

Kessler v 3888 Crescent Prop. Corp.

2007 NY Slip Op 33062(U)

June 17, 2007

Supreme Court, Kings County

Docket Number: 0001407/2006

Judge: Gerard H. Rosenberg

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At an IAS Term, Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of June, 2007.

(E)

P R E S E N T:

HON. GERARD H. ROSENBERG,

Justice.

-----X

Steven Kessler, et al.,

Plaintiffs,

-against-

388 Crescent Property Corp., et al.,

Defendants.

-----X

DECISION & ORDER

Index No. 1407/06

Motion Seq. No. 002

The following papers numbered 1 to 7 used on this motion.

	Papers Numbered
Notice of Motion, Annexed Affirmation(s)/Affidavit(s) and Exhibits Annexed _____	1 - 2
Affirmation(s) in Opposition and Exhibits Annexed _____	3, 4 - 6
Reply Affirmation and Exhibits Annexed _____	7

Upon the foregoing papers, and upon oral argument, movant Isaac Sasson (Sasson) moves pursuant to CPLR 602 for an order consolidating this action (the foreclosure action) with a subsequently instituted action brought by him for judicial dissolution (the dissolution action) under Kings County Index No. 2354/06.

The Foreclosure Action

The parties state¹ that on or about December 2, 2004 defendant 388 Crescent Property

¹ This recitation has been obtained from statements made by the respective attorneys in the Affirmation in Support of the Motion to Consolidate, as well as from the Affirmation in Opposition. As such, these are more allegations than fact at this point.

Corp. (Crescent Property) was the highest bidder (bidding \$905,000.00) for real property known as 388/390 Crescent Street a/k/a 120 McKinley Avenue, Brooklyn, New York (the Premises), which was sold at a tax lien auction in an action entitled *NYCTL 1998-2 Trust v 237 Cleveland Street Corp*, Index No. 19262/01. A purchase money mortgage in the amount of \$700,000.00 was obtained by Crescent Property from the plaintiffs Steven Kessler, Corey Kessler, LJK Associates, Inc., Milad Contracting Corp., Pension Plan Trust, Lee Nissensohn, David Edelman, Paul Edelman and Robert Cohen (the plaintiffs) on April 5, 2005.

Plaintiffs claim that Crescent Property was represented in mortgage discussions by Ernest Gorriti and Emilio Gorriti [sic] (the Gorritis), who claimed to have authority to borrow this money.² In support of this claim, plaintiffs submit evidence showing that in addition to executing the mortgage note as President of 388 Crescent Property, Emilio Gorriti executed a personal guarantee for the amount of the mortgage loan. In addition, Ernest Gorriti executed a personal guarantee for the mortgage and note as well.

Sasson alleges that the Gorritis “scammed” him out of approximately \$350,000.00 which he invested in Crescent Property, and that he is watching his investment about to be foreclosed upon. Therefore, in order to try to salvage some of his investment, Sasson commenced the separate dissolution action to dissolve Crescent Property and have a receiver appointed, hoping that this would achieve the result that “the Gorritis could no longer pocket

² Various exhibits are appended to the Affirmation in Opposition, such as Crescent Property’s corporate resolution approving the mortgage loan, and a certificate of Representation and Warranties, signed by Emilio Gorriti as President of Crescent Property.

[*3]

the rent monies they continue to collect.” Sasson states that he is a one-half owner of Crescent Property and that the other half is owned by the Gorritys’ aunt, Luisa Cruz (Cruz), each holding 50% of all outstanding shares. Sasson further claims that while he has invested \$365,000.00 of his own money in Crescent Property, Cruz has invested nothing in exchange for her 50%. Moreover, Sasson alleges that the Gorritys advised him that Cruz had to be a shareholder in order to obtain the mortgage.

At the time of the purchase on April 5, 2005 Crescent Property gave a first mortgage on the Premises in the principal amount of \$700,000.00, which is the mortgage being foreclosed. Sasson asserts that the Gorritys executed the note and mortgage despite having no authority to do so, being neither officers nor directors of Crescent Property. Moreover, Sasson states that it is inconsistent for the Gorritys to have claimed represented that Cruz needed to be a shareholder when her name appears nowhere on the mortgage documents, and while the Gorritys signed the mortgage and gave personal guarantees therein.

Sasson alleges that he gave \$180,000.00 prior to the closing and an additional \$125,000.00 at the closing. He also states that at the closing he was advised by the Gorritys to make a check in the amount of \$25,280.00 payable to “388 Crescent Street Corp.” (note - this is a different entity than “388 Crescent Property Corp.”), a corporation controlled by the Gorritys, and that only Sasson has made the mortgage payments. Sasson claims that according to agreement any profits realized by Crescent Property are to be first applied to pay back Sasson for all sums he has personally invested, and after he has been paid in full all profits are to be equally divided between Sasson and Cruz.

Sasson also alleges that he had learned that Cruz had, without Sasson's knowledge or consent, applied for another mortgage on behalf of Crescent Property and sought to use the Premises as collateral, which was when he commenced the dissolution action. He alleges that in that other mortgage application Cruz lists herself as the sole owner and director of Crescent Property. He believes that the Gorritis, through Cruz, are attempting to further defraud Sasson by stripping the Premises of its equity.

The Dissolution Action

The dissolution action is pending in the Commercial Division of this Court, and is currently being held in abeyance as per an order dated November 2, 2006 (Demarest, J.) in which it is noted that the dissolution "matter is inextricably related to a pending foreclosure action . . . In light of this redundancy, and potential conflict, this Court advises Petitioner herein to seek intervention in the pending foreclosure action . . ."

Sasson, the petitioner in the dissolution action, did not seek intervention in the foreclosure action, opting instead to bring this motion to consolidate.

The motion is opposed by the plaintiffs, arguing that the actions are not properly consolidated, and that Sasson is guilty of estoppel in waiting until now to attempt to become involved in the foreclosure action, despite having been aware for at least one year that the mortgage was in default and that a foreclosure action was imminent. Plaintiffs allege that to their knowledge, Sasson has elected to not appear in the foreclosure action, despite being named as a defendant.

The motion is also opposed by defendants 388 Crescent Property Corp., Emilio

Gorriti, Ernest Gorriti and Luisa Cruz s/h/a Tonya Cruz, who claim that Sasson has neither sought to pay the monies now due nor raised legally cognizable defenses to the foreclosure action. These defendants argue that even assuming, *arguendo*, that internal conflict among the mortgagor(s) is the reason for non-payment, and/or that Sasson has proper causes of action against his shareholders, defendants, or other third-parties, such is irrelevant to the foreclosure action before this court.

In reply, Sasson indicates that once Justice Demarest refused to grant him any relief until this foreclosure action was resolved, he had no alternative but to seek consolidation. He then asks that the powers of the temporary receiver who has already been appointed in this action be broadened to include the sale of the premises. Through said sale, Sasson would be able to recoup at least part of his losses to the extent there were any surplus funds. Sasson therefore asks that the receiver be directed to sell the premises, pay off the mortgagee and retain any surplus until such time as the respective rights of Sasson and Cruz can be determined.

Analysis

CPLR § 602 governs consolidation and provides:

(a) Generally. 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.

Movant has presented no legal basis to entitle him to consolidation of the foreclosure and dissolution actions. These actions involve different legal and factual circumstances, and

to consolidate the dissolution action with the foreclosure action would, in the court's opinion, prejudice the plaintiffs in the foreclosure action. The issues in this foreclosure are relatively straightforward - plaintiffs issued a mortgage to the defendants, who then defaulted in meeting the terms of the mortgage. Plaintiffs are entitled under the terms of the mortgage and note to foreclose on the mortgage without being forced to await resolution of the issues being raised in the dissolution action.

That being said, if there is a surplus remaining following the foreclosure sale, the issues being raised in the corporate dissolution may very well become relevant to distribution of those funds. Both a referee and a temporary receiver have been appointed in the foreclosure action, and the court sua sponte modifies the Judgment of Foreclosure and Sale to direct that the referee, after satisfaction of the mortgagee, deposit any surplus monies with the court until such time as the respective rights of Sasson, Cruz and any other interested person(s) and/or entities can be determined in the dissolution action.

Plaintiffs are directed to submit an appropriate Amended Judgment to this court on notice to all parties entitled to receive said notice, and to movant Isaac Sasson.

ENTER,



HON. GERARD H. ROSENBERG

J. S. C.