

Deutsche Bank Natl. Trust Co. v Russo

2011 NY Slip Op 30683(U)

March 11, 2011

Supreme Court, Suffolk County

Docket Number: 29849/2008

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 29849/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COM

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

DEUTSCHE BANK NATIONAL TRUST
COMPANY AS TRUSTEE FOR AMERICAN
HOME MORTGAGE ASSETS TRUST 2007-5
MORTGAGE-BACKED PASS-THROUGH
CERTIFICATES, SERIES 2007-5,

Plaintiff,

-against-

ROBERTA RUSSO, NATIONAL CITY BANK,
JOSHUA CHESLOW,

Defendants.

ROBERTA RUSSO,

Third-Party Plaintiff,

-against-

ROBERT SACKS, KEITH MIDDLEBROOK,
EAST COAST CAPITAL CORP.,

Third-Party Defendants.

ORIG. RETURN DATE: APRIL 23, 2010
FINAL SUBMISSION DATE: JUNE 24, 2010
MTN. SEQ. #: 002
MOTION: MG

ORIG. RETURN DATE: JUNE 24, 2010
FINAL SUBMISSION DATE: JUNE 24, 2010
MTN. SEQ. #: 003
MOTION: MD

ORIG. RETURN DATE: JUNE 21, 2010
FINAL SUBMISSION DATE: JUNE 24, 2010
MTN. SEQ. #: 004
MOTION: MOT D

ORIG. RETURN DATE: AUGUST 5, 2010
FINAL SUBMISSION DATE: AUGUST 5, 2010
MTN. SEQ. #: 005
MOTION: MG

ORIG. RETURN DATE: AUGUST 19, 2010
FINAL SUBMISSION DATE: AUGUST 19, 2010
MTN. SEQ. #: 006
MOTION: MOT D

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Upon the following papers numbered 1 to 22 read on these motions FOR PRELIMINARY INJUNCTIONS, JUDGMENT OF FORECLOSURE AND SALE, TO COMPEL ACCEPTANCE OF LATE ANSWER, AND FOR DEFAULT JUDGMENT Order to Show Cause and supporting papers 1-3; Affirmation and Affidavit in Opposition to Order to Show Cause 4, 5; Replying Affidavit in Support of Order to Show Cause and supporting papers 6, 7; Notice of Motion and supporting papers 8-10; Order to Show Cause and supporting papers 11-13; Notice of Motion and supporting papers 14-16; Memorandum of Law 17; Affirmation in Opposition 18; Notice of Motion and supporting papers 19-21; Affirmation in Opposition 22; it is,

ORDERED that this motion (#002) by defendant/third-party plaintiff ROBERTA RUSSO ("Russo"), for an Order: (1) pursuant to CPLR 6311, restraining third-party defendants, ROBERT SACKS ("Sacks") and KEITH MIDDLEBROOK ("Middlebrook") (collectively "third-party defendants"), during the pendency of this action, from: (a) advertising the subject premises commonly known as 155 Chardonnay Drive, East Quogue, New York ("Premises") for rental; (b) collecting proceeds from the renting of the Premises; and (c) taking any action that would interfere with or otherwise prohibit Russo's right to rent the Premises to a lawful tenant; and (2) for ejectment of third-party defendants from the Premises, is hereby **GRANTED** to the extent set forth hereinafter; and it is further

ORDERED that this motion (#003) by plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR AMERICAN HOME MORTGAGE ASSETS TRUST 2007-5 MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-5 ("plaintiff"), for a Judgment of Foreclosure and Sale including an award for plaintiff's attorneys' fees, is hereby **DENIED**, without prejudice, for the reasons set forth hereinafter; and it is further

ORDERED that this motion (#004) by Middlebrook for an Order: (1) pursuant to CPLR 6311, restraining Russo from the use and benefit of certain furniture and household furnishings and other improvements present at the Premises; and (2) for the return of the use and occupancy of the Premises to Middlebrook, the owner of record of the Premises, is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this motion (#005) by third-party defendant EAST COAST CAPITAL CORP. ("East Coast") for an Order, pursuant to CPLR 3012 (d), compelling Russo to accept East Coast's Verified Third-Party Answer with Affirmative Defenses, dated and served on June 7, 2010, is hereby **GRANTED** as set forth hereinafter; and it is further

ORDERED that this motion (#006) by Russo for an Order, pursuant to CPLR 3215, granting a default judgment for the relief demanded in the Verified Third-Party Complaint against Sacks and East Coast, and on Russo's cross-claim against defendant NATIONAL CITY BANK ("National City"), and for an assessment of damages by the Court with a jury, together with costs and disbursements, on the grounds that said defendants have defaulted in appearing, is hereby **GRANTED** solely to the extent set forth hereinafter.

The Court has consolidated these five motions for the purpose of rendering the within decision and Order.

This action was commenced on August 12, 2008 to foreclose a mortgage securing a note in the principal amount of \$1,592,061 made by Russo on March 12, 2007, affecting the Premises. The original lender was American Brokers Conduit; however, the note and mortgage were subsequently assigned to plaintiff by assignment of mortgage executed on October 27, 2008. An Order of Reference was granted by this Court on January 13, 2009, without opposition. The Court notes that the Premises is not Russo's principal dwelling.

Russo commenced the instant third-party action on April 9, 2010, against Sacks, Middlebrook, and East Coast. Russo alleges that she has been defrauded out of hundreds of thousands of dollars as a result of several "investment schemes" perpetrated upon her by Sacks, among others. One such investment scheme involved the acquisition and mortgaging of the Premises by Sacks and Russo, allegedly utilizing Russo's credit and net worth, which title is

now held by Middlebrook. Russo informs the Court that Sacks is currently in the custody of the United States at the Monmouth County Correctional Institution, in Freehold, New Jersey, having been convicted on February 15, 2010 of 42 counts of mail fraud, wire fraud, conspiracy to commit bank fraud, and identity theft. Russo alleges that Sacks collected significant rental income from the Premises, while she remains solely responsible for debt "in excess of \$2 million" incurred in connection with the acquisition of the Premises, which debt is being foreclosed in the main action herein.

Russo alleges that in or about February 2007, Sacks asked Russo to purchase the Premises so as to enable Sacks to "flip" it and return a quick and substantial profit within one month of purchase. Russo apparently agreed because she had, in September 2006, provided Sacks with \$500,000 for an investment involving the development of real estate in Panama City, Florida. Russo claims she was concerned that if she did not agree to Sacks' request, that the return of her Florida investment, and other alleged fraudulent investments recommended by Sacks, including \$45,000 paid to one Samuel Saleki for a Canadian medical provider, and \$125,000 for the making of a feature film, would be jeopardized.

Russo acquired title to the Premises from James Derespino, an alleged "confederate" of third-party defendants, by bargain and sale deed executed on March 12, 2007. On even date, Sacks and Russo entered into an Ownership Agreement, which recited, among other things, that Sacks desired to purchase the Premises; that Russo would secure a loan for the purchase; and that Sacks would reside in the Premises exclusively. The Ownership Agreement contained a clause which provided that the parties would indemnify and hold each other harmless from any claims for nonpayment of mortgages, taxes, insurance, carrying charges, and infractions based upon violations of local laws. Russo further encumbered the Premises on March 12, 2007 with a mortgage in the amount of \$400,000 given to National City. However, Russo claims that she did not execute this mortgage, or receive the proceeds therefrom. East Coast acted as the mortgage broker in connection with the National City mortgage.

As discussed, Russo alleges that Sacks rented out the Premises, representing himself as the owner and landlord, and received and converted the rental proceeds for his own use and benefit. This rental occurred without the proper permit, and resulted in a criminal summons being issued against Russo on or about August 10, 2007 by the Town of Southampton, and a \$500 fine imposed.

Russo contends that Sacks represented to her that he would be responsible for making all payments associated with the Premises, but that he failed to make such payments. Consequently, in and about February and March of 2008, the real estate taxes, and the first and second mortgages, went into default. Russo argues that Sacks is indebted to her with respect to these defaults based upon the indemnification clause in the Ownership Agreement.

Thereafter, Sacks allegedly told Russo that he found a buyer for the Premises, to wit: Middlebrook. By quitclaim deed executed on October 14, 2008, Russo transferred her interest in the Premises to Middlebrook, allegedly for no consideration. Russo claims that she was under the impression that such transfer would relieve her of all liability under the first and second mortgages, as well as get her a return of her prior investments with Sacks.

By "Agreement" between Russo and Sacks executed on November 24, 2008, Sacks agreed to pay Russo \$500,000, by paying her \$100,000 by the end of January, 2009, and \$100,000 "each 45 days to 90 days thereafter until the total amount is paid." However, the Agreement recites that it is "contingent on Robert Sacks receiving a line of credit from Keith Middlebrook." Russo informs the Court that none of the terms of this Agreement were met, and Russo remains liable to date under the first and second mortgages.

Based upon the foregoing, Russo has commenced this third-party action asserting eight causes of action: (1) fraudulent inducement; (2) void the Middlebrook deed; (3) ejectment; (4) conspiracy/conversion; (5) breach of fiduciary duty (Sacks); (6) breach of fiduciary duty (East Coast); (7) tortious interference with contract; and (8) unjust enrichment. Russo also asserts, in her third-party complaint, a "cross-claim" against National City and all third-party defendants for fraud in connection with the National City mortgage, notwithstanding the fact that Russo defaulted in appearing in the main action. Russo further seeks injunctive relief in the form of a return of the right to use and occupy the Premises in order to rent it and market it for sale. Russo prays for monetary damages in the amount of \$1 million, punitive damages in the amount of \$500,000, and an assessment of liability against all third-party defendants for any liability Russo may incur regarding the first and second mortgages. The Court notes that the referee herein reports that as of January 12, 2010, Russo owed the sum of \$1,890,176.12 to plaintiff under the first mortgage alone.

Russo has filed the instant application for a preliminary injunction to restrain Sacks and Middlebrook, during the pendency of this action, from: (a) advertising the Premises for rental; (b) collecting proceeds from the renting of the Premises; and (c) taking any action that would interfere with or otherwise prohibit Russo's right to rent the Premises to a lawful tenant. In addition, Russo requests an Order ejecting third-party defendants from the Premises.

On April 9, 2010, the Court (Blydenburgh, J.) granted Russo the following temporary restraining Order:

ORDERED, that pending the hearing and determination of this motion, third-party defendants ROBERT SACKS and KEITH MIDDLEBROOK are forbidden from entering or using the Premises and third-party plaintiff shall have use and occupancy of same, and third-party defendants are prohibited from making or suffering any sale, assignment, or transfer of, or any interference with, any interest in connection with the Premises or any property in their possession or custody in which they know or has reason to believe the third-party plaintiff has an interest.

Middlebrook has filed opposition to Russo's application. Middlebrook claims that he did not obtain the Premises from Russo fraudulently, but rather in exchange for "valuable services" rendered to Russo. In particular, Middlebrook contends that he was hired by Russo on three separate occasions to "restore her financial portfolio which would improve her financial data and credit rating." In return for performing such services on the first two occasions, Middlebrook allegedly received a fee, although he neglects to inform the Court as to the amounts of the fees. On the third occasion, Middlebrook claims that as Russo did not have sufficient funds to pay his fee, she offered to convey her interest in the Premises to him, which was effectuated by the aforementioned quitclaim deed executed on October 14, 2008. Middlebrook alleges that he then expended monies and undertook certain improvements to the Premises, totaling approximately \$80,000 to \$90,000. After such expenditures, Middlebrook alleges that Russo advised him that she wanted the Premises back, but would not reimburse him for the expenditures or compensate him for his services rendered.

