

Hotel Mezz Lender, L.L.C. v Falor

2010 NY Slip Op 34138(U)

October 29, 2010

Supreme Court, New York County

Docket Number: Index No. 601175/07

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 601175/2007 *CR*

HOTEL 71 MEZZ LENDER, LLC
 vs.
FALOR, ROBERT D.

SEQUENCE NUMBER : 050
 SUMMARY JUDGMENT

PART 53

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision and order.

Dated: 10/29/2010

CR

CHARLES E. RAMOS 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: COMMERCIAL DIVISION

-----X
HOTEL MEZZ LENDER, L.L.C.,

Plaintiff,

-against-

Index No.
601175/07

ROBERT D. FALOR, DAVID FALOR, CHRIS M.
FALOR, JENNIFER FALOR, GEOFFREY L.
HOCKMAN, GUY T. MITCHELL, and AMY MITCHELL,

Defendants.
-----X

Charles Edward Ramos, J.S.C.:

Plaintiff Hotel 71 Mezz Lender (Hotel 71) moves for summary judgment against defendant Amy Mitchell pursuant to CPLR 3212 and 3126.

Background

The factual background in this action has been set forth in numerous prior decisions of this Court and will not be repeated, except as relevant to this motion.

This action arises out of a mezzanine loan (Mezzanine Loan) made by Hotel 71, pursuant to a promissory note. The Mezzanine Loan was extended to Chicago H&S Senior Investors, L.L.C. (the Borrower) in order to finance the renovation and conversion of a prominent hotel located in Chicago. Certain defendants owned an interest in the Borrower.

As security for the Mezzanine Loan, Hotel 71 required individual defendants Robert D. Falor, Jennifer Falor, David Falor, Chris Falor, and Guy T. Mitchell (Mr. Mitchell), to unconditionally and absolutely guarantee payment and performance of the Borrower's obligations under the Mezzanine Loan, by

executing a personal guaranty (Guaranty).

As set forth in Hotel 71's Rule 19-A Statement, on March 29, 2005, Mr. Mitchell and his wife, Amy Mitchell (Mrs. Mitchell) executed a side letter agreement (Side Letter Agreement). The Side Letter Agreement provides that Mrs. Mitchell would not be liable under the Guaranty unless she acquired an ownership interest in certain non-residential assets set forth in a financial statement (Financial Statement) annexed to the Guaranty, in which case she would become a party to, and assume liability under, the Guaranty, to the extent of the value of those assets.

In mid-2005, the Borrower defaulted and Hotel 71 sought to accelerate the maturity date of the Mezzanine Loan. On June 28, 2005, the parties, including Mrs. Mitchell, executed a forbearance agreement (Forbearance Agreement), pursuant to which Hotel 71 agreed to temporarily forebear enforcement of its default remedies to permit the Borrower to cure events of default. In addition, the parties agreed to "acknowledge and bind themselves to the warranties and release and waiver [of defenses]" (Exhibit A, annexed to the Weigel Aff.).

When the Borrower failed to cure the events of default, Hotel 71 instituted this action to enforce the Guaranty, and to recover the entire outstanding balance of the Mezzanine Loan.

In the course of this action, Mr. Mitchell filed garnishee statements and an affidavit with this Court in which he claimed that tenancies by the entirety were created with his wife, Mrs.

Mitchell, with respect to certain assets listed in the Financial Statements. In the affidavit, Mr, Mitchell stated:

“On January 1, 2006, a portion of or the entire ownership of these Mitchell Hospitality Investments, LLC, Mitchell Hotel Group, LLC, and GAM Holdings, LLC] properties¹ was converted to tenancies by the entireties” (Exhibit C, annexed to the Weigel Aff., Mitchell Aff., ¶¶ 31-33).

Subsequently, Hotel 71 amended its complaint to add Mrs. Mitchell as a defendant in order to hold her liable under the Guaranty on the ground that the Side Letter Agreement had been triggered.

On April 21, 2008, this Court awarded judgment to Hotel 71 in the amount of \$52,404,066.54 against the Falor defendants and Mr. Mitchell, which judgment was affirmed by the First Department (*Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447 [1st Dept 2009]).

Thereafter, Mrs. Mitchell moved to dismiss the claims against her on the ground of lack of personal jurisdiction, which was denied. Mrs. Mitchell answered the complaint and asserted various affirmative defenses.

Hotel 71 states that it originally noticed Mrs. Mitchell for deposition on December 30, 2008, and that upon her request, it was adjourned three times. The last time that Mrs. Mitchell's deposition was scheduled, August 26, 2009, she failed to appear or offer an excuse (Hotel 71's Rule 19-A Statement, ¶ 20).

¹ According to Hotel 71, GAM Holdings, LLC holds the interests in nine entities listed in the Financial Statement referenced in the Side Letter Agreement, that, in turn, holds the interests in Mr. Mitchell's network of real estate holdings.

Discussion

Hotel 71 moves for summary judgment against Mrs. Mitchell in order to find her liable under the Guaranty on the basis of the Side Letter Agreement. Alternatively, Hotel 71 moves for summary judgment against her on its claims of constructive fraudulent transfer and fraudulent conveyance. According to Hotel 71, Mr. Mitchell claimed that he transferred certain solely-owned assets to Mrs. Mitchell so that they could own them jointly, which constitutes actual and constructive fraudulent conveyances under the laws of Florida, where the Mitchells reside, and New York, whose laws govern the agreements at issue. Finally, Hotel 71 moves to strike Mrs. Mitchell's answer on the basis of her wilful failure to appear for a deposition, under CPLR 3126.

In opposition, Mrs. Mitchell submits an affidavit in which she attests that "none of the assets listed in the Financial Statement dated January 14, 2005, and referred to in the Side Letter Agreement have been transferred to me" (Aff Opp of Mrs. Mitchell, ¶¶ 19-22, 27, 29, 35). Although she concedes that a tenancy by the entirety was created with respect to certain property, she asserts that it was done for estate planning purposes and does not fall within the "scope and meaning" of the Side Letter Agreement (*Id.*). Specifically, she contends that, because these properties were transferred to "Guy and Amy Mitchell," the properties have not actually been transferred to her as contemplated by the Side Letter Agreement (*Id.*).

Mrs. Mitchell also submits an affidavit from her accountant,

who states that he has reviewed the list of properties referenced in the Financial Statement and that they are all owned by LLCs or by Guy and Amy Mitchell as tenants by the entirety and not by Mrs. Mitchell individually.

The Side Letter Agreement clearly and unambiguously states that Mrs. Mitchell would become liable under the Guaranty in the event that certain non-residential properties identified in the Financial Statements are "owned by or become transferred to" her. It states:

"It is agreed that Amy Mitchell is not a party to ... any of the Guaranties ... In the event that any of the assets described in the Financial Statement, other than the Residences, are owned by, or become transferred to, Amy Mitchell, then, in such event Amy Mitchell shall be deemed to be a Guarantor and Amy Mitchell will be liable under the Guaranties as if she had been an original signatory thereto, but only to the extent of the value of such assets so transferred to or owned by Amy Mitchell" (Exhibit A, annexed to the Smith Aff., Side Letter Agreement).

At the outset, the Court rejects as meritless Mrs. Mitchell's contention that the Side Letter Agreement is not triggered because certain assets listed in the Financial Statements were transferred either to LLCs or to "Guy and Amy Mitchell" by tenants in the entirety.

Under New York law, whose law governs the Side Letter Agreement, where property is owned in a tenancy by the entirety, the husband and wife own the real property and take title to it as if they were one person (*Matter of Estate of Violi*, 65 NY2d 392, 395 [1985]). Thus, either the husband or wife are considered the owner of the entire property, and not of any

undivided portion of the estate (*Reister v Town Bd. of Town of Fleming*, 18 NY2d 92, 95 [1966]).

Consequently, to the extent that any of the non-residential properties listed in the Financial Statements were transferred to or became owned by Mrs. Mitchell, even in the capacity as a tenancy by the entirety, the plain and unambiguous language of the Side Letter Agreement provides that she is deemed a guarantor under the Guaranty.

Otherwise, neither Mrs. Mitchell or her accountant refute that a portion of or the entire ownership of ... GAM Holdings, LLC] properties was converted to tenancies by the entireties" subsequent to her execution of the Side Letter Agreement, as set forth in Mr. Mitchell's affidavit (Exhibit C, annexed to the Weigel Aff., Mitchell Aff., ¶¶ 31-33). Thus, under the clear application of the Side Letter Agreement, Mrs. Mitchell is deemed a guarantor, and liable under the Guaranty "to the extent of the value of such assets."

This Court has already determined that the Guaranty is enforceable, that the signatories waived affirmative defenses, and that they are liable on the basis of the Borrower's default (Exhibit D, annexed to the Weigel Aff.). The Court ordered judgment be entered against the guarantors, which was affirmed by the First Department and is thus, law of the case. Consequently, Hotel 71 has made a prima facie showing of entitlement to judgment as a matter of law against Mrs. Mitchell under the Guaranty on the basis of the triggering of the Side Letter

Agreement.

Alternatively, under CPLR 3126, a court may sanction a party for willfully failing to comply with discovery, including striking the pleadings.

Mrs. Mitchell's defense that she failed to attend her deposition based upon her personal belief that the Side Letter Agreement had not sprung and that this Court did not have personal jurisdiction over her, despite this Court's denial of her motion to dismiss upon that basis, is not a defense at all.

Mrs. Mitchell's failure to attend her deposition on three occasions clearly evinces a pattern of disobeying court orders and warrants the conclusion that her conduct was wilful (see *Hotel 71 Mezz Lender LLC*, 63 AD3d at 449; *Fish & Richardson, P.C. v Schindler*, 75 AD3d 219 [1st Dept 2010]). Therefore, striking Mrs. Mitchell's answer is appropriate under the circumstances.

In light of the Court's disposition, it will not address Hotel 71's alternate grounds for summary judgment liability based upon constructive and actual fraudulent conveyance.

Accordingly, it is

ORDERED, that the motion for summary judgment by plaintiff Hotel 71 Mezz Lender, LLC is granted as to liability against defendant Amy Mitchell; and it is further

ORDERED that, upon the establishment that defendant Amy Mitchell has willfully failed to provide discovery, plaintiff Hotel 71 Mezz Lender, LLC's motion to strike is granted and the answer of defendant Amy Mitchell is stricken; and it is further

ORDERED that the Clerk is directed to enter judgment as to liability in favor of plaintiff Hotel 71 Mezz Lender against defendant Amy Mitchell; and it is further


ORDERED that the previously appointed receiver in this action, Steven Weiss, Esq. of Scheichet & Davis, P.C., shall be designated as referee to hear and report the issue of the value of the non-residential assets transferred to or owned by Amy Mitchell and listed on the Financial Statements for the purpose of assessing the amount of her liability; and it is further

ORDERED that the parties shall appear for a reference hearing, including with all evidence that they seek to present and shall be ready to proceed, on the date fixed by the referee subject only to an adjournment that may be authorized by the referee, which hearing will be conducted in the same manner as a trial before a Justice without a jury; and it is further

ORDERED that any motion to confirm or disaffirm the report of the referee shall be made within the time and manner specified by CPLR 4403 and section 202.44 of the Uniform Rules for the Trial Courts.

Dated: October 29, 2010

ENTER:



J.S.C.
CHARLES E. RAMOS