

Curtis v 12 E. 128th St. LLC

2013 NY Slip Op 33654(U)

January 14, 2013

Supreme Court, New York County

Docket Number: 810278/2011

Judge: Joan A. Madden

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SCANNED ON 2/7/2013

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: How Joan A. M. ddu
Justice

PART 11

Index Number : 810278/2011
CURTIS, ERIC
vs.
13 EAST 128TH STREET, LLC
SEQUENCE NUMBER : 001
DISMISS DEFENSE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ^{and cross motions} ~~is~~ *decided in accordance with*
the annexed memorandum ^{are} *Decision + Order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

FEB 06 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 14, 2013

[Signature], J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
ERIC CURTIS,

Plaintiff

- against -

12 EAST 128TH STREET LLC, JUSTIN GEORGE
and DINGLE BAY ENTERPRISES INC., DEFINED
BENEFIT PLAN,

Defendants.

-----X
JOAN A. MADDEN, J.

Index No. 810278/11

FILED

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NEW YORK
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In this mortgage foreclosure action, plaintiff Eric Curtis (“Curtis”) moves for summary judgment and for dismissal of the affirmative defenses and counterclaim asserted by defendant Dingle Bay Enterprises Inc., Defined Benefit Plan (“Dingle Bay”). Dingle Bay opposes the motion and cross moves for summary judgment on its counterclaim. Defendant Justin George (“George”), who appears *pro se*, opposes the motion and cross motion.

Background

On or about November 13, 2008, George purchased vacant land at 14 East 128th Street, New York, NY, NY (the “property”), using \$825,000 of his own money with the intention of having condominiums built on the property. Curtis and George maintain that Curtis loaned George \$150,000 for the project as evidenced by three checks from Curtis to George for \$50,000 each dated May 20, 2008. In November 2008, a note was executed between Curtis and George confirming that the total amount owed to Curtis for the loan was \$179,800, and that it was due and payable on March 11, 2009. Curtis asserts that when George did not pay the amount due by March 11, 2009, Curtis filed a Confession of Judgment in the amount of \$179,800, on or about April 7, 2009, and asserted liens against assets in George’s name.

Curtis maintains that George thereafter sought an extension of the loan and offered “to replace the judgment liens with a mortgage lien against the property” (Curtis Aff. ¶ 6). Curtis

states that he agreed to release the liens by providing George with a Satisfaction of Judgment and submits a copy of a Satisfaction of Judgment dated June 26, 2009, signed by Curtis, but not notarized, stating that a \$187, 217.59 debt owed by George to Curtis had been satisfied.

Curtis further asserts that George made an unspecified partial payment on the unpaid judgment of \$187, 217.59. In or about early August 2009, George formed 13 East 128th Street, LLC (“13 East”). On August 12, 2009, George caused 13 East to execute a note in favor of Curtis in the amount of \$132,799 and a mortgage in that amount encumbering the property. (hereinafter “the Curtis mortgage”).

On August 25, 2009, prior to the recording of the Curtis mortgage, 13 East executed a mortgage in favor of Dingle Bay, in the amount of \$300,000. 13 East was unable to repay its obligation to Dingle Bay and on or about June 10, 2010, 13 East transferred its ownership interest in the property to Dingle Bay in consideration for Dingle Bay not foreclosing on the property.

Curtis now moves for summary judgment on its claim to foreclose on the Curtis mortgage, asserting that there are no triable issues of fact, and that the affirmative defenses and counterclaim asserted by Dingle Bay are without merit. The counterclaim alleges the existence of a scheme to defraud among Curtis, George and 13 East, which purportedly involved George providing the Judgment of Confession to Curtis for no consideration, George’s creation of 13 East and his conveyance of the property to 13 East for no consideration, the execution by 13 East of the Curtis mortgage and note, which Dingle Bay alleges were done with the knowledge and intent that 13 East would execute a mortgage in favor of Dingle Bay a short time later. It is further alleged that Curtis, George, and 13 East intentionally concealed the existence of the Curtis mortgage from Dingle Bay. It is alleged that through the above actions, Curtis, George and 13 East “exhibited the falsity, scienter, and deception to defraud [Dingle Bay] and divert

assets to themselves for their own financial remuneration” (Answer, ¶ 49).

In opposition to the motion, Dingle Bay asserts that there are triable issues of fact which preclude granting summary judgment in favor of the Curtis as the documentary evidence shows that the Curtis mortgage was invalid as it was given without consideration as Curtis’ loan was satisfied prior to the execution of mortgage, and therefore the mortgage is a nullity. It also asserts that its affirmative defenses are sufficiently pleaded, as is its counterclaim for fraudulent misrepresentation on which it cross moves for summary judgment.

George opposes that motion and cross motion and maintains that a title company conducted a title search and that neither he, nor 13 East did anything to prevent discovery of Curtis mortgage, and that it was his understanding that there would be a pay off of the Curtis mortgage. George argues that discovery is needed to determine why the first mortgage was not found, and that he is entitled to have his interrogatories answered and discovery before summary judgment is granted.

In reply, Curtis argues, *inter alia*, that Dingle Bay does not have standing to collaterally attack the mortgage, consideration is not a prerequisite to validity of mortgage, that the Satisfaction of Judgment was delivered by Curtis’s counsel at the closing of the Curtis mortgage in exchange for consideration of the mortgage and note (and that the satisfaction was signed before the mortgage was executed on June 26, 2009 at request of title company), and that this exchange was adequate consideration.

In support of these statements, Curtis submits an affirmation from his counsel, Tarik Davis (“Davis”) who states that he negotiated the substitution of the mortgage lien with the judgment lien. According to Davis, the Satisfaction of Judgment was part of a single transaction in which George and 13 East delivered the Curtis mortgage and note on August 19, 2009, and that George signed the Satisfaction of Judgment on June 26, 2009, at the request of the title

company, and that he did not turn over the Satisfaction of Judgment until the closing date of August 12, 2009. He also states that he did not have the Satisfaction of Judgment notarized on June 26, 2009 as "it was merely a pre-closing delivery for me to hold in escrow [and] allowed me to inform the title insurer that such executed instrument was in my possession." (Davis Aff. ¶6). Davis also states that "at the closing [of the Curtis mortgage], I delivered the Satisfaction of Judgment to the title insurer when [George and 13 East] delivered the [Curtis] mortgage and mortgage note as consideration in exchange" (Id., ¶ 7).

In further reply, Dingle Bay disputes Curtis' version of events and in support of its position, submits an affidavit from Susan Del Toro an owner of Experience Abstract Services. Ms. Del Toro states that the original Satisfaction of Judgment was supplied to her company for the purpose of issuing an Owner's Policy of Title Insurance free and clear of all liens for the property located at 89-02, 120 Street, Richmond Hill, in Queens County, and she attaches a copy of the Satisfaction of Judgment for \$187,217.59, notarized on June 24, 2009. Dingle Bay argues that this evidence demonstrates that the Satisfaction of Judgment was not prepared in conjunction with the Curtis mortgage but with an entirely different transaction. Dingle Bay argues that as the loan to George was antecedent to the mortgage, the mortgage was given to George without consideration and is invalid.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320,

324 (1986).. Moreover, when a party seeks to dismiss a claim or counterclaim based on documentary evidence, the movant must show “that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.” Acquista v. New York Life Ins. Co., 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d 268, 275 (1977).

To establish a prima facie case in an action to foreclose on a mortgage, a plaintiff must “establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment.” Witelson v. Jamaica Estates Holding Co. I, 40 AD3d 284, 284 (1st Dept 2007). It is well established that “a mortgage is not valid and enforceable unless there is an underlying valid debt or obligation for which the mortgage is intended as security.” Coronet Capital Co. v. Spodek, 256 AD2d 292 (2d Dept 1999)(citations omitted); see also, 9 Warren's Weed, New York Real Property, Mortgages, § 4.01 [1] [4th ed]).

Here, even assuming *arguendo*, that Curtis provided evidence sufficient to make a prima facie showing entitling it to summary judgment, Dingle Bay has controverted that showing by providing evidence sufficient to raise a material issue of fact as to whether the Curtis mortgage was collateral for a valid debt. In particular, the record raises various questions of fact in this regard, including whether the Satisfaction of Judgment evidence that the debt owed by George to Curtis had been satisfied such that the Curtis mortgage was not security for a valid debt. In addition, as there has been no discovery, and certain essential facts are in the sole possession of Curtis, it would be premature to grant summary judgment in Curtis' favor. See Baldasano v. Bank of New York, 199 AD2d 184 (1st Dept 1993); see also Amico v. Melville Volunteer Fire Co., Inc., 39 AD3d 784 (2d Dept 2007)(noting that “a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment.”)

As for the counterclaim, the documentary evidence submitted by Curtis is insufficient to warrant its dismissal, particularly in light of evidence submitted by Dingle Bay calling into question the nature and purpose of the various transactions among Curtis, George and 13 East, including those related to the Curtis mortgage. In addition, the court finds that the counterclaim is sufficient to state a claim for fraud, as amplified by various evidence in the record, and that it is premature to dismiss Dingle Bay's affirmative defenses.

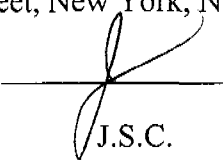
Finally, Dingle Bay's cross motion for summary judgment on the counterclaim must be denied based on the same disputed issues of fact which preclude a grant of summary judgment in Curtis' favor.

Accordingly, it is

ORDERED that the motion and cross motion for summary judgment are denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on February 21, 2013 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: January 14, 2013


J.S.C.

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