

Doow-Kcor Constr. Corp. v Azzaretto

2007 NY Slip Op 33307(U)

October 5, 2007

Supreme Court, Nassau County

Docket Number: 1319-07/

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**DOOW-KCOR CONSTRUCTION CORP.,
Plaintiff,**

**Motion Sequence # 1, # 2
Submitted July 6 and
July 30, 2007, respectively**

-against-

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**AUSTIN AZZARETTO and THE UNITED STATES
OF AMERICA, THE NEW YORK STATE
COMMISSIONER OF TAXATION AND FINANCE,
and "JOHN DOE #1" through "JANE DOE #10",
the last 10 names being fictitious and unknown
to the Plaintiff, the persons or parties intended
being the occupants, tenants, persons or
entities, if any, having or claiming an interest in
or lien upon the mortgaged premises described
in the Verified Complaint,**

Defendants.

The following papers were read on these motions:

Notice of Motion for Summary Judgment	1
Affidavit and Affirmation in Opposition.....	2
Reply Affidavit.....	3
Notice of Motion to Consolidate.....	4
Affirmation in Opposition.....	5
Reply Affirmation.....	6

Plaintiff, DOOW-KCOR CONSTRUCTION CORP. (hereinafter referred to as "DOOW-KCOR"), moves for an order granting it summary judgment on the complaint, striking defendants' answer and dismissing the counterclaims and affirmative defenses,

for an order appointing a referee to compute the total sums due and owing to plaintiff and amending the caption to strike "JOHN DOE #1 through JANE DOE # 10". Defendant, AUSTIN AZZARETTO (hereinafter referred to as "AZZARETTO"), opposes the motion and, in a subsequent motion, moves to consolidate the instant action with a subsequent action commenced by him, entitled AUSTIN AZZARETTO v. GARY RABINOWITZ, LUCILLE RABINOWITZ a/k/a LUCILLE TESTA and DOOW-KCOR CONSTRUCTION CORP., under Index No. 011002/07, in which he seeks to reach the principals of DOOW-KCOR, as alleged alter egos of the corporation. The motions are determined as follows:

DOOW-KCOR, by affidavit of its President, LUCILLE RABINOWITZ, states that instant action is a simple foreclosure action against a mortgage on premises located on Rockwood Avenue, Massapequa, New York (hereinafter referred to as the "Rockwood property"), vacant land zoned for residential use. She states that during DOOW-KCOR's period of ownership, it intended to construct two (2) one family homes on the Rockwood property and previously constructed two (2) foundation thereon. Ms. RABINOWITZ relates that she and her husband, GARY RABINOWITZ, had been close friends with AZZARETTO for many years when, in 2002, she and her husband determined to move from the area and decided they were no longer interested in developing the Rockwood property. She claims that DOOW-KCOR intended to place the property for sale with a broker but learned that AZZARETTO was interested in purchasing the Rockwood property. Ms. RABINOWITZ states that DOOW-KCOR agreed to sell the Rockwood property to AZZARETTO for the sum of \$314,200, with a \$109,000 down payment and a purchase money mortgage, in the sum of \$205,200, to be repaid within one (1) year. Annexed to the moving papers are copies of the contract of sale, the deed, the note and mortgage, all

dated July 20, 2004. Ms. RABINOWITZ asserts that payment of the mortgage was due, in full, on July 19, 2005, but two (2) years have passed since the maturity date and AZZARETTO has not satisfied the mortgage nor any payments thereon. Ms. RABINOWITZ states that the sum of \$205,200 is due and owing, plus interest as provided in the mortgage, costs and attorney's fees. It is her position that AZZARETTO has taken advantage of their friendship and has ignored their requests for payment and failed to return their phone calls. Moreover, she rejects AZZARETTO's affirmative defenses and counterclaims which allege a purported joint venture agreement and points out that such a theory is unsupported by any proof or evidence sufficient to overcome the documentary evidence submitted on the motion evidencing the sale, deed transfer, note and mortgage. Ms. RABINOWITZ states that DOOW-KCOR purported agreement to convey an access road to the land locked property, though obtained on January 1, 2004, will not be conveyed to AZZARETTO until he has satisfied the mortgage on the Rockwood property. Counsel for DOOW-KCOR states that it is entitled to the requested relief based upon the documentary evidence presented herein and that AZZARETTO's counterclaims are barred by, *inter alia*, the Statute of Frauds and the Parole Evidence Rule and that his affirmative defenses are barred, *inter alia*, by the doctrine of unclean hands, laches, waiver and estoppel.

In opposition to the motion, AZZARETTO asserts that this litigation is not about the foreclosure of a mortgage, but about a joint venture between the principals of DOOW-KCOR, GARY and LUCILLE RABINOWITZ (hereinafter referred to as the "RABINOWITZs"), who joined together to partition and develop the Rockwood property. It is AZZARETTO's position that the RABINOWITZs, operating through a corporate "shell",

breached their joint venture agreement and have seriously misrepresented the circumstances to the Court.

AZZARETTO claims that, based on documentary evidence submitted by him, it can be undisputed that he and RABINOWITZs acted on a plan to develop the Rockwood property, which included payment by AZZARETTO of a capital contribution to the joint venture, and the acquisition by the RABINOWITZs to an access road to the land-locked property. Counsel for AZZARETTO urges that there are issues of fact that require the denial of summary judgment.

AZZARETTO repeats that the parties were close personal friends since 1991, frequently socializing and sharing life time events with their respective families. He claims that, since 1992, through the corporation, the RABINOWITZS attempted to develop the Rockwood property with little success. The plan consisted of partitioning the existing lot into two (2) lots, with the eventual construction of two (2) homes – one on each lot. Additionally, the corporate entity was to acquire an access road to the land-locked property, creating, in effect, “flag lots”. AZZARETTO claims that the RABINOWITZs’ attempts to complete the project were plagued with problems and numerous violations with the Town Code of Oyster Bay. He states that, in the Fall of 2003, the RABINOWITZs contacted him, an experienced real estate developer, to see if he would be interested in becoming involved with the project and smoothing over the problems with the Town. He claims that RABINOWITZs believed that brining in a new partner to assist in cleaning up the Code problems would be like starting a “fresh page” with respect to the Rockwood property development.

AZZARETTO states that the parties discussed various options and decided to operate as a joint venture to complete the partitioning and development of the property. Counsel provides the Court with citations alleging that the oral joint venture agreement is not barred by the Statute of Frauds. AZZARETTO claims that it was agreed:

1) that the RABINOWITZs would provide the Rockwood property as their capital contribution to the joint venture;

2) that AZZARETTO would make an initial capital contribution of \$75,000 to the project, pay the real estate taxes on the property; and fund all the costs for development of the property, including the construction costs and the costs associated with the required municipal approvals, including the Board of Zoning Appeals approvals;

3) that the RABINOWITZs would receive compensation at the end of the project in the sum of \$130,000 in addition to the benefits of AZZARETTO's capital contributions and payment of the real estate taxes, and that AZZARETTO would receive the balance of the proceeds of sale;

4) that the RABINOWITZs would be in charge of acquiring the access road to the property and that AZZARETTO would be in charge of the Town approvals to construct the houses.

AZZARETTO asserts that an integral part of the agreement was the RABINOWITZs' responsibility to obtain the access road to the land-locked property. He annexes copies of cancelled checks in the sums of \$25,000 and \$75,000 which he claims represent his capital contribution to the joint venture. He also provides receipts, reflecting early May 2004 payments for the rental of a dumpster in the sum of \$1,500 to clean up the property, a source of the Code violations, the rental of a gate to secure the property, a claimed

\$50,000 payment for real estate taxes on the property and \$900 spent in processing the applications to the Town. AZZARETTO asserts that all of these steps were taken by him, without objection by the RABINOWITZs, prior to execution of the July 20, 2004 documents, and evidence the joint venture that he alleges in his counter-claim and companion action that he seeks to consolidate. Indeed, a copy of a letter from the RABINOWITZs' attorney to LORRAINE RABINOWITZ a/k/a TESTA, reflects his concern that they must talk to their "partner" and move forward with cleaning up and securing the Rockwood property, as the Town was receiving complaints about the vacant land and potential injury to children.

AZZARETTO states that the RABINOWITZs added his name to tax documents, evidence of their joint venture status, which commenced in the Fall of 2003, well before the July 20, 2004 documents were executed. He claims that the transfer was not an arms length transaction, that he was not represented by counsel and that the RABINOWITZs have blatantly violated of the joint venture agreement by refusing to contribute the access road to the joint venture so that partition of the property could be complete. Counsel urges that defendant has raised many issues of fact which preclude the granting of summary judgment. Moreover, he urges that the two (2) pending actions be consolidated based upon common issues of law and fact and for judicial economy.

It is well settled that summary judgment is a drastic remedy which may only be granted when there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 (2nd Dept 1993). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-

determination and that resolution of issues of credibility is not appropriate” (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dep’t 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party’s pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (*See, Mosheyev v Pilevsky, supra*). After a careful reading of the submissions herein, it is the judgment of the Court that while plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law, the defendant has raised issues of fact which have not been refuted by plaintiff and which preclude the granting of summary judgment. Accordingly it is hereby

ORDERED, that plaintiff’s motion for summary judgment is denied; and it is further

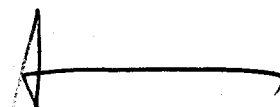
ORDERED, that defendant’s motion for consolidation of Action #1 and Action # 2 is presently denied as no Request for Judicial Intervention (RJI) has been filed in Action #2 and there is presently no action in the Court System to consolidate. However, upon presentation of proof to the Court of the purchase of the RJI, consolidation will be granted to the extent of joint discovery and a joint trial; and it is further

ORDERED, that a Preliminary Conference shall be held on November 20, 2007 in the consolidated actions, before Differentiated Case Management (DCM) at 100 Supreme Court Drive, Mineola, New York at 2:30 P.M. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: October 5, 2007



WILLIAM R. LaMARCA, J.S.C.

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ENTERED
OCT 15 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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