

TDD Irrevocable Trust v J & A Saporta Realty Corp.
2013 NY Slip Op 33807(U)
November 27, 2013
Supreme Court, Nassau County
Docket Number: 1816-13
Judge: Steven M. Jaeger
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

TDD IRREVOCABLE TRUST,

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 1816-13

Plaintiff,

MOTION SUBMISSION
DATE: 10-10-13

-against-

J & A SAPORTA REALTY CORP.,

MOTION SEQUENCE
NO. 1

Defendant.

The following papers read on this motion:

- Notice of Motion, Affirmation, and Exhibits X
- Affirmation in Opposition and Exhibits X
- Reply Affirmation X
- Reply Memorandum of Law X
- Submission of a Formerly Unavailable Document For
Plaintiff's Opposition to Defendant's Motion to Dismiss X

Motion by defendant J&A Saporta Realty Corp. ("J&A") for an order pursuant to CPLR 3211(a)(1), (3) and (7) dismissing the amended complaint is denied.

Plaintiff TDD Irrevocable Trust ("TDD") commenced this action to recover a judgment against J&A: (a) for a declaration that the chain of title back to the Illegal Deed In Escrow is invalid; (b) for a declaration that the property is still subject to TDD's 5% beneficial interest; (c) alternatively or additionally, against J&A for an amount to be proven at trial and claimed to be not less than \$55,000,

plus 9% interest per year from the date owed and/or from judgment, and costs therein.

J&A is the current owner of the real property located at 945-947 West Beech Street, Long Beach, New York (the "property") having purchased same from JDM Corporation (see deed dated June 1, 2011).

TDD alleges that when J&A purchased the property on June 1, 2011 for \$1,100,000, such property was and is subject to a 5% beneficial interest belonging to TDD conveyed in August 2007 and recorded in February 2009.

In the amended complaint, TDD alleges as follows:

Paragraph 8 states: "By conveyance on August 3, 2007, the property was sold to Susan and Frank Odery (the "Oderys"). On that date, the Oderys turned around and, as grantors, created a trust by conveying to the TDD Irrevocable Trust, a "5% beneficial interest in the sale price upon a sale" of the property (among other beneficial interests), with Timothy DiResta (a business colleague) being the sole beneficiary of the Trust (the "Beneficiary"), and which Trust was recorded with the Nassau County Clerk on February 2, 2009 (the "recorded Declaration of Trust")."

Paragraph 9 provides: "When the Oderys purchased the property on August 3, 2007, they assumed two mortgages and notes on the property. The second

lender, James D. MacDonald (“MacDonald”), at that time required (as the second lender for him to allow the assumption of the mortgage and note to him) that the Oderys provide him with a purported “Deed In Escrow” (a then **pre-executed deed** and related transfer documents in his favor) under a **deed in escrow agreement** to be used in event that the Oderys defaulted **at a later time** on the second mortgage and note to him that they assumed” (emphasis in original).

Paragraph 10 provides: “Upon information and belief, almost two years later the Oderys defaulted on both mortgages and notes in or about May 2009 and, after notice and an opportunity to cure lapsed under the purported deed in escrow agreement and otherwise, MacDonald allegedly ‘took the property back’ in June 2009 through the purported Deed In Escrow and his recording of the same with the Nassau County Clerk. **No foreclosure action was ever brought by him. . . .**” (emphasis in original). On June 3, 2013 Susan Odery resigned as trustee. Timothy DiResta became the new trustee (the “Trustee”).

Paragraph 11 states that: “Upon information and belief, MacDonald in June 2009 received a full recovery of the debt owed to him by the Oderys from the first lender, JDM Corporation (a family affiliate of his), by agreement with JDM Corporation in consideration for JDM Corporation becoming the owner of the

property **through** MacDonald. Upon information and belief, based on that agreement with JDM Corporation, MacDonald allegedly transferred the property by quitclaim deed to JDM Corporation which property JDM Corporation then put up for sale. **No foreclosure action was ever brought by JDM Corporation. . .**” (emphasis in original).

On June 1, 2011, JDM Corporation sold the property to J&A for \$1,100,000.

In February 2013, TDD filed the complaint herein. On or about June 21, 2013, the complaint was amended.

J&A moves to dismiss the amended complaint pursuant to CPLR 3211(a)(1), (3) and (7) based upon documentary evidence, the absence of standing and legal capacity to sue, and failure to state a cause of action.

“A motion to dismiss pursuant to CPLR 3211(a)(1) may be granted ‘only where the documentary evidence utterly refutes plaintiff’s actual allegations, conclusively establishing a defense as a matter of law’ ” (*Sobel v Ansanelli*, 98 AD3d 1020 [2d Dept 2012], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Harris v Barbera*, 96 AD3d 904 [2d Dept 2012]; *Parekh v Cain*, 96 AD3d 812 [2nd Dept

2012]). Furthermore, “[t]o qualify as documentary evidence, printed materials ‘must be unambiguous and of undisputed authenticity’ ” (*Sobel v Ansanelli, supra*, quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]; see *Flushing Sav. Bank, FSB v Siunykalmi*, 94 AD3d 807, 808 [2d Dept 2012]; *Yeshiva Chasdei Torah v Dell Equity, LLC*, 90 AD3d 746, 746-747 [2d Dept 2011]).

CPLR 3211(a)(3) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that the party asserting the cause of action has not legal capacity to sue.”

“On a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Bua v Purcell & Ingrao*, 99 AD3d 843 [2d Dept 2012]; see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2001]; *Leon v Martinez*, 84 NY2d 83, 87 [1990]). Further, “[w]here a party offers evidentiary proof on a motion pursuant to CPLR 3211 (a)(7) , and such proof is considered but the motion has not been converted to one for summary judgment, ‘the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is

not a fact at all and unless it can be said that no significant dispute exists regarding it. . . dismissal should not eventuate' ” (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1997]; *Jannetti v Whelan*, 97 AD3d 797 [2d Dept 2012]). Accordingly, “consideration of such evidentiary materials will almost never warrant dismissal under CPLR 3211(a)(7) unless the materials establish conclusively that [the plaintiff] has no [claim or] cause of action. . . .” (*Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 257 [2d Dept 2012] [internal quotations omitted]).

Applying these principles to the case at bar, the Court finds that J&A is not entitled to dismissal of the action on any of these grounds.

Exception 13, in Schedule B of the 2011 title report issued by East Coast Abstract Inc. as authorized agent for Stewart Title Insurance Company on behalf of the buyer J&A, expressly states the following:

“By deed dated June 3, 2009 and recorded June 9, 2009 in Liber 12507 Page 524 Susan E. Odery and Frank J. Odery conveyed title to James D. McDonald. Accordingly, company requires:

- a. proof of the consideration for the deed as none appears to have been paid; and
- b. company requires the consent of Timothy DiResta, a named beneficiary of the TDD Irrevocable Trust to said transfer to McDonald. (BEING INVESTIGATED).”

This title report by the abstract company that defendant hired discloses through Exception 13 that J&A appeared to need Mr. DiResta's consent, as the beneficiary of the Trust to the transfer to McDonald and that no consideration deed was involved in the prior transfer.

It appears from the papers that the abstract company secured a mutual indemnification from a prior abstract company, All State Abstract Corp. for these questionable issues and, then, defendant's abstract company omitted the exception and allowed the purchase by J&A to close.

However, Exception 13 revealed that the trust had some interest in the property and that there now exist factual issues as to whether J&A knew (actual notice) or should have known (constructive notice) of said interest. The Trust Agreement dated August 3, 2007 and recorded February 3, 2009 is evidence of some claimed interest in the property. There is no dispute that the trust was of record as to the property and its existence revealed prior to the subsequent sale to movant J&A.

In view of the foregoing, J&A's motion to dismiss is denied.

This constitutes the order and judgment of this Court.

Dated: November 27, 2013

ENTERED
DEC 02 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE


STEVEN M. JAEGER, A.J.S.C.