

Whitney Lane Holdings, LLC v Don Realty, LLC

2008 NY Slip Op 33708(U)

April 4, 2008

Supreme Court, Saratoga County

Docket Number: 2006-2874

Judge: Stephen A. Ferradino

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF SARATOGA

WHITNEY LANE HOLDINGS, LLC

Plaintiff,

-against-

DECISION and ORDER
RJI #45-1-2006-1581
Index # 2006-2874

DON REALTY, LLC; DONOVAN and ARRIANNA
LITTLEFIELD (a/k/a ADRIANNA LITTLEFIELD)
by their guardian MATTHEW J. SGAMBETTERA, ESQ.
and DDA & A REALTY, LLC

Defendants.

APPEARANCES

Davidoff Malito & Hutcher, LLP
Attorneys for the Plaintiffs
200 Garden City Plaza, Suite 315
Garden City, New York 11530

Sgambettera & Associates, P.C.
Attorneys for the Defendants
323 Ushers Rd., P.O. Box 1550
Clifton Park, New York 12065

STEPHEN A. FERRADINO, J.

2008 APR - 9 AM 10:02
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

FILED

The plaintiff has requested an order of this court pursuant to CPLR § 1018 directing that OSJ of Clifton Park, LLC (hereinafter OSJ) be joined as a defendant in this action on the grounds that OSJ is the assignee of the promissory note and mortgage that are the subject matter of this action. The defendants DDA & A Realty, LLC and DDL Family Limited Partnership have opposed the motion to join OSJ. Additionally the defendants have cross-moved for an order pursuant to CPLR § 3212 granting summary judgment dismissing the complaint against the defendants.

This matter arises out of a simple commercial real estate transaction that has been complicated by a series of assignments from the original sellers to several entities, a default and allegations of fraud. An examination of the multiple transactions reveals two reoccurring players Derwood A/K/A Don Littlefield and the defendants' attorney Matthew Sgambettera. The property was sold for four million five hundred and fifty thousand dollars. At the November 4, 2004 closing the plaintiff paid approximately one million dollars to the defendants Don Realty, LCC, and Donovan and Arrianna Littlefield (A/K/A Adrianna Littlefield) by their guardian Matthew J. Sgambettera, Esq. (hereinafter the defendants). On November 5, 2004 the plaintiff executed a note in the amount of three million five hundred and fifty thousand dollars and a mortgage. The defendants requested the note and mortgage be placed in the name of DDA & A Realty, LLC (hereinafter DDA&A). The plaintiffs representative executed the documents and Derwood Littlefield as Manager signed on behalf of DDA & A. On September 5, 2006 DDA & A Realty assigned the mortgage to DLL Family Limited Partnership (hereinafter DLL). Derwood Littlefield signed the assignment on behalf of DDA & A as "Managing Member".

In October 2006 the plaintiff sought to renegotiate the terms of the note. Negotiations broke down and on November 30, 2006 the plaintiff commenced its action against the defendants. The plaintiff alleges the defendants fraudulently concealed the town's plan to take a portion of the property in contravention of the express terms of the contract for sale of the property. The plaintiff seeks to recover monetary damages it claims to have suffered as a result of the alleged fraudulently induced sale.

The note matured on December 1, 2006. The plaintiff defaulted. On December

13, 2007 DLL filed a foreclosure action against the plaintiff. On June 22, 2007 DDL assigned the mortgage to OSJ of Clifton Park, LLC (hereinafter OSJ). Defendants' counsel Matthew J. Sgambettera, "General Partner" signed the assignment on behalf of DDL. The foreclosure remains pending. The plaintiff's action and DLL's foreclosure action have been joined for trial. DLL by virtue of its status as an assignee of the note and mortgage was added as defendant to plaintiff's action *nunc pro tunc* by this court's February 5, 2007 order. DLL had made a motion pursuant to CPLR § 1018 requesting OSJ be substituted for DLL in the foreclosure action. The motion was granted by the court's July 30, 2007 order.

The plaintiff seeks to add OSJ as a defendant to this action by virtue of DLL's June 22, 2007 assignment and transfer of the Note and Mortgage to OSJ. The assignee of a non-negotiable note secured by a mortgage acquires the mortgagee-assignor's rights against the mortgagor; however, he takes both the note and the mortgage subject to the very same mortgagor's claims and defenses that the note and mortgage were subject to in the hands of the assignor. *Trustees of Union College v Wheeler*, 61 N Y 88 [1874] ; *Beck v Sheldon*, 259 NY 208 [1931]. The possible claims and defenses are many and varied, including, for example, fraud. *Siebro's Finance Corp. v Kirman*, 232 AD 375 [1931]. The plaintiff's motion to add OSJ as a defendant by virtue of its status as an assignee is granted.

Turning to the defendants motion for summary judgment. In *Salas v Town of Lake Luzerne*, 265 AD2d 770, 770 [1999], the Court held that the attorney's affirmation in support of a motion for summary judgment is insufficient when the attorney has no personal knowledge of the facts. See also, *Wright v Rite-Aid of NY, Inc.*, 249 AD2d 931,

932 [1998]; *Hodgson, Russ, Andrews, Woods & Goodyear v Roth*, 186 AD2d 1001, 1002 [1992]. In brief, the motion must be supported by a an affidavit of a person having knowledge of the facts, together with a copy of the pleadings and other available proof.” *S.J. Capelin Associates, Inc. v Globe Manufacturing Corp.*, 34 NY2d 338, 341 [1974]. Based upon the record in this case the defendants’ attorney clearly has intimate knowledge of the transactions. In fact when DLL assigned the mortgage to OSJ it was signed on behalf of DLL by the defendants’ attorney as a “general partner.” Interestingly in response to a interrogatory requesting the home address, business address, home telephone number and business telephone number of Don Littlefield the defendants responded as follows: Mr. Don Littlefield, c/o Sgambettera & Associates, P.C., 323 Ushers Road, P.O. Box 1550, Clifton Park, New York, 12065, (518) 977-7600. Clearly the defendant and his attorney have a close relationship.

The defendants’ argument that they are entitled to summary judgment because there is no connection between the defendants/sellers and the defendants/mortgagees is preposterous. The common players linked to the sale, note, mortgage and subsequent assignments is unmistakable. Furthermore the contract of sale called for both the cash payment made at closing and the note and mortgage to complete the purchase of the property. The defendants elected to have an affiliated entity execute the note and mortgage on their behalf. The defendants and the party to the note are clearly not unaffiliated as proposed by the defendants. Furthermore defendants attempt to segregate the transactions relative to the fraud allegations is equally absurd. The defendants cross-motion for summary judgment is denied.

Any relief not specifically granted is denied. No costs are awarded to any party.

This decision shall constitute the order of the Court. The original papers shall be forwarded to the attorney for the plaintiff for filing and entry.

Dated: April 4, 2008
Malta, New York

Kathleen A. Marchione
Kathleen A. Marchione
Saratoga County Clerk

M. G. Ferradino
STEPHEN A. FERRADINO, J.S.

2008 APR -9 AM 10:02
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

ENTERED

Papers Received and Considered:

Notice of Motion dated February 21, 2008

Affidavit of Stuart Perlmutter, Esq., sworn to February 21, 2008 with attached Exhibits A-E

Notice of Cross-Motion dated March 5, 2008

Affidavit of Matthew J. Sgambettera, Esq., sworn to March 5, 2008 with attached Exhibits A-I

Affidavit of John Conforti, sworn to March 5, 2008

Memorandum of Law in Support of Defendant DDA & A Realty, LLC's and DLL Family Limited Partnership's Motion for Summary Judgment and In Opposition to Plaintiff's Motion to Join OSJ of Clifton Park, LLC as a Defendant dated March 5, 2008

Reply Affidavit of Stuart Perlmutter, Esq., sworn to March 11, 2008 with attached Exhibits 1-7