

Bank of Am. v KESO SAGG, LLC

2011 NY Slip Op 30808(U)

March 28, 2011

Supreme Court, Suffolk County

Docket Number: 9600/10

Judge: Denise F. Molia

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Index No.: 9600-10

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA,
Justice

BANK OF AMERICA,

Plaintiff,

- against -

KESO SAGG, LLC, KESO SAGG 2 LLC, PRIF II WILLIAM, LLC, KENT M. SWIG, and "JOHN DOE #1" through "JOHN DOE #10", the last ten 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.

KESO SAGG, LLC, KESON SAGG 2 LLC, ELIZABETH M. SWIG, THE TRUST FBO OLIVER BURG SWIG-1998, OLIVER BURG SWIG, THE TRUST FBO SIMON MACKLOWE SWIG-1998, SIMON MACKLOWE SWIG, and KMS HOLDINGS, LLC,

Counterclaimants, Cross-Claimants and
Additional Counterclaimants,

- against -

BANK OF AMERICA, N.A., PRIF II WILLIAM, LLC, KENT M. SWIG, and "JOHN DOE #1" through "JOHN DOE #10", the last ten 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,

Additional Defendant and Counterclaimant/
Cross-Claim Defendants.

CASE DISPOSED: NO
MOTION R/D: 8/24/10
SUBMISSION DATE: 12/10/10
MOTION SEQUENCE No.: 001 MOT D
002 MOT D
003 MOT D

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Upon the following papers filed and considered relative to this matter:

RST

Notice of Motion dated July 26, 2010 (001); Affirmation in Support dated July 26, 2010; Exhibit A annexed thereto; Memorandum of Law; Notice of Motion dated July 27, 2010 (002); Affirmation in Support dated July 27, 2010; Exhibits 1 through 4 annexed thereto; Notice of Motion dated August 27, 2010 (003); Affidavit of Elizabeth M. Swig dated October 6, 2010; Exhibits A through D annexed thereto; Affidavit of Stephen B. Meister dated October 6, 2010; Exhibits A through T annexed thereto; Memorandums of Law; Reply Memorandums of Law; and upon due deliberation; it is

ORDERED, that the portion of the motion by defendant Kent M. Swig, pursuant to CPLR 3211(a)(1), (3), and (7), for an Order dismissing the claims of the Verified Answer, Counterclaim, Cross-Claim and Complaint brought by the defendants/Cross-Claimants, Keso Sagg, LLC, and Keso Sagg 2, LLC based on (1) documentary evidence, (2) lack of standing to sue, and (3) the failure to state a claim for which relief may be granted, is denied; and it is further

ORDERED, that the portion of the motion by defendant Kent M. Swig, pursuant to CPLR 3211(a)(1), (3), and (7), for an Order dismissing the claims of the purported Additional Counterclaimants, Elizabeth M. Swig, The Trust FBO Oliver Burg Swig-1998, Oliver Burg Swig, The Trust FBO Simon Macklowe Swig-1998, Simon Macklowe Swig, and KMS Holdings, LLC, is granted.

ORDERED, that the portion of the motion by plaintiff Bank of America, N.A., pursuant to CPLR 3211(a)(1), (6), and (7), dismissing as against the plaintiff, the Counterclaims and Complaint contained in the Verified Answer, Counterclaims, and Cross-Claim of Keso Sagg, LLC, and Keso Sagg2, LLC, is granted; and it is further

ORDERED, that the portion of the motion by plaintiff Bank of America, N.A., pursuant to CPLR 3211(b), dismissing each of the affirmative defenses asserted against plaintiff, is granted; and it is further

ORDERED, that the portion of the motion by plaintiff Bank of America, N.A., for an Order dismissing the purported Complaint of Additional Counterclaimants dated May 20, 2010 as asserted by Elizabeth M. Swig, The Trust FBO Oliver Burg Swig-1998, Oliver Burg Swig, The Trust FBO Simon Macklowe Swig-1998, Simon Macklowe Swig, and KMS Holdings, LLC, is granted; and it is further

