

Pol v Ashirov

2009 NY Slip Op 32957(U)

December 11, 2009

Supreme Court, Queens County

Docket Number: 4557/09

Judge: Howard G. Lane

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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
IA PART 22

ADOLFO POL and MARIA POL,
Plaintiffs,

BY: **LANE, J.**

DATED: December 11, 2009

-against-

INDEX NO.: 4557/09

BORIS ASHIROV and AARON ASHIROV,
Defendants.

MOTION DATE:
September 22, 2009

MOTION SEQ. NO.: 1

Plaintiffs Adolfo Pol and Maria Pol commence the instant action seeking to enforce the terms of an alleged mortgage agreement and foreclose on the mortgaged premises. Plaintiffs alleged that defendants Boris Ashirov and Aaron Ashirov have defaulted under the terms of the mortgage agreement by failing to make the allegedly agreed upon payments.

Defendants now move for an order pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss plaintiffs' causes of action. Defendants argue that the mortgage agreement is facially invalid as the method of amortization in the mortgage note is allegedly ambiguous and indefinite; that plaintiffs fraudulently induced defendants to enter into the agreement; and that the action is barred by the Doctrine of Unclean Hands.

Plaintiffs oppose the instant motion and further cross-moves for an order pursuant to CPLR 3212 granting summary judgment and dismissing defendants' counterclaims.

Defendants' CPLR 3211(a)(1) Motion

CPLR 3211 provides in relevant part: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1) A defense is founded on documentary evidence ***." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***." (*Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248 [1st Dept 1995]; *Fernandez v Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702[3d Dept 1992]; *Vanderminden v Vanderminden*, 226 AD2d 1037 [3d Dept 1996]).

To the extent the motion is based upon plaintiffs' alleged failure to include a method of amortization in the mortgage note the mortgage agreement alone is insufficient to dispose of plaintiffs' causes of action. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v Kaufman* 91 NY2d 425 [1998]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the information in the Mortgage and Note is insufficient to determine as a matter of law that the mortgage agreement was facially invalid and resolve the motion in favor of defendants. Therefore, that branch of defendants' motion to

dismiss the complaint pursuant to CPLR 3211(a)(1) is denied.

Defendants' CPLR 3211(a)(7) Motion

It is well-settled that "on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***." (*Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608 [2d dept 1999]; *Leon v Martinez*, 84 NY2d 83[1994]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see *Stukuls v State of New York*, 42 NY2d 272 [1977]; *Jacobs v Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see *Rovello v Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159 [2d Dept

1997])). In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory." (*1455 Washington Ave. Assocs. v Rose & Kiernan*, 260 AD2d 770, 771 [3d Dept 1999]).

In the instant matter, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference, the court finds that plaintiff has adequately stated a cause of action for a breach of mortgage note and seeking foreclosure. This courts obligation is to look to the pleadings and determine whether the facts, accepted as true, fit within any cognizable legal theory (*see Leibowitz v Bank Leumi Trust Co.*, 152 AD2d 169, 170 [2d Dept 1989]). Plaintiffs here allege they have a valid and enforceable mortgage note and that defendants have not paid on the note (*Metropolitan Distribution Services, Inc. v DiLascio*, 176 AD2d 312 [2d Dept 1991]). These allegations sufficiently make out a cause of action for breach of a mortgage note. Therefore, that branch of defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is denied.

Plaintiffs' Cross Motion pursuant to CPLR 3212

The proponent of a motion for summary judgment carries

the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e. with the proponent of the issue. Thus "if the evidence on the issue is evenly balanced, the party that bears the burden must lose." (*Director, Office of Workers Compensation Programs v Greenwich Collieries*, 512 US at 272; *300 East 34th Street Co. v Habeeb*, 248 AD2d 50 [1st Dept 1997].) A party moving for summary judgment is obliged to prove through admissible evidence that the movant is entitled to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or

debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8 [1960]; *Sillman v Twentieth Century Fox Film Corp.*, *supra*).

To establish a prima facie entitlement to foreclose on a mortgage, the plaintiff must demonstrate the existence of the mortgage and note, ownership of the mortgage and the defendants' default in payment (see *Campaign v Barbra*, 23 AD3d 327 [2d Dept 2005]).

Plaintiffs presented sufficient evidence to warrant entitlement to judgment as a matter of law under CPLR 3212. In this foreclosure action plaintiffs have submitted a mortgage and note which unequivocally demonstrates the existence of such documents. The aforementioned note was executed by defendants and duly recorded. Plaintiffs have also established the default of the defendants as well as ownership of the Note.

The burden now shifts to the defendants to raise a triable issue of fact regarding their defenses (*Household Fin. Realty Corp. v Winn*, 19 AD3d 545 [2d Dept 2005]). Defendants first argue that the mortgage is facially invalid as there is allegedly no method of amortization contained in the agreement. Considering defendants' argument, this court finds that this sufficiently presents an issue of fact with respect to a material term in a mortgage agreement. It has been noted that "[t]he

complete failure to specify an interest rate (or, possibly, a term or a method of amortization) would generally result in the denial of specific performance" (*Marder's Nurseries v Hopping*, 573 NYS2d 990, 997 [1991]). Also, defendants further argue that the mortgage is void because of fraud as defendants assert plaintiffs made oral representations to them regarding financing and interest rates and the agreement defendants signed contained terms contrary to those which were allegedly stated orally. Defendants have not come forward with sufficient support to establish this assertion. On the contrary, the law is well settled that "[w]here the person claiming to have been defrauded has by specific contract provisions agreed to terms which are contrary to the oral promises allegedly relied upon, he himself would be guilty of deliberately misrepresenting his own true intentions and the parol evidence rule applies" (see *Citibank v Plapinger*, 66 NY2d 90, 95-96). Further, a specific disclaimer destroys allegations that the agreements were executed in reliance upon contrary oral misrepresentations (*Danann Realty Corp. v Harris*, 5 NY2d 317, 320).

In order to state a cause of action under 42 USC 1982 it must be alleged "with specificity facts sufficient to show or raise a plausible inference of 1) the defendant's racial animus; 2) intentional discrimination; and 3) that the defendant deprived plaintiff of his rights because of his race." (*Garg v Albany*

Indus. Dev. Agency, 899 F Supp 961 [NDNY 1995]). Here, defendants have not plead with any specificity "the events of the intentional and purposeful discrimination, as well as the racial animus constituting the motivating factor for the [plaintiffs'] actions" (*Waldron v Rotzler*, 862 F Supp 763 [NDNY 1994]). Further, defendants have not alleged any facts that demonstrate that defendants' race was the reason for plaintiffs actions (see *Waldron v Rotzler*, 862 F Supp 763 [NDNY 1994]). Additionally, although there are allegations of fraud in the underlying transaction, the doctrine of unclean hands is not applicable in the instant matter (see *Jo Ann Homes at Bellmore, Inc. v Dworetz*, 25 NY2d 112 [1969]).

Accordingly, defendants' motion for an order pursuant to CPLR 3211(a)(1) and(7) is hereby denied defendants have sufficiently stated a cause of action and there is no documentary evidence which conclusively resolves the issues in this case. Plaintiffs' motion for an order pursuant to CPLR 3212 for summary judgment and dismissal of defendants' counterclaims is denied with respect to the facial validity of the mortgage, and granted as to illegal discrimination and fraud.

Settle order.

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HOWARD G. LANE, J.S.C.