

Jackson Eldert LLC v CCA Mgmt. Corp.

2012 NY Slip Op 33315(U)

January 9, 2012

Sup Ct, Queens County

Docket Number: 17800/11

Judge: Robert J. McDonald

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD
Justice

IAS PART 34

----- X

JACKSON ELDERT LLC, NYC PARTNERSHIP
HOUSING DEVELOPMENT FUND COMPANY, INC.,

Index No.: 17800/11

Motion Date: 11/3/11

Plaintiff,

Motion No.: 12

- against -

Motion Seq.: 2

CCA MANAGEMENT CORP. RETIREMENT PLAN,
CARLO CINGANELLI, JOHN C. CASTRO, ESQ.,

Defendants.

----- X

The following papers numbered 1 to 7 read on this motion by the defendants for an order pursuant to CPLR 3211(a)(1),(3),(7) and (10) dismissing the complaint against them and on this cross motion by the plaintiffs for an order amending the caption

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1
Notice of Cross Motion - Affidavits - Exhibits	2
Answering Affidavits - Exhibits	3
Reply Affidavits	4-5
Memoranda of Law	6-7

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff Jackson Eldert LLC and plaintiff NYC Partnership Housing Development Fund Company, Inc. are respectively the beneficial owner and record owner of property located in Brooklyn, New York (Block 4257, Lots 1 and 6). Plaintiff Jackson, a developer which intended to build affordable housing on the vacant land, financed its acquisition with a loan from defendant CCA Management Corp. Retirement Plan (CCA). Plaintiff Jackson issued a note in the principal amount of \$2,500,000 dated May 14, 2008 in favor of defendant CCA, and the note required the payment of interest from July 1, 2008 until maturity (November

14, 2009) at an annual rate of 13%. Defendant CCA secured the note with a mortgage on the vacant land. Vincent J. Nicolosi, Esq. represented defendant CCA at the closing of the mortgage. At the time the note and mortgage matured, Neil Jeffrey Weissman, the managing member of plaintiff Jackson, spoke with Nicolosi about extending the loan. Nicolosi instructed Weissman to simply continue making the monthly interest payments in the amount of \$27,000. The plaintiff did so, and defendant CCA cashed the checks without protest. Defendant CCA accepted the post-maturity interest payments from November 14, 2009 through July 22, 2011 without exercising its option to declare the note and mortgage in default upon maturity for failure to repay the principal when due. The defendants allegedly knew that the plaintiffs were in the process of obtaining construction financing through state and city programs and that as soon as certain approvals came through would pay the mortgage held by CCA. Nicolosi kept informed about the construction financing through several conversations with Weissman, and in April or May of 2011, Nicolosi again told Weissman to continue making the same interest payment. Shortly thereafter, attorney John C. Castro assumed Nicolosi's responsibilities for the mortgage loan. In May or June of 2011, the plaintiffs requested a payoff letter, but the defendants did not issue one. The plaintiffs allege that the defendants delayed in issuing the payoff letter because of litigation between defendant Cinganelli and a member of the plaintiff limited liability company on an unrelated matter and that the defendants informed the plaintiffs that "CCA's Management's cooperation would be tied to the resolution of the pending litigation." The plaintiffs closed on a construction loan and on July 7, 2011 tendered to CCA the principal balance owed on the note (\$2,500, 000) plus per diem interest. Defendant CCA rejected the tender of payment and thereafter issued a payoff statement which included default interest in the amount of \$865,902.83 (calculated at the rate of 20% per year) and a late charge of \$125,000.

The plaintiffs began this action on or about July 28, 2011. The first cause of action is for breach of contract arising from the allegedly wrongful imposition of a default under the note and mortgage. The second cause of action is for breach of the covenant of good faith and fair dealing arising from the alleged wrongful initial refusal of defendant CCA to provide a payoff letter and refusal to permit the plaintiffs to pay off the mortgage. The third cause of action is for a declaratory judgment that the plaintiffs did not default on the note and mortgage. The fourth cause of action seeks leave to deposit money into court and a preliminary injunction.

On July 28, 2011, this court granted the plaintiffs a temporary restraining order on condition that they deliver bank checks for the principal balance of \$2,500,000 and for per diem interest in the amount of \$9,027.80 to Certilman Balin Adler & Hyman, LLP, the law firm representing the defendants. The plaintiffs delivered the checks as required.

Those branches of the defendants' motion which are for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint against defendant Carlo Cinganelli are granted. Although defendant Cinganelli may be the beneficiary of the defendant retirement plan, he is not a party to the note or mortgage. Defendant Cinganelli cannot be held liable for a breach of contract to which he was not a party. (*See, Caprer v. Nussbaum*, 36 AD3d 176.)

That branch of the defendants' motion which is for an order pursuant to CPLR

3211(a)(7) dismissing the complaint against defendant Castro is granted. The court can discern no cognizable cause of action against the attorney who merely represented the defendant mortgagee and did not represent the plaintiffs. “Under ordinary circumstances, an attorney who does not represent a party may only be held liable to that party upon a showing of fraud or collusion, or a malicious or tortious act ***.” (*Krasne v. Gedell* 147 AD2d 616, 618; *Marshel v. Farley*, 21 AD3d 935.) The complaint does not adequately allege that attorney Castro acted maliciously toward the plaintiffs, that is, acted with the sole motive of injuring the plaintiffs. (*See, Smith v. Meridian Technologies, Inc.*, 86 AD3d 557.) Moreover, the complaint does not adequately allege that the defendants sustained damages because of a delay in issuing a payoff letter.

That branch of the defendants’ motion which is for an order pursuant to CPLR 3211(a)(3) dismissing the complaint against them on the ground that Jackson Eldert LLC lacks the legal capacity to sue is denied. That branch of the defendants’ motion which is for an order pursuant to CPLR 3211(a)(10) dismissing the complaint against them on the ground of failure to join a necessary party is denied. The plaintiffs’ cross motion for an order permitting the amendment of the caption is granted. Jackson Eldert LLC is now known as Eldert Development 2 LLC according to the records of the New York State Department of State.

That branch of the defendants’ motion which is for an order pursuant to CPLR 3211(a)(1) dismissing the complaint insofar as it rests on allegations that they breached the mortgage by failing to provide a payoff letter is denied. In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted " must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***." (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700,702; *Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248.) The defendants argue that the plaintiffs’ request for a payoff letter made by e-mail on June 9, 2011 did not satisfy the requirements of RPL § 274-a. The statute requires the holder of a mortgage to deliver to the owner of the real property upon which such mortgage is a lien a payoff statement upon “ written demand by registered or certified mail.” (*See, Horseheads Commercial Development Partners v. Horseheads Indus. Realty Associates*, 227 AD2d 764.) However, section 1.11 of the mortgage granted by plaintiff Jackson provided in relevant part: “ (b) The Mortgagee, within thirty (30) days of the receipt of a request from the mortgagors, but not more frequently than once in any twelve month period, will furnish to the Mortgagors a statement setting forth the principal balance then outstanding on the Note, accrued interest thereon to the date of the statement and the date to which such interest has been paid.” Plaintiff Jackson had not only a statutory right to a payoff letter, but also a contractual right, and the mortgagor could exercise its contractual right without making a written demand by registered or certified mail.

That branch of the defendants’ motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint insofar as it rests on allegations that they breached the mortgage by failing to provide a payoff letter is granted. The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the

defendant's failure to perform, and resulting damage. (*McCormick v. Favreau*, 82 AD3d 1537; *Clearmont Prop., LLC v. Eisner*, 58 AD3d 1052.) The complaint does not adequately plead that plaintiff Jackson sustained damages because of defendant CCA's delay in providing the payoff letter.

That branch of the defendants's motion which is for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint against it insofar as it rests on allegations that defendant CCA improperly charged interest at the default rate is denied. The defendants argue that the terms of the mortgage preclude the plaintiffs from alleging that the former waived their right to charge interest at the default rate. For example, paragraph 2.1.2(n) of the mortgage provides: "The mortgagee shall have the right to receive and accept partial payment of any sum or sums which constitute a part of the debt or the interest accrued thereon and such receipt and acceptance by the Mortgagee shall not be deemed a waiver or modification of any default or defaults by the mortgagors existing at such time." Paragraph 3.9(a) provides: "No provision of this Mortgage may be waived, changed, amended, modified or discharged orally ***." Paragraph 3.9(d) provides: "No waiver by the Mortgagee or modification of the terms hereof shall be effective unless it is in writing ***. *** The Mortgagors hereby irrevocably waive any right to claim that any provision of this Mortgage, including the provisions set forth in this subsection, have been waived orally or by the acts or omissions of the Mortgagee." However, the mortgage terms relied upon by the defendants are not in themselves dispositive of the plaintiff's claims. A party can defeat a no-oral-modification clause by showing either partial performance or equitable estoppel. (*See, Rose v. Spa Realty Associates*, 42 NY2d 338.) The plaintiffs have alleged that they made the post maturity interest payments as agreed to with Nicolosi, the defendants' agent, and that they changed their position in detrimental reliance upon that agreement. "Once a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute [GOL 15-301] to bar proof of that oral modification ***." (*Rose v. Spa Realty Associates, supra*, 344.) An equitable estoppel is applied by the law "in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought ***." (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 184.)

Dated: Long Island City, NY
January 9, 2012

ROBERT J. McDONALD
J.S.C.