

**Valiotis v Bekas**

2011 NY Slip Op 31480(U)

June 2, 2011

Supreme Court, Queens County

Docket Number: 23426/2010

Judge: David Elliot

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Plaintiff commenced this action on September 15, 2010, seeking foreclosure of the mortgage dated August 11, 2004 given by defendants Bekas on the real property known as, 25-36/25-38 31st Avenue, Astoria, New York, comprised of two tax lots (Block 598, Lots 40 & 41), to secure a three-year promissory note, evidencing an indebtedness in the principal amount of \$400,000.00, plus interest. The mortgage requires payment in accordance with the promissory note, which calls for monthly payments of interest only in the first year of the loan, monthly payments of principal and interest in the second and third years of the loan, and the balance due to be paid in full on September 1, 2007. The mortgage contains an acceleration provision in the event of a default by defendants Bekas, which is defined, in part, as failure to make any installment payment of principal or interest within 15 days of the due date. Plaintiff claims he is the holder of the mortgage and note, and that defendants Bekas defaulted under the terms of the mortgage and note by failing to make the interest payments which became due and payable since January 1, 2005. Plaintiff alleges that he elects to accelerate the mortgage debt.

Defendant Demetrios Bekas, appearing pro se,

served an answer denying the allegations of the complaint, asserting numerous affirmative defenses, as well as counterclaims for alleged fraud, breach of fiduciary duty, "tortious conduct," violation of state and federal statutes and "direct liability as principal." He seeks rescission of the subject mortgage transaction, rescission of the transfer to plaintiff of shares of stock in Top Cove Associates, Inc., and an award of compensatory and punitive damages.

Defendant Vaia Bekas, the wife of defendant Demetrios Bekas, appearing pro se, served a separate answer denying the material allegations in the complaint, asserting various affirmative defenses, and interposing a counterclaim for rescission of the mortgage and note.

It is unclear from these submissions whether plaintiff served a reply to the counterclaims asserted by either defendant Demetrios Bekas or defendant Vaia Bekas.

Defendant Demetrios Bekas has submitted opposition papers in relation to the motion by plaintiff, purportedly on behalf of himself and defendant Vaia Bekas. Absent proof that defendant Demetrios Bekas is an attorney in good standing and licensed to practice law in New York, or has an executed power of attorney authorizing him to appear for

defendant Vaia Bekas in this action, he may not appear on behalf of Vaia Bekas in opposition to the motion.

Preliminarily, the court notes that CPLR 3408 provides a mandatory settlement conference be held in any residential foreclosure action involving a "home loan" as defined pursuant to RPAPL 1304, in which "the defendant" (emphasis supplied) is a "resident" of the property subject to foreclosure. Plaintiff asserts that the subject property is commercial real estate, and does not fit within the criteria for inclusion in the residential foreclosure program. Defendants Bekas have failed to prove that the subject mortgage involves a "home loan," i.e., a loan which was incurred primarily for personal, family or household purposes, and that they, as opposed to other family members, reside in the premises (CPLR 3408, RPAPL 1304, 22 NYCRR 202.12-a). Moreover, the respective answers of defendants Bekas admit that they reside at another premises in Bayside, New York. As a consequence, no mandatory settlement conference is required in this action.

With respect to that branch of the motion to discontinue the action against defendants "John Doe," "Jane Doe" and "XYZ Corporation," and substitute George Kouvaras

and Piros in their place and stead, plaintiff named "John Doe," "Jane Doe" and "XYZ Corporation" as party defendants, whose names were unknown to him, but who were intended to be tenants or persons with a claim or interest in the property. Plaintiff caused George Kouvaras to be served with process as defendant "John Doe," a tenant at the premises, and further caused Piros to be served with process as defendant "XYZ Corporation." Thus, that branch of the motion seeking to amend the caption by deleting "John Doe," "Jane Doe," and "XYZ Corporation" and substituting George Kouvaras and Piros in their place and stead is granted.

With respect to the branch of the motion by plaintiffs for summary judgment against defendants Bekas, it is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment in a foreclosure action, a plaintiff must make a prima facie showing by producing the mortgage, the note, and evidence of default (see *EMC Mtge.*

*Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002]; *IMC Mtge. Co. v Griggs*, 289 AD2d 294 [2001]; *Paterson v Rodney*, 285 AD2d 453 [2001]; *Republic Natl. Bank of N.Y. v Zito*, 280 AD2d 657, 658 [2001]; *Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, 559 [1997]).

