

Tria Stein LLC v Toobian

2011 NY Slip Op 30208(U)

January 19, 2011

Sup Ct, New York County

Docket Number: 116769/08

Judge: Joan A. Madden

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

PRESENT: JOAN A. MADDEN
Justice

PART 11

TRIA STEIN, LLC

Plaintiff,

- v -

PAYAM TOOBIAN, et al,
Defendant.

INDEX NO.

116769/08

MOTION DATE

MOTION SEQ. NO.

001

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 returned in accordance with the annexed decision. Settle order on notice.*

Dated: January 19, 2011

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
TRIA STEIN LLC,

Plaintiff,

INDEX NO. 116769/08

-against-

PAYAM TOOBIAN, CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD, BOARD OF
MANAGER OF THE TRUMP WORLD TOWER
CONDOMINIUM, "JOHN DOE NO. 1" TO "JOHN DOE
NO. 20," inclusive, the last twenty 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.

-----X
JOAN A. MADDEN, J.:

In this action to foreclose a mortgage, plaintiff Tria Stein LLC ("Tria Stein") moves for an order pursuant to CPLR 3212 granting summary judgment and for an order appointing a Referee to compute. Defendant mortgagor Payam Toobian opposes the motion.

The following facts are not disputed unless otherwise noted. The mortgage in this action relates to condominium unit owned by defendant Toobian and located at Trump World Tower Condominium, Unit 77A, 845 United Nations Plaza, a/k/a 335/347 East 47th Street, New York, New York. Toobian gave the mortgage to Tria Stein as part of the consideration for his purchasing real property owned by Tria Stein in Queens. Specifically, on April 24, 2008, Tria Stein as seller and 1111 Avenue (as nominee for Toobian) as purchaser, executed a contract of sale for the property located at 30-59 and 30-61 Steinway Street in Astoria, Queens (the

“Steinway Street property”), at the purchase price of \$6,100,000. On August 23, 2008, a closing was held and the title of the property was transferred by deed from Tria Stein LLC to Rama Realty Associates, LLC (“Rama”), an entity owned by Toobian. To finance the purchase, Toobian obtained a \$350,000 loan from Banco Popular, secured by a first mortgage on the Steinway Street property. Toobian also gave Tria Stein a purchase money second mortgage in the amount of \$600,000, secured by the condominium unit that is the subject of this foreclosure action.¹ The mortgage provided for interest at the rate of 7%, and payment of interest only in the amount of \$3,500 on the first day of each month commencing October 1, 2008, for one year ending September 1, 2009, “when the whole of the unpaid principal balance and any interest accrued thereon as aforesaid shall be due and payable.” It is undisputed that Toobian did not make the first payment due October 1, 2008, nor any payment thereafter.

On December 17, 2008, Tria Stein commenced the instant action to foreclose on its mortgage against the condominium unit. Toobian served an answer asserting affirmative defenses of failure to state a cause of action, failure to name a necessary party, usury and an offset in the amount of \$1,500. The answer also asserted a counterclaim for \$10,000 in rent and other payments due from tenants under the contract of sale, and a counterclaim for \$1,500, as reimbursement for the cost of an appraisal under the contract of sale. Tria Stein is now moving for summary judgment and the appointment of a Referee to compute, and Toobian opposes.

In moving for summary judgment in an action to foreclose a mortgage, plaintiff establishes a prima facie right to foreclose by producing the mortgage, the assignment, if any, the

¹An ACRIS search under Block 1340, Lot 1330, the parcel identifier for the condominium unit, lists a first mortgage in the amount of \$2,960,000 recorded on May 23, 2007, and the instant second mortgage in the amount of \$600,000 recorded on September 2, 2008.

unpaid note and evidence of default. See CitiFinancial Co. (DE) v. McKinney, 27 AD3d 224 (1st Dept 2006); LPP Mortgage, Ltd v. Card Corp., 17 AD3d 103 (1st Dept), lv app den, 6 NY3d 702 (2005); Hypo Holdings, Inc v. Chalasani, 280 AD2d 386 (1st Dept), lv app den 96 NY2d 717 (2001). Once plaintiff satisfies that burden, it is incumbent on the party opposing foreclosure to come forward with evidence sufficient to raise a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff. See Nassau Trust Co. v. Montrose Concrete Products Corp., 56 NY2d 175, reargmt den 57 NY2d 674 (1982); CitiFinancial Co. (DE) v. McKinney, *supra*; Mahopac National Bank v. Baisley, 244 AD2d 466 (2nd Dept 1997), lv app disp 91 NY2d 1003 (1998).

Here, Tria Stein has established its prima facie entitlement to judgment as a matter of law by uncontested proof of the note, the mortgage and Toobian's default. See CitiFinancial Co. (DE) v. McKinney, *supra*; LPP Mortgage, Ltd v. Card Corp., *supra*; Hypo Holdings, Inc v. Chalasani, *supra*. In opposing the motion, Toobian does not deny that money is owed or that he has defaulted on the mortgage. Rather, Toobian submits an affidavit asserting that Tria Stein and its principal, Spyro Avdoulos, "made fraudulent statements and misrepresentations to me about the status of a certain tenant Antonis Hellen who rented a clothing store at the Steinway Property," and "[a]s a result of such fraud and misrepresentation, I have sustained substantial damages all of which must be offset against and recovered" from the mortgage Tria Stein is seeking to foreclose. Toobian states that he has "instructed his attorneys to prepare and serve a complaint against both Tria Stein and Avdoulos in connection with their fraudulent conduct" and submits a copy of the complaint captioned Rama Realty Associates LLC v. Tria Stein LLC and Spyro Avdoulos (Supreme Court, New York County, Index No. 600141/10), which was filed in

this court on January 20, 2010.²

In reply, Tria Stein argues that Toobian waived the defense of fraud pursuant to CPLR 3018(6), since fraud was not raised as an affirmative defense in the answer and it is raised for the first time in Toobian's affidavit in opposition to the summary judgment motion. Tria Stein also argues that the facts demonstrate there was no fraud, and submits an affidavit from Avdoulos denying he had any knowledge the clothing store intended to vacate the premises.

First, as to the issue of waiver, while the court agrees with Tria Stein that Toobian did not plead or raise any issue as to fraud or misrepresentation in his answer, the court does not agree that such defense has necessarily been waived. As the Court of Appeals explains, [w]hen a plaintiff moves for summary judgment, it is proper for the court to look beyond the defendant's answer and deny summary judgment if facts are alleged in opposition to the motion, which, if true, constitute a meritorious defense." Nassau Trust Co. v. Montrose Concrete Products Corp., supra at 182.

The rule in Nassau Trust Co. v. Montrose Concrete Products Corp., however, does not resolve the issues as presented by Toobian in his opposition papers. In opposing summary judgment, Toobian does not take the position that he has a meritorious defense of fraud and misrepresentation in the instant action to foreclose the mortgage on the condominium unit. Notably, Toobian is not seeking any specific relief with respect to that mortgage, i.e. rescission or cancellation. Toobian simply takes the position that an award of summary judgment to Tria Stein in this action would be "premature," "inappropriate" and "inequitable," in light of the fact

² The court's computer records indicate that defendants filed an answer on March 29, 2010, but no other activity has taken place in the case.

that Rama Realty commenced a separate action for damages asserting affirmative claims against Tria Stein and Avdoulos for fraud and misrepresentation. Toobian argues that since the complaint in the Rama Realty action alleges that the fraud and misrepresentation have “caused Rama to incur substantial monetary damages,” the damages awarded in that action “may well exceed the entire principal due” under the mortgage in the instant action, and therefore, should be “offset” against the amount due under the mortgage.

Toobian’s arguments are not persuasive. Tria Stein commenced the instant action on December 17, 2008, and moved for summary judgment eleven months later on November 17, 2009. In direct response to that motion, Toobian instructed his attorneys to prepare the complaint on behalf of Rama Realty; both Toobian’s opposition papers and the Rama Realty complaint are dated December 14, 2010. The Rama Realty complaint was filed one month later on January 20, 2010, but Rama Realty has not taken any steps since that time to advance the action. Moreover, while summary judgment can be denied when a defendant has a viable counterclaim arising from the same underlying transaction as is involved in the main action, and the counterclaim is inseparable or inextricably intertwined with that transaction, see Yoi-Lee Realty Corp. v. 177th Street Realty Assocs, 208 AD2d 185 (1st Dept 1995), Toobian has not asserted a counterclaim for fraud or misrepresentation in the instant action. Essentially Toobian has charted his own course, by having Rama Realty commence a separate action for fraud and misrepresentation alleging that it has suffered damages, and essentially seeking to stay or delay the foreclosure proceedings indefinitely, because Rama Realty’s damages “may well exceed” the amount due under the mortgage. Under these circumstances, where Toobian as Rama Realty has failed to go forward with prosecuting the fraud action or to move for consolidation or to assert a

counterclaim for fraud, it cannot be reasonably concluded that Rama Realty's fraud claims are inseparable from or inextricably intertwined with the underlying transaction involved in the mortgage foreclose action against Toobian, individually.

In any event, even if Toobian were seeking to assert a defense or counterclaim for fraud or misrepresentation in the instant action, his affidavit fails to make a sufficient showing as to the necessary element of reasonable reliance, since the information as to whether the commercial tenant was winding down his business and intended to vacate the store, was readily obtainable by conducting an inspection of the premises and speaking to the tenant. See e.g. Woods v. 126 Riverside Drive Corp., 64 AD3d 422 (1st Dept 2009), lv app den 14 NY3d 703 (2010) (where party has means of discovering by the exercise of ordinary intelligence, the true nature of the transaction he is about to enter into, he must make use of those means or he cannot be heard to complain that he was induced to enter into the transaction by misrepresentations).

For all the above-stated reasons, Toobian fails to raise a triable issue of fact as to a bona fide defense, and plaintiff's motion for summary judgment and an order appointing a Referee to compute is granted.

Settle order on notice, including a copy of this decision.

DATED: January 19, 2011

ENTER:



J.S.C.