

Agai v Mihalatos

2010 NY Slip Op 32023(U)

July 15, 2010

Supreme Court, Nassau County

Docket Number: 4089/09

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

JACOB AGAI,

Plaintiff,

- against -

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 4089/09
Motion Seq. No.:0
Motion Date: 09/30/09

DENNIS MIHALATOS, ELIZABETH MIHALATOS,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC., as nominee for ALLIANCE MORTGAGE BANKING
CORP., THE PEOPLE OF THE STATE OF NEW YORK,
UNITED STATES OF AMERICA
AND JOHN DOE # 1 through JOHN DOE #5,
the last five names being fictitious and unknown to Plaintiff,
the persons or parties intended being the tenants, occupants,
persons or corporations, if any, having or claiming an
interest in or lien upon the premises described in the complaint,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit, Memorandum of Law and Exhibits	1
Affirmation in Opposition	2
Reply Affirmation and Exhibits	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves in the above captioned foreclosure action seeking an order of this Court

pursuant to CPLR § 3212(e) and RPAPL § 1351 for partial summary judgment foreclosure against defendants Dennis Mihalatos and Elizabeth Mihalatos (hereinafter referred to as “defendants Mihalatos”) and the appointment of a Referee to compute the total costs due to Plaintiff from defendants Mihalatos.

Plaintiff’s motion is denied in that partial Summary Judgment is held in abeyance pending the determination of the remaining causes of action in the Kings County Supreme Court, Index No. 10880/08 and the Richmond County Supreme Court, Index No, 102968/07.

FACTS

The undisputed facts are that the defendants Mihalatos and plaintiff entered into a loan agreement, where plaintiff loaned proceeds in the amount of \$450,000.00 to defendants Mihalatos. Plaintiff distributed the funds to defendants Mihalatos on or about October 2005 and defendants Mihalatos were to pay the same in full, including interest of 6% per annum, on October 5, 2008 pursuant to a document entitled “mortgage note.” It is noted that the copy of the “mortgage note” annexed to plaintiff’s motion as an exhibit indicates execution by defendants Mihalatos, but there is no dated acknowledgment of their signature on the instrument, nor is there evidence of it being recorded. The mortgage, executed by defendants Mihalatos on or about June 4, 2007, and duly recorded in the Office of the Nassau County Clerk on or about July 6, 2007, was to be secured by the defendant Mihalatos’ improved real property located at 85 Knollwood Road West, Roslyn, New York; legal description, Section 6, Block B-01, Lot 26. Defendants Mihalatos defaulted in paying on the note on the agreed upon the maturity date.

Given the business relationship of the parties, a time line of the events leading to the instant matter is appropriate. Defendant Dennis Mihalatos and plaintiff formed a New York based limited liability company, 319 AMA, LLC (“AMA”) on or about April 19, 2005. Shortly thereafter, plaintiff, through two business entities, 291 Avenue P, LLC and Summerfield Development, LLC, of which he is the principal, contracted with the Defendant Dennis

Mihalatos's construction company, Diontech Consulting, Inc. ("Diontech") on or about April 27, 2005 to perform work on two projects in Brooklyn, New York. On or about October 15, 2005, plaintiff loaned defendants Mihalatos the sum of \$450,000.00, the subject of the instant motion before this Court.

In June 2006, plaintiff loaned defendant Dennis Mihalatos and Diontech the sum of \$500,000.00, personally guaranteed by defendant Dennis Mihalatos, which was to be paid in full on or about July 2007. In September 2006, AMA purchased certain real property for \$1,250,000.00. Defendant Dennis Mihalatos and Diontech defaulted on the \$500,000.00 loan in July 2007. In September 2007, AMA sold the real property purchased in September 2006, at a profit for \$2,025,000.00. Plaintiff collected the entire amount of proceeds from the sale and, while conceding that a certain percentage of those proceeds were due to Defendant Dennis Mihalatos, there is dispute between the parties as to the amount. Plaintiff contends that Defendant Dennis Mihalatos's share was about \$269,000.00 and applied that amount to the outstanding \$500,000.00 indebtedness in partial satisfaction of the June 2006 loan. Defendants Mihalatos executed the mortgage and mortgage rider for the subject \$450,000.00 loan on or about June 4, 2007 and the same was recorded on or about July 6, 2007.

Plaintiff filed a motion for Summary Judgment in the Richmond County Supreme Court on or about July 30, 2007, seeking a judgment regarding the remaining \$240,000.00 of the Diontech loan, plus costs.¹ In August 2007, Diontech filed a mechanic's lien in the amount of \$1.3 million on plaintiff's two Brooklyn real properties on the basis that plaintiff's two entities

¹The Richmond County Supreme Court, granted Summary Judgment in favor of the Plaintiff. Upon Diontech's successful appeal, the Court reversed and remanded the matter after determining that genuine issues of material fact existed as to whether the money allegedly owed to the plaintiff in connection with the project completed by the limited liability corporation jointly owned by the parties and one of the debtors, Mihalatos, was retained by the plaintiff in partial satisfaction of the loan. The case is still pending as of this date. *See Agai v. Diontech Consulting, Inc.*, 64 A.D.3d 622, 8821 N.Y.S.2d 503 (2d Dept. 2009).

failed to make complete payment for Diontech's construction work. Plaintiff counterclaimed, alleging that Diontech's liens were fraudulent.² Diontech then commenced an action on or about April 3, 2008, in the Supreme Court, County of Kings, to enforce the mechanic's liens. Plaintiff then commenced the underlying and instant foreclosure matter by filing a Summons and Complaint in this Court on or about January 28, 2009. Plaintiff also moved this Court on June 25, 2009, seeking an order dismissing the defendants Mihalatos's counterclaims and cross-motions and consolidating all three causes of actions. The motion, heard by the Hon. Edward W. McCarty III, was denied.

Plaintiff then moved the Court for partial Summary Judgment in the instant proceeding on the basis that the foreclosure on the residential property is unrelated to the foregoing business litigation and therefore should be severed. Defendants Mihalatos, in their opposition, argue that any monies that were due and owing under this mortgage should have been offset by the monies owed them from the sale of the real property in the AMA transaction. Further, the pending matters in the Richmond and Kings County Supreme Courts should be resolved prior to the Court granting plaintiff's motion for partial Summary Judgment.

DISCUSSION

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, 525 N.Y.S.2d 793 (1988); *Rebecchi v. Whitmore*, 172 A.D.2d 600, 5687 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." See *Gilbert Frank Corp. v. Federal Ins. Co.*, *supra* at

²The matter before the Kings County Supreme Court, *Diontech Consulting, Inc. v. 291 Avenue P, LLC and et al.*, Index No. 10880/08 and et al., is still pending. The Plaintiff has posted a bond to remove the encumbrances from the real property and is seeking \$10,000,000.00 in damages against Diontech in his counterclaims.

[* 5]

967; *GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965, 498 N.Y.S.2d 786 (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).

CPLR § 3212(e) provides for partial summary judgment, that is, summary judgment “as to one or more causes of action, or part thereof, in favor of any one or more parties.” Where partial summary judgment is granted, a court may sever the cause of action for which summary judgment has been granted from any remaining cause(s) of action. Alternatively, a court may direct that the entry of partial summary judgment be held in abeyance pending the determination of the remaining cause(s) of action. Where partial summary judgment has been granted in favor of a counterclaim, and the adversary has unresolved claims pending in the action, a court may stay entry or execution of partial summary judgment to avoid prejudice to the adversary.

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 questions of fact to his or her default. *See United Companies Lending Corp. v. Hingus*, 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, 667 N.Y.S.2d 450 (3d Dept 1998); *Aurora Loan Services, LLC v. Sattar*, 17 Misc.3d 1109(A), 851 N.Y.S.2d 62 (Kings County Sup. Ct. 2007).

Plaintiff has produced a copy of the mortgage. However, a fully executed mortgage note and evidence of a recording of the same has not been included in plaintiff’s papers. *See* Defendants Notice of Motion Exhibit A. Notwithstanding defendants Mihalatos’s admission to

their default and that the money is due and owing to plaintiff, (*see* Plaintiffs' Affirmation in Opposition, ¶ 3), plaintiff has only established that defendants Mihalatos defaulted in repaying \$450,000.00. This does not, given the nature of this transaction and based on the record before the Court, entitle plaintiff to the remedy of foreclosure.

What is not clear, and it is noted that the defendants Mihalatos do not raise the issue, is whether the parties intended this transaction to be an actual mortgage. The record indicates that defendants Mihalatos received the sum of \$450,000.00 from plaintiff in October 2005. *See* Plaintiff's Notice of Motion, Exhibit B. Plaintiff and Defendant Dennis Mihalatos were involved in several business ventures shortly after the receipt of the funds. The mortgage were executed in 2007 *after* (emphasis added) the default of the \$500,000.00 loan and *after* (emphasis added) AMA's sale of the real property. This raises an issue of fact as to whether the loan is an actual mortgage and whether the anticipated profits and/or income from the parties' business ventures purported to offset the outstanding \$450,000.00 indebtedness. *See Agai v. Diontech Consulting, Inc.*, 64 A.D.3d 622, 8821 N.Y.S.2d 503 (2d Dept. 2009); *Toys R Us-NYTEX, Inc. v. Rosenshein Development Corp.*, 172 A.D.2d 826, 569 N.Y.S.2d 196 (2d Dept. 1991); *Atlas Arm Co. v. Smith*, 25 A.D.2d 669, 268 N.Y.S.2d 385 (2d Dept. 1966).

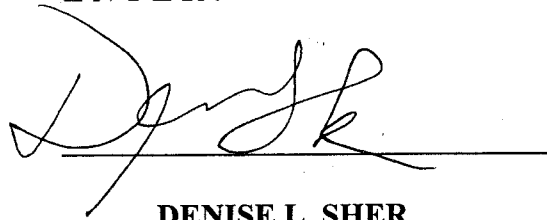
Although plaintiff acknowledges that the transactions cited herein involve the same parties, he argues that each occurrence is divisible and arises from independent sets of facts thus requiring severance from the instant motion. *See Masterwear Corporation v. Bernard*, 298 A.D.2d 249, 750 N.Y.S.2d 5 (1st Dept 2002). However, it appears that there is a special relationship between the two parties which raises a question of fact as to whether defendants Mihalatos relied on that relationship to facilitate the satisfaction and/or offset of the outstanding loan. *See Fleet Bank v. Pine Knoll Corp.*, 290 A.D.2d 792, 736 N.Y.S.2d 737 (3d Dept. 2002). The fact that plaintiff attempted to convert the loan into a mortgage two years after funds were distributed, and shortly after the default of another loan between the same parties, severely undermines plaintiff's motion for partial Summary Judgment seeking foreclosure of the defendants Mihalatos's real property. Further, there is prejudice to defendants Mihalatos, as

foreclosure will result in the loss of their home while they could very well prevail in their pending causes of action and counterclaims against plaintiff. *See Masterwear Corporation v. Bernard, supra; Alec Peters Associates v. Roberts*, 249 A.D.2d 219, 671 N.Y.S.2d 258 (1st Dept. 1998); *Levy v. Renck*, 137 A.D.2d 464, 525 N.Y.S.2d 41 (1st Dept 1988).

Accordingly, this Court is exercising its discretion and staying the execution of partial Summary Judgment. Plaintiff's motion is therefore denied.

This constitutes the decision and order of this Court.

ENTER:



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

**ENTERED
JUL 23 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Dated: Mineola, New York
July 15, 2010