In support of his motion, plaintiff offers, among other things, a copy of the verified complaint, the answers of defendants Bekas, affidavits of service, the mortgage and underlying note, an affirmation of regularity of his counsel, and his own affidavit dated January 24, 2011. Plaintiff, in his verified complaint, attests to the default in payment by defendants Bekas under the mortgage and note by failing to make interest payments which became due and payable on January 1, 2005.

These submissions establish plaintiff's prima facie entitlement to summary judgment as against defendants Bekas (see *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856 [2009], *supra*; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002], *supra*; *IMC Mtge. Co. v Griggs*, 289 AD2d 294 [2001]; *Paterson v Rodney*, 285 AD2d 453 [2001], *supra*). The burden shifts to defendants Bekas to raise a triable issue of fact regarding their respective affirmative defenses (see

*Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282 [2005]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002], *supra*; *First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2000]).

In his opposition papers, defendant Demetrios Bekas claims plaintiff was a long-time family friend, and business partner and advisor, and as a consequence, he believed plaintiff was acting in his best interest when he devised a plan for him to deal with pressing debts and personal problems. Defendant Demetrios Bekas asserts the plan called for defendants Bekas to enter into the subject mortgage loan and transfer stock in Top Cove Associates, Inc. (Top Cove), to River City LLC, an entity owned by plaintiff, and for Demetrios Bekas to execute a confession of judgment in favor of plaintiff. Defendant Demetrios Bekas asserts that plaintiff knew the Bekases would be unable to afford the subject mortgage loan, but exploited his fiduciary relationship with them, and made various misrepresentations to induce them to enter into the mortgage loan, and Demetrios Bekas to transfer the stock, and execute the confession of judgment. According to defendant Demetrios Bekas, he and Vaia Bekas entered into the mortgage

transaction, without the benefit of legal counsel or proper disclosure, and transferred the Top Cove stock to River City LLC, in reliance upon plaintiff's misrepresentations that he would hold the Top Cove stock as their "nominee," accept profit distributions from Top Cove in lieu of mortgage payments by them, and refrain from prosecuting any foreclosure action. Defendant Demetrios Bekas claims plaintiff also misrepresented that he would cause the real property owned by Top Cove (the Top Cove property) to be rezoned to permit residential use, and upon the rezoning, convey the Top Cove shares back to defendants Bekas. Defendant Demetrios Bekas additionally claims that plaintiff wrongfully refuses to reconvey the shares of Top Cove stock to the Bekases, and has engaged in racketeering, by committing bribery and wire fraud in relation to an entity known as "Levant Lines," and notary fraud.

Defendant Demetrios Bekas asserts lack of consideration as an affirmative defense in his answer. Defendant Demetrios Bekas, however, does not dispute that plaintiff's check (#2444), in the amount of \$400,000.00, represents the mortgage proceeds, or that it was made payable to "P.I. Sports" at the direction of defendants

Bekas. Although defendant Demetrios Bekas asserts "upon information and belief," the check is a "fake," and a "forgery," he makes no claim that the check was dishonored, or returned as unpaid.

With respect to the affirmative defenses asserted by defendants Bekas in their respective answers, based upon claims of misrepresentation, fraudulent inducement, breach of fiduciary duty, breach of the "loan commitment" or mortgage, or implied covenants of good faith and fair dealing, negligent lending, estoppel and waiver, parties are under an obligation to read a document before they sign it, and cannot generally avoid the effect of a document (see *Cash v Titan Financial Servs., Inc.*, 58 AD3d 785, 788 [2009]), in the absence of proof they were in a fiduciary or confidential relationship with the person who purportedly made the misrepresentations (see *Levin v Kitsis*, 82 AD3d 1051 [2011]).

Based upon the language of the promissory note and subject mortgage, plaintiff is entitled to foreclose the subject mortgage upon the default by defendants Bekas in making the payments of interest due thereunder. In addition, the note and mortgage do not indicate plaintiff is

limited to seeking profit distributions, if any, from Top Cove in satisfaction of the mortgage debt. The mortgage, furthermore, provides it may not be orally changed or terminated, and the note bars oral waivers. Defendants Bekas have failed to demonstrate that their relationship with plaintiff, vis-a-vis the subject mortgage loan, was anything other than a contractual one of debtor and creditor. As a consequence, it was unreasonable for defendants Bekas to believe that plaintiff would refrain from prosecuting a foreclosure action against them if they were to default in making interest payments, in light of the clear written provision in the mortgage stating the availability of such remedy (*see Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175 [1982]; *Flintkote Co. v Bert Bar Holding Corp.*, 114 AD2d 400 [1985]; *New York State Urban Dev. Corp. v Garvey Brownstone Houses*, 98 AD2d 767, 771 [1983]).

In the absence of any fiduciary or confidential relationship in connection with the mortgage loan, defendants Bekas have failed to show plaintiff was obligated to exercise due regard as to their ability to repay the loan (*see Bank Leumi Trust Co. v Block 3102 Corp.*, 180 AD2d 588,

589 [1992], lv denied 80 NY2d 754 [1992]; *Walts v First Union Mortg. Corp.*, 259 AD2d 322 [1999]; cf. Banking Law § 6-1 [prohibits a lender or mortgage broker from making or arranging a "high-cost home loan" (as defined therein) without due regard to the borrower's repayment ability]).

Defendants Bekas assert as an affirmative defense and defendant Demetrios Bekas asserts as a counterclaim in his answer, that the subject mortgage was not signed in the presence of a notary public and plaintiff is guilty of "notary fraud." Plaintiff has presented a copy of the subject mortgage which, on its face, is properly subscribed and bears a certificate of acknowledgment of a notary public. The certificate of acknowledgment on the power of attorney constitutes prima facie proof of the authenticity of the signatures of defendants Bekas (see CPLR 4538; *Hoffman v Kraus*, 260 AD2d 435 [1999]), and in any event, defendants Bekas make no claim that they did not sign the mortgage (see *Sobel v Wolf*, 28 Misc 2d 708 [1961]).

Defendants Bekas assert in their respective answers that they executed the mortgage without the benefit of legal counsel. There is no legal requirement, however, that a borrower be represented by an attorney in connection

with a mortgage loan transaction, and defendants Bekas make no claim that plaintiff interfered with their right to consult with an attorney at anytime, including at the closing of the transaction.

Defendants Bekas assert in their respective answers that plaintiff is guilty of laches in bringing this action. Laches is not a defense to a mortgage foreclosure proceeding where, as here, the action was commenced within the statute of limitations (CPLR 213[4]; see *New York State Mtge. Loan Enforcement & Admin. Corp. v North Town Phase II Houses, Inc.*, 191 AD2d 151 [1993]; *Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc.*, 173 AD2d 1004 [1991]). Even if the defense was available here, defendants Bekas have not shown that they changed their position, or failed to take some action to their prejudice as a result of the alleged delay.

Defendant Demetrios Bekas asserts that the mortgage loan is unconscionable and plaintiff is guilty of unclean hands because a clause in the mortgage note (dated August 11, 2004) provides that the note shall become due and payable in the event a judgment is entered against the obligors, and at the time of the execution of the note, a

confession of judgment dated June 8, 2004 already had been entered by plaintiff against defendant Demetrios Bekas. This assertion is rejected because plaintiff did not elect to accelerate the mortgage on the basis of the entry of the confession of judgment, and makes no claim that the entry of such judgment constituted a default by defendants Bekas under the terms of the mortgage.

To the degree defendant Demetrios Bekas asserts that plaintiff is guilty of a violation of the Federal Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC § 1961 et seq.), he has failed to assert factual allegations indicating the subject mortgage debt is an unlawful one (see 18 USC § 1962[a]). Defendant Demetrios Bekas, moreover, acknowledged the subject mortgage debt was "legitimate," in his verified complaint in the action entitled *Bekas v Valiotis* (Supreme Court, Queens County, Index No. 9318/2010).

Defendants Bekas assert in their respective answers that plaintiff failed to "disclose" and "deliver" to them all pertinent documents related to the mortgage. They, however, have failed to demonstrate plaintiff had any legal obligation to disclose the terms of the loan to them in

advance of August 11, 2004, the date when the loan documents were executed, or provide a copy of the executed mortgage documents to them. Although there are disclosure and delivery requirements pursuant to the Truth in Lending Act [TILA] (15 USC 1601 et seq.) and Real Estate Settlement and Procedures Act [RESPA] (12 USC § 2601 et seq.), TILA and RESPA do not apply here because the instant mortgage loan involves an extension of credit primarily for a business or commercial purpose (see 15 USC § 1603[1]; 12 USC § 2606[a][1]).

The claim by defendants Bekas that plaintiff has violated the Home Ownership and Equity Protection Act ("HOEPA"), an amendment to the TILA, is without merit. To qualify as a mortgage under the HOEPA, a mortgage loan must be a "consumer credit transaction" (15 USC § 1602[h]) with a "creditor" (15 USC § 1602[f]) secured by the "consumer's principal dwelling" (15 USC § 1602[v]) and must be a second or subordinate residential mortgage as opposed to a "residential mortgage transaction" (15 USC § 1602[w]). Again, defendants Bekas have failed to prove that the subject property is their "principal dwelling." Nor do defendants Bekas claim that the terms of the executed

mortgage, relied upon by plaintiff in support of his motion, differ from the copy of the mortgage which was annexed as "Exhibit H" to the answer of defendant Demetrios Bekas.

To the extent defendant Demetrios Bekas raises the violation of General Business Law § 349 in his answer as an affirmative defense and counterclaim, that section prohibits deceptive business practices and acts. A claim under General Business Law § 349 must include an allegation of a consumer-oriented act or practice that is misleading in a material way which causes injury to the party seeking relief (see *Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). An act is deceptive if it is likely to mislead a reasonable consumer acting reasonably under the circumstances (see *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995]). The act need not constitute common-law fraud to be actionable (see *Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000], *supra*). Although an individual mortgagor who has been the victim of misleading practice by a mortgagee has been held to have a remedy under General Business Law § 349 (see *e.g. Popular Financial Services, LLC v Williams*, 50 AD3d 660 [2008]; *Delta Funding Corp. v Murdaugh*, 6 AD3d 571 [2004]), the assertion by defendants

Bekas that plaintiff fraudulently induced them to enter into the loan transaction does not "amount to conduct affecting the consuming public at large" and "is outside the ambit of [the] statute" (*Brooks v Key Trust Co. Nat. Assn.*, 26 AD3d 628 [2006]).

To the degree defendant Demetrios Bekas asserts plaintiff violated General Business Law § 598 as an affirmative defense and counterclaim, that section has no relevance to the facts herein. It imposes a penalty for the wilful refusal by a person in charge of a personal service business, in violation of General Business Law § 597, to issue a receipt to a customer for personal property left in his or her custody.

Under these circumstances, the counterclaims asserted by defendants Bekas sounding in fraud and breach of fiduciary duty relative to the subject mortgage and note, violations of TILA, RESPA, HOEPA and the General Business Law, and for rescission of the subject mortgage and note are not viable.

With respect to the counterclaims asserted by defendant Demetrios Bekas for tortious and fraudulent conduct allegedly committed by plaintiff in relation to the

confession of judgment, Demetrios Bekas previously asserted claims against Efstathios Valiotis in the Bekas action under Index No. 9318/2010 for fraud in the inducement in connection with the stock sale agreement and confession of judgment, breach of fiduciary duty, breach of implied covenants of good faith and fair dealing in connection with confession of judgment and Top Cove stock sale agreement and, "tort outrage," tortious inference with prospective business relations, and "damage" to creditors. By order dated September 22, 2010 in the Bekas action, the court granted the motion by Valiotis pursuant to CPLR 3211 to dismiss the complaint in that action. The court determined therein that an affidavit of Demetrios Bekas, submitted in another action entitled *Gatzonis v Top Cove Assocs., Inc.* (Supreme Court, Queens County, Index No. 1493/2005), established that Bekas had executed the confession of judgment for valid debts. The court also determined that because Bekas had been successful in his position in the *Gatzonis* action, he could not take a contrary position in the Bekas action simply because his interest in relation to the confession of judgment had changed.

This court adopts the same reasoning, and likewise

concludes that based upon the doctrine of judicial estoppel, defendant Demetrios Bekas may not assert counterclaims against plaintiff for alleged fraud, breach of fiduciary duty, RICO and General Business Law violations and prima facie tort in relation to the confession of judgment simply because such an argument may favor him in this matter.

Defendant Demetrios Bekas asserts as a counterclaim that the transfer of the Top Cove stock was a result of tortious and fraudulent conduct committed by plaintiff. He claims that he was fraudulently induced to transfer the Top Cove stock to plaintiff in exchange for \$2.5 million, based upon plaintiff's misrepresentations that plaintiff would hold the stock as his nominee, cause the Top Cove property to be rezoned to increase its fair market value, and recoup monies owed by defendant Bekas to plaintiff out of the increased equity. Defendant Demetrios Bekas asserts, in effect, that he relied upon such misrepresentations to his detriment since plaintiff had previously offered, in a June 28, 2004 letter, to purchase the stock from him for \$3.25 million.

Although plaintiff argues that defendant Demetrios Bekas is precluded from asserting such counterclaim by

virtue of the September 22, 2010 order in the Bekas action, the court therein dismissed Bekas's claims relative to the transfer of the Top Cove due to pleading inadequacies, and not on the merits. Nevertheless, the elements of a cause of action alleging fraud in the inducement are representation of a material existing fact, falsity, scienter, reliance, and injury (see *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 407 [1958]; *Urstadt Biddle Properties, Inc. v Excelsior Realty Corp.*, 65 AD3d 1135 [2009]; *Urquhart v Philbor Motors, Inc.*, 9 AD3d 458, 458-459 [2004]). The alleged promises regarding the rezoning of the Top Cove property, etc., were not misrepresentations of material existing facts. The stock sale agreement contains no reference to any of the alleged promises made by plaintiff to rezone the Top Cove property, recoup monies, or reconvey the stock. It is also notable that Demetrios Bekas, in an affidavit dated February 17, 2005, submitted to the court in the Gatzonis action, affirmed the factual statements made by his attorney in that action in an affirmation dated the same date. Such counsel's affirmation, which mentions the sale of the Top Cove stock to plaintiff for the purchase price of \$2.5 million, is silent as any alleged promises made by

plaintiff to defendant Demetrios Bekas to rezone the Top Cove property, etc.

Defendant Demetrios Bekas asserts as a counterclaim that plaintiff, by bringing this action for foreclosure, is guilty of conduct which constitutes a prima facie tort. However, he has failed to allege or prove that this action was brought without any justification and he has suffered special damages (*see Freihof v Hearst Corp.*, 65 NY2d 135 [1985]; *Nationscredit Financial Services Corp. v Turcios*, 55 AD3d 806 [2008]).

Defendant Demetrios Bekas has failed to state a counterclaim predicated upon a violation of RICO. He has failed to assert factual allegations showing the subject mortgage debt is an unlawful one. In addition, with respect to his claims relative to Levant Lines, he alleges that due to plaintiff's commission of bribery and wire fraud, he and other "shareholders," who personally guaranteed the "Kreatsoulos debt," were unable to meet their financial obligations. Such allegation is insufficient to establish that an injury came about "by reason of" a RICO violation (*see Hemi Group, LLC v City of New York, N.Y.*, \_\_\_ US \_\_\_, 130 S Ct 983, 175 L Ed 2d 943 [2010] [a plaintiff must show

that a predicate offense "not only was a 'but for' cause of his injury, but was the proximate cause as well"). Nor is such allegation sufficient to demonstrate such conduct constituted the necessary element of an enterprise (see 18 USC §§ 1961, 1962[c]; *Procter & Gamble Co. v Big Apple Indus. Bldgs.*, 879 F2d 10, 14 [1989], cert. denied 493 US 1022 [1990]), and a pattern of racketeering activity, including relatedness and continuity (see 18 USC § 1962[c]; see generally *H.J. Inc. v Northwestern Bell Tel. Co.*, 492 US 229, 236-240 [1989]; *Niagara Mohawk Power Corp. v Testone*, 272 AD2d 910 [2000]).

To the extent defendant Demetrios Bekas also asserts a counterclaim for "direct liability of plaintiff as a principal," the nature of this claim is unclear. The allegations made in connection with this counterclaim merely state legal conclusions, and are insufficient to state a valid cause of action.

Those branches of the motion by plaintiff seeking to strike the respective affirmative defenses and counterclaims asserted by defendants Bekas, and for summary judgment in his favor as against defendants Bekas are granted.

That branch of the motion for leave to appoint a referee is granted.

Settle Order consistent with this Decision.

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J.S.C.