

Austin Blvd. Rest. Corp. v Iacono

2008 NY Slip Op 30655(U)

February 26, 2008

Supreme Court, Nassau County

Docket Number: 3657-04/

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

AUSTIN BOULEVARD RESTAURANT CORP.,
AUSTIN BOULEVARD PROPERTY CORP.
and 650 ROUTE 112 RESTAURANT CORP.,

Plaintiffs,

TRIAL/IAS PART 10

ACTION NO. 1

INDEX NO.: 003657/2004

-against-

LEONARD IACONO, MICHAEL IACONO,
ROBERT D. MAYER, TSR ISLAND PARK
CORP., TSR ISLAND PARK REALTY CORP.,
TSR FRANCHISING CORP. and MAYER
& COMPANY,

Defendants.

MOTION DATE: 01/23/2008
MOTION SEQUENCE: 005 & 006

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

TSR ISLAND PARK REALTY CORP.,

Plaintiffs,

ACTION NO. 2

INDEX NO.: 011743/2004

-against-

AUSTIN BLVD. PROPERTY CORP., AUSTIN
BLVD. REST. CORP., 650 ROUTE 112
RESTAURANT CORP., BRIAN WARD, FRANK
JACHETTA, and "JOHN DOE 1" through "JOHN
DOE 5", being parties who may have or claim
to have some right or interest in the mortgaged
premises as tenants, contract vendees or otherwise,

XXX

who names being fictitious, and their names being unknown to plaintiff,

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

TSR ISLAND PARK REALTY CORP.,

ACTION NO. 3

Plaintiff,

INDEX NO.: 003561/2008

-against-

BRIAN WARD and FRANK JACHETTA,

X X X

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

TSR FRANCHISING CORP.,

ACTION NO. 4

Plaintiff,

INDEX NO.: _____

-against-

BRIAN WARD and FRANK JACHETTA,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavits & Exhibits Annexed.....	1
Notice of Motion, Affirmation, Affidavit & Exhibits Annexed.....	2
Affirmation in Opposition of Marc A. Pergament, Esq. & Exhibits Annexed.....	3
Reply Memorandum of Law.....	4
Reply Affirmation of Randolph E. White, Esq.	5

Exhibits “A” through “G” of Reply Affirmation..... 6
 Exhibits “H” through “M” of Reply Affirmation..... 7

Motion pursuant to CPLR 3212 by the plaintiff TSR Island Park Realty Corp. in Action No. 2 (Index No. 011743/2004) for, *inter alia*: (1) summary judgment on its complaint; (2) dismissal the defendants’ counterclaims; and (3) further relief directing the turnover of proceeds from the sale of certain real property secured by the plaintiff’s mortgage.

Motion pursuant to CPLR 3213 by the plaintiff TSR Island Park Realty Corp. in Action No. 3 (Index No. 003561/2008), for summary judgment in lieu of complaint and ancillary relief.

The plaintiffs in Action Nos. 2 and 3 – TSR Island Park Realty Corp. and TSR Franchising Corp. [collectively “TSR”] – have demonstrated their *prima face* entitlement to judgment on their motions, which are respectively, for: (1) summary judgment in their mortgage foreclosure action (Action No. 2); and (2) summary judgment in lieu of complaint (Action No. 3).

TSR’s applications in both actions are predicated on various loan documents executed in 2003 by the defendants Brian Ward, Frank Jachetta and Austin Boulevard Property Corp. [“Austin Property”], pursuant to which Austin Property acquired from TSR, a “Spare Rib” restaurant franchise located in Island Park, New York (White Reply Aff., Exh., “K”).

TSR advanced to defendant, Austin Property, the sum of \$500,000.00 toward its purchase of the Island Park franchise. The sum was secured by a purchase money mortgage and a contemporaneously executed guaranty agreement provided by Ward and Jachetta (TSR Mot. Exh., “1”, “3”).

It is undisputed that the \$500,000.00 principal indebtedness secured by the TSR mortgage has not been repaid by the defendants in accord the terms of the loan documents submitted, *i.e.*, the note, purchase money mortgage, and a “joint and several” guaranty agreement (Iacono Aff., [Action No. 3] Exhs., “1”-“3”).

In support of its application, TSR has produced in Action No. 2, *inter alia*, the “mortgage documents underlying the transaction and undisputed evidence of nonpayment” (*Red Tulip, LLC v. Neiva*, 44 AD3d 204, 209; *see also, Charter One Bank, FSB v. Leone*, 45 AD3d 958; *La Salle*

Bank Nat. Ass'n v. Kosarovich, 31 AD3d 904; *LPP Mtge., Ltd. v. Card Corp.*, 17 AD3d 103, 104).

Moreover, TSR's submissions in Action No. 3 for summary judgment in lieu of complaint (CPLR 3213), have similarly demonstrated entitlement to judgment in the first instance, *i.e.*, TSR has shown that codefendants Ward and Jachetta unconditionally guaranteed the payment of Austin Property's debts; that Austin Property defaulted on its obligations under the loan documents; and that Ward and Jachetta have defaulted on their obligations under the guaranty (*see generally, North Fork Bank Corp. v. Graphic Forms Associates, Inc.*, 36 AD3d 676; *MDJR Enters. v. LaTorre*, 268 AD2d 509; *Steve Young Intern., Ltd. v. Barnes*, 267 AD2d 24, 25).

In light of this *prima facie* showing, it was incumbent upon the defendants to come forward with proof in admissible form sufficient "to demonstrate the *existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff*" (*Cochran Inv. Co., Inc. v. Jackson*, 38 AD3d 704, quoting from, *Mahopac Natl. Bank v. Baisley*, 244 AD2d 466, 467 *see also, HSBC Bank USA v. Merrill*, 37 AD3d 899, 900; *North Fork Bank Corp. v. Graphic Forms Associates, Inc.*, 36 AD3d 676; *Famolaro v. Crest Offset, Inc.*, 24 AD3d 604).

In opposition to the plaintiff's motions, the defendants primarily assert they were fraudulently induced to enter into the underlying sale transaction (Permanent Aff., in Opp., ¶ 37, 38).

Although fraud in the inducement can constitute a defense to TSR's actions on the guarantee and mortgage (*Hobart v. Schuler*, 55 NY2d 1023, 1024 [1982]; *Joseph v. NRT Inc.*, 43 AD3d 312, 313; *AFG Industries, Inc. v. Empire Glass Co., Inc.*, 226 AD2d 487; *Regal Limousine, Inc. v. Allison Limousine Service, Ltd.*, 136 AD2d 534), the integrated loan instruments and guaranty before the Court contain definitive disclaimer language relative to, among other things, the assertion of any and all counterclaims and defenses (*Citibank, N.A. v. Plapinger*, 66 NY2d 90, 96 [1985]; *Wittenberg v. Robinov*, 9 NY2d 261 [1961]; *Danann Realty Corp. v. Harris*, 5 NY2d 317, 320-321 [1959]; *Red Tulip, LLC v. Neiva, supra*; *Rigney v. McCabe*, 43 AD3d 896; *Palm Beach Mortg. Management, LLC v. Red Tulip, LLC*, 18 AD3d

379, 380 *see also*, *Marine Midland Bank, N.A. v. CES/Compu-Tech, Inc.*, 147 AD2d 396, 397-398).

It is settled that “specific disclaimers contained within an agreement can provide an effective defense against allegations in a complaint which assert that the agreement was executed in reliance upon oral misrepresentations” (*Mosca v. Kiner*, 277 AD2d 937, 938, *quoting from*, *Schooley v. Mannion*, 241 AD2d 677, 678 *see*, *Citibank, N.A. v. Plapinger*, *supra*; *Danann Realty Corp. v. Harris*, *supra*; *Sterling Nat. Bank v. Biaggi*, ___AD3d___, 2008 WL 110079 [1st Dept. 2008]; *Sacco v. Sutera*, 266 AD2d 446, 698; *General Trading Co., Inc. v. A & D Food Corp.*, 292 AD2d 266, 267; *Marine Midland Bank N.A. v. Walsh*, 260 AD2d 990, 991 *Germano v. Friedman*, 221 AD2d 501, 502).

Firstly, and with respect to the “unconditional” and “irrevocable” guarantee executed by defendants Ward and Jachetta in Action No. 3 – which they further warranted was “legal, valid and binding” (Guaranty, ¶ 4[b]) – the operative provisions state that the guaranty is “*continuing, absolute, unlimited and unconditional [and] shall not be subject to any counterclaim, setoff, deduction or defense based upon any claim the Guarantor may have against the Lender or the Borrower or any other person, * * * and shall not be released, discharged or in any way affected by, any circumstance or condition (whether or not any Guarantor shall have any knowledge thereof) whatsoever which might constitute a legal or equitable discharge or defense including, but not limited to * * * [c] any waiver, consent, change, extension, indulgence or other action or any * * * inaction under or in respect of any Loan Document or any other agreement * * * [or] [h] any act, omission or breach on the part of the Lender under any Loan document or any other agreement at any time existing between the Lender and Borrower * * * [or] (i) any claim as a result of any other dealings among the Lender, the Guarantor and the Borrower * * **” (Guaranty, ¶¶ 1[a], 2)[emphases added].

The guaranty further provides that, “[t]he Guarantor hereby unconditionally and irrevocably guarantees to the Lender full and punctual payment,” and that “[t]his Guaranty * * * shall be binding upon and enforceable against the Guarantor without regard to the validity or enforceability of any document, instrument or agreement evidencing or governing the Obligations or any other agreement or instrument executed in connection therewith (including,

without limitation, this Guaranty, the franchise agreement, note, mortgage, security agreement) or contemplated thereby * * *” (Guaranty, ¶ 1[a])(*see, Red Tulip, LLC v. Neiva, supra*, at 209; *Raven Elevator Corp. v. Finkelstein*, 223 AD2d 378).

The Mortgage instrument emphasizes in part that “Mortgagor acknowledges that * * * [its] obligation to pay the Indebtedness in accordance with the provisions of the Note and this Mortgage is and shall at all times continue to be absolute and unconditional in all respects, and shall at all times be valid and enforceable irrespective of any agreement or circumstances of any nature whatsoever which might otherwise constitute a defense to the Note or this Mortgage * * *” (Mortgage, ¶ 44)[emphases added](*see, Banco Do Estado De Sao Paulo, S.A. v. Mendes Jr. Intern. Co.*, 249 AD2d 137, 138 *see also, Harrison Court Associates v. 220 Westchester Ave. Associates*, 203 AD2d 244, 245; *Preferred Equities Corp. v. Ziegelman*, 190 AD2d 784-785).

The Note and Mortgage both similarly state that, “[i]f any action or proceeding be commenced to collect this Note or enforce any of its provisions or the provisions of the Mortgage, Borrower [Mortgagor] expressly waives any and every right to interpose any counterclaim in any such action or proceeding * * *” (Mortgage, ¶ 45; Note, ¶ 7[g]) (*Citibank, N.A. v. Plapinger, supra*; *Sterling Nat. Bank v. Biaggi, supra*; *General Trading Co., Inc. v. A & D Food Corp., supra*).

The Court agrees that the collective import and effect of the foregoing language is to preclude the defendants in both actions from raising the defenses of fraud in the inducement and/or any additional “defenses or counterclaims relating to the underlying debt” (*Raven Elevator Corp. v. Finkelstein, supra see, Citibank, N.A. v. Plapinger, supra*, at 95; *Sterling Nat. Bank v. Biaggi, supra, Red Tulip, LLC v. Neiva, supra; Famolaro v. Crest Offset, Inc., supra; Sacco v. Sutera, supra; E.D.S. Sec. Systems, Inc. v. Allyn*, 262 AD2d 351; *Marine Midland Bank N.A. v. Walsh, supra*, at 991; *Harrison Court Associates v. 220 Westchester Ave. Associates, supra*, at 345).

