

Fernandes v Fernandes
2013 NY Slip Op 33189(U)
November 27, 2013
Supreme Court, Queens County
Docket Number: 1145/12
Judge: Timothy J. Dufficy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
ANTHONY FERNANDES AND
ELSIE FERNANDES,

Plaintiffs,

Index No. : 1145/12

Mot. Date: 7/12/13

-against-

Mot. Cal. No. 59

Mot. Seq. 3

CLIFFORD BASIL FERNANDES AND
JESSICA VERAS FERNANDES,

Defendants.

-----X

The following numbered papers read on this motion by plaintiffs pursuant to CPLR 3212 for summary judgment against defendants granting plaintiffs the right to “retain” the shares of cooperative stock and proprietary lease, subject to the approval of the board, and directing defendants to execute any and all documents necessary to transfer ownership of the shares and lease to plaintiffs, or in the alternative, granting plaintiffs a money judgment against defendants in the amount of \$30,000.00, plus interest from February 25, 2000 to the present, or granting plaintiffs a money judgment against defendant Jessica Veras Fernandes in the amount of \$15,409.00, and an award of legal fees and the costs incurred in the collection and enforcement of the agreement, or in the alternative, to obtain a special age preference for trial since plaintiffs are over 70 years of age and in ill health; and this cross motion by defendant Jessica Veras Fernandes for summary judgment dismissing the complaint insofar as asserted against her, or to dismiss the complaint asserted against her based upon plaintiffs’ failure to post a bond.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	1-6
Notice of Cross Motion - Affidavits - Exhibits	7-11
Answering Affidavits - Exhibits	12-14

Upon the foregoing papers it is ordered that the motion and cross-motion are determined as follows:

The plaintiffs, originally appearing pro se, commenced this action on January 18, 2012, against defendants Clifford Basil Fernandes, their son, and Jessica Veras Fernandes, the estranged former wife of Clifford. In their complaint, dated January 17, 2012, the plaintiffs allege that on February 25, 2000, they made a loan in the principal amount of \$30,000.00 plus interest at 8% per annum to the defendants to help the couple purchase the cooperative apartment known as 138-08A 68th Drive, Kew Gardens, New York, and that the loan is evidenced by a written security agreement, dated February 25, 2000. The plaintiffs also allege that the defendants defaulted under the agreement, by failing to make “consistent” payments, and that the last payment made by the defendants to the plaintiffs was on May 16, 2009. The plaintiffs further allege that the defendants have failed to pay the loan, notwithstanding repeated demands that they do so. The plaintiffs seek to recover a money judgment against the defendants in the amount of \$30,000.00, plus interest from February 25, 2000, or in the alternative, “foreclose” on the cooperative apartment known as 138-08A 68th Drive, Kew Gardens, New York.

Defendant Jessica Veras Fernandes served an Answer, denying the material allegations of the Complaint, asserting various affirmative defenses, including ones based upon lack of personal jurisdiction due to improper service of process and failure to comply with a condition precedent to suit, by failing to provide a proper notice of default prior to the commencement of the action, and a cross-claim against defendant Clifford Basil Fernandes for indemnification. Defendant Clifford Basil Fernandes is in default in answering. He provided an “affidavit,” dated April 11, 2012, to the plaintiffs, acknowledging service of process had been made upon him, and indicating, among other things, that he did not intend to serve an answer to the Complaint.

The plaintiffs, now appearing by counsel, move for summary judgment in their favor as against the defendants, offering among other things, a copy of the February 25, 2000, an affidavit of plaintiff Elsie Fernandes, dated June 6, 2013, and a “joint” affidavit of the plaintiffs, dated March 15, 2013. The plaintiffs seek a declaration granting the plaintiffs the right to “retain” the shares of cooperative stock and proprietary lease, subject to the approval of the board, and to direct defendants to execute any and all documents necessary to transfer ownership of the shares and lease to plaintiffs, or in the alternative, for leave to enter a money judgment against defendants in the amount of \$30,000.00, plus interest from

February 25, 2000 to the present, or for leave to enter a money judgment against defendant Jessica Veras Fernandes in the amount of \$15,409.00, and an award of legal fees and the costs incurred in the collection and enforcement of the agreement. Defendant Jessica Veras Fernandes opposes the motion and cross-moves for summary judgment dismissing the complaint insofar as asserted against her. Defendant Clifford Basil Fernandes has not appeared in relation to the instant motion or cross motion.

At the outset, the Court notes that the affirmation in reply of plaintiffs' counsel was purportedly served upon counsel for defendant Jessica Veras Fernandes by facsimile transmission on July 10, 2013. Nevertheless, the annexed transmission sheet indicates a communication error occurred during the fax transmission, and advised the fax be re-sent or the sender contact the intended recipient to be sure the recipient's fax machine was ready to receive a fax. The plaintiffs do not offer any proof that the fax was re-sent or received by counsel for defendant Jessica Veras Fernandes. The Court therefore shall not consider the reply affirmation of plaintiffs' counsel in determining the motion and cross-motion.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

That branch of the motion by the plaintiff for summary judgment against defendant Clifford Basil Fernandes is denied. The plaintiffs have failed to demonstrate issue has been joined with respect to defendant Clifford Basil Fernandes (*see* CPLR 3212[a]). Thus, the court cannot grant summary judgment in their favor against him (*see Gaskin v Harris*, 98 AD3d 941 [2d Dept 2012]; *Union Turnpike Assoc., LLC v Getty Realty Corp.*, 27 AD3d 725, 727–728 [2d Dept 2006]; *Chakir v Dime Sav. Bank of N.Y.*, 234 AD2d 577 [2d Dept 1996]).

With respect to the cross-motion by defendant Jessica Veras Fernandes, defendant Jessica Veras Fernandes failed to move to dismiss the Complaint, upon the ground of improper service of process within 60 days of the plaintiff's acceptance of her answer, with the "FIRST DEFENSE" based upon improper service of process, pursuant to the stipulation, dated August 9, 2012, and has made no application to extend the period of time upon the

ground of undue hardship (CPLR 3211[e]). As a consequence, defendant Jessica Veras Fernandes has waived the defense of improper service of process (CPLR 3211[e]; *see Dimond v Verdon*, 5 AD3d 718 [2d Dept 2004]). Defendant Jessica Veras Fernandes, moreover, explicitly admits in her affidavit dated June 18, 2013 submitted in support of her cross-motion, that she “*eventually consented* to the [c]ourt’s jurisdiction” (emphasis supplied).

The February 25, 2000 agreement requires the plaintiffs, upon their election to demand payment of the entire amount owing to them in the event of a default, to give defendants a 15-day notice of default at the “Building Address” (138-08A 68th Drive, Kew Gardens Hills, New York) by registered mail, return receipt requested, prior to any public or private sale or the security, or the exercise of defendants’ other legal rights. Defendant Jessica Veras Fernandes denies she was served with a notice of default. The plaintiffs offer a copy of an undated letter from them and addressed to both defendants at the apartment address, indicating that the last payment made “on the debt was in May of 2009,” “the amount with interest currently due is \$74,285.36,” and advising that “if the debt is not repaid within 15 days from receipt of this letter and you both default on this loan we shall take whatever action is necessary under this agreement to collect on this debt.” The letter, however, fails to apprise the defendants of the nature of the default under the February 25, 2000 agreement, and the plaintiffs make no claim as to when payment under the purported underlying note is due (*see Kwon v Yun*, 606 F Supp 2d 344 [SD NY 2009]; *Cavendish Traders, Ltd. v Nice Skate Shoes, Ltd.*, 117 F Supp 2d 394, 399 [SD NY 2000]), including whether the alleged note is a demand note. Moreover, to the extent plaintiff Elsie Fernandes, in her affidavit in support of the plaintiffs’ motion, indicates that the plaintiffs sent the defendants a notice of default to December 5, 2011, such affidavit does not constitute proper proof of service of a notice of default in accordance with the February 25, 2000 agreement. The affidavit does not specify who actually mailed the notice, the address to which the notice was mailed, and manner of mailing, and the plaintiffs have not offered any other affidavit, by someone with personal knowledge, to demonstrate proper proof of service of the notice of default upon defendants. Under such circumstances, the plaintiffs have failed to demonstrate they complied with a condition precedent contained in the February 25, 2000 agreement, which required that plaintiffs give defendants notice of

default prior to demanding payment of the purported loan in full (*see HSBC Mortg. Corp. (USA) v Gerber*, 100 AD3d 966 [2d Dept 2012]; *Norwest Bank Minn. v Sabloff*, 297 AD2d 722 [2d Dept 2002]; *GE Capital Mtge. Servs. v Mittelman*, 238 AD2d 471 [2d Dept 1997]). Defendant Jessica Veras Fernandes therefore is entitled to summary judgment dismissing the complaint insofar as asserted against her based upon her affirmative defense that the plaintiffs failed to comply with the condition precedent to suit in the February 25, 2000 agreement. The cross-motion by defendant Jessica Veras Fernandes for summary judgment dismissing the Complaint insofar as asserted against her is granted. That branch of the motion by plaintiff for summary judgment against defendant Jessica Veras Fernandes is denied.

With respect to that branch of the motion by plaintiffs for a special trial preference, a special trial preference may be granted upon a showing that the interests of justice will be served by an earlier trial (CPLR 3403[a][3]) or upon the application of a party who has reached the age of 70 years (CPLR 3403[a][4]). The Note of Issue and Certificate of Readiness have been filed. The cross-motion by plaintiffs for a trial preference is granted, in view the undisputed evidence that plaintiff Anthony Fernandes is 72 years of age and plaintiff Elsie Fernandes is 70 years of age (CPLR 3403 [a][4]).

A copy of this Order with Notice of Entry shall be served upon the defendants and the Clerk of the Trial Scheduling Part, within twenty (20) days of the entry of this Order.

Dated: November 27, 2013

TIMOTHY J. DUFFICY, J.S.C.