaintiffs. As a result of that foreclosure, Defendant, Alex Perez, Jr., took title to the parcel. Plaintiffs now seek to foreclose the mortgage and recover the debt.

Defendant contends that this action should be dismissed as time barred pursuant to CPLR § 213(4), which states, in part, that "an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein" must be commenced within six years. According to Defendant, this action accrued when the first payment of principal became due on July 31, 1999, more than six years ago. Plaintiffs, however, contend that because this is an installment mortgage that was never accelerated a separate cause of action accrued for each

installment when it became due, but that no cause of action could accrue for the entire sum until either the entire amount came due or the mortgage debt was accelerated (*Notarinicola v. Lafayette Farms, Inc.*, 288 AD2d 198 [2d Dept 2001]).

Defendant also contends that even if the mortgage was never accelerated, Plaintiffs claim for the July 31, 1999 payment of \$7,000 is still be time barred because the cause of action for that installment accrued more than six years ago. Plaintiffs, however, contend that the cause of action for the July 31, 1999 installment was revived by General obligations Law § 17-107 which revives mortgage debt where the debtor makes a partial payment. SJHC made its last payment to Plaintiffs on May 1, 2003, within the six year statute of limitations.

Accordingly, Defendant's motion to dismiss is denied.

All papers, including this Decision and Order, are being returned to the attorney for the Plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: May 4, 2007

Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Defendant's Notice of Motion, dated March 21, 2007 with Attached Exhibits A & B.
2. Plaintiff's Affidavit in Opposition, dated April 3, 2007.
3. Plaintiff's Affirmation in Opposition, dated April 18, 2007.
4. Defendant's Reply, dated April 16, 2007

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