

Carbone v 243 E. 118th St., LLC

2008 NY Slip Op 33427(U)

December 19, 2008

Supreme Court, New York County

Docket Number: 100422/2006

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
JANE S. SOLOMON

PART 55

Index Number : 100422/2006
CARBONE, JAMES
VS.
243 W.118TH ST., LLC
SEQUENCE NUMBER : 007
PARTIAL SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1-5
6-8
9-10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided as per annexed Superior Order,

(NB 1-12-09 at noon conform request re remaining 3d party def)

FILED
DEC 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12-17-08

[Signature]
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FACTUAL BACKGROUND

In January of 2004, 243 East 118th St., LLC ("243 LLC") acquired the building located at the address in Manhattan referenced by its name (the "Property") from 243 East 118th Street Realty Corp. ("243 Corp."). Gerald Migdol and Sheri Migdol (the "Members" or the "Migdols") were and now are the sole members of 243 LLC and each owns a 50% interest. In connection with the purchase, 243 LLC purchased a title insurance policy (the "Purchase Policy") from Stewart Title Insurance Company ("Stewart"). The Purchase Policy and the title report issued in connection with it did not reveal that a mortgage that 243 Corp. obtained in 1999 from the West Coast Guaranty Bank ACF Edwin V. Cooksey, IRA (the "Cooksie Mortgage") in the amount of \$285,000 remained of record.

Under Section 1(a) of the Purchase Policy, an insured is defined as the named insured (243 LLC) as well as "those who succeed to the interest of the named insured by operation of law as distinguished from purchase, including, but not limited to heirs, distributees, survivors, personal representatives, next of kin, or corporate or fiduciary successors." Section 2 provides that coverage under the Purchase Policy shall continue in favor of the insured after a conveyance of title "only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a

purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest."

Section 32(A)(1)(a) of the 2001 Title Insurance Rate Service Association ("TIRSA") Rate manual provided for the continuation of insurance if title is transferred in certain enumerated ways. If title is transferred in a manner listed in that section, coverage will continue as long as: (a) "there is no change in the beneficial ownership as the result of" the transfer; and (b) "the transfer is made for no consideration." Although numerous types of transfers are specifically set forth in that section, nominee/principal transfers are not listed among the kinds of transfers that would allow coverage to continue.¹

In April of 2004, 243 LLC transferred the Property to the Migdols for ten dollars consideration. The transfer was made in connection with the procurement of a mortgage loan made by Wells Fargo Home Mortgage and secured by the Property. In the loan documents, the Migdols warranted that they were the lawful owners of the Property. A new title report was done and a new title insurance policy was issued by First American Title Insurance Company of New York to the lender. As with the

¹Section 32(A)(1)(a) of the TIRSA rate manual was subsequently amended in 2007 to specifically include such transfers in the list of transfers that would permit coverage to continue.

Purchase Policy, the title report issued in connection with this policy did not show that the Cooksie Mortgage was still recorded against the Property. In October of 2004, the Migdols transferred ownership of the Property back to 243 LLC for ten dollars consideration. In November of 2004, a mortgage foreclosure action was commenced against 243 LLC by the holder of the Cooksie Mortgage. On December 9, 2004, the Migdols were personally served with the summons, verified complaint, and notice of pendency. In June of 2006, the Court awarded summary judgment in favor of the creditor.

On December 17, 2004, eight days after the Members were served in the Cooksie Mortgage foreclosure action, 243 LLC contracted to sell the Property to the plaintiffs. A closing was scheduled for November 30, 2005. However, before that date, an amended title report was issued with an exception for the notice of pendency filed in connection with the Cooksie Mortgage. A problem also surfaced with respect to a bankruptcy proceeding relating to the Property.² 243 LLC's attorney contacted Stewart about the difficulty regarding the bankruptcy filing and requested Stewart's assistance in resolving the issue. In

² 243 Corp. was one of a number of real estate ventures affiliated with the Greenblatt family which filed for bankruptcy relief in 2004 and 2005. Indeed, in 2007, 243 LLC and Mr. Migdol were sued in an adversary proceeding in those cases. Moreover, the Greenblatts were named as third-party defendants in this action.

response, on December 14, 2005, Stewart disclaimed coverage under the Purchase Policy in a letter to 243 LLC's attorney on the ground that the transfer from 243 LLC to the Members terminated coverage.

Stewart took the position that it was not obligated "to defend or indemnify [243 LLC] in regard to its current difficulty with the Bankruptcy filing, or otherwise, and respectfully declines to do so." On December 29, 2005, 243 LLC responded in writing by rejecting Stewart's disclaimer and demanding that Stewart provide coverage. On February 22, 2006, 243 LLC wrote to Stewart and again requested that Stewart confer coverage. It appears that 243 LLC gave Stewart written notice of the Cooksie Mortgage foreclosure action for the first time in this letter.

In light of the difficulty it encountered in closing with plaintiffs, 243 LLC attempted to terminate the contract of sale and return the down payment. Plaintiffs then commenced this action for specific performance.³ 243 LLC thereafter commenced a third-party action asserting, *inter alia*, declaratory judgment and bad faith causes of action against Stewart.

³Plaintiffs moved for summary judgment. On September 22, 2008, the Court granted the motion and instructed counsel to settle judgment. Judgment has not yet been settled.

DISCUSSION

In this motion, 243 LLC moves for summary judgment on its declaratory judgment and bad faith causes of action. 243 LLC contends that the motion should be granted because it is entitled to coverage under the Purchase Policy. It seeks a declaration that Stewart must indemnify it for any liability and damages arising from the Cooksie Mortgage and reimburse it for its defense costs. 243 LLC also seeks to recover its legal and court costs in bringing the third-party complaint because Stewart denied coverage in bad faith.

Stewart opposes 243 LLC's motion for summary judgment on two grounds: (1) coverage under the Purchase Policy terminated when 243 LLC transferred the Property to its members; and (2) 243 LLC did not give prompt written notice to Stewart regarding the Cooksie Mortgage. The Court is persuaded that coverage terminated under the Purchase Policy when 243 LLC transferred the Property to the Migdols. Accordingly, the Court need not reach Stewart's notice argument.

The terms of the Purchase Policy clearly provide that coverage shall only continue after a conveyance of title if: (a) the insured retains an estate or interest in the land; or (b) coverage remains by virtue of a purchase money mortgage or covenants of warranty. It is not argued that coverage continued due to a purchase money mortgage or covenants of warranty.

Further, when 243 LLC conveyed the Property, it lost its "estate or interest" in the Property and coverage terminated at that point. A holding to the contrary would be inconsistent with the very nature of a limited liability company and the notion that a limited liability company owns property as a separate and distinct legal entity.

On facts similar to this case, the Court of Special Appeals of Maryland has held that coverage under a title insurance policy terminated when a couple transferred ownership of their property to a limited liability company of which they were the sole members. *Gebhardt Family Inv., L.L.C. v. Nations Title Ins. of New York, Inc.*, 132 Md. App. 457 (Md. App. 2000). The Court interpreted language that is virtually identical to Sections 1(a) and 2 of the Purchase Policy. The Court based its holding on the basic maxim that a "*transfer of property from a member to the limited liability company is more than a change in the form of ownership; it is a transfer from one entity or person to another.*" 132 Md. App. at 463 (quoting *Hagan v. Adams Prop. Assocs., Inc.*, 253 Va. 217, 220 (1997)). A holding to the contrary would, in the Court's view, "disregard the nature and viability of limited liability companies." *Id.* at 464.

Here, just as the transfer from a couple to a limited liability company terminated coverage in *Gebhardt*, coverage was terminated when 243 LLC transferred the Property to the Members.

A final point bears mentioning. It appears that 243 LLC made the transfer to the Migdols so that they could obtain a loan refinancing the Property by representing to the lender that they (and not the LLC) owned it. This was in conformity with the principle that a limited liability company owns property as an entity that is separate and distinct from its members and vice versa. Now, after a title insurance coverage dispute has arisen, the Members seek to disregard the distinction between individual and company ownership.

243 LLC's principal contention in support of its motion is that the 2007 and not the 2001 TIRSA Rate Manual is applicable to the 2004 transfer of the Property to the Members. Because that conveyance was a nominee/principal transfer within the meaning of section 32(A)(1)(a) of the 2007 Rate Manual, 243 LLC contends that coverage continued after the conveyance. However, Stewart correctly argues that the 2001 TIRSA Rate Manual was in effect at the time of the transfer and termination of coverage. The fact that the Rate Manual was revised in 2007 to add nominee/principal transfers shows that the 2001 version clearly did not include such conveyances within the list of transfers that would permit coverage to continue.

Stewart's denial of coverage was warranted and not made in bad faith. Accordingly, 243 LLC's motion for partial summary judgment is denied. Stewart did not cross-move for summary

judgment. Instead, Stewart improperly makes its request for such relief in its Memorandum of Law. However, upon searching the record, the Court determines that summary judgment should be granted dismissing the third-party complaint as against Stewart.

CONCLUSION

Accordingly, it hereby is

ORDERED that 243 LLC's motion for partial summary judgment is denied; and it is further

ORDERED that the third-party complaint is dismissed as against Stewart and the Clerk is directed to sever the same and enter judgment accordingly with costs and disbursements as taxed; and it is further

ORDERED that 243 LLC shall appear in Part 55 on January 12, 2009 to schedule the inquest directed in this Court's Decision and Order dated January 22, 2007.

Dated: December 19, 2008

ENTER:

FILED


J.S.C.

DEC 23 2008

JANE S. SOLOMON

**COUNTY CLERK'S OFFICE
NEW YORK**