

Locantro v Randazzo
2012 NY Slip Op 31680(U)
June 8, 2012
Sup Ct, Queens County
Docket Number: 20434/2002
Judge: Frederick D.R. Sampson
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Sampson
Justice

IA Part _____

WILLIAM J. LOCANTRO x

Index
Number 20434 2002

Against

Motion
Date March 29 2012

JOHN RANDAZZO, SR. ET AL.,

x

Motion
Cal. Number 23

Motion Seq. No. 7

The following papers numbered 1 to 34 read on this motion by John Randazzo, Jr., to dismiss the complaint pursuant to CPLR § 3211 (a)(1) and (a)(7), and to terminate the notice of pendency; and on this cross motion by William J. Locantro to compel discovery, pursuant to CPLR § 3025.

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Upon the foregoing papers it is ordered that the motion is denied, and the cross motion is granted.

This is an action by plaintiff William Locantro to foreclose a mortgage given by John Randazzo, Sr. and John Randazzo, Jr. (collectively referred to herein as the Randazzo defendants), as security for a note in the amount of \$58,012.00. John Randazzo, Jr. moves to dismiss the action on the grounds that he did not sign the mortgage note; that service was improperly made; no consideration was given for the mortgage; and that plaintiff failed to

name a necessary party, to wit, the debtor nightclub known as Regine's. Plaintiff opposes the motion, and cross-moves for discovery.

Facts

In or about the Fall of 2001, James Locantro represented 2565 Entertainment Corporation (2565 Corp), an entity that owned Regine's (Regine's), a nightclub located at 2565 Jericho Turnpike in Westbury, New York. By written agreement, 2565 Corp agreed to sell Regine's to Locantro Entertainment Inc., d/b/a Insomnia Entertainment, Inc. (Insomnia), an entity owned by the Randazzo defendants and two of their business partners, Gioacchino Salamone (Salamone) and Salamone A. Matteo (Matteo). The purchase price was \$400,000.00. William Locantro was not a direct party to this transaction, but was owed money by 2565 Corp.

At the time of the sale, 2565 Corp. owed plaintiff approximately \$88,000.00 for unpaid work performed by plaintiff's electrical contracting company, which 2565 Corp. agreed to pay to plaintiff from the proceeds of the sale. This debt arose from a litigation settlement, the terms of which are memorialized in a court order dated August 1, 2001. Absolute Electrical Contracting is owned by plaintiff and the debt from the settlement was assigned to plaintiff individually.

On February 28, 2002, Insomnia appeared at a closing to complete the purchase of Regine's from 2565 Corp. Plaintiff was to be paid the money set forth in the Order by 2565 Corp from the proceeds of the sale of Regine's. However, the Randazzo defendants were unable to close on the club purchase because they were short \$133,012.11 of the purchase price. To make up for the fact that they were short of the purchase price, plaintiff agreed to take payment of \$30,000.00 from 2565 Corp and to take a promissory note and mortgage from the Randazzo defendants. This promissory note was to discharge 2565 Corp's antecedent debt to plaintiff and was credited toward the purchase price of the club. Specifically, plaintiff took a mortgage note from the Randazzo defendants, dated February 28, 2002, in the amount of \$58,012.00, at 15% interest. The note provided for nine monthly payments of \$725.15, with a balloon payment of \$58,737.26 in the tenth month. In discussions at the closing, the Note initially was to be secured by a mortgage on property located at 169-16 24th Avenue, Queens, New York, which Randazzo, Sr. and represented that they owned jointly. Before finalizing the closing, however, Randazzo Sr. acknowledged that the property was not owned by him and Salamone, but instead by him (Randazzo Sr.), and his son. As a result, Randazzo, Jr.'s signature was therefore required on the mortgage and Note, and the documents were modified to reflect this changed identity.

Since Randazzo, Jr. was not present at the closing, Randazzo, Sr. represented that he would take the mortgage home with him and have Randazzo, Jr. sign the mortgage and Note, have the documents notarized and deliver the documents to James Locantro's office the following morning. The mortgage and Note were delivered, as indicated, the next day on March 1, 2002. While reviewing the mortgage and Note, James Locantro investigated the notary and discovered that there was no listing for the notary, "Jeffrey Brown," under the license number listed. James Locantro immediately telephone Randazzo Sr. and insisted on meeting him and his son, Randazzo, Jr., to re-notarize his signature. The Randazzo defendants refused to come to James Locantro's office but agreed to meet at the Neptune Diner (located on the corner of Astoria Boulevard and Roosevelt Avenue in Astoria, Queens), near their home in the late afternoon where they were joined by Salamone and Matteo.

At the diner, James Locantro examined driver's licenses of all of the purchasers including Randazzo, Jr., which listed his address as that of the property, and pointing to the Mortgage and Note, James Locantro asked Randazzo, Jr. if he signed the Mortgage and Note and if that was his signature. When Randazzo, Jr. affirmed his signature on the Mortgage and note, James Locantro re-notarized the documents by affixing his signature. James Locantro then filed the Mortgage with the Queens County Clerk's office on April 1, 2002.

Plaintiff submits that the Randazzo defendants were almost immediately in default of the Note after having paid only two of the ten payments. When the default was not cured and no further payments on the Note were forthcoming, plaintiff instructed James Locantro to deliver default letters to the Randazzo defendants. Accordingly, by letters dated July 16, 2002, James Locantro notified the Randazzo defendants of the default under the Note. Randazzo Jr. did not respond to the default letter or deny that he was a signatory. On or about August 1, 2002, after the Randazzo defendant had still failed to cure the default, plaintiff filed a Notice of Pendency on the property as well as a Summons and Complaint seeking to foreclose on the Property. In preparing the Notice of Pendency and the Complaint, James Locantro ordered a title report, which disclosed that Randazzo, Jr. was the sole owner of the Property.

James Locantro commenced this action by personally serving the Randazzo defendants on August 18, 2002, at the nightclub located at 2565 Jericho Turnpike. The Randazzo defendants never answered the Complaint and the matter was referred to a referee. As a result, on or about January 6, 2006, a Judgement of Foreclosure and Sale was entered in favor of plaintiff and against defendants, confirming the referee's report, namely that defendants owed plaintiff the sum of \$85,922.31 and ordering the mortgaged premises to be sold. Randazzo Jr then moved to vacate the default judgment, which was resolved by

stipulation so ordered by the court on or about June 27, 2006. No other defendants have appeared to defend this action and plaintiff submits that the defendants were served with the Complaint. Randazzo Jr is the only party defending this action. Defendant served his Verified Answer to the Complaint on or about February 22, 2006.

Discussion

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the court must afford the complaint a liberal construction, accept all facts as alleged in the complaint to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87–88 [1994]; *Grant v Aurora Loan Services*, 88 AD3d 949 [2011]). Under CPLR § 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*see, e.g., Heaney v Purdy*, 29 NY2d 157 [date]). In assessing a motion under CPLR § 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]) and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Rovello v Orofino Realty Co.*, *supra*, at 636). Applying these principles, the court finds that plaintiff has stated a cause of action for foreclosure which requires proof of the existence of a mortgage and mortgage note, as well as proof of default in payments thereunder (*see Amerasia Bank v Saiko Enterprises, Inc.*, 263 AD2d 519 [1999]; *Federal Home Loan Mortg. Corp. v Karastathis*, 237 Ad2d 558 [1997]). Specifically, plaintiff’s complaint and the exhibits attached thereto - including the Note and Mortgage with a metes and bounds description of the property identified by block and lot number, apprise the defendants to this action that (1) the Note calls for the payment of \$58,012.00 by Randazzo Sr. to plaintiff; (2) the Note is secured by the Mortgage, which includes a metes and bounds description of the property and identifies the property by block 5771 and lot 12; (3) the Note is recorded in the Queens County Clerk’s office; (4) the Randazzo defendants have defaulted on the Note and Mortgage; and (5) as a result of such default there is due and owing by the Randazzo defendants to plaintiff the sum of \$58,012.00 plus interest at the rate of 15% from June 1, 2002, as set forth in the Note and Mortgage. In addition, the “wherefore” clause of the Complaint seeks both monetary relief and to foreclose on the Mortgage.

Randazzo, Jr. also moves to dismiss, pursuant to CPLR § 3211 (a)(1), on the ground that documentary evidence demonstrates that his signature on the Mortgage and Note was forged. On a motion to dismiss, pursuant to CPLR § 3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence “resolves all factual issues as

a matter of law, and conclusively disposes of the plaintiff's claim” (*Scadura v Robillard*, 256 AD2d 567, 567 [1998]). “[I]f the court does not find [their] submissions ‘documentary’, it will have to deny the motion” (Siegel, Practice Commentaries, **4 McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 22). Here, since the expert’s report relied on by the defendant does not qualify as such (see *Fontanetta v Doe*, 73 AD3d 78 [2010]), Randazzo, Jr. fails to meet this threshold. To be considered “documentary,” evidence must be unambiguous and of undisputed authenticity (see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22). It is clear that affidavits are not “documentary evidence” within the intendment of a CPLR § 3211 (a) (1) motion to dismiss (*Fontanetta v Doe*, supra).

Notably, the findings contained in the expert affidavit are inconclusive. The expert opines that there is “evidence to suggest or indications that John Randazzo Jr did not sign his name to the questioned Mortgage.” Clearly, this does not conclusively establish that Randazzo, Jr. did not sign the Mortgage. In fact, even assuming arguendo, that Randazzo Jr’s signature was a forgery, he would be estopped from denying the legitimacy of his signature since he expressly confirmed it as legitimate to the notary (see *Airco Alloys Division, Airco Inc v Niagara Mohawk Power Corp.*, 76 AD2d 68 [1980] [equitable estoppel prevents one from denying his own expressed or implied admission which has in good faith been accepted and acted upon by another].)

As for Randazzo’s claim of improper service, he waived the defense of lack of personal jurisdiction by failing to move to dismiss on that ground within 60 days of his answer (see CPLR 3211 [e]; *Alaska Seaboard Partners v Anninos*, 259 AD2d 572 [1999]; *DeSena v HIP Hosp.*, 258 AD2d 555 [1999]). Under CPLR § 3211 (e), a motion to dismiss based upon improper service must be made within 60 days of the filing of the responsive pleading. CPLR § 3211 (e) specifically states:

“an objection that the summons and complaint . . . was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.”

Here, Randazzo’s answer is dated February 22, 2006. In the nearly six years since Randazzo, Jr. served his answer, he has never previously moved to dismiss the complaint on the grounds of improper service.

There is no merit to Randazzo’s Jr.’s contention that the Mortgage was not supported by good and valuable consideration. “Consideration consists of either a benefit to the

promisor or a detriment to the promisee. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him” (*Anand v Wilson*, 32 AD3d 808, 809 [2006]; see *Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 464 [1982]). Here, plaintiff’s acceptance of the \$58,012.00 Note from the Randazzo defendants, which was secured by their Mortgage of the property, was in exchange for partial satisfaction of the approximate \$88,000.00 debt owed by 2565 Corp to plaintiff. This constituted adequate consideration. Plaintiff and 2565 Corp initially agreed that 2565 Corp’s antecedent debt owed to plaintiff would be satisfied from the proceeds of the sale of Regine’s to Insomnia which was owned by the Randazzo defendants. When the Randazzo defendants and other partners of Insomnia arrived at the closing \$133,012.11 short of the all-cash purchase price of \$400,000.00, plaintiff agreed to accept the Note and Mortgage in partial satisfaction of 2565 Corp’s debt to plaintiff. By accepting the Note and Mortgage, the Randazzo defendants and Locantro, Inc could complete the closing and acquire Regine’s. If plaintiff had not accepted the Note, the closing may not have occurred. This constituted adequate consideration to support the Mortgage.

Randazzo, Jr.’s allegation that he derived no individual benefit from the purchase and sale of Regine’s is without merit. “It is well established that a benefit conferred on a third-party is sufficient consideration to bind the promisor” (*Mencher v Weiss*, 306 NY 1, 8 [1953]; see *Holt v Feigenbaum*, 52 NY2d 291 [1981]; see also *Weiner v McGraw-Hill, Inc.*, 57 NY2d 458 [1982]).

Finally, there is no merit to Randazzo, Jr.’s claim that 2565 Corp is a necessary or indispensable party to be joined under CPLR §1001. CPLR §1001 (a) provides, “Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.” The purpose of the compulsory joinder rule is both to prevent duplicative litigation and to protect the rights of persons who may be adversely affected by the outcome (see, *Manufacturers Hanover Trust Co. v Crossland Sav.*, 177 AD2d 78, 79, 82 [1992]; *Parker v 151 E. 83rd St. Tenants Corp.*, 171 AD2d 599 [1991]; 3 Weinstein-Korn-Miller, NY Civ Prac ¶ 1001.01). Here, there are no rights of 2565 Corp that will be adversely affected in this action. This action concerns plaintiff’s foreclosure of the Mortgage securing the Note. 2565 Corp. has no connection to the Note or the Mortgage. 2565 was not a signatory to either the Note or the Mortgage; is not the mortgagor of the property subject to the mortgage; is not a mortgagee of the mortgage; and is not a promisee of the Note. Randazzo, Jr. and his partners in the purchase are now (or were) the owners of Regine’s. 2565 Corp no longer has any interest in the property at issue since it was paid in full for the sale of its interest in Regine’s almost 10 years ago. 2565 Corp has no claims against any of the parties to this action or the underlying transaction, and it is not presently defending any claims by such parties. Moreover, Randazzo, Jr. hasn’t articulated any

possible right of 2565 Corp that may be affected by this action, or adverse outcome that may inure to 2565 Corp.

Plaintiff cross-moves to amend the complaint to include necessary parties, and to compel the production of documents pertaining to lienors, and other items relating to the handwriting exemplars from Randazzo, Jr.. The cross motion is granted.

Plaintiff has learned from a recent title report on the property that there are certain persons and entities that should be added as additional parties to this action based upon events which occurred subsequent to the filing of the action. These include potential mortgagees, lienors and persons with possible interest in the title to the property.

On or about January 10, 1985, Randazzo, Jr. and his wife Marie Randazzo purchased the property. According to the titled report, Republic National Bank sought to foreclose a mortgage on the property in an action under Index No. 11322/1997. The title report indicates by hand that there has been “no action” on this litigation matter since 1997, but indicates that such mortgage has been satisfied as of July 30, 2002. The New York State Unified Court System website, however, indicates that this action remains active.

According to the title report, Randazzo, Jr. gave a mortgage to Beneficial Homeowners Service Corporation (BHSC) in the amount of \$15,750.59 on June 16, 2002, which was recorded on August 7, 2002. This mortgage remains outstanding and is subordinate to plaintiff’s mortgage, which is dated February 28, 2002, and was recorded on April 1, 2002. On August 8, 2002, after James Locantro served the default notices on the defendants and one day before James Locantro filed the Notice of Pendency on the property, a purported transfer of title to the property was executed by Maria Barretta (Barretta), who purported to transfer title to Frank Solecito (Solecito) for no consideration. This deed was recorded on October 23, 2002, more than six months after plaintiff’s mortgage had been recorded. According to the title report, on or about July 25, 2003, Barretta filed a Notice of Pendency and also sought to impose a constructive trust on the property under Index No. 18269/2003. The title report notes that “no action” has been taken in this litigation matter since 2003, but there is no information available on the New York State Unified Court System website.

On or about December 5, 2003, Randazzo Jr filed a voluntary action for bankruptcy under Chapter 7 in the Bankruptcy Court for the Eastern District of New York. Plaintiff was not notified of the bankruptcy or listed on the Schedule of Creditors. By order dated April 2, 2004, Randazzo, Jr.’s listed debts were discharged by the Bankruptcy Court for the Eastern District of New York. On or about August 23, 2006, Randazzo Jr filed a declaratory

judgment action against Barretta and Solecito in Supreme Court, Queens County under Index No. 18520/2006. According to the New York State Unified Court System website, the motion was unopposed by Barretta. By order dated September 10, 2007, the court declared the deed for the property between Barretta and Solecito null and void, thus confirming (presumably) that the property was owned by Randazzo Jr.

The title report also disclosed an additional mortgage foreclosure action on the property under Index No. 30508/2002, which was filed on November 22, 2002. According to the title report, no action has occurred in this matter since 2002, and the Notice of Pendency in this action has “expired.” Furthermore, the title report lists a number of liens on the property by the Environmental Control Board against Randazzo Jr from 2003, 2004, and 2005, and against Solecito from 2009, 2010, and 2011, including new liens since the filing of this action. Accordingly, the following persons and entities are added as additional parties: Maria Barretta, Republic National Bank, Beneficial Homeowners Service Corporation and the Mortgage Electronic Foreclosure Registration.

Leave to amend the complaint is to be freely granted, provided the proposed amendment does not prejudice or surprise the defendant, is not palpably insufficient, and is not patently devoid of merit (*see* CPLR 3025[b]; *Kinzer v Bederman*, 59 AD3d 496 [2009]; *Lucido v. Mancuso*, 49 AD3d 220, 227 [2008]). CPLR 3025 does not require an evidentiary showing of merit for the proposed amendment (*Lucido*, 49 AD3d at 229). The proposed amended complaint in this case is not palpably insufficient or patently devoid of merit. There is no showing of any prejudice, and plaintiff’s delay in bringing the motion to amend does not, in itself, constitute sufficient prejudice to warrant denial. “Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine” (*Edenwald Contracting Co., Inc., v City of New York*, 60 NY2d 957 [1983]). Here, Randazzo, Jr. has not demonstrated any prejudice resulting from the amendment of the complaint with the proposed joinder of the necessary parties. Furthermore, in an action to foreclose a mortgage, the plaintiff must join all parties whose interests are subordinate to that of the mortgagee (RPAPL §1311; *see e.g., Polish Nat. Alliance of Brooklyn, U.S.A. v White Eagle Hall Co., Inc.*, 98 AD2d 400 [1983]; *G.B. Seely’s Son, Inc. v Fulton-Edison, Inc.*, 52 AD2d 575 [1976]).

Plaintiff also seeks the production of “all documentation concerning current liens against” the property. Allegedly, Randazzo never produced any documents in response and improperly replied that “said documentation is already in the possession of the plaintiff as the plaintiff has previously admitted to having obtained the information from the public records of the New York City Registrar’s Office.” When, as here, discovery which is sought is “material and relevant,” pursuant to CPLR § 3101(a) and is not subject to claims of

privilege, attorney work product, or material prepared for litigation in accordance with CPLR § 3103(a), disclosure is proper and should be permitted.

Plaintiff also seeks the production of Randazzo, Jr.'s original signatures that Ryan (handwriting expert) used for comparison purposes in preparing his expert report; and other handwriting exemplars from him. Randazzo, Jr. is claiming that his signature was forged on the Mortgage and Note. Plaintiff served him with a request for discovery and inspection seeking certain original handwriting exemplars for review by plaintiff's handwriting expert. Clearly the original signatures and handwriting exemplars are material and relevant to determining the authenticity of Randazzo, Jr.'s signature on the Mortgage and Note, and plaintiff is entitled to them in light of the defendant's affirmative defense of forgery (*see, Passaro v Passaro*, 120 AD2d 658 [1986]; *Great Am. Ins. Co. v Giardino*, 71 AD2d 836 [1979]). There is no merit to Randazzo, Jr.'s contention that such exemplars constitute material prepared for litigation, which would be qualifiedly protected from disclosure, pursuant to CPLR § 3101 (d) (2). Thus, the branch of the motion which seeks to compel Randazzo, Jr. to provide his original signatures that Ryan used for comparison purposes in preparing his expert report and revised expert report, and to compel his appearance before plaintiff's handwriting expert to supply handwriting exemplars, is granted.

In conclusion, the motion by defendant John Randazzo, Jr. to dismiss the complaint is denied. The cross motion by plaintiff William J. Locantro to compel discovery is granted.

Dated: June 8, 2012

J.S.C.