

Gates v Easy Living Homes, Inc.

2008 NY Slip Op 32080(U)

July 15, 2008

Supreme Court, Suffolk County

Docket Number: 0025472/2003

Judge: Elizabeth H. Emerson

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INDEX
NO.: 25472-03

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY**

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 1-16-08
SUBMITTED: 3-19-08
MOTION NO: 016-MOT D
017-MD
018-XMD

ELEANOR GATES, X

Plaintiff,

-against-

EASY LIVING HOMES, INC., ELLIOT A. BAKER,
DAVID MARTIN, JODI MARTIN, NEW YORK STATE
COMMISSION OF TAXATION AND FINANCE,
RICHARD OLSEN d/b/a RICHARD OLSEN
CONSTRUCTION CO., "JOHN DOE" and "JANE DOE",
said names being fictitious, parties intended being possible
tenants or occupants of premises,

Defendants.

DAVID MARTIN, JODI MARTIN, VINCENT FARACI X
and ROSEANN FARACI s/h/a "JOHN DOE" and "JANE
DOE",

Third-Party Plaintiffs,

LAZER, APTHEKER, ROSELLA & YEDID, P.C.
Attorneys for Plaintiff
225 Old Country Road
Melville, New York 11747

BRODY, O'CONNOR & O'CONNOR, ESQS.
Attorneys for Defendants/Third-Party
Plaintiffs/Second Third-Party Plaintiffs David
Martin, Jodi Martin, Vincent Faraci and Roseann
Faraci
7 Bayview Avenue
Northport, New York 11768

Index No.: 24-125

-against-

SCOTT BAKER and ANDREW SHERIFF,

Third-Party Defendants.

DAVID MARTIN, JODI MARTIN, VINCENT FARACI X
and ROSEANN FARACI s/h/a "JOHN DOE" and "JANE
DOE",

Second Third-Party Plaintiffs,

Index No.: 25-184

-against-

SAND CASTLE DEVELOPMENT CORP. and SCOTT
BAKER,

Second Third-Party Defendants.

X

Upon the following papers numbered 1 to 80 read on these motions for summary judgment and to appoint a referee; cross-motion for summary judgment ; Notice of Motion and supporting papers 1-25; 26-36 ; Notice of Cross Motion and supporting papers 37-58 ; Answering Affidavits and supporting papers 59-65; 66-70 ; Replying Affidavits and supporting papers 71-72; 73-78 ; Other 79-80 (plaintiff's memorandum of law); it is,

ORDERED that the branches of the motion by the plaintiff which are for an order granting summary judgment in her favor, dismissing the counterclaims and severing the cross claims of the defendants David and Jodi Martin, appointing a referee to compute, and amending the caption are granted; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that Arza Feldman, Esq. with an office at 626 EAB Plaza, West Tower, 6th Floor, Uniondale, New York 11556 is hereby appointed referee to ascertain and compute the amount due the plaintiff for principal, interest, real estate taxes, and other disbursements provided for by statute and in the note and mortgage upon which this action is based, and to examine and report on whether the mortgaged premises can be sold in parcels; and it is further

ORDERED that, by accepting this appointment, the referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR part 36), including, but not limited to, § 36.2(c) ("Disqualifications from appointment") and § 36.2(d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED that the caption is amended by deleting therefrom the names of the defendants "John Doe" and "Jane Doe" and substituting therefor the names "Vincent Faraci" and "Roseann Faraci"; and it is further

ORDERED that the motion by the plaintiff for an order directing the defendants David Martin, Jodi Martin, Vincent Faraci, and Roseann Faraci to pay the real estate taxes on the mortgaged premises or an amount equal to the fair market value of their use and occupancy thereof is denied; and it is further

ORDERED that the cross motion by the defendants David Martin, Jodi Martin, Vincent Faraci, and Roseann Faraci for summary judgment dismissing the complaint is denied.

This case has a long and complex history of which the parties are fully aware. The court will, therefore, limit its discussion to only those facts that are relevant to the motions now before it.

Briefly, this is an action to foreclose three mortgages held by the plaintiff, Eleanor Gates, on the premises known as 3 and 4 Giasi Court, West Babylon, New York (hereinafter "the premises"). In 1999 and 2000, the defendants Easy Living Homes, Inc. (hereinafter "Easy Living"), and Elliot Baker, as guarantor, borrowed \$185,000, \$120,000, and \$120,000, respectively, from the plaintiff. As collateral for the repayment of such loans, Easy Living executed and delivered three

mortgages to the plaintiff encumbering the premises. All three mortgages were duly recorded.

Easy Living developed the premises by building two houses thereon. It is undisputed that the plaintiff had loaned money to Easy Living and Elliot Baker on numerous prior occasions and that such loans were secured by mortgages on the properties that Easy Living developed. It is also undisputed that the plaintiff did not always enforce the loans as written. For example, although the loans provided for the payment of interest during the terms thereof, the plaintiff never enforced those provisions, preferring to collect the full amount due at the closings. Also, due dates were frequently extended to accommodate completion of the projects.

In 1999, the Martins and Faracis entered into contracts with Easy Living to purchase the homes it was building on the premises. Construction was delayed and, in order to mitigate its damages, Easy Living allowed the Martins and Faracis to move into the homes in 2000, prior to the closings. It is undisputed that, when the Martins and Faracis took possession, the homes had not been completed, nor had Easy Living obtained certificates of occupancy therefor. It is also undisputed that the Martins and Faracis have not made any payments to either the plaintiff or Easy Living for their use and occupancy of the premises or for real estate taxes. The Martins and Faracis still occupy the premises despite the fact that title thereto has never closed.

In 2003, the plaintiff commenced this foreclosure action. A prior motion for summary judgment by the plaintiff was denied by an order of this court dated January 4, 2005.¹ That order also determined a motion by the Martins and Faracis for a preliminary injunction enjoining the plaintiff from proceeding with this foreclosure action pending the determination of two related actions. The court granted the motion for injunctive relief to the extent of directing the parties not to proceed in this action without further order of the court. The related actions have now been resolved. The plaintiff again moves for summary judgment, among other things, and for an order directing the Martins and Faracis to pay the outstanding real estate taxes on the premises or an amount equal to the fair market value of their use and occupancy thereof. The Martins and the Faracis cross move for summary judgment dismissing the complaint.

It is well settled that, in moving for summary judgment in an action to foreclose a mortgage, the plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (*see, Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482; *Village Bank v Wild Oaks Holding*, 196 AD2d 812). When the plaintiff has done so, it is incumbent upon the defendant to produce evidentiary proof in admissible form sufficient to require a trial of his defenses (*see, Republic Natl. Bank of N.Y. v O'Kane, supra* at 482).

The court finds that the plaintiff has established, *prima facie*, her entitlement to judgment as a matter of law. In opposition to the plaintiff's motion and in support of their cross

¹ That order was affirmed by the Appellate Division, Second Department, on May 16, 2006 (29 AD3d 733).

motion, the Martins and Faracis contend (1) that the plaintiff's motion should be denied because the plaintiff moved for summary judgment without first obtaining leave of court, as required by this court's order dated January 4, 2005, (2) that the plaintiffs are equitably estopped from foreclosing on the three mortgages that are the subject of this action, and (3) that the mortgages are defective because the premises has not been subdivided.

In view of the fact that the related actions have now been resolved, the court grants the plaintiff leave to move for summary judgment *nunc pro tunc*. The Martins and Faracis contend that discovery is not complete, but they have failed to provide the court with any specific items of discovery that the plaintiff has not provided. The Martins and Faracis also contend that Elliot Baker and the third party defendants Scott Baker and Andrew Sheriff have not appeared for depositions. However, absent an affidavit demonstrating that facts necessary to oppose the motion exist but cannot be stated without obtaining discovery from the Bakers and Andrew Sheriff, the court declines to deny the motion (*see, Hess v Schwartz*, 7 Misc 3d 1011[A] [and cases cited therein]). It has been more than two years since this court's denial of the prior motion for summary judgment was affirmed, and the Martins and Faracis have had more than enough time to complete discovery. The mere hope that evidence sufficient to defeat the motion may be uncovered during the discovery process is insufficient to deny the motion (*see, Hess v Schwartz, supra*). Accordingly, the court finds that, although it would have been better practice for the plaintiff to seek leave of court before making the present motion, the failure to do so does not warrant denial thereof.

The Martins and Faracis contend that the mortgages are defective because the premises has not been subdivided. However, the Martins and Faracis have failed to cite any authority therefor. Moreover, at least one case has held that, while the failure to obtain municipal subdivision approval may constitute a cloud on the marketability of the property's title, it does not constitute a valid defense to a foreclosure action (*see, Manufacturer's and Traders Trust Co. v Tommell*, 163 Misc 2d 526, 527-528). In any event, the referee appointed by the court will determine whether or not the premises can be sold in parcels (*see, RPAPL 1321[1]*).

The Martins and Faracis contend that the plaintiff is equitably estopped from foreclosing on the mortgages. Equitable estoppel may be successfully invoked, in the interest of fairness, to prevent enforcement of rights that would ultimately work a fraud or injustice upon the person against whom enforcement is sought (*see, John P. v Vito C.*, 6 Misc 3d 1009[A], at *3). With respect to the party estopped, the elements of equitable estoppel are: (1) conduct that amounts to a false representation or concealment of material facts, (2) an intention that such conduct will be acted upon by the other party, and (3) knowledge of the real facts. Moreover, the party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts, (2) reliance on the conduct of the party estopped, and (3) a prejudicial change of position (*Matter of the City of New York*, 14 Misc 3d 1232[A], at * 17; *Airco Alloy's Division, Airco, Inc. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 81-82).

The Martins and Faracis contend that they were repeatedly assured, both prior to taking possession of the homes and during the pendency of this litigation, that the plaintiff would not foreclose on the mortgages that Easy Living gave her. They contend that they relied on

representations by Easy Living, Elliot Baker, Scott Baker, and Easy Living's attorney that their homes would be completed and that the plaintiff would not foreclose. They contend that they also relied on the plaintiff's prior practice of resolving all of the outstanding financial issues at the closing. They contend that they changed their position in reliance thereon by selling their former homes, moving into the premises, and making substantial improvements to the premises in order to be able to live there. They further contend that they will be denied the premises' substantial appreciation if the plaintiff is allowed to foreclose.

There is no evidence in the record that the plaintiff made any direct representations to the Martins and Faracis. Rather, the record reveals that it was Easy Living and the Bakers who continually assured the Martins and Faracis that the plaintiff would not foreclose. Although the Martins and Faracis contend that the plaintiff testified at her deposition that she told Scott Baker she would not foreclose on the premises, such deposition testimony is, at best, equivocal. Moreover, the record does not reflect that the plaintiff made such a statement to Scott Baker with the intent of inducing the Martins and Faracis to act thereon. There also is no evidence in the record that the Bakers or Easy Living were acting as the plaintiff's agents when they advised the Martins and Faracis that the plaintiff would not foreclose. Contrary to the Martins and Faracis' contention, the court finds that the relationship of Easy Living and Elliot Baker to the plaintiff was that of a mortgagor to a mortgagee, not that of a joint venturer.

A joint-venture agreement is generally defined as a special combination of two or more persons in some specific venture in which a profit is jointly sought without any actual partnership or corporate designation (*see, Ackerman v Landes*, 112 AD2d 1081, 1082). When determining whether a joint venture exists, the factors to be considered are the intent of the parties (express or implied), whether there was joint control and management of the enterprise, whether there was a sharing of the profits as well as a sharing of the losses, and whether there was a combination of property, skill, or knowledge (*see, Mendelson v Feinman*, 143 AD2d 76, 77).

The Martins and Faracis allege that the plaintiff provided the financing and that Elliot Baker constructed the homes. However, they do not allege, nor does the record reflect, that the plaintiff had any control over the purported series of joint ventures with Elliot Baker, including the one that is the subject of this action. Moreover, the record does not reflect that the plaintiff and Elliot Baker intended to share profits and losses. The Martins and Faracis argue that the plaintiff and Elliot Baker had been doing business together for decades and that they routinely disregarded their contractual rights and obligations, reaching resolutions based on the profitability or lack thereof of any particular project at the time of the closing. They argue that this course of conduct evinces a joint venture. However, the plaintiff's abandonment or modification of the loan and mortgage agreements are consistent with the protection of her position as a creditor and does not establish that the plaintiff and Elliot Baker intended to share profits and losses (*see, Tilden of N.J. v Regency Leasing Sys.*, 230 AD2d 784, 785-786). In the absence of joint control and an agreement to share profits and losses, the Martins and Faracis have failed to establish the existence of a joint venture (*see, Goodstein Properties v Rego*, 266 AD2d 506, 507; *Gold Mech. Contrs. v Lloyds Bank P.L.C.*, 197 AD2d 384).

Under these circumstances, the court finds that the Martins and Faracis have failed

to raise a triable issue of fact to defeat the plaintiff's motion for summary judgment. They have also failed to establish their entitlement to judgment as a matter of law. Accordingly, the plaintiff's motion for summary judgment is granted to the extent indicated above, and the cross motion is denied. The court declines to consider the Martins and Faracis' application to sanction the plaintiff, which is raised for the first time in their opposition and reply papers. Absent a notice of cross motion demanding such relief, the court is without jurisdiction to grant it (*see*, CPLR 2215; **Myung Chun v N. Am. Mtge. Co.**, 285 AD2d 42, 45; **Torre v Torre**, 142 AD2d 942).

In view of the absence of a certificate of occupancy for the premises, the court finds that the plaintiff is not entitled to recover from the Martins and Faracis the real estate taxes or an amount equal to the fair market value of their use and occupancy of the premises (*see*, **Martin v Easy Living Homes, Inc.**, 15 AD3d 360, 361 [and cases cited therein]). Accordingly, the plaintiff's motion for such relief is denied.

HON. ELIZABETH HAZLITT EMERSON

DATED: July 15, 2008

J. S.C.