

Gall v Colon-Sylvan

2012 NY Slip Op 33931(U)

November 9, 2010

Supreme Court, Nassau County

Docket Number: 6536/07

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

~~SHORT~~ FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ELEMER GALL a/k/a CSABA GALL,

Plaintiff,

-against-

FRANCES COLON-SYLVAN, WELLS
FARGO N.A., JOSEPH GRANT, EMPIRE
LAND SERVICES CORP., ANTHONY
MICHAEL CAMISA, DAVID M. FISH and
JJRG ENTERPRISES, INC.,

Defendants.

WELLS FARGO N.A.,

Counterclaim Plaintiff,

-against-

ELEMER GALL, FRANCES COLON-SYLVAN,
JOSEPH GRANT and JJRG ENTERPRISES INC.,

Counterclaim Defendants.

The following papers read on this motion:

- Order to Show Cause..... X
- Cross-Motion..... X
- Affirmation in Opposition..... X

Motion by Judith Reardon, Esq for leave to renew and reargue her motion for leave to withdraw as plaintiff's counsel is **denied**. Cross-motion by defendant-counterclaim plaintiff Wells Fargo for an order of attachment is **granted** to the extent indicated below.

This is an action for breach of fiduciary duty. Plaintiff Elemer Gall and defendant Joseph Grant formed a corporation, JJRG Services, Inc, to acquire distressed properties and renovate them for resale. In February 2005, the corporation purchased a property located at 75 Oakdale Boulevard in Farmingdale, however a dispute arose between Gall and Grant concerning the renovation project.

On November 1, 2006, JJRG entered into a contract to sell the property to defendant Frances Colon-Sylvan, who is Grant's girlfriend. The contract was signed by Joseph Grant on behalf of the corporation. Colon-Sylvan, representing that the property would be her primary residence, obtained a purchase money mortgage from defendant Wells Fargo. The title was insured by defendant Empire Land Services Corp. The closing occurred on December 26, 2006. It appears that Gall did not sign any documents pertaining to the transaction, but Grant acted for him by a power of attorney (Affirm. of Judith Reardon in opposition to Wells Fargo's cross motion at ¶ 14, ex. J). Nevertheless, Gall did in fact appear at the closing (Wells Fargo ex A, ex E at ¶ 147).

The present action was commenced on April 16, 2007. Plaintiff asserts claims against defendant Grant for breach of fiduciary duty, fraud, and conversion. Additionally, plaintiff asserts fraud claims against defendant Wells Fargo and defendant Empire Land Services. Wells Fargo counterclaims against plaintiff for fraud based upon his participation in the loan transaction. Wells Fargo alleges that Colon-Sylvan had no intention of residing in the premises or paying the debt but she agreed to be the nominal borrower because Gall and Grant did not have adequate credit to qualify for the loan transaction (Wells Fargo's amended answer at ¶ 139). In August 2007, Wells Fargo commenced an action against Colon-Sylvan and Gall to foreclose the mortgage (Index No 14073-07), a few months after plaintiff commenced the present action. By order dated July 12, 2010, the court denied Judith Reardon Esq's motion for leave to withdraw as counsel for plaintiff. The court noted that the case was almost ready to be certified for trial, that Ms. Reardon had received some compensation, and that she was holding an additional \$52,000 in escrow, pending resolution of the various claims.

Ms. Reardon moves for leave to renew and reargue her motion for leave to withdraw

as counsel for plaintiff. In support of her motion for leave to renew, counsel asserts that the escrow funds have already been applied to her outstanding fees and that she has no "independent knowledge of her client's financial condition."

Defendant Wells Fargo cross moves pursuant to CPLR § 6201(3) for an order of attachment on the ground that plaintiff has disposed of property with intent to defraud his creditors or frustrate the enforcement of a judgment. Wells Fargo alleges that the funds which were paid out of escrow were the proceeds of the mortgage transaction. A check in that approximate amount was issued to plaintiff from his attorney's "mortgage disbursement account" on December 26, 2006.

Since Ms. Reardon has not shown that the court overlooked or misapprehended any matter of fact or law in determining her prior motion for leave to withdraw as plaintiff's counsel, her motion for leave to reargue is denied (CPLR 2221[d]). Moreover, Ms. Reardon has not established that her client deliberately disregarded an agreement or obligation as to fees or expenses (22 NYCRR § 1200.16[c][5]). Ms. Reardon's motion for leave to renew her motion for leave to withdraw as plaintiff's counsel is **denied**.

CPLR § 6201(3) provides that an order of attachment may be granted in any action, except a matrimonial, where plaintiff would be entitled to a money judgment and the defendant, with intent to defraud its creditors or frustrate the enforcement of a judgment, has assigned, disposed of, or secreted property, or removed it from the state, or is about to do any of these acts. The moving papers must contain evidentiary facts, as opposed to conclusions, that other party has or is about to secrete assets (*Mineola Ford Sales v Rapp*, 242 AD2d 371 [2d Dept 1997]). In addition to proving fraudulent intent, the moving party must show probable success on the merits of the underlying action (Id).

Plaintiff argues that Wells Fargo cannot establish likelihood of success with respect to its fraud claim because, having brought an action to foreclose the mortgage, it is precluded from bringing another action to recover any part of the mortgage debt (See Real Property Actions and Proceedings Law § 1301[3]). "The purpose of RPAPL 1301 is to avoid multiple suits to recover the same mortgage debt and confine proceedings to collect the mortgage debt to one court and one action" (*Valley Savings Bank v Rose*, 228 AD2d 666 [2d Dept 1996]). The statute is to be strictly construed since it is in derogation of the creditor's common law right to pursue the alternate remedies of foreclosure and recovery of the mortgage debt (Id at 667).

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An action to recover the mortgage debt is based upon contract. Thus, an action for fraud, or to rescind a mortgage loan based on fraud, is not an action on the mortgage debt, even though plaintiff's damages may be the amount of the mortgage debt. Construing RPAPL § 1301 strictly, it does not preclude Wells Fargo's counterclaim for fraud, or to rescind the mortgage based on fraudulent inducement. Absent evidence as to the value of the property, the court cannot assume that defendant will obtain complete relief in the mortgage foreclosure action.

Based on the relationship between Grant and Colon-Sylvan and plaintiff's unexplained presence at the closing, Wells Fargo has established a likelihood of success on the merits with respect to its fraud claim. Thus, plaintiff's direction to release the mortgage proceeds appears to have been with intent to defraud his creditors and part of the fraudulent scheme.

Defendant Wells Fargo's application for an order of attachment in the amount of \$52,000 is **granted**, upon condition that defendant submits an undertaking, in the same amount, that it shall pay to the plaintiff all costs and damages which may be sustained by reason of the attachment. Defendant may submit an order of attachment upon notice to the plaintiff.

So ordered.

Dated NOV 09 2010

Stephen A. Lucarelli
J.S.C.

ENTERED

NOV 18 2010

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