

**V.U. Goldstar, Inc. v King LLC**

2010 NY Slip Op 30880(U)

April 7, 2010

Supreme Court, Nassau County

Docket Number: 10464/08

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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V.U. GOLDSTAR, INC. and VEYSEL UYANIK

Plaintiffs,

- against -

KING LLC and YGAL YOSEF,

Defendant.

TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 10464/08  
Motion Seq. Nos.:02, 03  
Motion Dates: 12/01/09  
12/22/09

**AMENDED DECISION**

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**The following papers have been read on these motions:**

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	Papers Numbered
<u>Notice of Motion for Summary Judgment, Affidavit, Affirmation and Exhibits</u>	<u>1</u>
<u>Notice of Cross Motion, Affidavit, Affirmation and Exhibits</u>	<u>2</u>
<u>Affidavit in Reply to Motion and in Opposition to Cross Motion and Exhibits</u>	<u>3</u>

King LLC, ("King") plaintiff in the second action, brought a foreclosure action against defendants, V.U. Goldstar, Inc. ("Goldstar") and Veysel Uyanik ("Uyanik") in the Supreme Court, County of Kings. Goldstar and Uyanik brought a cause of action for liability under Navigation Law against King and Ygel Yosef ("Yosef") in the Supreme Court, County of Nassau. Both actions were consolidated for joint trial under the Index No. 10464/08 and the ensuing motion and cross motion is now brought under the Index No. 10464/08.

King and Yosef's motion in the foreclosure action for an Order pursuant to CPLR §3212 granting summary judgment for foreclosure and dismissing Goldstar's and Uyanik's complaint alleging liability for a petroleum spill pursuant to Navigation Law §173(1) and § 176(1) is granted in part and denied in part. Kings' motion seeking summary judgment in

foreclosure is granted, and the motion seeking dismissal of Goldstar's and Uyanik's complaint is denied. The cross motion by Goldstar and Uyanik for an Order pursuant to CPLR §3212 granting summary judgment against King and Yosef for set off against mortgage arising out of costs to clean up petroleum contamination of premises is denied.

Goldstar, a corporation incorporated under the laws of the State of New York and Uyanik, an individual, entered into a Contract of Sale ("Contract") on or about April, 2006 to purchase a service station located at 740 Hempstead Tpke., Franklin Square, NY ("premises") from defendants, King, LLC, a limited liability Corporation formed under the laws of the State of New York and Yosef, its principal and managing agent. The purchase price was \$750,000.00 and the purchasers tendered the appropriate consideration, a down payment in the amount of \$35,000.00.

It is noted that this is the second contract between these parties for the same premises, the first one being executed on or about December, 2005 which Goldstar and Uyanik cancelled. The parties executed the April 2006 contract with the same terms and conditions and purchase price, after Goldstar and Uyanik expressed a change of mind about the transaction. The parties closed title on or about June 2006. At the closing, the purchasers tendered proceeds in the amount of \$400,000.00 inclusive of the down payment, to the defendants and the balance of \$350,000.00 was to be paid pursuant to a mortgage note ("Note") in favor of King. The Note was payable over a term of 72 monthly payments which included interest of 3% per annum.

Prior to the foregoing purchase, on or about September 2004, a petroleum leak occurred on the premises. The New York State Department of Environmental Conservation assigned a spill number to the incident. The source of the spill was repaired; however, the record is not clear nor has it been affirmed that the affected soil was removed and/or the area was cleaned up after the spill. The record does establish that the purchasers were aware of the incident and they researched costs and estimates of cleaning up any resulting contamination of the premises. *See* King's and Yosef's Notice of Motion Exhibits E, F, G. There are also facts in dispute as to whether the purchase price was discounted in consideration for any costs incurred for clean up by the purchasers after the closing of title.

Goldstar and Uyanik made the monthly payments on the Note up until and inclusive of

April 2008 and they have not made any further payments since that time. King, who is presently out of business, commenced a foreclosure action in the Supreme Court, County of Kings, alleging a default on Goldstar's and Uyanik's part and demanding of them the balance of \$265,886.50. Goldstar and Uyanik commenced a separate action in Supreme Court, County of Nassau against King and Yosef, alleging liability for the petroleum spill and requesting a set off against the outstanding mortgage in the amount of \$250,000.00. Both actions were consolidated in the Nassau County Supreme Court for joint trial.

#### Foreclosure Cause of Action

On a motion for summary judgment the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 (1988); *Rebecchi v. Whitmore*, 172 A.D.2d 600, 568 N.Y.S.2d 423 (2d Dept.1991). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact." *Gilbert Frank Corp. v. Federal Ins. Co.*, *supra*, at 967; *GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965 (1985); *Rebecchi v. Whitmore*, *supra* at 601. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, *supra*.

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. County of Albany*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept.1989).

When a mortgagee produces the mortgage and unpaid note, together with evidence of the mortgagor's default, the mortgagee demonstrates its entitlement to a judgment of foreclosure as a matter of law, thereby shifting the burden to the mortgagor to assert and demonstrate by competent and admissible evidence, any defense that could properly raise a question of fact to his or her default. *See United Companies Lending Corporation v. Hingos*, 283 A.D.2d 764, 724 N.Y.S.2d 134 (3d Dept. 2001); *Trustco Bank, Nat. Ass'n v. Labriola*, 246 A.D.2d 735 (3d Dept. 1998). King has produced a copy of the Mortgage Note (*See Defendants Notice of Motion*

[\*4]  
Exhibits B) and copy of Goldstar's and Uyanik's summons and complaint where they admit to refusing the Goldstar's demands for mortgage payments and to making mortgage payments up to the point "when the balance due was approximately equal to the amount of the cleanup." See King's Notice of Motion Exhibits I, Goldstar's and Uyanik's Verified Complaint ¶ 26 and 27.

Based on the foregoing, King and Yosef have made their *prima facie* case entitling them to summary judgment for foreclosure and the burden now shifts to Goldstar and Uyanik as to whether they have set forth a proper defense for their default on the Note.

Goldstar and Uyanik argue that King and Yosef are liable to indemnify them pursuant to the relevant provisions of the Navigation Law; however they have not shown bad faith, fraud or oppressive or unconscionable conduct by the mortgagee, King, relieving them of a default of the Note. See *First Union National Bank v. Wetson*, 261 A.D.2d 668, 689 N.Y.S.2d 543 (3d Dept. 1999). Further, there is no evidence of any indemnification agreement regarding any conditions arising out of violations of Navigation Law merging with or appending to the terms and conditions of the Note. See *Hoffinger Industries Inc. v. Alabama Ave. Realty, Inc.*, 68 A.D.3d 818, 891 N.Y.S.2d 430 (2d Dept. 2009). Although Goldstar and Uyanik may have a viable cause of action for liability pursuant to Navigation Law, it is not a defense to their default of the Note. King's and Yosef's motion for summary judgment as to the foreclosure action is thereby granted.

#### Liability Pursuant to Navigation Law

As King and Yosef assert defenses from liability for any obligations arising out of the Navigation Law, pursuant to the terms of the Contract of Sale, a citation of the relevant provisions is provided herein. Sections 5.01, 7.01, and 16.02 of the Contract state as follows:

"Section 5.01... Acknowledgments, [ ] Representations [ ] and [ ] Warranties [ ] of [ ] Purchaser ["as is clause"]... Purchaser has inspected the Premises, is fully familiar with the physical condition and state of repair thereof, and... shall accept the Premises "as is" and in their present condition, subject to reasonable use, wear, tear and natural deterioration between now and the Closing date." See Defendants' Notice of Motion, Exhibit A.

"Section 7.01... Responsibility for Violations... all notes or notices of violations of law or governmental ordinances, orders or requirements which were noted or issued prior to the date of this contract by any governmental department, agency or bureau having

jurisdiction as to conditions affecting the Premises shall not [be] the responsibility of seller to remove or be complied with. Seller is not required to remove or comply with any such violations prior to Closing. Seller shall not be required to pay to Purchaser at the Closing for any estimated or actual unpaid cost to effect or complete any removal or compliance, and Purchaser shall be required to accept title to the Premises subject thereto, except that Purchaser shall not be required to accept such title and may terminate this contract as provided in §13.02..." See Defendants' Notice of Motion, Exhibit A. Section 16.01 of the Contract further emphasizes this; "...[e]xcept as otherwise provided in this contract, no representations, warranties, covenants or other obligations of the Seller set forth in this contract shall survive the [C]losing and no action based thereon will be commenced after the [C]losing." See Defendants' Notice of Motion, Exhibit A. Navigation Law §173(1) provides; "...[t]he discharge of petroleum is prohibited." Section 176(1) states; "...[a]ny person discharging petroleum in the manner prohibited by section one hundred seventy-three of this article shall immediately undertake to contain such discharge...", and §181(1) states; "...[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained..."

Goldstar and Uyanik argue that King and Yosef are liable as a matter of law and that the foregoing Navigation Law provisions impose a strict liability on the person responsible for the discharge. King and Yosef attempted to relieve themselves from such prospective liability pursuant to the cited terms in Section 5.01 and Section 7.01 of the Contract of Sale. They also set forth facts, which have been categorically denied by Goldstar and Uyanik, that the premises was sold at a discounted and below market rate purchase price to support the argument that they were to be exculpated from liability arising out the petroleum spill. However, there are no provisions in the Contract or any other agreement that set forth that such discount pricing is in consideration for clean up and remediation costs incurred after the closing of title, nor does the Contract state that the terms cited in its Sections 5.01 and 7.01 survive the closing of title.

It is well settled that the terms of a Contract of Sale for real property are merged in the deed and, as a result, are extinguished upon the closing of title unless there is a clear intent evidenced by the parties that a particular provision shall survive delivery of the deed. See *Dourountoudakis v. Alesi*, 271 A.D.2d 640, 706 N.Y.S.2d 476 (2d Dept. 2000); *H.B. Singer*,

*LLC v. Thor Realty, LLC*, 57 A.D.3d 613, 869 N.Y.S.2d 203 (2d Dept. 2008). Further, the provisions of Section 16.01 expressly state that the terms and obligations arising under the Contract, do not survive the closing of title.

In sum, the uncontested fact is that a petroleum spill occurred on the premises while defendants were still the owners. There is nothing on record indicating that there was any cleanup of the affected soil. As such, King and Yosef are dischargers of petroleum pursuant to Navigation Law and are liable to Goldstar and Uyanik for any costs and disbursements relative to the clean up of the petroleum spill. *See White v. Long*, 229 A.D.2d 178, 655 N.Y.S.2d 176 (2d Dept. 1997). Goldstar's and Uyanik's motion for summary judgment as to King's and Yosef's liability pursuant to Navigation Law is hereby granted.

#### Cross Motion

In light of the foregoing, Goldstar and Uyanik assert that they are entitled to a set-off against the mortgage. Although it has been determined that the King and Yosef are subject to liability for the costs of the clean up, such cross claim "is not so intertwined with [plaintiffs'] foreclosure claim as to render granting plaintiff's motion for summary judgment on the foreclosure claim and severing counterclaims inappropriate." *See Fleet Bank v. Pine Knoll Corp.*, 290 A.D.2d 792, 736 N.Y.S.2d 737 (3d Dept. 2002). Further, there is a dispute as to the costs of the actual clean up and remediation of the contamination resulting from the petroleum spill.

Based on the foregoing, Goldstar's and Uyanik's cross motion for a set off is denied.

Accordingly, King's and Yosef's motion for an Order granting summary judgment as to the foreclosure action against Goldstar and Uyanik is granted; their motion for an Order dismissing Goldstar's and Uyanik's complaint as to the liability for petroleum spill pursuant to Navigation Law is denied; King's and Yosef's motion for an Order granting summary judgment as to the Goldstar's and Uyanik's claim of entitlement to a set-off against the mortgage is granted, and Goldstar's and Uyanik's cross motion for an Order granting summary judgment against King and Yosef as to the liability pursuant to Navigation Law is granted, and denied as to their entitlement for a set-off against the mortgage. This shall constitute the decision and order of this Court.

Submit judgment of foreclosure on notice.

The matter is hereby set down for an inquest to determine damages to be held before the Calendar Control Part (CCP) on the 7th day of June, 2010 at 9:30 a.m.

Plaintiff shall file a note of issue on or before May 21, 2010. A copy of this order shall be served upon the County Clerk when the note of issue is filed. Failure to file a note of issue or appear as directed shall be deemed an abandonment of the claim giving rise to the inquest. A copy of this order shall be served upon defendant by May 21, 2010.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
April 7, 2010

**ENTERED**

APR 09 2010

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**