Furthermore, Middlebrook alleges that he is not a confederate of Sacks or East Coast, and was not involved in the real estate or mortgage

transactions involving Russo and Sacks. As such, Middlebrook argues that he has been wrongfully included in this action as a third-party defendant.

Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously (see *Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 79 NY2d 236 [1992]; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334 [2004]; *Bonnieview Holdings v Allinger*, 263 AD2d 933 [1999]). Thus, in order to obtain a preliminary injunction, a moving party must demonstrate: (1) a likelihood of success on the merits; (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (see CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Iron Mtn. Info. Mgt., Inc. v Pullman*, 41 AD3d 656 [2007]; *Gerstner v Katz*, 38 AD3d 835 [2007]).

Here, the Court has weighed the elements necessary for the granting of a preliminary injunction, and finds that Russo has sustained her burden. Russo has demonstrated a likelihood of success on the merits, as she has shown that the Premises were acquired in her name using her credit and net worth; that Sacks contributed little or no consideration to the purchase of the Premises, yet rented the Premises as an owner/landlord; that Middlebrook subsequently acquired that Premises with inadequate or no consideration; and that notwithstanding the transfer of title to Middlebrook, Russo remains liable under the first and second mortgages, which total over \$2 million. In addition, the Court finds that Russo could suffer irreparable injury absent the injunction, as Middlebrook, as titleholder, may attempt to transfer the property to a third-party. Further, under circumstances presented, the balance of the equities tip in favor of Russo.

Accordingly, this motion by Russo is **GRANTED** to the extent that the temporary restraining Order heretofore granted on April 9, 2010 (Blydenburgh, J.), is hereby continued as a preliminary injunction, pending further Order of the Court, with the limitation imposed hereinafter on the parties' ability to rent or lease the Premises.

Given the Court's ruling on Russo's motion, and the fact that Russo may have been fraudulently induced into executing plaintiff's mortgage in the principal amount of approximately \$1.5 million, this motion by plaintiff for a

Judgment of Foreclosure and Sale is **DENIED**, without prejudice to renew pending the ultimate resolution of the third-party action.

Middlebrook has filed a motion seeking an injunction to restrain Russo from the use and benefit of certain furniture and household furnishings and other improvements present at the Premises, and for the return of the use and occupancy of the Premises to Middlebrook.

On June 16, 2010, the Court (Rebolini, J.) declined to grant Middlebrook a temporary restraining Order, which sought to restrain Russo from leasing the Premises or collecting rents therefrom; utilizing or receiving any benefit from any of Middlebrook's furniture or household furnishings present in the Premises; and/or, alternatively, requiring Russo to return the furniture to Middlebrook; to deposit not less than \$80,000 in escrow with Middlebrook's attorney as security for any damage to the Premises; to obtain liability insurance in connection with Russo's use of the Premises in an amount not less than \$1 million, naming Middlebrook as an additional insured; and to return the use and occupancy of the Premises to Middlebrook.

Middlebrook alleges that injunctive relief is necessary to prevent damage to the Premises in the event Russo rents the Premises during the summer season. Middlebrook contends that when Sacks and Russo were operating the Premises, they rented it to multiple tenants at once, causing severe damage to the Premises and the household furnishing located therein. As Middlebrook claims that after he took title he furnished the interior of the Premises with "new, high-end furniture and amenities," he seeks an injunction to minimize any damage thereto. Middlebrook informs the Court that he has leased the Premises, but not as a "group share house."

Based upon the Court's findings and ruling on Russo's motion for a preliminary injunction, and to maintain the status quo and to preserve the subject Premises pending the determination of this action (*see e.g. S.J.J.K. Tennis, Inc. v Confer Bethpage, LLC*, 2011 NY Slip Op 670 [2d Dept]; *S.P.Q.R. Co., Inc. v United Rockland Stairs, Inc.*, 57 AD3d 642 [2008]; *Ruiz v Meloney*, 26 AD3d 485 [2006]), this motion by Middlebrook for a preliminary injunction is **GRANTED** solely to the extent that all parties are hereby restrained from renting or leasing the Premises during the pendency of this action.

Finally, East Coast has filed a motion for an Order compelling Russo to accept East Coast's Verified Third-Party Answer with Affirmative Defenses, dated and served on June 7, 2010, and Russo has filed a motion for a default judgment against Sacks and East Coast for the relief demanded in the Verified Third-Party Complaint and on Russo's cross-claim against National City, and for an assessment of damages by the Court with a jury, on the grounds that said defendants have defaulted in appearing.

East Coast alleges that Russo initially attempted to serve it with process in mid-April of 2010, by service upon "Mike" at East Coast's offices located in Syosset, New York. However, East Coast indicates that "Mike" was not an officer, director, managing agent, or cashier of East Coast, and not authorized to accept service of process. Thereafter, East Coast alleges that on May 13, 2010, Russo served the third-party complaint upon it by service upon the Secretary of State of the State of New York, pursuant to BCL 306. As such, East Coast argues that it timely served an answer thereto on June 7, 2010. However, Russo rejected such answer as untimely based upon the initial attempt at service in mid-April.

CPLR 3012 (d) provides that "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default" (CPLR 3012 [d]).

The Court finds that any delay in service of East Coast's answer was minimal, and that Russo has suffered no prejudice as a result thereof. Moreover, the Court notes that a showing of a potential meritorious defense is not an essential component of a motion to serve a late answer (CPLR 3012 [d]), where, as here, no default order or judgment has been entered (*see Nason v Fisher*, 309 AD2d 526 [2003]; *DeMarco v Wyndham Intl.*, 299 AD2d 209 [2002]; *Terrones v Morera*, 295 AD2d 254 [2002]).

With respect to Russo's motion for a default judgment, Russo alleges that on April 26, 2010, she served Sacks personally with the third-party summons and complaint at the Monmouth County Correctional Institution, and that on April 12, 2010, she served National City by mailing the third-party summons and complaint to its attorney. Russo contends that Sacks and National City have failed to appear or respond to the third-party complaint, and the time to

do so has since expired. As such, Russo seeks a default judgment against Sacks, East Coast and National City, and an assessment of damages with a jury. Neither Sacks nor National City has proffered opposition to this application, and as discussed, East Coast has filed a motion to compel acceptance of its answer to the third-party complaint.

Given the short period of delay, the lack of willfulness on the part of East Coast, and the strong public policy in favor of resolving cases on the merits, that branch of Russo's motion for a default judgment against East Coast is **DENIED**, and East Coast's motion to compel Russo to accept its Verified Third-Party Answer with Affirmative Defenses, is **GRANTED** (see *Giacopelli v Guiducci*, 36 AD3d 853 [2007]; *Giladi v City of New York*, 34 AD3d 733 [2006]; *Jolkovsky v Legeman*, 32 AD3d 418 [2006]; *Kaiser v Delaney*, 255 AD2d 362 [1998]; *I.J. Handa, P. C. v Imperato*, 159 AD2d 484, *supra*; see also *2M Realty Corp. v Boehm*, 13 AD3d 361 [2004]). East Coast's Verified Third-Party Answer with Affirmative Defenses, annexed to East Coast's moving papers as Exhibit "E," shall be deemed served upon Russo as of the date of service upon Russo of this Order with notice of entry.

That branch of Russo's motion to enter a judgment on default against Sacks is **GRANTED**, without opposition. An inquest for an assessment of damages against Sacks shall be conducted at the time of trial. However, that branch of Russo's motion to enter a judgment on default against National City is **DENIED**. Without passing the validity of this "cross-claim" contained in the third-party complaint, the Court finds that by merely serving the pleadings upon National City's attorney via first class mail, Russo has failed to demonstrate that personal jurisdiction was obtained over National City with respect to its cross-claim (*cf.* CPLR 311; 312-a; BCL 306; see *Strong v Bi-Lo Wholesalers*, 265 AD2d 745 [1999]).

The foregoing constitutes the decision and Order of the Court.

Dated: March 11, 2011


HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION