

Landau v Haglili

2012 NY Slip Op 32758(U)

September 10, 2012

Supreme Court, Queens County

Docket Number: 3510/12

Judge: Timothy J. Dufficy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

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GUSTAW G. LANDAU a/k/a GABI LANDAU,

Plaintiff,

-against-

AVIKAM HAGLILI, STACIE HAGLILI,
“JOHN DOE” and “JOHN DOE”,

Defendants.

Index No.: 3510/12
Mot. Cal. Date: 6/7/12
Mot. Cal. No. 22
Mot. Seq. 1

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The following papers numbered 1 to 13 read on this motion by defendants **AVIKAM HAGLILI AND STACIE HAGLILI** for an order pursuant to CPLR 3212 granting summary judgment, with prejudice, in their favor and against the plaintiff and dismissing the complaint on the grounds that the plaintiff has failed to demonstrate compliance with Tax Law §258, failed to serve the defendants with notices that are compliant with RPAPL §§1303, 1304 and 1320; and, in the alternative, seeks an order granting the defendants leave to conduct discovery, and for an order pursuant to CPLR 6514(a) cancelling the Notice of Pendency, filed on February 17, 2010, and directing that the plaintiff pay the associated costs and expenses, in addition to any costs of the action and attorneys’ fees .

	<u>PAPERS NUMBERED</u>
Notice of Motion -Affirmation-Exhibits.....	1-6
Opposing Affirmation-Exhibits	7-9
Reply Affirmation-Exhibits.....	10-11
Other Affirmation.....	12-13

Upon the foregoing papers the motion is determined as follows:

Plaintiff Gustaw G. Landau, a/k/a Gabi Landau, a private lender, commenced the within action on February 12, 2012, and alleges in his complaint that on September 26, 2007, he entered into an oral agreement to lend the defendants the sum of five hundred thousand

dollars (\$500,000.00), with interest at the rate of 7% per annum, and that the defendants further agreed to secure the loan by real property which they own at 144-16 71 Avenue, Flushing, New York, Block 6658, Lot 11. The plaintiff alleged that on September 26, 2007, he wired the funds to an account specified by the defendants, and that on the same day the defendants executed and delivered to the plaintiff a writing that states as follows: “We, Avikam and Stacie Haglili are securing the loan for the amount of \$500,000.- with the house that we own at 144-16 71 Ave, Flushing, NY 11367 to Gabi Landau.” A copy of this agreement is attached to the complaint.

The plaintiff alleges that on October 1, 2007, the defendants tendered to the plaintiff the first payment of interest in the amount of two thousand nine hundred sixteen dollars (\$2,916.00). It is alleged that on February 29, 2008, the defendants delivered to the plaintiff a writing acknowledging the terms of the parties’ agreement regarding the repayment of the loan, which plaintiff identifies as the “note.” A copy of the note and an “interpretation” of the note is attached to the complaint. It is noted that said note consists of a typewritten form, written in Hebrew, known as a “Shtar ‘Isko” and that the English “interpretation” attached to the complaint is not accompanied by an affidavit of translation (CPLR 2101[b]).

The plaintiff alleges that the note provided for the monthly payment of interest only in the sum of two thousand nine hundred sixteen dollars (\$2,916.00) for the period of October 1, 2007 through December 1, 2007, and that repayment of the loan was due on or before December 31, 2008. It is alleged that neither the loan, nor the lien, were recorded.

The plaintiff’s first cause of action for breach of contract seeks to recover on the note, in the sum of five hundred thousand dollars (\$500,000.00), plus interest at the rate of 7% per annum from December 31, 2008. The second cause of action seeks to impress an equitable mortgage on the subject real property. The third cause of action seeks to foreclose on the equitable mortgage.

The Plaintiff filed a Notice of Pendency against the subject real property on February 22, 2012, and states that the plaintiff seeks to impress an equitable mortgage and foreclose

a lien and mortgage dated September 26, 2007, executed by defendants to secure the sum of five hundred thousand dollars (\$500,000.00).

The defendants served an answer and interposed ten affirmative defenses.

The defendants now seek an order granting summary judgment and dismissing the complaint, with prejudice, on the grounds that the plaintiff has failed to demonstrate compliance with Tax Law § 258, and that the plaintiff has failed to serve the Haglili defendants with notices pursuant to RPAPL §§ 1303, 1304 and 1320. In the alternative, the defendants seek leave to conduct discovery. The defendants further seek an order cancelling the Notice of Pendency, filed on February 17, 2010, pursuant to CPLR 6514(a), and seek to recover costs and expenses, including attorneys' fees.

In opposition, the plaintiff's counsel asserts that the defendants are only seeking partial summary judgment as to the third cause of action, and asserts that until the court grants relief on the second cause of action to impress an equitable mortgage, the mortgage cannot be recorded and the recording taxes cannot be paid pursuant to Tax Law §258. It is further asserted that until an equitable mortgage is impressed, the notices required under RPAPL cannot be served. The plaintiff, thus, requests that the third cause of action be marked off the calender, or held in abeyance pending the outcome of this action, and in the alternative plaintiff consents to the voluntary discontinuance, without prejudice, of the third cause of action. The plaintiff's counsel further asserts that no basis exists for the dismissal of the first and second causes of action, and the request to cancel the Notice of Pendency should be denied.

The defendants, in their reply, assert that the failure to comply with Tax Law §258 and RPAPL §§ 1303 and 1320 require the dismissal of the entire complaint, and that the dismissal of the foreclosure action requires the dismissal of the entire complaint, as plaintiff is required to elect his remedies, pursuant to RPAPL 1301.

That branch of the defendants' motion which seeks to dismiss the complaint is granted. Proper service of RPAPL § 1303 notice with the summons and complaint is a

condition precedent to the commencement of the action, and noncompliance results in dismissal of the complaint (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 98 [2011]). The plaintiff concedes that with respect to its mortgage foreclosure action, it failed to serve the defendants with the notice required by RPAPL § 1303, as well as the notice required by RPAPL § 1320.

Furthermore, the plaintiff's complaint improperly asserts a claim to recover on the note, as well as claims to impress an equitable mortgage and to foreclose on the equitable mortgage. "The holder of a note and mortgage may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but must only elect one of these alternate remedies" (*Gizzi v Hall*, 309 AD2d 1140, 1141 [2003]; see RPAPL 1301; see also *Aurora Loan Servs., LLC v Lopa*, 88 AD3d 929, 930 [2011]; *Sabbatini v Galati*, 14 AD3d 547, 548 [2005]). RPAPL 1301 (1) "is the embodiment of the equitable principle that once a remedy at law has been resorted to, it must be exercised to exhaustion before a remedy in equity, such as foreclosure, may be sought" (*Valley Sav. Bank v Rose*, 228 AD2d 666, 667 [1996]). The purpose of the statute is to avoid multiple lawsuits to recover the same mortgage debt (*id.* at 667).

This Court will not engage in the pruning of the plaintiff's complaint. Rather, the plaintiff is required to elect his remedy and may commence a new action either on the note, or to impress an equitable mortgage and for foreclosure.

That branch of the defendants' motion which seeks to cancel the Notice of Pendency is granted (CPLR 6514[a]). However, an award of costs and expenses, including counsel fees, pursuant to CPLR 6514 (c) is not warranted under the circumstances presented here.

That branch of the defendants' motion, which seeks to recover attorneys' fees pursuant to Real Property Law §282, is denied. As the lien agreement relied upon by the plaintiff does not contain any agreement for the payment of attorneys' fees, no implied covenant exists which would permit the defendants to recover attorneys' fees pursuant to Section 282.

In view of the foregoing, that branch of the defendants' motion which seeks summary judgment and dismissing the complaint, and the cancellation of the Notice of Pendency, is granted. Those branches of the defendants' motion which seek an award of costs and expenses, including attorneys' fees, pursuant to CPLR 6514(c), and attorneys' fees, pursuant to Real Property Law §282, are denied.

The County Clerk of Queens County is directed, upon payment of the proper fees by plaintiffs, if any, to cancel and discharge a certain Notice of Pendency filed in this action on February 22, 2012, against property known as SECTION 35, BLOCK 6658, LOT 11, and commonly known as 144-16 71st Avenue, Flushing, New York, and said clerk is directed to enter upon the margin of the record of the same a Notice of Cancellation referring to this Order.

Dated: September 10, 2012

TIMOTHY J. DUFFICY, J.S.C.