

ARSR Solutions, LLC v 304 E. 52nd St. Hous. Corp.
2012 NY Slip Op 30315(U)
January 23, 2012
Supreme Court, Nassau County
Docket Number: 10272-10
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
ARSR SOLUTIONS, LLC,

Plaintiff,

-against-

304 EAST 52ND STREET HOUSING CORPORATION,

Defendant.
-----X

**TRIAL/IAS PART: 16
NASSAU COUNTY**

**Index No: 10272-10
Motion Seq. Nos: 3 and 4
Submission Date: 11/21/11**

Papers Read on these Motions:

- Notice of Motion, Affidavits in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Notice of Cross Motion, Affidavits in Support/Opposition and Exhibits.....X**
- Reply Affidavits and Exhibits.....X**
- Reply Memorandum of Law in Further Support.....X**

This matter is before the court on 1) the motion by Plaintiff ARSR Solutions, LLC (“ARSR” or “Plaintiff”) filed June 3, 2011, and 2) the cross motion by Defendant 304 East 52nd Street Housing Corporation (“Housing Corp.” or “Defendant”) filed November 7, 2011, both of which were submitted November 21, 2011. For the reasons set forth below, the Court denies the motion and cross motion, including Defendant’s application for legal fees and sanctions.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3212, granting Plaintiff summary judgment against Defendant.

Defendant cross moves for an Order 1) pursuant to CPLR § 3212, dismissing the Complaint (Ex. 7 to Ronneburger Aff. in Supp.); 2) pursuant to CPLR § 3211, dismissing this action; and 3) scheduling a hearing to determine the legal fees and sanctions to be imposed

against Plaintiff based on its pursuit of this allegedly frivolous litigation.

B. The Parties' History

The parties' history is set forth in detail in a prior decision of the Court dated March 21, 2011 ("Prior Decision") in which the Court denied Plaintiff's motion for a default judgment ("Prior Motion") and directed Plaintiff to accept Defendant's Answer. The Court incorporates the Prior Decision herein by reference. As noted in the Prior Decision, the Complaint alleges as follows:

On or about May 8, 2007, East 51st Street Development Company, LLC ("East 51st LLC") executed and delivered to Arbor Realty Funding, LLC ("ARF") an Amended, Restated and Consolidated Loan Promissory Note payable to the order of ARF in the original principal amount of \$39,489,253.20 on the terms set forth in that note. On or about May 8, 2007, East 51st LLC also executed and delivered to ARF a Building Loan Promissory Note payable to the order of ARF in the original principal amount of \$3,704,275 on the terms set forth in that note. On or about May 8, 2007, East 51st LLC also executed and delivered to ARF a Project Loan Promissory Note payable to the order of ARF in the original principal amount of \$2,444,428.80 on the terms set forth in that note. These notes are referred to collectively as the "Notes."

On or about May 8, 2007, James Kennelly ("Kennelly") executed and delivered to ARF a Pledge and Security Agreement. Pursuant to that Pledge and Security Agreement, Kennelly pledged the shares ("Shares") that he owned in Housing Corp., correlating to Units 2, 3 and 4 in the building located at and known as 304 East 52nd Street, New York, New York ("Units") and the proprietary leases appurtenant thereto to secure repayment of the Notes.

Also on or about May 8, 2007, Housing Corp. and ARF entered into a recognition agreement ("Recognition Agreement") in which Housing Corp., *inter alia*, recognized as valid ARF's lien on the shares of Housing Corp. pledged to ARF by Kennelly and the leases appurtenant to those shares which concern the Units. The Recognition Agreement provides, *inter alia*, that 1) Housing Corp. shall recognize ARF's right as lienor against the Units pursuant to the Security and, if one or more of the Leases be terminated and/or Shares canceled, against the net proceeds of any sale or subletting of the applicable Unit, after reimbursement of all sums due under the applicable lease; and 2) notwithstanding any apparent authority granted to ARF under agreements with Kennelly, ARF shall have no right or power to transfer the Units upon foreclosure or otherwise without Housing Corp's approval, which approval shall not be unreasonably withheld or delayed.

On or about April 15, 2010, ARF foreclosed on its lien on the Units and thereafter assigned its winning credit bid of \$750,000 to ARSR. ARSR has succeeded to ARF's rights and obligations under the Recognition Agreement. By letter dated April 27, 2010, addressed to the managing agent and copied to Kennelly, counsel for ARSR wrote to Housing Corp. and demanded that Housing Corp. immediately issue a new stock certificate in the name of ARSR. ARSR received no response and, on May 10, 2010, counsel for ARSR sent a second letter to Housing Corp. repeating its demand in the prior letter. Plaintiff alleges that Housing Corp. has still failed and refused to approve and effectuate the transfer of ownership of Shares and leases appurtenant to the Units to ARSR. Plaintiff further alleges that Housing Corp. has unreasonably withheld its approval of the transfer of the Shares and leases appurtenant, in violation of the Agreement with ARSR.

