

Dominion Fin. Corp. v Haimil Realty Corp.

2014 NY Slip Op 31225(U)

May 1, 2014

Supreme Court, New York County

Docket Number: 850084/12

Judge: Carol E. Huff

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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DOMINION FINANCIAL CORPORATION, : Index No. 850084/12

Plaintiff, :

- against - :

HAIMIL REALTY CORP., NYC DEPARTMENT OF :
FINANCE, NYS DEPARTMENT OF TAXATION AND :
FINANCE, and "JOHN DOE(S)" and "JANE DOE(S)", :
the names being fictitious and unknown to Plaintiff, the :
persons or parties intended being the tenants, occupants, :
persons or entities, if any, having or claiming an interest in :
or lien upon the premises, described in the complaint, :

Defendants. :

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CAROL E. HUFF, J.:

Motions with sequence numbers 004, 005, 006 and 007 are consolidated for disposition.

This is a mortgage foreclosure action with respect to property located at 209 East 2d Street (15 Avenue B), ground floor commercial and penthouse residential units, New York, New York (the "Premises"). The remaining units of the building, which were converted to condominiums, have been sold to third parties. Defendant Haimil Realty Corp. moves for sanctions against plaintiff "for filing a false instrument and affidavit with this Court" (004); Haimil moves for an order compelling non-party Israel Discount Bank ("IDB") to comply with its subpoena, and IDB cross-moves for a protective order and for sanctions (005); plaintiff moves to enforce a previous Stipulation of Partial Settlement (the "Stipulation") and for an order appointing a receiver (006); and Haimil moves for an order directing its previous counsel to

release funds held in escrow pursuant to the Stipulation (007).

Plaintiff alleges that Haimil has defaulted in making payments on a \$3.4 million “Consolidated Mortgage” against the Premises. It contends that a principal balance of \$1,607,719.23 plus accrued interest remains owing, and that Haimil has failed to make payments since May 2010. Plaintiff further alleges that Haimil has failed to make real estate tax payments for several years, and has failed to provide proof of insurance as required by the Consolidated Mortgage and the Stipulation.

Plaintiff moved for summary judgment in August 2013. Responding to Haimil’s answer and counterclaims, plaintiff referenced a \$1 million loan made to Haimil subsequent to the Consolidated Mortgage (which was executed on December 22, 2004), secured by a junior mortgage against the Premises. That “Subsequent Loan,” according to plaintiff, was paid off prior to the commencement of this action and is not relevant to these proceedings. Haimil contends that the Subsequent Loan was “bogus” and that the funds plaintiff states were used to pay off the Subsequent Loan should have been applied against the Consolidated Mortgage.

In its papers, plaintiff attached a copy of the purported \$1 million note (the “Note”) associated with the Subsequent Loan. The Note was transparently inauthentic, a doctored copy of another note. Upon realizing this plaintiff immediately withdrew the motion for summary judgment. In his affidavit in response to this motion, plaintiff’s vice president James Rinzler states that his father maintained all of plaintiff’s records until he passed away in 2009. Rinzler states that he found the Note in the files and provided it to plaintiff’s counsel. When it was revealed that the Note was inauthentic, Rinzler tried but failed to find a copy of the actual note, stating: “I am not surprised that the original note is not in our files because it is our practice to

return notes to its maker, or destroy them, upon full payment of the loan, which in this case happened on April 1, 2008.” James Rinzler 10/15/13 Aff., ¶ 17.

Haimil seeks sanctions pursuant to 22 NYCRR 130-1.1(c)(3), which provides that a court may award sanctions for frivolous conduct. In determining whether conduct is frivolous, “the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent. . . .” Since plaintiff immediately withdrew the motion and the Note upon learning of the Note’s inauthenticity, and provided an explanation, sanctions will not be awarded and the motion (004) is denied.

However, whether the \$1 million loan is determined to be “bogus” or legitimate will be a key factor in the ultimate disposition of this action, and the parties are given leave to move for sanctions at the conclusion of the case.

Plaintiff moves (006) for an order directing the enforcement of the Stipulation, which was entered into with Haimil’s prior counsel. The Stipulation provides that Haimil “will refrain from collecting rent from the commercial/retail space . . . until the conclusion of the foreclosure action.” The rent was to be collected by Haimil’s counsel, who was required to use the escrowed funds to pay real estate taxes and water sewer charges, and to provide proof of fire and liability insurance. Whatever funds were left over after the foreclosure action was concluded would be distributed to the prevailing party. Further, “If at any time counsel for defendant no longer wishes to hold the funds in escrow, they may turn over same to counsel for plaintiffs. . . .”

Subsequently, Haimil moved (007) for an order directing the release of collected rents

held in escrow by Haimil's prior counsel.

After the filing of these motions, prior counsel, pursuant to the Stipulation, released the escrowed funds to plaintiff's counsel. Accordingly, Haimil's motion (007) for an order directing release of escrowed funds by prior counsel is denied as moot.

That part of plaintiff's motion (006) for an order directing the enforcement of the Stipulation is granted. Haimil has offered no valid legal reasoning to support its contention that the Stipulation should not be enforced. Its arguments concerning the validity of the Consolidated Mortgage will be determined at a later time, and have no effect on the enforceability of the Stipulation.

Plaintiff also seeks an order appointing a receiver for the residential penthouse unit of the Premises. (The Stipulation provided that plaintiff withdraw and not renew its motion for a receiver for the commercial unit.)

Where a mortgagee establishes a prima facie case for foreclosure, and the mortgage agreement provides for the appointment of a receiver, it is within a court's discretion to order the appointment. Bank of Leumi Trust Co. of New York v Lightning Park, Inc., 215 AD2d 246 (1st Dept 1995). The Consolidated Mortgage provides that, in an action to foreclose it, plaintiff shall be entitled "to the appointment of a receiver without notice to the owner. . . ." ¶ 5. Real Property Law § 254(10) provides that the use of this language in a mortgage agreement means that the mortgagee is entitled, "in any action to foreclose the mortgage,"

without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the

payment of the indebtedness.

Plaintiff has presented a prima facie case of entitlement to judgment by submitting proof of the mortgage and default (see Barcov Holding Corp. v Bexin Realty Corp., 16 AD3d 282 [1st Dept 2005]), and pursuant to the Consolidated Mortgage was not required to provide notice to Haimil prior to seeking the appointment of a receiver. While raising substantial arguments in answering the complaint and asserting counterclaims, Haimil has not as yet demonstrated that plaintiff's action lacks merit. Moreover, Haimil has admitted to failing to pay real estate taxes (Douglas Pick 1/15/14 Aff., ¶ 14), thus threatening plaintiff's interest in the property. Accordingly, plaintiff's motion for an order directing the appointment of a receiver for the penthouse residential unit of the Premises is granted.

Haimil's motion (005) for an order compelling non-party IDB to comply with a subpoena is founded on Haimil's erroneous assertion that, as a result of a collateral assignment of the Consolidated Mortgage proceeds by plaintiff to IDB on August 1, 2007, "IDB was the record holder of the Consolidated Note and the holder of record of the Consolidated Mortgage." The collateral assignment specifically gave IDB an interest only in the proceeds of the mortgage loans, not in the Premises, and that interest was transferred back to plaintiff in 2012. Accordingly, IDB's connection to the transactions relevant to this action is limited, and it has produced all of the documents required of it. Accordingly, Haimil's motion (005) is denied. As to IDB's cross motion, a protective order is unnecessary in light of the disposition of Haimil's motion, and sanctions are not warranted at this time.

Accordingly, it is

ORDERED that Haimil's motion (004) for sanctions against plaintiff is denied; and it is

further

ORDERED that Haimil's motion (005) to compel compliance with a subpoena is denied; and it is further


ORDERED that IDB's cross motion (005) seeking a protective order and sanctions is denied; and it is further

ORDERED that that part of plaintiff's motion (006) seeking to enforce the Stipulation of Partial Settlement in this matter is granted, and Haimil is directed to comply with the terms of the Stipulation; and it is further

ORDERED that that part of plaintiff's motion (006) seeking an order directing the appointment of a receiver for the penthouse residential unit of the Premises is granted, and plaintiff is directed to settle order as to this order only; and it is further

ORDERED that Haimil's motion (007) for an order directing its previous counsel to release funds held in escrow pursuant to the Stipulation is denied as moot.

Dated: **MAY 1 2014**



CAROL E. HUFF
J.S.C.