

Baron v Mason

2010 NY Slip Op 31695(U)

June 30, 2010

Supreme Court, Nassau Court

Docket Number: 02869/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 20

_____ X

STACEY BARON and JOHN M. GANGEMI,

Plaintiffs,

Index No... 02869/08
Motion Sequence...07, 08
Motion Date... 03/26/10

-against-

MADELYNN R. MASON, MASON & APRIL,
LLC and ACME VENTURES, INC., d/b/a R.P.
FUNDING,

Defendants.

_____ X

ACME VENTURES, INC., d/b/a R.P. FUNDING,

Third-Party Plaintiff,

-against-

STACEY BARON and JOHN M. GANGEMI,
KENT HELMS and THOMAS F. HELMS,

Third-Party Defendants.

_____ X

Papers Submitted:

- Notice of Motion.....X
- Notice of Cross-motion.....X
- Affirmation in Opposition to Cross Motion.....X
- Supplemental Affirmation in Opposition.....X

The Defendant, MADELYNNR. MASON (hereinafter “MASON”) and Third-Party Plaintiff, ACME VENTURES, INC., d/b/a R.P. Funding (hereinafter “R.P. FUNDING”) move, pursuant to CPLR § 3212, for an order granting them summary judgment against the Plaintiffs dismissing the Plaintiffs’ cause of action sounding in fraud. The Defendant, MASON and the Third-Party Plaintiff, R.P. FUNDING collectively move for the following: (i) an order granting summary judgment against all the Third-Party Defendants, STACEY BARON (hereinafter “BARON”), JOHN M. GANGEMI (hereinafter “GANGEMI”), KENT HELMS and THOMAS F. HELMS (hereinafter collectively referred to as the “HELMS”); (ii) an order striking the answer of the Third-Party Defendants, BARON and GANGEMI, and (iii) an order granting a default judgment against the Third-Party Defendants, HELMS.

The Plaintiffs, Third-Party Defendants, BARON and GANGEMI, cross-move (Mot. Seq. 08) for summary judgment against the Third-Party Plaintiff and for dismissal of the Third-Party Complaint pursuant to RPAPL § 1301. For the reasons set forth herein, the Defendants’ motion for summary judgment and the Plaintiffs’ cross-motion for summary judgment are decided as provided herein.

Procedural Background

This action was commenced by the Plaintiffs against the Defendants, MASON, MASON & APRIL, LLC and R.P. FUNDING on or about February 14, 2008, by the filing of a Summons and Verified Complaint. The original complaint against the Defendants arose

out of a mortgage note (hereinafter “Note”), the amount of which is in dispute, that was executed by the Plaintiff, BARON in favor of R.P. FUNDING. On or about March 20, 2008, the Defendants, MASON and R.P. FUNDING moved to dismiss the Plaintiffs’ complaint pursuant to CPLR § 3211 (a)(5), (7) and (10). By order of the then Justice Davis, dated November 25, 2008, all of the Plaintiffs’ causes of action were dismissed except for the Plaintiffs’ claim for fraud.

On or about July 31, 2009, the Third-Party Plaintiff, R.P. FUNDING filed a third-party foreclosure action against the Plaintiffs, Third-Party Defendants, BARON and GANGEMI for their alleged failure to make payments on the Note. The Third-Party Defendants, HELMS are named as Third-Party Defendants based on their purported interest in, or lien upon said mortgaged premises which accrued subsequent to the date of the mortgage. This case was certified for trial on July 31, 2009, and the Note of Issue was filed on October 13, 2009.

Undisputed Facts

On November 15, 2002, the Plaintiffs, BARON and GANGEMI executed a promissory note in favor of the Defendant, MASON in the amount of \$25,000.00. On or about February 13, 2003, the Plaintiff, BARON, executed a mortgage note on a property located at 29 Tappentown Lane, Brookville, New York. Although the parties dispute the amount of the Note, the face of the Note indicates that the mortgage was in the principal amount of \$150,000.00. The mortgage was recorded in the Office of the County Clerk of

Nassau County on March 19, 2003.

The Defendant, MASON is the sole shareholder and officer of the Defendant, Third-Party Plaintiff, R.P. FUNDING, and is the Plaintiff, BARON's step-mother. The Defendant, MASON is also a trust and estates attorney and a named partner of the firm MASON & APRIL, LLC. The Plaintiff, BARON currently owns the subject premises and the Plaintiff, GANGEMI is a current resident of same. The occurrences that are the subject of the original complaint and third-party action arise from a family transaction for a particular sum of money, the balance of which is now in dispute.

Parties' Contentions

The Plaintiff, BARON contends that her husband, GANGEMI, was involved in a litigation matter involving a medical management business he owned with his partner, the Third-Party Defendants, HELMS. According to the Plaintiff, BARON, in order to resolve the monetary obligation with the Third-Party Defendants, HELMS, GANGEMI was required to pay \$125,000.00 up front. The Plaintiff states that her step-mother, MASON, provided advice and counsel on how to secure the \$125,000.00 to meet their obligation. The Plaintiff was purportedly advised to secure the funding through a third party lender, the Defendant, R.P. FUNDING. According to the Plaintiff, the funds underlying the Note included a contribution from the Plaintiff's mother and step-father, Marcia Katz and Michael Katz, in the sum of \$80,000.00, and an additional \$23,500.00 was contributed by the Plaintiffs, BARON and GANGEMI. The Plaintiff, BARON states in her affidavit that the

\$80,000.00 was intended to pay off a portion of the principal on the Note. The Plaintiff, BARON contends that the Defendants, MASON and R.P. FUNDING refused to acknowledge that the \$80,000.00 was a payment towards the principal of the Note. Subsequently, in 2004, due to the Defendants' failure to acknowledge the payment, Marcia Katz and Michael Katz commenced an action against the Plaintiffs, BARON and GANGEMI for the \$80,000.00 and obtained a judgment for the principal, plus interest.

With respect to the \$25,000.00 loan for which the Plaintiff executed a promissory note in November, 2002, the Plaintiff states that the loan was partially paid in the amount of \$14,000.00 on or about January 7, 2003. The Plaintiff, BARON also states that the \$25,000.00 promissory note executed in November, 2002 had no relation to the subsequent Note that was executed in February, 2003. According to the Plaintiff, BARON, any allegation by the Defendant, MASON that the \$25,000.00 promissory note rolled into or was consolidated with the subsequent Note, is false. Although the face of the mortgage indicates that the mortgage note was for \$150,000.00, the Plaintiff, BARON was not aware of any obligation other than the agreed upon amount of \$125,000.00. Although the Plaintiff, BARON admits to executing the Note, she states that she was only given the signature pages to sign in an informal setting and did not review the entire document, as she trusted her mother-in-law and the representations made by her.

Further, the Plaintiff avers that there are no recitations in the Note that indicate the previous \$25,000.00 was rolled over or included in any way with the mortgage. The

Plaintiff notes that there are no documents presented by the Defendant indicating a consolidation, novation, merger, amendment, discharge, release, assignment or assumption of the previous \$25,000.00 promissory note. The Plaintiffs commenced this action claiming that they were defrauded by the Defendants with respect to the amount of the mortgage note and the amount that the Defendants contend is still due and owing on the mortgage.

The Defendants, MASON and R.P. FUNDING, state in support of their motion for summary judgment that the \$150,000.00 Note executed in February, 2003 encompassed the previous \$25,000.00 loan as well as the subsequent \$125,000.00. The Defendant, MASON states in her sworn affidavit that she rightfully assigned her interest in the \$25,000.00 promissory note to the Defendant, Third-Party Plaintiff, R.P. FUNDING. The Defendant, MASON states that the Plaintiff, BARON acknowledged and executed the mortgage note for \$150,00.00. According to the Defendant, MASON, the Plaintiffs defaulted on the mortgage note and, as such, are in breach of the agreement.

The Defendants, MASON and R.P. FUNDING also move for summary judgment on their third party foreclosure action stating that the Plaintiffs, Third-Party Defendants' failure to make monthly payments on the mortgage entitles them to a judgment as a matter of law.

Standard

Issue finding, rather than issue determination, is the key to summary judgment.

In re Cuttitto Family Trust, 10 A.D.3d 656 (2nd Dept. 2004); *Greco v. Posillico*, 290 A.D.2d

532 (2nd Dept. 2002); *Gniewek v. Consolidated Edison Co.*, 271 A.D.2d 643 (2nd Dept. 2000); *Judice v. DeAngelo*, 272 A.D.2d 583 (2nd Dept. 2000). The court should refrain from making credibility determinations, (see *S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338 (1974); *Surdo v. Albany Collision Supply Inc.*, 8 A.D.3d 655 (2nd Dept. 2004); *Greco v. Posillico*, *supra*; *Petri v. Half Off Cards, Inc.*, 284 A.D.2d 444 (2nd Dept. 2001), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *Glover v. City of New York*, 298 A.D.2d 428 (2nd Dept. 2002); *Perez v. Exel Logistics*, 278 A.D.2d 213 (2nd Dept. 2000).

The Defendants, Mason and R.P. Funding's Motion for Summary Judgment on Plaintiffs' Fraud Claim:

Addressing first the Defendants' motion for summary judgment, there are several issues of fact raised by the Plaintiffs that prevent this Court from granting judgment as a matter of law on the Plaintiffs' cause of action for fraud. The Plaintiffs claim that the Defendants actions were fraudulent in the formation and execution of the mortgage note. Specifically, the Plaintiffs claim that, in addition to the \$25,000.00 difference in the Note, the Defendants refuse to acknowledge certain monies that were paid toward the February, 2003 mortgage.

The Defendants, on the other hand, argue that the Plaintiffs were fully aware of their monetary obligation and that the lawsuit is a merely an attempt to escape their obligations under the Note. The issues raised by the parties, including, but not limited to, the amount of the mortgage note, the "rollover" of the previous promissory note and the balance

due, are all issues and questions that must be determined by the trier of fact.

The Defendants also contend that the Plaintiffs' prior experience and familiarity with executing mortgages should be considered by the Court in making its determination. These are precisely the types of questions that are properly left within the province of the trier of fact. The Court is not in a position to determine the credibility of the conflicting affidavits submitted herein, nor should it.

The Plaintiffs have sufficiently raised issues of fact with respect to each element of fraud. Specifically, the Plaintiffs presented proof, in admissible form, that they were not advised of the personal and corporate conflict of interest or the consolidation or assignment of the prior promissory note of \$25,000.00 with the new Note. Viewing the facts in the light most favorable to the non-moving party, a reasonable trier of fact could find that these omissions were material in nature. The Plaintiffs also sufficiently raised issues of fact as to whether they reasonably relied on the misrepresentation and that injuries were sustained.

The Third-Party Plaintiff's Motion for Summary Judgment on its Foreclosure Action and the Plaintiffs, Third-Party Defendants Cross-Motion for Summary Judgment

The Defendant, Third-Party Plaintiff, R.P. FUNDING, must first make a *prima facie* showing of entitlement to judgment as a matter of law by demonstrating the existence of the executed promissory note, the unconditional terms of repayment, and a default thereunder. *Grammas Assocs., Architectural & Eng'g Servs. v. Ehrlich*, 229 A.D.2d 517 (2nd Dept. 1996); *Key Bank v. Lisi*, 225 A.D.2d 669 (2nd Dept. 1996); *East N. Y. Sav. Bank v.*

Baccaray, 214 A.D.2d 601 (2nd Dept. 1995). Once the Third-Party Plaintiff makes out a *prima facie* case, the burden then shifts to the Third-Party Defendants to establish, by admissible evidence, the existence of triable issues of fact or a meritorious defense.

R.P. FUNDING submitted the subject Note and Mortgage in support of its motion for summary judgment. *See* Notice of Motion, Exhibits “G” and “H”. The Third-Party Plaintiff also presented sufficient documentation to establish that the Third-Party Defendant, BARON failed to pay the balance of the Note, the amount of which is in dispute. The Third-Party Defendants claim that RPAPL § 1301 precludes the foreclosure action.

Section 1301 of the RPAPL pertains to circumstances where there is a judgment entered for the plaintiff in the foreclosure action. Here, Marcia Katz and Michael Katz commenced an action to recover the \$80,000.00 purportedly loaned to the Third-Party Defendants to satisfy a portion of the Note. The Katz’s, however, are not a Party herein and have no relation to the Third-Party Plaintiff, R.P. FUNDING. The Plaintiffs, BARON and GANGEMI cannot rely on RPAPL § 1301 as MASON and R.P. FUNDING were not parties to that action.

Additionally, a critical issue in dispute between the parties is whether the \$80,000.00 the Katz’s allegedly loaned to the Plaintiffs, BARON and GANGEMI was intended to pay a portion of the February, 2003 Note. The Third-Party Defendants’ reliance on RPAPL § 1301 does not warrant the granting of summary judgment in favor of the Plaintiffs.

However, the Court's determination that the Plaintiffs, BARON and GANGEMI raised issues of fact with respect to their fraud claim also deprives the Third-Party Plaintiff, R.P. FUNDING the granting of summary judgment in their favor. The questions presented with respect to the Plaintiffs' fraud claim also serves as a meritorious defense to the foreclosure action thereby precluding the granting of summary judgment.

Accordingly, based upon the forgoing, the Defendants, Third-Party Plaintiff's motion for summary judgment and the Plaintiffs, Third-Party Defendants' cross-motion for summary judgment are hereby **DENIED**.

This constitutes the Decision and Order of the Court.

Any applications not specifically addressed herein are **DENIED**.

DATED: Mineola, New York
June 30, 2010



Hon. Randy Sue Marber, J.S.C.

ENTERED

JUL 01 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**