

Endeavor Funding Corp. v Ollie Allen Holding Co., LLC
2010 NY Slip Op 30861(U)
April 14, 2010
Supreme Court, New York County
Docket Number: 106712/07
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Endevor Funding Corp.

INDEX NO. 106712/07
MOTION DATE 11/16/09
MOTION SEQ. NO. 03
MOTION CAL. NO. _____

- v -

Ollie Allen Holding Company LLC

The following papers, numbered 1 to 14 were read on this motion to/for summary judgment

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

PAPERS NUMBERED

1-9
5-12
13-14

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is* decided in accordance with the *attached* memorandum decision and order.

FILED

APR 15 2010

NEW YORK
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Dated: 4/14/10

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X
ENDEAVOR FUNDING CORP.,

Plaintiff,

DECISION AND ORDER

-against-

OLLIE ALLEN HOLDING COMPANY, LLC,
OLLIE ALLEN, PARISER INDUSTRIES, INC.,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, "JOHN DOE 1" to "JOHN DOE 25",
said names being fictitious, the persons,
parties, corporations or entities, if
any, having or claiming an interest in
or lien upon the mortgaged premises
described in the complaint,

Index No. 106712/07

Defendants.

-----X
OLLIE ALLEN,

Third-Party Plaintiff,

-against-

ALLISON RAMOS, ESQ.,

Third-Party Defendant.

-----X
JANE S. SOLOMON, J.:

Plaintiff Endeavor Funding Corp. (Endeavor) moves,
pursuant to CPLR 3212, for an order granting plaintiff summary
judgment against defendant Ollie Allen (Allen) on its complaint
for foreclosure of a mortgage, and dismissing the defenses and
counterclaims in Allen's First Amended Answer, Defenses and
Counterclaims; 2) holding defendants Ollie Allen Holding Company,
LLC (OAHC), Pariser Industries, Inc. (Pariser) and New York City
Environmental Control Board (ECB) in default for failure to
answer or appear in the action; 3) pursuant to CPLR Article 43

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and RPAPL 1321, appointing a referee to compute and report the sums due and owing to Endeavor and to report whether the mortgaged premises should be sold in one or more parcels; and pursuant to CPLR 603, severing the third-party action filed by Allen against third-party defendant Allison Ramos, Esq. (Ramos).

Third-party defendant Ramos cross-moves, pursuant to CPLR 603, for an order severing the third-party action.

This action involves a one year balloon loan in the principal amount of \$475,000 made to OAHC on July 24, 2006, at an interest rate of 12% per annum. For the purpose of securing the loan, on that same date, Allen signed a mortgage note, as president of OAHC, and individually, as guarantor, promising to pay the sum of \$624.64, as interest, on July 24, 2006, and \$4,750, as interest only, on September 1, 2006, and on the first day of each month thereafter, to and including August 1, 2007, with the entire sum of unpaid principal and all accrued unpaid interest to be paid on August 1, 2007. The note also provided that if any payment was not made by the due date, a late charge of two percent of the monthly payment would be due and payable with the next monthly installment, and that, in the event of default, the unpaid principal indebtedness would bear interest from the date of default at the highest interest rate permitted by law. The note was secured by a mortgage on property located at 427 Convent Avenue, New York, New York, which contains a five-

unit dwelling.

Endeavor alleges that at the time of the loan, Allen had extensive experience with mortgage borrowing, having entered into at least nine separate mortgage loan transactions between 1992 and 2005, by which she mortgaged the subject property. Although in Allen's deposition, she testified that she did not remember taking out some of the mortgages, copies of the various mortgages are annexed to Endeavor's Affirmation of Bruce Minkoff, dated July 23, 2009. The last two of these mortgages were in transaction with the Neighborhood Housing Services (NHS) in the amount of \$50,000, executed on March 29, 2001, and from Emigrant Mortgage Company, Inc. (Emigrant) in the amount of \$275,000, executed on September 23, 2004.

According to Endeavor, the NHS mortgage was subordinated to the Emigrant mortgage and, at the time of Endeavor's loan, the Emigrant mortgage was in foreclosure. Indeed, Allen had filed a Chapter 13 bankruptcy petition on June 13, 2003, which was dismissed with prejudice on August 24, 2007.

Endeavor alleges that Allen made the monthly payments on its mortgage until January 1, 2007, when she failed to make that monthly payment or any due thereafter. According to Endeavor, Allen is now in default and the principal and all other amounts set forth in the note are due, together with the costs and expenses of this action.

On or about May 17, 2007, Endeavor filed this action in foreclosure against OAHG and Allen, as guarantor. Endeavor also joined Pariser, the ECB, and 25 John Doe defendants as parties defendant for the purpose of cutting off possible mechanic's liens, ECB judgments and other unknown claims, which may be liens against the property. On or about that same date, Endeavor filed a Notice of Pendency, noting that the civil action had been commenced.

On July 26, 2007, no answers having been filed by any of the defendants, Endeavor moved to hold them all in default and for the appointment of a referee to compute. On September 24, 2007, this court denied Endeavor's motion, deeming opposition papers filed by Allen to be a cross motion to compel the acceptance of a late answer, deeming her answer to be timely filed, and further deeming Allen's first counterclaim to be one for fraud, and not a Debtor and Creditor Law claim for fraudulent conveyance. In November 2007, Allen filed an amended answer and counterclaims, asserting three counterclaims, for fraud in the inducement, violation of New York's predatory lending laws, and breach of fiduciary duty. Endeavor alleges that no appearance has been made or answer filed by Pariser or the ECB.

Endeavor further alleges that although, in November 2008, counsel for Allen, Charles Whittier, agreed by stipulation to serve an answer on behalf of OAHG, in March 2009, he notified

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counsel for Endeavor that he would not be serving an answer on behalf of OAHC.

Discovery having concluded, on May 28, 2009, Endeavor filed a Note of Issue. On or about June 8, 2009, Allen filed a third-party complaint against Ramos asserting causes of action for fraud in the inducement, breach of contract and tortious legal malpractice.

Endeavor has submitted copies of the mortgage, the note which Allen signed, both as president of OAHC and as guarantor, and the affidavit of Robert Flink, president of Endeavor, providing evidence of default in payment of the obligations under the note. This evidence establishes Endeavor's prima facie case for summary judgment on its foreclosure claim.

In opposition to Endeavor's motion, Allen argues first that the transfer of title to the Convent Avenue property from Allen to OAHC was void because of Allen's lack of authority to act on behalf of OAHC. Allen next argues that the mortgage loan is a "high cost home loan" that violates Banking Law § 6-1. Finally, Allen argues that Endeavor conspired to fraudulently induce her to transfer title to the Convent Avenue property to OAHC, and that, therefore, the mortgage note is void and unenforceable.

Allen's argument that the transfer of title to the Convent Avenue property is void because she did not have the

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authority to act on behalf of OAHC is unavailing. Allen contends that because she did not incorporate OAHC and no stock certificates were issued to her, she could not act for OAHC.

It is undisputed that Endeavor would not make the loan to Allen unless it was made to a corporate entity, rather than to Allen, individually. Endeavor's insistence was based, at least in part, because of Allen's prior bankruptcy filing.

Ramos testified that she filed the paperwork to incorporate OAHC as an LLC because in speaking with Allen, "it was understood that that was what she had to do in order to do this refinance with this lender." Deposition of Allison Ramos, January 13, 2009, at 79-80.

In the recent decision of *Matter of Hausman* (13 NY3d 408, 412 [2009]), the Court of Appeals ruled that a limited liability company can be validly formed where the following three requirements have been followed: "1) the preparation of the articles of organization; 2) execution of the articles of organization; and 3) the filing of the articles of organization with the State." See Limited Liability Company Law § 203. Here those actions were accomplished by Ramos.

The Court in *Matter of Hausman* further held that it saw no reason why the de facto corporation doctrine should not apply to limited liability companies, stating:

Under very limited circumstances, courts may invoke the de facto corporation doctrine where

there exists (1) a law under which the corporation might be organized, (2) an attempt to organize the corporation and (3) an exercise of corporate powers thereafter.

Matter of Hausman, 13 NY3d at 412. This court concludes that those conditions have been met in this case.

Here, where there is no indication that anyone other than Allen could act for OAHC, the fact that certificates were not issued does not invalidate the actions that Allen took on its behalf. At the closing, Allen signed multiple papers as president of OAHC, and took the proceeds to pay off her outstanding mortgages to Emigrant and Neighborhood Housing Services, as well as a check written to her personally for \$15,876.94, the unencumbered balance of the loan proceeds. "Ratification may be implied when 'the principal retains the benefit of an unauthorized transaction with knowledge of the material facts (citations omitted).'" *Cashel v Cashel*, 65 AD3d 1182, 1183 (2d Dept 2009). Finally, in her deposition, Allen conceded that, at the time of closing, she was informed that she had three days in which to rescind the loan. See Deposition of Ollie Allen, at 195. It is undisputed that she took no action to rescind.

Thus, Allen cannot now argue that she did not have the authority to act on behalf of OAHC.

With respect to Allen's claim under Banking Law § 6-1, in 2006, when the loan was made, section 6-1 (e) defined a "home

loan" as follows: "[t]he principal amount of the loan does not exceed the lesser of: (A) conforming loan size limit for a comparable dwelling as established from time to time by the federal national mortgage association; or (B) three hundred thousand dollars." L 2007, ch 552, § 1. Although the dollar limitation on the definition of "home loan" was eliminated in 2007, only loans issued on or after, October 14, 2007, the effective date of the legislation, were covered by the amendment to this section of the statute. See L 2007, ch 552, § 1. Thus, Banking Law § 6-1 is inapplicable to Allen's loan for \$475,000. Allen's assertion that Endeavor made a loan in the amount of \$475,000 in order to find a "loophole" in the \$300,000 cap, is not creditable, particularly since she was seeking a loan in order to satisfy the outstanding mortgage debt to Emigrant and NHS, to which she owed a total of \$378,471.94 and \$41,707.04 respectively. It also is apparent that the loan was not a "home loan" as Allen apparently was unable to obtain that sort of financing in view of the bankruptcy and outstanding unpaid mortgages, a further reason for the insistence by Endeavor that the loan be made to a business entity.

Finally, Allen opposes Endeavor's motion and asserts a counterclaim on the ground of fraud in the inducement.

To prevail on a cause of action alleging fraud, a plaintiff must prove "(1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false

and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations."

Leno v DePasquale, 18 AD3d 514, 515 (2d Dept 2005) (citation omitted).

In her amended answer, Allen alleges that "at no time was the Counter-Plaintiff informed that one of the conditions for obtaining re-financing from the Counter-Defendants would be that she would have to transfer her legal and equitable interest in the Convent property to a limited liability corporation." First Amended and Verified Answer, Defenses and Counterclaims, ¶ 14. However, Allen's assertion is contradicted by her deposition testimony that, prior to the closing, she had indicated that she did not want an LLC. See Deposition of Ollie Allen, Dec. 17, 2008, at 102 and 125. Allen's testimony is confirmed by that of Ramos, who stated that she discussed the need for a holding company and the pros and cons of the form with Allen before the LLC was formed. See Deposition of Allison Ramos, dated April 27, 2009, at 155.

That Allen was aware of Endeavor's requirement that the loan be made to an LLC, rather than to her in her personal capacity, is further supported by copies of an e-mail exchange between Shahnaz Abboud, Paralegal/Closing Coordinator, Robert Flink, of Endeavor, Ramos, and Steven T. Wieder, Esq. discussing

the fact that Allen wanted to borrow the money under her own name, but that Endeavor was only willing to make the loan to a corporation. See e-mail from Reallawyers@aol.com to Flinklaw@gmail.com, dated July 6, 2006, 2:35 p.m.; e-mail from Robert Flink to Reallawyer@aol.com, dated July 6, 2006, 3:09 p.m.; and e-mail from Wmpsteve@aol.com to aramos.esq@verizon.net, July 6, 2006, 3:52 p.m.

In an unsigned affidavit annexed to her Affirmation in Opposition to Plaintiff's Motion, Allen asserts that she was not represented by counsel at the closing and was never informed about the legal significance of the LLC form when she signed the loan documents. In light of Allen's deposition testimony that Ramos was her attorney, and that prior to the closing, she indicated that she did not want an LLC, Allen's unsigned affidavit contradicting her testimony merely creates feigned issues of fact that are insufficient to defeat Endeavor's summary judgment motion. *Garcia-Martinez v City of New York*, 68 AD3d 428, 429 (1st Dept 2009).

From all of the evidence, it must be concluded that Allen ultimately decided to enter into the transaction, despite the requirement that the property be transferred to OAHC, in order to prevent the immediate foreclosure of the Emigrant mortgage. In her testimony, Ramos paraphrased Allen as concluding "I have to do what I have to do. I have to

refinance." Deposition of Allison Ramos, dated January 13, 2009, at 48.

With respect to Allen's counterclaim of breach of fiduciary duty, the relationship between Allen and Endeavor is that of borrower and lender and thus does not create a fiduciary duty. *Walts v First Union Mtge. Corp.*, 259 AD2d 322 (1st Dept 1999). Thus, Allen's third counterclaim is dismissed.

Finally, Endeavor's motion and Ramos's cross motion to sever the third-party action were granted by the Interim Order dated November 16, 2009. Although two of the counterclaims and the third-party action involve Ramos's alleged role in Allen's execution of the mortgage note, a sufficient distinction exists between the foreclosure action and Allen's claim for malpractice to warrant that these claims be severed, even were Endeavor's summary judgment motion not granted, particularly in light of the fact that the third-party action was not commenced until after the note of issue was filed in the main action.

Accordingly, it hereby is

ORDERED that the motion for summary judgment in favor of plaintiff Endeavor Funding Corp. and against Ollie Allen (Allen) on its complaint for foreclosure of the mortgage made by Ollie Allen Holding Company, LLC (OAHC) and dismissing the defenses and counterclaims asserted by Allen in her First Amended and Verified Answer, Defenses and Counterclaims is granted and

the Clerk shall enter judgment accordingly; and it is further

ORDERED that defendants Ollie Allen Holding Company, LLC, Pariser Industries, Inc. and New York City Environmental Control Board are in default for failure to answer or appear in this action; and it is further

ORDERED that the issues of the amount due and owing to Endeavor Funding Corp. from OAHG, and whether the mortgaged premises should be sold in one or more parcels, is referred to a Special Referee to compute and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues, provided, however, that calculation of the sum due from Allen shall abide the sale of the property and an application for a deficiency judgment under RPAPL section 1371; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

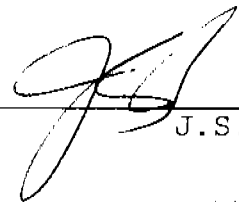
Dated: April 14, 2010

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J.S.C.

JANE S. SOLOMON