In its Answer with Counterclaim ("Answer") (Ex. 9 to Ronnenburger Aff. in Supp.), Defendant denies many of the allegations in the Complaint and asserts the following affirmative defenses: 1) Plaintiff fails to state a cause of action on which relief can be granted; 2) Plaintiff is an improper party plaintiff in that it did not possess the rights to the alleged Shares on which it is seeking judgment; 3) Plaintiff is barred from recovery under the doctrine of unclean hands; and 4) Plaintiff's cause of action fails based on documentary evidence in light of the fact that ARF did not have a lien on the Units as they were included in the Notes contemplated by the February 18, 2010 Agreement acknowledged by ARF and surrendered pursuant to the November 11, 2009 purchase by HFZ from ARF. Defendant also asserts a Fifth Affirmative Defense and Counterclaim in which it alleges that this action is frivolous and was pursued by Plaintiff as a "mere litigation tactic" (Answer at ¶ 30).

C. The Parties' Positions

Plaintiff submits that it is entitled to summary judgment because it has established that the Shares belong to Plaintiff, pursuant to the Recognition Agreement and Assignment of Bid (Exs. 2 and 6 to Connolly Aff. in Supp.). In support, Plaintiff, *inter alia*, 1) cites relevant language in the Recognition Agreement which, Plaintiff contends, "recognized ARF's lien on the Shares and the leases appurtenant to the Units as valid" (P's Memo. of Law in Supp. at p. 7), 2) refers to the filing of UCC-1 Financing Statements (*id.* at Ex. 3) which evidences the transfer of the Units from Kennelly to ARF; and 3) argues that because ARF foreclosed on the Units prior to the Closing of the Loan Purchase and Sale Agreement and assigned its winning bid to Plaintiff, it is clear that Plaintiff is the rightful owner of the Shares. Plaintiff also argues that

Defendant's affirmative defenses and counterclaim do not defeat Plaintiff's right to summary judgment.

Defendant reaffirms the position it took in opposition to the Prior Motion, which is that Plaintiff's claims are frivolous because Plaintiff has no claim to the Units. Defendant contends that, pursuant to the Deed in Lieu Agreement and Loan Purchase and Sale Contract and other relevant documentation, all of ARF's rights to the Units were transferred to HFZ by February 18, 2010 at the latest, and as early as November 11, 2009. Thus, ARF had no authority to conduct the sale of the Units, or transfer any bid to Plaintiff, because it no longer had any rights to the Units.

Defendant also contends that there are numerous weaknesses in Plaintiff's motion papers including but not limited to the following: 1) Connolly affirms that he is an attorney for Arbor Realty Trust which is not a party to this action, and none of the relevant documents refer to that entity; 2) Plaintiff has provided no explanation for how it was legally able to foreclose on its lien on the Units, the procedure it followed prior to foreclosing, the basis for default or the efforts it made to enable Kennelly to cure the default; 3) even assuming *arguendo* that Plaintiff is the holder of the successful bid from the 2010 sale, in light of Plaintiff's failure to explain the foreclosure procedure, there is no legal basis for the foreclosure sale and, therefore, Plaintiff's bid ownership has no measurable value; and 4) the UCC filings provided by Plaintiff only refer to Unit 4 and, therefore, if Plaintiff was in fact the assignee of the bid from a valid UCC sale, it could only have related to Unit 4.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations

will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Dismissal Standards

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's motion and Defendant's cross motion based on the Court's conclusions that there exist issues of fact, including whether ARF owned the Units prior to the foreclosure sale and therefore could assign its bid to Plaintiff, that make summary judgment inappropriate. In addition, the Court denies Defendant's motion to dismiss pursuant to CPLR § 3211 based on its conclusion that the documentary evidence does not definitively contradict the allegations in the Complaint or conclusively establish Defendant's defense.

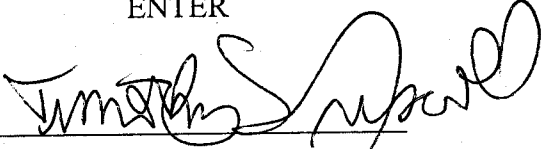
The Court denies Defendant's application for legal fees and sanctions.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on February 1, 2012 at 9:30 a.m. for a Certification Conference.

DATED: Mineola, NY
January 23, 2012

ENTER

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
JAN 30 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE