

Saint Annes Dev. Co. v Trabich

2008 NY Slip Op 31336(U)

April 28, 2008

Supreme Court, Nassau County

Docket Number: 7478-07/

Judge: Karen Veronica Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____x

**SAINT ANNES DEVELOPMENT COMPANY,
LLC,**

Index No. 7478/07

Plaintiff(s),

**Motion Submitted: 2/13/08
Motion Sequence: 002, 003, 004**

-against-

**TERRY TRABICH, NASSAU COUNTY
ASSESSORS OFFICE, and JOHN DOE ONE
through JOHN DOE TWENTY-FIVE,**

Defendant(s).

_____x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XXX
- Answering Papers.....XX
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....X
- Defendant's/Respondent's.....

Motion by plaintiff for an order dismissing the affirmative defenses and counterclaims interposed by the defendants, awarding summary judgment and appointing a Referee to compute and amending the caption to strike John Doe One through John Doe Twenty-Five is denied. Cross-motion by defendant Terry Trabich for an order awarding summary judgment and dismissing the three causes of action of the verified complaint is granted and the complaint is dismissed. Motion by plaintiff by order to show cause for an order enjoining defendant from further encumbering the real property, which is the subject of this mortgage foreclosure proceeding is denied.

Plaintiff Saint Annes Development Company, LLC brings this action in foreclosure and seeks summary judgment and an order appointing a referee to compute. The complaint avers that defendants Neil and Terry Trabich allowed a lien to be placed upon the subject property in contravention of a covenant contained in a "Facility Agreement" dated May 2, 2006. Plaintiff also alleges that the funds borrowed by the obligors under the "Facility Agreement" were not used solely to finance the construction costs associated with the underlying project, and that the obligors refused to cure the alleged breaches.

The mortgage agreement identifies the Borrower as defendant Terry Trabich and the Lender as plaintiff Saint Annes Development Company, LLC. Under Section D of the Mortgage agreement the "Note" is described as follows:

The note signed by Borrower and dated May 2, 2006 will be called the note. *The Note shows that I owe Lender One Million dollars (U.S. \$1,000,000.00) plus interest* and other amounts that may be payable

Section D goes on to limit the amount owing to the actual amount owed:

under a certain credit facility agreement, which credit facility was *arranged by Lender with a bank on my behalf*, pursuant to a *separate agreement* being entered into *simultaneously herewith*. I have promised to pay this debt in full by December 31, 2009.

The mortgage thus refers to a "note" and to a "separate agreement" between plaintiff and defendant whereby plaintiff was to arrange a credit facility (credit line) on defendant's behalf with a bank. Thus, the credit facility agreement referred to in the Mortgage Document is a bank credit facility or credit line. The additional agreement referred to as a "separate agreement being entered into simultaneously herewith" is the agreement, which plaintiff avers was breached and will be referred to as the "May 2, 2006 Agreement" for purposes of clarity. Notwithstanding the recitation in the mortgage, there appears to be no "note" (see, *UCC § 3-104[1]*) evidencing the \$1 million debt between defendant and plaintiff.

Turning to the terms of the mortgage, it is well settled that a mortgage is a contract which is enforced pursuant to its terms. As a contract it is "construed * * * in accordance with the intention of the parties * * * as expressed by the language they chose to employ" (*Brayton v. Pappas*, 52 A.D.2d 187, 188, 383 N.Y.S.2d 723 [4th Dept., 1976]). This court may not supply "an omitted term . . . under the guise of construction . . ." (id). And, any relief not provided for in the mortgage document may not be pursued in a foreclosure action

(see, *Brenner v. Alroy*, 171 A.D.2d 589, 567 N.Y.S.2d 456, [1st Dept., 1991] [the mortgage itself did not permit an award for . . . fees, thereby precluding plaintiff from procuring this relief in the foreclosure proceeding]).

With respect to the rights provided to the lender, the mortgage states:

I am giving Lender these rights to protect Lender from possible losses that might result if I fail to:

(A) Pay all the amounts that I owe Lender as stated in the Note . . .

(B) Pay, with interest, any amounts that Lender spends under this Security Instrument to protect the Value of the Property and Lender's rights in the Property; and

(C) Keep all of my other promises and agreements *under this Security Instrument and the Note* (emphasis supplied).

The mortgagee may foreclose upon those rights only if the borrower "fails to keep any promise or agreement made *in this Security Instrument or the Note . . .*" (§ 22[a] [emphasis supplied]).

The promises upon which plaintiff seeks to premise this foreclosure do not appear in the mortgage agreement and clearly do not appear in the non-existent note, and thus plaintiff has failed in its burden to show a default under the mortgage (*Staten Island Sav. Bank v. Carnival*, 39 A.D.2d 779, 332 N.Y.S.2d 728 (2d Dept., 1972) [". . . plaintiff had the burden of establishing the preponderance of the competent and credible evidence that there had been a default"]).

It must be emphasized that the foreclosure is not premised upon non-payment of the debt owed to plaintiff. The absence of a note might not preclude a foreclosure for failure to pay the underlying debt, as a mortgage is valid and enforceable if there is "an underlying valid debt or obligation for which the mortgage is intended as security" (*In re Borriello*, 329 B.R. 367, 380 [Bankruptcy Court E.D.N.Y., 2005]). While there may be a valid underlying debt between the parties, there is no default in payment alleged. And, as the mortgage does not provide for foreclosure in the event of a breach of the promises made in the May 2, 2006 Agreement, this action is without foundation. Furthermore, it does not appear that plaintiff has complied with RPAPL § 1303, which requires specific notices to be delivered with the

summons and complaint to commence a foreclosure action. Accordingly, the cross-motion is granted and the complaint is dismissed.

The application for a preliminary injunction is denied as moot, and without merit. Plaintiff chose to forego the protections afforded its mortgage under the recording statutes in exchange for defendant's promise not to further encumber the subject premises. Defendant breached that promise and plaintiff's remedy included recording its mortgage. As the mortgage is now recorded and its priority is secured as against any further junior lienors, no injury will inure if defendant were to further encumber the subject premises, and an injunction is not warranted.

The foregoing constitutes the Order of this Court.

Dated: April 28, 2008
Mineola, N.Y.


J. S. C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE