

Nair v Parappurath

2010 NY Slip Op 30674(U)

March 26, 2010

Supreme Court, New York County

Docket Number: 113910/2004

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Ling - Cohan
Justice

PART 36

Index Number : 113910/2004

NAIR, MADHU
vs.
PARAPPURATH, SABASTIN

SEQUENCE NUMBER : 004

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION REG. NO. _____

MOTION CAL. NO. _____

this motion to/for Dismiss/summary judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1/2	_____
5	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ^{3,4} & cross motion are decided in accordance with the attached memorandum decision.

FILED
MAR 30 2010
NEW YORK
COUNTY CLERK'S OFFICE

JUDGE DORIS LING-COHAN

Dated: 3/26/10

[Signature]
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):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : IAS PART 36

-----x
 MADHU NAIR,

Plaintiff,

- against -

SABASTIN PARAPPURATH a.k.a P.J.
 SABASTIN AND GREENPOINT SAVINGS BANK,

Defendants.
 -----x

Index No. 113910/2004

Mot. Seq. No. 004

HON. DORIS LING-COBAN, J.:

Plaintiff Madhu Nair seeks to dismiss the claim for attorneys' fees by defendant GreenPoint Mortgage Funding, Inc. s/h/a GreenPoint Savings Bank ("GreenPoint"). GreenPoint cross-moves, pursuant to CPLR 3212, for summary judgment on its counterclaim for attorneys' fees.

BACKGROUND

This is a partition action between co-owners of a residential building located at 4026 Bronx Boulevard, Bronx, New York (the "subject premises"). Plaintiff and defendant Sabastin Parappurath a/k/a P.J. Sabastin ("Parappurath") own the subject premises and GreenPoint is the mortgagee.

Plaintiff commenced this action against Parappurath and GreenPoint after a fire at the subject premises, which loss was not covered by insurance. The complaint alleges claims against Parappurath for negligence based on the failure to maintain insurance on the premises, and for partition. The complaint further states that GreenPoint is named as a defendant "for notice purposes only" (Complaint, Not of Mot, Exh C ¶10).

Issue was joined as to GreenPoint with the service of an answer asserting a mortgage lien and a counterclaim for attorneys' fees under paragraph 12 of the mortgage, which states, in part, that "[if] any lawsuit is started in connection with this Mortgage, all sums paid by ... [GreenPoint] for this purpose, including reasonable lawyers' fees shall be paid by ... [the Mortgagors] together with interest at the same rate in the Note" (Not of Mot, Exh B). The submissions include a summary of the attorneys' fees claimed by GreenPoint through April 30, 2009 (Not of Mot, Exh G), and detailed billing reports from the law firm retained by GreenPoint to represent it in this action.

Parappurath answered generally denying the allegations in the complaint and asserting counterclaims against plaintiff.

Plaintiff now moves to dismiss GreenPoint's counterclaim for attorneys' fees. GreenPoint cross-moves for summary judgment on its counterclaim for attorneys' fees. The court notes that, but for Greenpoint's counterclaim for attorneys' fees, the claims between plaintiff and defendant Parappurath would be settled. Additionally, from the inception of this lawsuit, this court has conducted extensive settlement negotiations between the parties.

DISCUSSION

Generally, each party to an action must pay its own attorneys' fees, unless an award of attorneys' fees has been determined by agreement, statute, or court rule (see *RAD Ventures*

Corp. v Artukmak, 31 AD3d 412, 414 [2d Dept 2006]). Furthermore, the right of a mortgagee to recover reasonable attorneys' fees is generally recognized if so provided in the mortgage instrument and not proscribed by statute. Where there is an express provision for payment of attorneys' fees in a mortgage, that provision will be enforced by the courts (*see Levine v Infidelity, Inc.*, 2 AD3d 691, 692 [2d Dept 2003]).

Here, it is not disputed that GreenPoint's mortgage constitutes a valid lien on the subject premises and is to be satisfied out of the proceeds of any judicial sale (*see Tedesco v Tedesco*, 269 AD2d 660, 661-662 [3d Dept 2000]). As previously stated, paragraph 12 of the mortgage provides that, if any lawsuit is started "in connection with this Mortgage," all sums paid by GreenPoint for this purpose, including reasonable lawyers' fees shall be paid by the mortgagors, together with interest at the same rate in the Note. However, contrary to GreenPoint's assertion, this partition action does not constitute a lawsuit started "in connection with" the mortgage so as to trigger its right under the mortgage to be reimbursed for attorneys' fees (*see id.* at 662). Simply stated, this action does not significantly affect GreenPoint's rights to the premises (*see id.*). As made clear in the complaint, GreenPoint was named as a defendant "for notice purposes only" (complaint, Notice of Motion, Exh C, ¶10). GreenPoint's arguments to the contrary are unavailing.

Accordingly, it is

ORDERED that the motion to dismiss the counterclaim for attorneys' fees is granted; and it is further

ORDERED that the cross motion for summary judgment on the counterclaim for attorneys' fees is denied; it is further

ORDERED that **unless a stipulation of settlement is filed with this court, the parties shall appear for conference on April 27, 2010, at 10 o'clock a.m., room 428, 60 Centre Street, NY, NY; it is further**

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

Dated: March 26, 2010



Hon. Doris Ling-Cohan, J. S. C.

J:\Dismiss\NAIR.parappurath.wpd

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