The case law relied upon by the defendants is legally and factually inapposite – and additionally – with respect to the federal holdings cited, is not binding on this Court (*e.g., Oneida Indian Nation of New York v. Pifer*, 43 AD3d 579, 581).

Finally, the Court rejects the assertion that a July 8, 2005 Bankruptcy Court order

directing a statutory sale of the subject property “free and clear” of all liens (11 USC §363[f]), constitutes the law of the case in connection with this Court’s review of TSR’s applications.

Notably, in April of 2005 Austin Property filed a federal, chapter 11 bankruptcy petition, which proceeding has since been concluded. By order dated August 2007, all related proceedings which were then pending before the Bankruptcy Court were, *sua sponte*, remanded to this Court. (White Reply Aff., Exhs., “A” “B”).

In any event, and in accordance with the Bankruptcy Court’s July 2007 order (the July 8 order), the subject property was sold to a third party for the principal sum of \$1.875 million – some \$350,000.00 more than the original purchase price (White Reply Aff., Exh., “E”; July 8 Order, ¶ 1).

The aforesaid order further authorized Austin to, *inter alia*, satisfy a first mortgage held by the Commence Bank and to discharge certain tax debts – after which the remaining sale proceeds were to be deposited into an interest bearing, escrow account maintained by Austin’s counsel, pending further order of the Court (July 8 Order, ¶ 5).

The “doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding” and “applies only to legal determinations that were necessarily resolved on the merits in a prior decision” (*Brownrigg v. New York City Housing Authority*, 29 AD3d 721, 722; *Gay v. Farella*, 5 AD3d 540, 541 *see also*, *Mark C. v. Patricia B*, 41 AD3d 1317; *Kopsidas v. Krokos*, 18 AD3d 822, 823 *see generally*, *People v. Evans*, 94 NY2d 499, 503 [2000]).

Moreover, “law of the case is directed to a court's discretion” “but does not restrict its authority” (*Cohen v. Crown Point Cent. School Dist.*, 306 AD2d 732, 734, fn 1; *People v. Evans*, *supra*, at 503). Nor does it “apply to rulings, such as case management decisions, which are based on the discretion of the court” (*Latture v. Smith*, 304 AD2d 534 *see*, *Clark v. Great Atlantic & Pacific Tea Co., Inc.*, 23 AD3d 510, 511; *Brothers v. Bunkoff General Contractors*, 296 AD2d 764, 765).

In its July 8 order, the Bankruptcy Court merely required the defendants to retain surplus sale proceeds in escrow pending further order in light of, *inter alia*, the fraud claims interposed by the defendants in a related adversary proceeding pending together with Austin Property’s then

previously filed Bankruptcy petition (July 8 Order, ¶ 5).

The Court's July 8 order does not assess, review or even comment upon the merits of the defendants' defenses and fraud claims (*see, Gay v. Farella, supra*, at 541 *see generally, People v. Bilsky*, 95 NY2d 172, 175 [2000]; *Cohen v. Ho*, 38 AD3d 705).

Rather, and in conformity with the special procedures authorized by section 363, the Bankruptcy Court merely directed the sale of the property and deferred to a later date, the resolution of any issues relating to the validity of the mortgage and defenses thereto. This Court does not consider the essentially vacant language of the order as making any implicit findings relating to the manner in which the defenses should be considered (*cf., Fleet Nat. Bank v. Marrazzo*, 23 AD3d 337, 338).

Accordingly, the fact that the Bankruptcy Court may have authorized Austin Property to retain the surplus sale proceeds in escrow pending later resolution of any disputed claims, is not a substantive determination on the merits with respect to Austin's defenses or the validity of the mortgage lien.

The Court has considered the defendants' remaining contentions and concludes that none is sufficient to defeat TSR's motions.

The foregoing constitutes the decision and order of the Court.

Settle order on notice.

Dated: February 26, 2008

J. B. Warshawsky

J.S.C.

ENTERED
FEB 29 2008
NAUSSAU COUNTY
COUNTY CLERK'S OFFICE