ORDERED, that the portion of the motion by plaintiff Bank of America, N.A., pursuant to CPLR 603, severing the plaintiff's mortgage foreclosure action from any and all remaining claims raised by the Cross-Claimants and Counterclaimants in the Answer and Counterclaim, including but not limited to the claim for a declaration quieting title pursuant to RPAPL Article 15, is granted ; and it is further

ORDERED, that the instant action in foreclosure is hereby severed from any remaining claims asserted by the counterclaimants Keso Sagg, LLC, and Keson Sagg 2, LLC, in their Answer and Counterclaim, including but not limited to the claim for a declaration of Quiet Title

pursuant to RPAPL Article 15. Such claims do not pertain to the plaintiff, the validity of the subject Note and Mortgage, or the default of KS and KS2 under the subject Note and Mortgage.

ORDERED, that the portion of the motion by defendant Prif II William LLC, pursuant to CPLR 3211(a)(1), (3), and (7), for an Order dismissing the Crossclaim of defendants/crossclaim plaintiffs, Keso Sagg, LLC, and Keson Sagg 2, LLC, is denied; and it is further

ORDERED, that the portion of the motion by defendant Prif II William LLC, pursuant to CPLR 3211(a)(1), (3), and (7), for an Order dismissing the Counterclaims and Cross-Claims of the purported Additional Plaintiffs, Elizabeth M. Swig, The Trust FBO Oliver Burg Swig-1998, Simon Macklowe Swig, and KMS Holdings, LLC, upon the pleadings and attached exhibits, is granted.

The instant action arises from the plaintiff, Bank of America, N.A.'s ("BoA") claim for the foreclosure of a \$15 million Consolidation, Extension, and Modification Agreement dated February 29, 2008 ("CEMA"), respecting the properties located at 610 and 612 Sagg Lake Lane, Sagaponack, New York. In the Verified Complaint, the plaintiff named only Keso Sagg, LLC ("KS"), Keso Sagg 2 LLC ("KS2"), PRIF II William ("PRIF"), Kent M. Swig ("Kent"), and "John Does" claiming an interest in the mortgaged premises.

Elizabeth M. Swig ("Elizabeth"), FBO Oliver Burg Swig-1998 ("Oliver's Trust"), Oliver Burg Swig ("Oliver"), The Trust FBO Simon Macklowe Swig-1998 ("Simon's Trust"), Simon Macklowe Swig ("Simon"), and KMS Holdings, LLC ("KMS"), although neither named defendants nor parties who have sought leave to intervene, responded to the Verified Complaint by filing a single pleading captioned Verified Answer, Counterclaim, Cross-Claim and Complaint, which purports to allege a single claim pursuant to RPAPL Article 15 to quiet title of the mortgaged premises. None of the aforementioned Counterclaimants are the record owner of the subject property, or have stated a cause of action as against the plaintiff in the underlying foreclosure action. Accordingly, such persons or entities are not parties to this action.

KS and KS2 were organized as Delaware Limited Liability Companies pursuant to operating agreements dated November 2005 and April 2006, respectively, and are governed by Delaware law. Said operating agreements were in effect in February 2008 when KS and KS2 entered into the CEMA with plaintiff. KS and KS2 each share the same two members: Kent M. Swig and KMS. At the time the CEMA was executed, KS and KS2 vested all management power in Kent Swig, without regard to any notice to, consent or approval of the members as set forth as follows:

14. Management. In accordance with Section 18-402 of the [Delaware Limited Liability Company] Act, management of the Company shall be vested in [Kent] Swig. [Kent] Swig shall have the power to do any and all acts necessary, convenient or incidental to or for the furtherance of the purposes described herein, including all powers, statutory or otherwise, possessed by members of a limited liability company under

the laws of the State of Delaware.

KMS was organized in 2001 as a New York Limited Liability Company, governed by New York law, with the following four members: Kent, Elizabeth, Oliver's Trust, and Simon's Trust. The operating agreement of KMS does not mention KS, KS2, or the mortgaged premises.

As alleged in the Complaint and admitted in the Counterclaim, the subject mortgaged premises are owned by KS and KS2. The Counterclaim does not allege that any of the purported additional litigants were ever in ownership of the subject mortgaged premises. Instead, the Counterclaim only affirmatively alleges that "KS and KS2 have superior title to the [mortgaged premises] which is superior and paramount to all other claims of right, title, interest or other liens."

In reviewing a motion to dismiss, the Court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory," (Leon v. Martinez, 84 N.Y.2d 83, 87-88), with dismissal proper in cases where the factual allegations fail to state any cause of action cognizable at law. Caniglia v. Chicago-Tribune-N.Y. News Syndicate, Inc., 204 A.D.2d 233, 612 N.Y.S.2d 146. "[T]he court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts." Leder v. Spiegel, 31A.D.3d 266, 267, 819 N.Y.S.2d 26.

"The Delaware Limited Liability Company Act allows great flexibility in assigning and delegating management authority." In re 1031 Tax Group, LLC, No. 07-11448, 2007 WL 208538 (S.D.N.Y. Brptcy July 17, 2007); 6 Del. Code Title 6, §18-402. Where the operating agreement of a Delaware limited liability company vests a manager with full management authority, he has broad power to conclusively to bind the company. Chase Manhattan Bank v. Iridium Africa Corp., 197 F. Supp.2d 120, 128-29 (D. Del. 2002).

The Counterclaim admits that the mortgaged premises are owned by KS and KS2. The operating agreements of KS and KS2 which were in effect at the time the CEMA was executed, explicitly vested all management power in Kent Swig, including the power to

- a. acquire by purchase, lease, contribution of property or otherwise, own, hold, sell, convey, transfer or dispose of any real or personal property . . .;
- e. borrow money and issue evidences of indebtedness in furtherance of any or all of the purposes of the company, and secure the same by mortgage, pledge or other liens on the assets of the Company;
- h. enter into, perform and carry out contracts of any kind . . .;

The documentary evidence submitted by KS and KS2 demonstrates that Kent Swig was the manager at the time that the CEMA was executed. By the terms of the KS and KS2 operating agreements, Kent Swig was authorized to encumber the mortgaged premises. Based upon the facts, KS and KS2 have failed to state a cause of action as against the plaintiff, Bank of America, N.A.

The remaining purported counterclaimants, Elizabeth Swig, Oliver, Oliver's Trust, Simon, Simon's Trust, and KMS, have attempted to join the litigation by merely adding their names to the pleading and attempting to amend the caption, without moving to intervene under either CPLR 1012 or 1013, or without the submission of a proposed pleading in the event intervention were to be permitted. Inasmuch as a motion to intervene was not filed, the purported Additional Counterclaimants are not granted permission to become parties, and they should be dismissed from this action. See, CPLR 1014; see also, Opusunju v. Giuliani, 175 Misc.2d 541, 542, 669 N.Y.S.2d 156, 157. It is noted that even if the Additional Counterclaimants had moved to intervene, such relief would not have been appropriate due to the fact that such parties lack standing, as they are not the real parties in interest with respect to the mortgaged premises. Kolkunove v. Guaranteed Home Mtg. Co. Inc., 43 A.D.3d 878, 842 N.Y.S.2d 46; Baron v. Rocketboom, LLC, 57 A.D.3d 269, 868 N.Y.S.2d 661.

The crux of this litigation emanates from a vigorously contested matrimonial action, and is centered on the allegations that Kent Swig exceeded his authority in the managing of the business and assets of Keso Sagg, LLC, and Keso Sagg 2, LLC, by mortgaging the subject premises and using the proceeds of the loan for his personal use, to the detriment of his wife and children. There is no evidence to demonstrate that the plaintiff was complicit in any activities with Kent Swig of a conspiratorial or fraudulent nature, so as to preclude this action in foreclosure for a loan, made with demonstrated legal authority, from proceeding. Accordingly, in light of the documentary evidence submitted demonstrating ownership of the property and establishing the ability of Kent Swig to mortgage said property in his capacity as manager of KS and KS2, the plaintiff is entitled to a dismissal of the affirmative defenses raised by the defendants and the right to prosecute the underlying foreclosure of the subject mortgage. Any cross claims remaining between the defendants may continue to be explored and litigated upon severance from the foreclosure action.

The foregoing constitutes the Order of this Court.

Dated: March 28, 2011

Hon. Denise F. Molia
HON. DENISE F. MOLIA J.S.C.