

T&V Constr., Inc. v Calapai

2010 NY Slip Op 32803(U)

October 6, 2010

Supreme Court, Suffolk County

Docket Number: 07-36421

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 5-27-10
ADJ. DATE 6-10-10
Mot. Seq. # 003 - MD

-----X		
T & V CONSTRUCTION, INC., JOHN	:	RUSKIN MOSCOU FALTISCHEK P.C.
VARVERIS and MONA VARVERIS,	:	Attorney for Plaintiffs
	:	1425 RXR Plaza
Plaintiffs,	:	Uniondale, New York 11556-1425
	:	
- against -	:	SALAMON, GRUBER, BLAYMORE
	:	& STRENGER, P.C.
ANDREW CALAPAI and THOMAS CALLOCHI,	:	Attorney for Defendant Andrew Calapai
	:	97 Powerhouse Road
Defendants.	:	Roslyn, New York 11577
-----X		

Upon the following papers numbered 1 to 39 read on this motion for summary judgment and amend answer; Notice of Motion/ Order to Show Cause and supporting papers 1 - 29; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 30 - 36; Replying Affidavits and supporting papers 37 - 39; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Andrew Calapai to amend his answer and for summary judgment dismissing the complaint against him and is denied.

This action was commenced pursuant to RPAPL Article 15 to quiet title to real property located at 44 Waldo Street, in Copiague, New York, for a declaration that plaintiff T&V Construction, Inc. (hereinafter "T&V") is the rightful owner of property, and for a declaration that the deed purporting to transfer title of the premises to defendant Andrew Calapai (hereinafter "Calapai") is null and void.

T&V's president and sole shareholder is Manuel Varveris (hereinafter "Varveris"). Varveris' former wife, Sandra Garcia (hereinafter "Garcia"), prior to September, 1999, owned the property at issue (hereinafter "the premises"). On or about September 28, 1999, Garcia borrowed \$102,000.00 from Greenpoint Mortgage Corp. (hereinafter "Greenpoint"), and as security for the loan, gave Greenpoint a mortgage. Garcia apparently was having financial difficulty and was unable to meet her obligations under the mortgage. Varveris agreed to help his former spouse, and his company, T&V, bought out

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Greenpoint's interest, and the mortgage was assigned to T&V by an assignment dated September 27, 2000, and filed with the Suffolk County Clerk on March 26, 2001. Also on September 27, 2000, T&V and Garcia entered into an agreement reducing Garcia's mortgage payments, agreeing that Varveris was authorized to make payments to T&V in the amount that Garcia was obligated to pay T&V, and agreeing that Varveris could then deduct the same from payments that he would have otherwise been making to Garcia for maintenance following their divorce. This agreement also appears to have been filed with the Suffolk County Clerk on March 26, 2001. When Garcia continued to have financial difficulties, Varveris agreed to purchase the property. Allegedly on the advice of counsel, Garcia and Varveris agreed, pursuant to an agreement in lieu of foreclosure, to transfer the property to T&V by execution and delivery of deed in lieu. As consideration for the transfer, Varveris not only released Garcia from the mortgage, but he allegedly paid off other debts of Garcia amounting to approximately \$200,000.00. Unbeknownst to Varveris, the deed in lieu and the agreement in lieu of foreclosure, both dated April 22, 2003, were never filed by his attorneys with the Suffolk County Clerk.

On July 24, 2007, defendant Calapai purchased the premises from Garcia for approximately \$255,000.00. Calapai borrowed \$229,500.00 from Concord Mortgage Corp. (hereinafter "Concord"), and as security for the loan, Calapai gave Concord a mortgage on the premises. Calapai's deed and Concord's mortgage were allegedly recorded on July 24, 2007. In addition, at the closing of sale to Calapai, \$150,000.00 was put in an escrow account to payoff the mortgage assigned to T&V.

T&V commenced this action against Calapai, arguing that circumstances should have necessarily aroused Calapai's suspicions that Garcia had no title to convey, that Calapai is not a good faith purchaser, and that Calapai did not obtain good title to the premises.

Calapai now moves for summary judgment arguing that he recorded his deed first, prior to any recording of T&V's deed, and that he is a bona fide purchaser and should be awarded title free and clear. In support of his motion, Calapai submits, *inter alia*, his own affidavit, wherein he states that in the early part of 2007, Garcia's boyfriend told him that Garcia wanted to sell the premises, that Garcia owned the premises, and that there were three tenants living at the premises. Calapai states that Garcia represented to him that she and her boyfriend were living in Florida, and that she no longer wished to own property in New York. He alleges that based upon Garcia's representations, he sought financing to purchase the premises and entered into Contract of Sale with Garcia. He also alleges that Garcia advised him that one of the tenants of the premises was her son, John Varveris (hereinafter "John"), and Garcia requested that he not contact her son, since she herself wanted to inform him of the sale of the premises. Calapai asserts that based upon such representation he did not contact the John prior to his purchase. Calapai also alleges that he engaged a mortgage broker who caused a title search to be done that confirmed that Garcia was the owner of the premises.

In addition, Calapai alleges that at the closing, Garcia signed various affidavits indicating that she was the owner of the premises, including an affidavit for special survey endorsement, an affidavit to the title company, a closing affidavit, and a seller's affidavit; and Calapai submits these affidavits in support of this motion. He also claims that prior to the time of closing he had never heard of T&V or Varveris. He alleges, in pertinent part, that he was informed of the recorded T&V mortgage at the closing and, after some discussion, it was determined that \$150,000.00 should be placed in escrow to pay off the

outstanding T&V mortgage. Calapai claims that despite being offered these escrow funds after the closing, T&V has refused to accept them.

Calapai further alleges, upon information and belief, that at the time of his purchase of the premises, the tenants occupying the premises included John and his wife, and Thomas Callochi (hereinafter "Callochi"). Calapai alleges that in the beginning of August, 2007, he requested, by letter, that the occupants of the premises begin to pay the rent to him, whereupon he was informed for the first time by John that his father, Varveris, owned the premises. He alleges that on the same day, Callochi informed him that he was paying rent to Varveris. Calapai explains that he had to institute an action to have these holdover occupants removed from the premises.

Calapai argues that T&V cannot make any claim herein for equitable relief because of laches. He contends that T&V took no action to ensure its deed was recorded for almost five years. Calapai submits copies of tax bills from 2003, 2004, 2006, and 2007, which indicate that Garcia was the owner of the premises. Additionally, Calapai submits a portion of Varveris' deposition testimony wherein he admitted seeing tax statements but never made any inquiry as to why Garcia was listed as owner on the statements. Calapai also argues that T&V has unclean hands because it used a deed in lieu to deprive the County and the State of transfer taxes. He further contends that since T&V has refused to accept the \$150,000.00 in escrow, it has waived this sum. Calapai requests that: the complaint be dismissed; T&V's mortgage, notice of pendency, and deed should be declared null and void; the mortgage and notice of pendency be expunged from the public records; and the escrow funds in the amount of \$150,000.00 be awarded to him.

Additionally, Calapai seeks to add three new counterclaims to his answer, two counterclaims which allege damages for the use and occupancy of the premises by John and his wife, and the third counterclaim which alleges damages for intentionally leaving the premises in the state of disrepair. He claims that he had to spend approximately \$22,000.00 in expenses to make the premises habitable, and that he could not start renting to new tenants until August, 2008. He alleges that he had to replace many of the appliances, fix broken windows, replace rugs, and replace missing doors. He also complains that John allowed a friend to stay at the premises for at least two months without his consent in late December, 2007. In support of his request to amend his answer, Calapai submits portions John's deposition testimony wherein John stated that when he moved out of the premises he removed his refrigerator and his medicine cabinet. John also admitted that his friend lived at the premises for a couple months, but he stated that did not charge him rent and that his friend was homeless and he paid nothing. Also in support, Calapai submits a copy of a stipulation dated December 11, 2008, wherein the parties agreed that the upstairs apartment would not be rented without mutual consent, and in the event that such rental occurs, any rents collected would be held in escrow by T&V's counsel. Calapai alleges that the stipulation was violated when John allowed his friend to live on the premises. Finally, in further support, Calapai submits copies of receipts of items he purchased as proof of his expenses to repair the premises. Calapai, thus, requests permission to amend his answer to assert claims for damages caused by John and for lost rental income, and that he be awarded damages in the amount of at least \$62,600.00.

T&V opposes this motion and argues that the circumstances surrounding Calapai's purported purchase of the premises are, at best, highly suspicious, and suggest that he knew or should have known

that something was “fishy” about the sale. T&V alleges that it does not dispute that the deed in lieu by which Garcia sold the premises was not filed. Nevertheless, argues T&V, Calapai did not qualify as a good faith purchaser because there were sufficient suspicious facts to put him on notice that a greater inquiry was necessary as to Garcia’s claim of title. T&V points out that despite the fact that there remained a mortgage of record and an assignment to T&V, which plainly identified its counsel, no attempt was made by Calapai or anyone else acting on his behalf to contact either Varveris or counsel, even for a payoff figure. It also points to paragraph 17 of its recorded mortgage wherein the mortgage provides that it may require immediate payment of the full amount of the loan secured by the mortgage in the event of the sale of the property. T&V alleges that despite this provision, it received no written or other communication regarding the sale or inquiries as to the payoff balance. T&V contends that minimal investigation would have revealed that Varveris was its principal and the apparent relationship between Varveris and Garcia.

T&V submits, among other things, a copy of Calapai’s deposition testimony wherein he testified that although he purchased this property as an investment, he never fully inspected the premises prior to closing, and only stood outside the front door on one occasion. In addition, Calapai testified that he never reviewed the title search, he never discussed with Garcia specifics about the condition of the premises, he never requested information about any utility bills or other documentation showing the carrying-cost of the property, he never spoke to the tenants prior to the closing, he never asked Garcia if there were any mortgages or liens against the property, and he never negotiated a different price for the premises than was initially asked for by Garcia. Calapai also testified to the effect that although he did not ask Garcia for written proof of the rents, he did ask Garcia about the amount of the rents that were paid by the tenants. Calapai further testified that at the closing he was told that Garcia was current on her mortgage obligation, but he could not explain why the figure of \$150,000.00 was chosen as the amount to escrow. Additionally, Calapai acknowledged that although one of the closing affidavits (which T&V submits in support of its opposition) read that Garcia was moving out on or about the closing date, that document was inaccurate since Garcia was not residing at the premises. T&V argues that even if Calapai did not have actual knowledge that Garcia was selling what she did not own, Calapai willfully stuck his head in the sand and ignored numerous signals that would have led him to investigate further as to Garcia’s title to the property.

T&V contends that its use of a deed in lieu was not improper and there was never any intent not to pay taxes. It asserts that after receiving title to the property pursuant to the deed in lieu, it acted in all regards as the owner and entered into leases and collected rents from the tenants. In a supporting affidavit, Varveris acknowledges that he had received tax bills for the premises showing the property remained in Garcia’s name, but alleges that he assumed there was a problem with the County records, and since he owned the property, he simply paid the bills. Varveris alleges that he did not realize that the deed in lieu had not been filed until 2007, when Garcia advised him that she had still been listed as receiving a STAR exemption for the premises, which was preventing her from receiving an exemption for another property. Varveris claims that he immediately contacted his attorneys to have them correct the problem, but his attorneys had lost or otherwise misplaced the deed and were trying to get a new one. Varveris alleges that this was only two or three months before the purported sale to Calapai.

Lastly, T&V argues that the sales price paid by Calapai, that is, the \$255,000.00, was well below

market value and should have raised suspicion in the mind of any good faith purchaser. It claims that it paid over \$300,000.00 in 2003, and that the market certainly went up between 2003 and early 2007, not down. T&V points out that Calapai testified at his deposition that an appraisal was done of the property, but Calapai has not produced a copy of this report in discovery of this action. T&V also asserts that Calapai's contention that it waived any claim to the \$150,000.00 in escrow is absurd. It contends that it believes it owns the property, but if it is incorrect, there is no basis for the mortgage to be expunged. Therefore, alleges T&V, Calapai's motion for summary judgment should be denied.

Real Property Law §291 will act to void an unrecorded conveyance of interest in real property as against a recorded subsequent conveyance only when the subsequent transaction is made in good faith and for valuable consideration, such that, the subsequent purchaser is a bona fide purchaser (*Vitale v Pinto*, 118 AD2d 774, 500 NYS2d 283 [1986]). "[W]here a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a bona fide purchaser" (*Maiorano v Garson*, 65 AD3d 1300, 1303; 886 NYS2d 190, 193 [2009], quoting *Williamson v Brown*, 15 NY 354 [1857]). For this reason, if a purchaser of real property knows of facts that "would excite the suspicion of an ordinary prudent person" and fails to investigate, the purchaser of such property will be chargeable with that knowledge which a reasonable inquiry, based upon the facts, would have revealed (*Booth v Ameriquest Mortgage Company*, 63 AD3d 769, 881 NYS2d 152, 153 [2009]). Furthermore, when someone other than the seller is in actual possession of the real property at the time of the purchase, the potential purchaser has a duty to inquire about title (*see Mazza v Realty Quest Brokerage Corp.*, 185 Misc2d 162, 712 NYS2d 288 [2000]).

In this case, triable issues of fact have been raised as to whether Calapai was a bona fide purchaser for valuable consideration of the property at issue (*see National City Home Loan Services, Inc. v Arango*, 72 AD3d 915, 898 NYS2d 522 [2010]). Initially, the Court notes that although Calapai alleges that his deed was recorded first, no proof has been submitted showing that his deed was even recorded, since the copy of the deed provided is missing a recording/filing stamp of the Suffolk County Clerk. In addition, even though an appraisal was allegedly performed on the property, no appraisal was submitted to support Calapai's contention that he paid sufficient consideration for the premises. Moreover, there is an issue of fact as to whether the circumstances herein should have led Calapai to inquire further about Garcia's ownership (*see Maiorano v Garson*, 65 AD3d 1300, *supra*). Specifically, there is an issue of fact as to whether Garcia's explanation that she did not want Calapai to speak to the tenants because she wanted to tell her son about the sale, was reasonable and should have been relied on by Calapai without further inquiry, or should have put Calapai on notice that there was a problem with Garcia's title, especially in light of the fact that Garcia was not in actual possession of the premises (*see Maiorano v Garson*, 65 AD3d 1300, *supra*; *Ferdico v Zweig*, 55 AD3d 537, 865 NYS2d 294 [2008], *lv denied* 12 NY3d 714 [2009]). Furthermore, Calapai's claim that he purchased this property as an investment, coupled with his failure to conduct an inspection of the interior of the premises, his failure to ask for a copy of the tenants' leases or written proof of tenants' rental payments, his failure to ask for even an electric bill, a gas bill, an oil bill or a water bill, any of which may have revealed that T&V was the titled owner, are indeed peculiar and raise an issue of fact as to whether he exercised due diligence in the conduct of this transaction (*see Tibby v Fletcher*, 13 AD3d 877, 788 NYS2d 430 [2004]). Also

troubling is the fact that Calapai provides no valid explanation as to why he executed an affidavit at the closing which stated, "The seller is moving out of the subject residence on or about the closing date" when such statement was blatantly false. His attempt, in his reply papers, to blame his attorney for this falsity is disingenuous. Nor does Calapai provide a valid explanation as to why, when Garcia made obvious untrue statements in the four affidavits she executed at the closing¹, neither he nor his attorney took issue with such statements. Finally, the Court agrees with the opposition herein that it is perplexing as to why Calapai or his representative, never contacted T&V for the amount necessary to payoff of its mortgage, and why, if Calapai believed Garcia's claim that she was current with her mortgage payments, \$150,000.00 was chosen as a payoff amount on a \$102,000.00 mortgage that had been paid down for almost eight years. Accordingly, numerous issues of fact have been raised as to whether Calapai is entitled to the status of a bona fide purchaser.

The Court finds no merit to Calapai's assertion that laches and unclean hands should bar T&V's claim. It was reasonable for Varveris, who was under the impression that his deed in lieu was properly filed with the County Clerk, to simply believe the taxing agency's records had not been updated to reflect the proper owner. Further, Varveris' and T&V's use of a deed in lieu, and any tax ramifications caused by the use of such deed, is irrelevant to this action.

In addition, Calapai's request to amend his answer to add new counterclaims is denied. Generally, leave to amend a pleading under CPLR 3025[b], is to be freely given as long as there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit (*see Washington Avenue Associates, Inc. v Euclid Equipment, Inc.*, 229 AD2d 486, 645 NYS2d 511 [1996]). However, where a motion for leave to amend is sought after a long delay and the case has been certified as ready for trial, judicial discretion in permitting such an amendment "should be discrete, circumspect, prudent and cautious" (*Trataros Construction, Inc. v New York City School Construction Authority*, 46 AD3d 874, 849 NYS2d 86, 87 [2007], quoting *Clarkin v Staten Is. Univ. Hosp.*, 242 AD2d 552, 662 NYS2d 91 [1997]). In this case, Calapai, was aware of the facts upon which these counterclaims were predicated since he made some of the same claims for use and occupancy damages almost three years ago in his District Court holdover petition. Not only has Calapai not explained the outcome of his request for these damages in the District Court proceeding, he gives no excuse for his delay in moving to add these new counterclaims at this late date in this action (*see American Cleaners, Inc. v American International Specialty Lines Insurance Co.*, 68 AD3d 792, 891 NYS2d 127 [2009]). Furthermore, it is well settled that a court should consider the merit of the proposed pleading before granting leave to amend so as to promote judicial economy (*Washington Avenue Associates, Inc. v Euclid Equipment, Inc.*, 229 AD2d 486, supra). Here, since Calapai admitted that he never inspected inside the premises and had no clue as to its condition, his claim that John and his wife left it in disrepair has no basis. John's deposition testimony is not supportive of Calapai's claim since John testified that he only took his own property when he left the premises, and Calapai has offered no evidence to show otherwise. Moreover, there is no proof that the stipulation between the parties was violated since, according to Calapai's affidavit, John


¹See Calapai's Exhibit D wherein Garcia alleged in two of the closing affidavits that there were no tenants in possession of the premises, and she alleged in two other of the closing affidavits that there were no liens on the premises.

allowed his friend to stay at the premises in late December, 2007, and the stipulation was not signed until December 11, 2008. Even if John's friend had stayed at the premises after the signing of the stipulation, the stipulation simply refers to renting the premises, and not non-paying guests. Therefore, Calapai's request to amend his answer to add these counterclaims is denied on the grounds of laches and lack of merit.

Finally, RPAPL 1511(2) provides that in an action to compel the determination of a claim to real property, "[w]here it appears to the court that a person not a party to the action may have an estate or interest in the real property which may in any manner be affected by the judgment, the court, upon application of such person, or of any party to the action, or on its own motion, may direct that such person be made a party." Necessary parties are defined as, "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action" (CPLR 1001[a]). Here, the record discloses that Concord may have a mortgage on the premises and may be adversely affected by the outcome of this action, particularly if Calapai's deed is declared null and void and all those claiming under him are barred from having a lien or encumbrance on the premises (see *Sorbello v Birchez Associates, LLC*, 61 AD3d 1225, 876 NYS2d 789 [2009]). However, it is unclear whether, at this point, Concord's mortgage has been satisfied. If it has not been satisfied, the plaintiff is directed to amend its complaint and add Concord as a defendant to this action (see *Northern Funding, LLC v 244 Madison Realty Corp.*, 41 AD3d 182, 837 NYS2d 646 [2007]).

Accordingly, Calapai's motion for summary judgment and to amend his answer is denied.

Dated: 10/6/10



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION