

Daniel Perla Assoc., L.P. v Cathedral Church of St. Lucy's

2011 NY Slip Op 30761(U)

March 17, 2011

Supreme Court, Nassau County

Docket Number: 016453-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

SCAN

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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DANIEL PERLA ASSOCIATES, L.P.,

Plaintiff,

-against-

CATHEDRAL CHURCH OF ST. LUCY'S,

Defendant.

TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 016453-10
Motion Seq. Nos: 1 & 2
Submission Date: 2/4/11

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The following papers have been read on these motions:

- Amended Notice of Motion, Affidavit of Service, Notice of Motion, Affirmation in Support and Exhibits.....X**
- Notice of Cross Motion, Affidavit in Support/Opposition, Affirmation in Support/Opposition and Exhibits.....X**
- Memorandum of Law in Support/Opposition.....X**
- Affirmation in Opposition/Further Support and Exhibit.....X**
- Reply Affirmation in Support.....X**

This matter is before the Court for decision on 1) the motion filed by Plaintiff Daniel Perla Associates, L.P. ("DPA" or "Plaintiff") on October 20, 2010, and 2) the cross motion filed by Defendant Cathedral Church of St. Lucy's ("Church" or "Defendant"), both of which were submitted on February 4, 2011. For the reasons set forth below, the Court 1) grants the branch of Defendant's cross motion (Motion Sequence # 2) seeking to transfer venue of this matter to Kings County and directs that the above-captioned action, including all motions, is transferred in its entirety to Kings County; 2) refers the motion and cross motion (Motion Sequence #s 1 and 2) to the Kings County judge who is assigned to this matter after the transfer; 3) directs that the above-captioned action is stayed pending further court order; and 4) **directs the Clerk of**

Nassau County to transfer forthwith the entire file, including all motion papers regarding any motions that have been filed in Nassau County, to the Clerk of Kings County.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3213, granting Plaintiff's motion for summary judgment in lieu of complaint.

Defendant cross moves for an Order 1) pursuant to CPLR §§ 3211(a)(5) and (8), dismissing the action; 2) pursuant to NYCRR § 130-1.1 awarding sanctions to Defendant based on Plaintiff's allegedly frivolous conduct in filing an action based on claims that were previously dismissed; or, alternatively 3) pursuant to CPLR § 510, transferring venue to the Supreme Court of Kings County, New York ("Kings County), where Plaintiff filed its first action regarding the same claims raised herein.

B. The Parties' History

In his Affirmation in Support of Plaintiff's motion, counsel for Plaintiff affirms as follows:

On December 12, 1986, Green Point Bank ("Green Point") entered into a loan agreement with the Defendant pursuant to which Green Point lent Defendant the principal sum of \$175,000.00 and Defendant executed a note promising repayment of the principal, plus interest. On December 24, 1994, Green Point entered into a loan agreement with the Defendant, pursuant to which Green Point lent Defendant the principal sum of \$26,692.54 and Defendant executed a note promising repayment of the principal, plus interest.

On December 28, 1994, these loans and notes were consolidated pursuant to a consolidation, extension and modification agreement ("Consolidated Note") (Ex. A to Thompson Aff. in Supp.). Pursuant to the Consolidated Note, Defendant promised to pay the principal amount of \$165,461.12, with interest. The Consolidated Note 1) provides for monthly payments of principal and interest; 2) provides that Defendant will pay the holder interest at a yearly rate of 9%, a late charge of 5% of any overdue monthly principal and interest payment, and expenses incurred in enforcing the Consolidated Note, including reasonable attorney's fees; and 3) provides that any sums due and owing will be paid in full on the maturity date of January 1, 2010.

The Consolidated Note was secured by a mortgage (“Mortgage”). On or about December 27, 2001, Green Point assigned the Consolidated Note to Vincent Crisci (“Crisci”) and on April 1, 2002, Crisci assigned the Consolidated Note to the Plaintiff. The assignment (“Assignment”) (Ex. B to Thompson Aff. in Supp.) Was recorded on June 10, 2002.

Defendant never paid payments pursuant to the Consolidated Note. Notice of default was provided in March of 2004 and Plaintiff subsequently commenced a foreclosure action based on that default, *Daniel Perla Associates, L.P. v. Cathedral Church of St. Lucy’s, New York City Environmental Control Board, The People’s Church, Inc. and Louis T. Milazzo, John Doe and Jane Doe*, Kings County Index Number 594-06 (“Related Kings County Action”). Perla, the General Partner of DPA, provided an Affidavit in Support of plaintiff’s motion for summary judgment in the Kings County Action (“Perla Kings County Affidavit”) (Ex. C to Thompson Aff. in Supp.).

By decision dated February 25, 2008 (“Kings County Decision”) (Ex. D to Thompson Aff. in Supp.), the Court in the Related Kings County Action 1) denied DPA’s motion for summary judgment and appointment of a referee to compute; and 2) granted the defendants’ cross motion for dismissal of the complaint. In that Decision, the Court noted that the defendants, in opposition to DPA’s motion and in support of their cross motion, had argued that the Mortgage and related loan documents were never given prior judicial approval pursuant to Section 12 of the Religious Corporations Law. DPA argued that summary judgment had already been granted to Green Point in a prior foreclosure action titled *Daniel Perla Associates, L.P. v. Cathedral Church of St. Lucy’s, New York City Environmental Control Board, The People’s Church, Inc. and Louis T. Milazzo, John Doe and Jane Doe*, Kings County Index Number 30521-05 (“Prior Foreclosure Action”), that the Church failed to raise any issue of court approval in connection with that action, and that the Church was thereby precluded from raising this issue in the Related Kings County Action. The Court rejected DPA’s contention that the defendants were collaterally estopped from challenging the validity of the Consolidated Mortgage, and granted the motion to dismiss the complaint based on the Court’s determination that the Mortgage was invalid pursuant to Section 12 of the Religious Corporation Law which requires prior judicial approval of a religious corporation’s encumbrance of real property. See Kings County Decision at pages 1 and 4-7. Plaintiff’s counsel submits that no such bar exists in

the matter *sub judice*, which is an action on the Note itself.

In his Affirmation in Support of the cross motion and Opposition to the motion, Father Louis Milazzo (“Milazzo”), the pastor and archbishop of the Church, affirms as follows:

This is DPA’s second action against the Church regarding the same Consolidated Mortgage, and Milazzo reaffirms and incorporates the sworn statements he provided in the Prior Foreclosure Action (Ex. C to Milazzo Aff. in Supp./Opp.). Milazzo submits that the Court should deny Plaintiff’s motion, and grant Defendant’s cross motion “because the mortgage at issue lacks the statutorily necessary approvals and is an invalid product of a nefarious scheme involving plaintiff, his friend and [the Church’s] former and now deceased pastor, as described in my prior affidavits and the exhibits attached thereto” (Milazzo Aff. at ¶ 2). Milazzo argues, further, that the Court should dismiss the instant action (“Instant Action”) in light of the decision in the Prior Foreclosure Action (Ex. D to Milazzo Aff.) in which the Court determined that the Mortgage at issue is invalid. Milazzo contends, further, that the Court should dismiss this action for failure to effect proper service, alleging that Plaintiff “dumped” the court papers outside the gate of the Church and did not provide the Church with any other copy of those papers (Milazzo Aff. at ¶ 3).

Milazzo also submits that the Court should sanction Plaintiff for filing the Instant Action, in light of the prior decisions in this matter. Alternatively, Milazzo asks the Court to transfer venue of this action to Kings County, where it can be assigned to the judge who is already familiar with the Prior Foreclosure Action and Prior Kings County Action.

C. The Parties’ Positions

Defendant submits that, if the Court denies its cross motion to dismiss the Instant Action, the Court should transfer the Instant Action to Kings County on the grounds, *inter alia*, that 1) the Court in Kings County is “intimately familiar with the facts of this case” (D’s Memorandum of Law at p. 24); 2) the property that is allegedly the subject of the Consolidated Mortgage is in Kings County; and 3) DPA’s current lawsuit against the title company relating to the Consolidated Mortgage is in Kings County.

Plaintiff submits that the invalidity of the Mortgage does not preclude the Instant Action on the Note. With respect to Defendant’s alternative application to transfer venue of the Instant Action to Kings County, Plaintiff submits that the Court should deny that application because

Defendant has failed to establish that the convenience of material witnesses and the ends of justice would be promoted by that transfer.

RULING OF THE COURT

CPLR §§ 510(1) - (3) provide that the Court, upon motion, may change the place of trial of an action where:

1. the county designated for that purpose is not a proper county; or
2. there is reason to believe that an impartial trial cannot be had in the proper county; or
3. the convenience of material witnesses and the ends of justice will be promoted by the change.

The Court concludes that, in light of 1) the litigation of the Prior Foreclosure and Kings County Actions in Kings County, 2) the corresponding familiarity of the Court in Kings County with the background of the parties' dispute, 3) the Church's location in Kings County, and 4) the subject real property's location in Kings County, the transfer of the Instant Action to Kings County, New York would promote the convenience of material witnesses and the ends of justice. Accordingly, the Court grants that branch of Defendant's cross motion that seeks to transfer venue of this action to Kings County, New York. In light of the foregoing, it is hereby:

ORDERED, that the branch of Defendants' cross motion (Motion Sequence # 2) seeking to transfer venue of this matter to Kings County is hereby granted and this matter is transferred in its entirety to Kings County; and it is further

ORDERED, that Motion Sequence numbers 1 and 2 are referred to the Kings County judge who is assigned to this matter after the transfer; and it is further

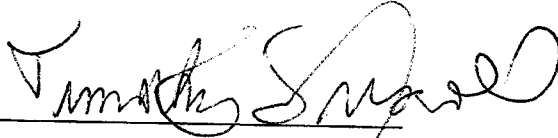
ORDERED, that this proceeding is stayed pending further court order; and it is further

ORDERED, that the Clerk of Nassau County is directed to transfer forthwith the entire file, including all motion papers regarding any motions that have been filed in Nassau County, to the Clerk of Kings County.

All matters not decided herein are hereby denied.
This constitutes the decision and order of the Court.

DATED: Mineola, NY
March 17, 2011

ENTER


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
MAR 21 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE