

LT Propco, LLC v Carousel Ctr. Co. LP

2008 NY Slip Op 32092(U)

July 21, 2008

Supreme Court, Onondaga County

Docket Number: 0003883/2007

Judge: John C. Cherundolo

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**SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA**

LT PROPCO, LLC,

Plaintiff,

vs.

**Index No. 07-3883
RJI No. 33-07-2230**

**CAROUSEL CENTER COMPANY LP and
CITY OF SYRACUSE INDUSTRIAL
DEVELOPMENT AGENCY,**

Defendants.

LORD & TAYLOR CAROUSEL, INC.,

Plaintiff,

vs.

**Index No. 06-7498
RJI No. 33-06-4465**

**CAROUSEL CENTER COMPANY LP and
CITY OF SYRACUSE INDUSTRIAL
DEVELOPMENT AGENCY,**

Defendants.

In the Matter of the Application of

**THE CITY OF SYRACUSE INDUSTRIAL
DEVELOPMENT AGENCY, to acquire certain
interests in the Carousel Center site,
which site is generally identified as
1 Carousel Center Drive (Lot 11K),
SBL No. 114-02-05.6; 304 Hiawatha
Boulevard W. Rear (Lot 11B), SBL No.
114-02-05.2 in the City of Syracuse,
New York, which parcels comprise a portion
of the site for the phased public project
known as**

**Index No. 05-7107
RJI No. 33-05-4945**

**(L&T Carousel Center
Interests)**

DESTINY USA

DECISION AND ORDER

This issue of standing focuses on whether LT Propco as a successor in interest to Lord & Taylor is a proper party to maintain an action for declaratory judgment as to the party's rights contained in the "Transaction Documents"¹ or to maintain an Eminent Domain Procedure Law ("EDPL") Article 5 proceeding for damages subsequent to the Syracuse Industrial Development Agency's [*hereinafter* "SIDA"] acquisition of rights under an EDPL Article 4 Vesting Order, dated May 17, 2006.² The relevant documents as to "ownership" and the acquisition and/or vesting of "rights" in the REA and ASA as to the mortgage lenders in this case ("Lenders")³ include a letter from Lord & Taylor's counsel to the court,⁴ and the "LT Loan Documents": the Master Loan document⁵, the Mortgage⁶, and the Lease and Rent Assignment⁷ attached to the Master Loan.

ARGUMENT SUMMARY

Simply addressing the defendants' motion for summary judgment on the issue of standing, SIDA argues that neither Lord & Taylor nor Propco are the proper parties having standing to sue, either for a declaratory judgment⁸ as to remaining rights in the

¹ Reciprocal Easement Agreement ("REA"), Affirmation of Gilberti, Jr., Ex. 1, Jan. 25, 2008; Allocable Share Agreement ("ASA") as a supplement to the REA, Gilberti Affirmation, Ex. 2, Jan. 25, 2008; and related documents.

² See Matter of Kaufman's Carousel, Inc. v. City of Syracuse Indus. Dev. Agency, 301 A.D.2d 292 (4th Dept. 2002); Gilberti Affirmation, ¶8.

³ Bear Sterns Commercial Mortgage, Inc. and Lehman Brothers F.S.B.

⁴ Gilberti Affirmation, Ex. 4.

⁵ *Id.*, Ex. 8.

⁶ *Id.*, Ex. 9.

⁷ *Id.*, Ex. 10.

⁸ See Index Nos. 2007-3883 (LT Propco Declaratory Judgment Action) and 2006-7498 (Lord & Taylor Declaratory Judgment Action)

REA/REOA or ASA⁹ or for seeking damages under EDPL Article 5 pursuant to SIDA's EDPL Article 4 condemnation and takings. Lord & Taylor/Propco argues that they are the owner in possession of the property in dispute and the Lenders' interest is nothing more than a mortgage lien on its title.

The plaintiffs' key argument is contained within the responding affirmation of Laura A. Mullin, dated February 5, 2008 (Mullin Aff.) in opposition to Carousel Center Company and SIDA's motions to dismiss. The argument is that New York is a "lien theory" state, "that a mortgage creates a lien upon the real property (or property interest, in this case the leasehold interest of Plaintiff), and does not vest title to the property in the lender." Mullin Aff., ¶3. Plaintiff further contends that as a result of New York's "lien theory" law, "title to property (in this case (the leasehold interest of the plaintiff), contained, in part, in the Transaction Documents) remains in the mortgagor (in this case, Plaintiff)." Id.

The defendants' key argument is that Lord & Taylor's interests in the Carousel Center property were sold as part of a larger transaction in which the entire Lord & Taylor division of the parent company, Federated Department Stores, was sold to a company called NRDC in October, 2006. Included in this sale were all interests that Lord & Taylor Carousel, Inc., had in the Lord & Taylor property at Carousel Center. See Affirmation of William J. Gilberti, Jr., dated Jan. 25, 2008 ("Gilberti Aff."). The defendants also claim that LT Propco, LLC, as an entity of NRDC, became the official borrower/mortgagor of the Lord & Taylor division when it was purchased from Federated Department Stores. Gilberti Aff., Ex. 8 (Loan Agreement), Ex. 9 (Mortgage).

⁹ Referred to by both parties as "the Transaction Documents"

The defendants further assert that the LT Loan Documents,¹⁰ executed at the time of the loan between LT Propco and the Lenders, demonstrate that LT Propco “did not merely mortgage its interests, it also separately and specifically assigned its interests in the REA that is the subject of this action...specifically assigned to the Lender the right to take *any* action to terminate the REA...LT Propco repeatedly represented its intent that those assignments were actual, present, absolute and unconditional assignments and not for additional security only.” See Reply Affirmation of William Gilberti, Jr., dated Feb. 12, 2008, ¶8 (“Gilberti Reply Aff.”).

The defendants cite multiple examples of LT Propco’s absolute, present, and unconditional assignment of its rights and interests in the REA and the Lord & Taylor property in general that go beyond a simple mortgage and assignment for security purposes: “It also ‘absolutely and unconditionally assign[ed] and grant[ed]’ to MERS, as nominee of Lehman Bros. and Bear Stearns ‘all of [LT Propco’s] right, title and interest in and to all current and future Leases and Rents’” which includes the REA (Gilberti Reply Aff., ¶5, *citing* the Mortgage, §§1.1(a-h), 1.2); “LT Propco represented its intention that the assignment would ‘constitute a present and absolute assignment...and not an assignment for additional security only’” (*Id.*, at ¶6, *citing* Assignment of Leases and Rents, §§1.1, 2.1); and “LT Propco covenanted that it ‘shall not, without the prior written consent of the Lender, as determined in its sole discretion, take (and hereby assigns to Lender any right it may have to take) any action to terminate, surrender, or accept any termination or surrender of, the REOA [a/k/a REA]’” (*Id.*, at ¶7, *citing* the Loan Agreement §5.1.28(e)).

¹⁰ See FN. 5-7, *supra*, and accompanying text.

ANALYSIS

As happens so often with complex cases such as this, the Court is called upon very early in the litigation to settle a dispute, the resolution of, which will have great import on the remainder of the case for both parties. Based on the record before this Court and the arguments submitted in connection therewith, this Court is of the opinion that in the instant motion to dismiss the action of LT Propco/Lord & Taylor for lack of standing, both the plaintiff and defendant are partially correct. LT Propco is correct in its assertion that it is an owner in possession of its property and that title has vested in them as owner with the Lenders having obtained a lien upon LT Propco's real property interests by virtue of the mortgage. In re Braddock Ave., 251 A.D.669 (2nd Dept. 1937), *aff'd sub nom In re Braddock Ave. v. City of New York*, 278 N.Y.163 (1938).

However, at the same time, LT Propco fails to acknowledge a basic tenant of property law - that title or ownership of real property is not a "yes or no" proposition but entails a multitude of rights in the property owner, a "bundle of sticks" if you will, where any one "stick" may be traded, sold, seized by eminent domain, or *assigned* to another party, while not divesting the "owner" of their true title. See U.S. v. Craft, 535 U.S. 274 (2002), *citing* B. Cardozo, *Paradoxes of Legal Sciences*, 129 (1928) (reprint 2000). It is in this aspect that the defendants are also correct that LT Propco, LLC, has bargained away some of its interests ("sticks") with regard to the REA/REOA and the ASA to the Lenders as part of its exchange for the funds used to purchase the Lord & Taylor division (assets) from Federated. See Mortgage, §§1.1(a-h), 1.2; Assignment of Leases and Rents, §§1.1, 2.1; Loan Agreement §5.1.28(e)¹¹.

¹¹ Gilberti Aff., Exs. 8-10.

Further, the court takes notice that the Lenders' grant to LT Propco of a revocable license strongly implies that the Lenders have an unconditional and present interest by virtue of the loan agreement, otherwise, they would not have anything to grant to LT Propco as part of a license. *See* Assignment of Leases and Rents, §2.1; Mullin Affirmation, ¶5; Gilberti Reply Aff., ¶¶17, 20-21. Regardless of LT Propco's present and unconditional assignment of rights in the REA and ASA, the defendants' attempt to characterize LT Propco's and the Lenders' relationship as a mere licensing relationship is simplistic and ultimately incorrect.¹²

The majority of cases cited by the defendants in support of their argument that directly address the issue of standing in property disputes deal with a licensee's lack of standing regarding fungible property, not real property. *See* Gilberti Reply Aff., ¶22; Defendant Carousel's Memorandum of Law Supporting Motion to Dismiss, pp.15-16 (Jan. 25, 2008). Defendants have not brought to the Court's attention any case law where the party asserting standing in a real property dispute was a licensee as to the rights asserted and the titleholder in possession and occupancy of the real property in dispute. However, the Court by its own research takes notice of the Appellate Division, Second Department, decision in Erhal Holding Corp., v. Rusin, 229 A.D.2d 417 (2nd Dept. 1996).

In Rusin, the plaintiff mortgage holder sought to notice a foreclosure sale after receiving a foreclosure judgment on the real property at issue. Erhal Holding Corp., v. Rusin, *supra*. The defendants' therein conveyed the real property in dispute, the defendants' home, to their two sons' partnership but continued to occupy the house. *Id.*

¹² *See* Gilberti Reply Aff., ¶¶20-22.

The sons then took out a mortgage on the home based on their title, which was ultimately assigned to the plaintiff, and soon after defaulted on the mortgage. Id. The defendants, upon discovering the default, began making monthly interest-only payments to plaintiff. Id. Upon default of the interest-only payments, plaintiff moved to notice a foreclosure sale, opposed by the defendants, who did *not* have title but occupied the real property in dispute. Id. The defendants' motion to compel redemption was granted because "the Rusins continued to reside on the subject property. The court properly determined that, by their possession of the property, they had the requisite standing to seek an order staying the foreclosure sale, and permitting them to tender the necessary sum required for redemption." Id.

CONCLUSION ON LT PROPCO'S STANDING

Even though the Court finds that LT Propco has unconditionally and presently assigned its interests in the REA and ASA to the Lenders, LT Propco as owner and occupant of the Lord & Taylor store at Carousel Center has retained at least possessory interest or requisite "title" to this property and has at least an equitable interest, including whatever impact the REA and ASA may ultimately have on that property. *See Erhal Holding Corp., v. Rusin, supra.* Like the defendants in Rusin, LT Propco has continually occupied the real property in question; however, unlike the defendants in Rusin, LT Propco is also a party to the mortgage in this case. LT Propco's interest, albeit equitable in nature, is at least as great an interest as the defendants in Rusin, and, therefore, LT Propco has the requisite standing to bring the instant action.

LT Propco has demonstrated to the Court's satisfaction that it has an equitable interest in the property in its possession and to which it retains title, including whatever effect the REA and ASA may have on its title and property interests. However, LT Propco's assignment of its direct rights in the REA and ASA to the Lenders has also made the Lenders an indispensable party in this dispute and joinder of the Lenders is therefore required as a matter of law. *See* N.Y. CPLR §§1001, 1003; *see also* City of New York v. Long Island Airports, 48 N.Y.2d 469 (1979) (dismissal without prejudice for failure to join necessary party); Hitchcock v. Boyack, 256 A.D.2d 842 (3rd Dept. 1998) (conditional order of dismissal allowing plaintiff a reasonable time to join the necessary party).

Additionally, LT Propco's unconditional and present conveyance of its rights¹³, including, specifically, its rights in the REOA/REA to the Lenders¹⁴ (rights to terminate, surrender, or accept any termination or surrender of the REOA/REA), renders LT Propco's purported termination of the REA on October 11, 2007, null and void absent the written consent of the Lenders. Moreover, LT Propco's interest in Lord & Taylor as acquired from the predecessor Federated Department Store included "proceeds to be received in connection with the pending condemnation proceedings of that certain Carousel Center Facility located in Syracuse, New York." Petitioners Affirmation of Douglass A. Foss (Foss Aff. Art.5 Claim), Index No. 2005-7107, dated Feb. 5, 2008, ex. A ("Propco Asset Purchase Agreement"), pg. 73, §(v). The issue as to if and/or how LT Propco may properly protect its interests in an EDPL Article 5 claim for damages as

¹³ Mortgage §1.1

¹⁴ Loan Agreement §5.1.28(e)

Lord & Taylor Carousel, Inc., has done (Index No. 2005-7107) needs to also be addressed.

CONCLUSION AS TO EDPL ARTICLE 5 ACTION AND STANDING

Judge Centra's Order of Condemnation granting SIDA's EDPL Article 4 petition was filed on May 16, 2006, and he ordered all interested parties to file any claims for just compensation no later than six months from the date the order was filed. See *Gilberti Aff.*, Ex. 14, pg. 8. The six month time limit would have accrued on November 16, 2006. The then current petitioner-claimants appealed Judge Centra's condemnation order to the Appellate Division, Fourth Department, on May 22, 2006. The Fourth Department granted a stay of Judge Centra's order on June 20, 2006 and that stay expired with issuance of the Fourth Department's decision in favor of the current defendant-condemnors on September 29, 2006 (a three month and nine day period of stay).

Assuming *arguendo* that the three month and nine day stay tolled Judge Centra's time frame in which to file an Article 5 claim for damages, the six month time frame plus tolling would have expired on February 26, 2007. As both parties are well aware, this Court granted a stay of all proceedings between these two parties on February 20, 2007 after the defendants filed a motion to dismiss the Lord & Taylor Carousel, Inc.'s Article 5 proceeding for a lack of standing. The February 20, 2007, stay of all proceedings was continued by this Court's Order, dated March 30, 2007, which granted defendants' request for discovery on the issue of who owned the rights in Lord & Taylor property at Carousel Center for the issue of standing and denied Lord & Taylor's cross-motion to

substitute LT Propco, LLC, for Lord & Taylor Carousel, Inc., as the plaintiff in that action.

Given the Court's discussion up to this point, the numerous stays imposed in the Article 5 proceeding, the possible tolling effect on the time frame for a potential claimant to file an EDPL Article 5 claim, and the defendants' lack of any real prejudice in allowing LT Propco to pursue its claim (defendants have been on continuous notice as to the property and claims asserted and the only "prejudice" is in having to defend against any damages resulting from their taking), the Court of its own authority now hereby reconsiders Lord & Taylor Carousel, Inc.'s motion to substitute LT Propco as petitioner in the Article 5 claim. Moreover, the Transaction Documents and the LT Loan Documents, as articulated by the defendants, are also persuasive to the extent that the Lenders are equally indispensable to the Article 5 proceeding (Index No. 2005-7107), which therefore requires their joinder as parties to that action. The Lenders include Bear Sterns Commercial Mortgage, Inc., and its successors in interest if there are any,¹⁵ Lehman Brothers, F.S.B., and MERS¹⁶ as each of their interests may appear.

Additionally, even if the tolling of Judge Centra's six month time frame did not occur as a result of the multiple stays granted in these cases, substitution of LT Propco merely changes the name of the petitioner in this case. This Court finds no prejudice to the respondents-condemner-defendants by virtue of the substitution of LT Propco, LLC. All of the claims made by Lord & Taylor Carousel, Inc., in the pursuit of protecting its interest in the Lord & Taylor property at Carousel Center (albeit erroneously made) are

¹⁵ Most notably and possibly Chase Morgan Stanley.

¹⁶ Mortgage Electronic Registration Systems, Inc. as the Lenders assignee in interest.

the same and identical claims relied upon by LT Propco in its own right. It does not affect the nature of the damages or the claims presented in an otherwise timely filed EDPL Article 5 damages proceeding.

The defendants have been on notice that there is a claim for damages as a result of their EDPL Article 4 taking and the court has not been convinced that any prejudice other than having to pay for the costs of that taking have been shown by the defendants. Therefore, unlike this Court “grant[ing] a motion to extend the time fixed in a prior order” for a *non-party* to file a new Article 5 damages claim where the defendants’ reliance on Tewari¹⁷ would be appropriate, a substitution of LT Propco, LLC, for Lord & Taylor Carousel, Inc., renders such reliance inapposite.

CONCLUSION

Based on all actions and proceedings before this Court, and this Court having had due deliberation thereon, it is hereby

ORDERED, LT Propco, LLC, is hereby substituted as the petitioner for Lord & Taylor Carousel, Inc., in the EDPL Article 5 damages proceeding now pending before this court (Index No. 2005-7107), and LT Propco, LLC, shall have 30 days from the date of this order to file an amended petition consistent with this and any other additional orders of this court; and it is further

ORDERED, for Index No. 2005-7107, LT Propco, LLC’s substitution is hereby **GRANTED** on the condition that LT Propco also join the Lenders as indispensable parties to the EDPL Article 5 proceeding; and it is further

¹⁷ Affirmation of Mark R. McNamara dated Mar. 6, 2008, ¶¶15-23; Tewari v. Tsoutsouras, 75 N.Y.2d 1 (1989).

ORDERED, that defendant Carousel Center Company, LP's motion, supported and joined by SIDA, to dismiss LT Propco, LLC, as substituted for Lord & Taylor Carousel, Inc., in its petition for damages under EDPL Article 5 (Index No. 2005-7107) for failure to join a necessary party under CPLR §§1001 & 1003 is hereby **CONDITIONALLY GRANTED** to the extent that LT Propco, LLC, shall have 30 days from the date of this order to join as necessary parties the Lenders, Bear Stearns Commercial Mortgage, Inc. (or its successors in interest, if any), and Lehman Brothers F.S.B. (or its successors and/or assigns in interest if there are any); and it is further

ORDERED, that **FAILURE** by LT Propco, LLC, to join the Lenders as necessary parties (or any of their successors/assigns in interest) in addition to filing an amended complaint substituting LT Propco, LLC, as petitioner for Lord & Taylor Carousel, Inc., will result in **DISMISSAL**, with prejudice, of Lord & Taylor Carousel, Inc.'s EDPL Article 5 petition for damages, which will also be binding on LT Propco.

DATED: July 21, 2008.

S/ John C. Cherundolo
Hon. John C. Cherundolo, A.J.S.C.