

Lorusso v Lazzaruolo
2014 NY Slip Op 31847(U)
July 9, 2014
Supreme Court, Suffolk County
Docket Number: 12-16955
Judge: Jeffrey Arlen Spinner
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 1-11-13 (#001)
MOTION DATE 3-20-13 (#002)
MOTION DATE 7-3-13 (#003)
MOTION DATE 7-10-13 (#004)
ADJ. DATE 4-2-14
Mot. Seq. # 001 - MD
 # 002 - XMotD
 # 003 - MD
 # 004 - XMD

-----X
ROBERT LORUSSO and OMER NALBANT and
ALIMA NALBANT, as Administrators of the
ESTATE OF EDDY NALBANT, deceased,

Plaintiffs,

- against -

HELAINA LAZZARUOLO and CARMELO S.
DE LUCA,

Defendants.
-----X

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Upon the following papers numbered 1 to 60 read on these motions and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 29 - 44 ; Notice of Cross Motion and supporting papers 13 - 26; 45 - 58 ; Answering Affidavits and supporting papers 27 - 28; 59 - 60 ; Replying Affidavits and supporting papers ; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by the plaintiffs for an order striking the answer of defendant Helaine Lazzaruolo and for an order pursuant to CPLR 3212 granting summary judgment in favor of the plaintiffs and against defendant Helaine Lazzaruolo is denied; and it is further

ORDERED that the cross motion by defendant Helaine Lazzaruolo for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as asserted against her or, in the

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alternative, for an order pursuant to CPLR 3126 dismissing the complaint as asserted against her based on the plaintiffs' willful failure to respond to her discovery demands, and for an order pursuant to CPLR 3025 permitting her to amend her answer to assert a counterclaim for violation of Banking Law § 6-1, is granted to the extent that the defendant is permitted to amend her answer to include the counterclaim, that the answer, in the form annexed to the moving papers, is hereby deemed served, and that the motion is otherwise denied; and it is further

ORDERED that the motion by the plaintiffs for an order striking the answer and counterclaim submitted by the Estate of Carmelo Deluca on behalf of defendant Carmelo Deluca, granting partial summary judgment in favor of the plaintiffs and against defendant Carmelo Deluca, and for an order deeming service upon the Estate of Carmelo Deluca timely, *nunc pro tunc*, and in compliance with CPLR 306-b or, in the alternative, extending plaintiffs' time for service of the summons and complaint upon the Estate of Carmelo Deluca is denied; and it is further

ORDERED that the motion by the Estate of Carmelo Deluca for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as asserted against it and for summary judgment in its favor and against the plaintiffs on its counterclaim, or, in the alternative, dismissing the complaint pursuant to CPLR 3126 based on the plaintiffs' wilful and contumacious failure to respond to its discovery demands, or, in the alternative, dismissing the complaint based on lack of personal jurisdiction, is denied.

On June 4, 2012, the plaintiffs commenced this action to recover monies due upon a promissory note made by defendants payable to plaintiff Robert LoRusso. According to plaintiff's complaint, on November 19, 2008, the defendants executed a promissory note in consideration for a \$400,000 loan at an interest rate of 10%. In order to secure payment for the loan, on that same date, the defendants executed a mortgage, which was recorded in the Suffolk County Clerk's office on December 12, 2008. By assignment dated February 26, 2009 and recorded in the Suffolk County Clerk's office on March 16, 2009, Mr. Lorusso assigned a 25% interest in the note and mortgage to Eddy Nalbant, while retaining a 75% interest in the note and mortgage. It is alleged in the complaint that, despite demand for payment by the plaintiffs, the defendants failed to pay the balance of the principal owed which became due on May 1, 2010. The note provided that the defendants would pay monthly installments of interest only commencing on December 1, 2008 and on the first of each month thereafter until November 1, 2009, when the entire unpaid principal balance would be paid in full. In a rider annexed to the promissory note, the defendants were given the option of extending the term of the note until May 1, 2010, provided that they were not in default on any payments. The complaint alleges that plaintiffs are the "owners and holders" of the note, and that defendants are now in default in payment of the principal and interest due under the note. The first cause of action is for the unpaid balance due on the note and the second cause of action is for attorney's fees.

An action was initially commenced on June 16, 2010 by Mr. LoRusso and Mr. Nalbant against the defendants. However, Mr. Nalbant passed away on October 9, 2009, prior to the commencement of the action. As a result, by order dated June 17, 2011, the Court (Molia, J.) granted the cross motion by defendant Helaine Lazzaruolo to dismiss the action on the ground that the action was void, *ab initio*, since plaintiff Nalbant died prior to the commencement of the action. Thereafter, Omer Nalbant and

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Alima Nalbant were appointed as administrators of Eddy Nalbant's estate and the plaintiffs commenced the instant action against the defendants.

The plaintiffs now move for summary judgment in their favor and against Lazzaruolo and Lazzaruolo cross-moves for summary judgment dismissing the complaint as asserted against her or, in the alternative, for an order pursuant to CPLR 3126 dismissing the complaint as asserted against her based on the plaintiffs' willful failure to respond to her discovery demands, and for an order pursuant to CPLR 3025 permitting her to amend her answer to assert a counterclaim for violation of Banking Law § 6-1. In addition, the plaintiffs move separately for summary judgment in their favor and against the Estate of Carmelo Deluca ("the Estate"), which is not a party to this action, and the Estate cross-moves for summary judgment dismissing the complaint as asserted against it and for summary judgment in its favor and against the plaintiffs on its counterclaim, or, in the alternative, dismissing the complaint pursuant to CPLR 3126 based on the plaintiffs' wilful and contumacious failure to respond to its discovery demands, or, in the alternative, dismissing the complaint based on lack of personal jurisdiction.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled 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 proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a prima facie showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp., supra*).

In order "[t]o establish prima facie entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms" (*Lugli v Johnston*, 78 AD3d 1133, 1135, 912 NYS2d 108, 111 [2d Dept 2010]; *see also New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]). A promissory note may be transferred by negotiation or assignment, and the transfer of such an instrument "vests in the transferee such rights as the transferor had therein" (Uniform Commercial Code §3-201 [1]). As with any other assignment, the assignee of a promissory note only acquires the title, rights and interests transferred by the assignor, and takes the property of the assignor subject to the claims and defenses that may have been asserted against the assignor (*see Kaufman v Sbarro of Sunrise Mall*, 47 AD2d 734, 365 NYS2d 219 [1st Dept 1975]; *see generally Matter of International Ribbon Mills [Arjan Ribbons]*, 36 NY2d 121, 365 NYS2d 808 [1975]). "A co-maker of a promissory note is liable to the payee for the full face amount of the note" (*see Welch v*

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Campbell, 197 Misc165, 167, 94 NYS2d 860, 863 [Sup Ct, Otsego County 1950], *affd* 278 AD 605, 102 NYS2d 51 [3d Dept 1951]).

Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law—in their first motion for summary judgment (001)—on the issue of liability against Lazzaruolo by submitting the promissory note signed by Lazzaruolo and defendant Carmelo Deluca as well as an affidavit from Mr. Lorusso in which he states that defendants defaulted on their loan obligations by failing to pay the principal balance of the loan which became due upon its maturity on May 1, 2010 (*see Lugli v Johnston, supra; New York Commercial Bank v J. Realty F Rockaway, Ltd., supra*).

In opposition and in support of her cross motion, Helaine Lazzaruolo raised a triable issue of fact as to whether Banking Law §§ 6-1 and 590 are applicable to LoRusso, whether the loan made by the plaintiffs constitutes a high-cost home loan within the meaning of Banking Law § 6-1 and, if so, whether the loan conformed to the statutory requirements set forth in Banking Law § 6-1 (*see Wells Fargo, NA v Savinetti*, 116 AD3d 765, 984 NYS2d 73 [2d Dept 2014]), and whether the plaintiffs were licensed pursuant to Banking Law § 590. Lazzaruolo asserts that the plaintiff violated Banking Law § 6-1, which relates to high-cost home loans. Pursuant to Banking Law § 6-1, a lender is defined as a “mortgage banker”—as defined in Banking Law § 590—or “exempt organization” (*see Banking Law § 6-1*). Banking Law § 590 defines a mortgage banker as “a person or entity who or which is licensed pursuant to section five hundred ninety-one of this chapter to engage in the business of making mortgage loans in this state” (Banking Law § 590 [f]). Furthermore, Banking Law § 590 prohibits any person from making a mortgage loan without first obtaining a license to do so (*see Banking Law § 590 [2]*). The licensing requirement does not apply to “any individual . . . [who] makes not more than three such loans in a calendar year, nor more than five in a two year period . . . provided that no such mortgage loans have been made which were solicited, processed, placed or negotiated by a mortgage broker, mortgage banker or exempt organization” (Banking Law § 590 [2] [a] [iii]). While LoRusso asserts that these sections of the Banking Law are not applicable to him and states in an affidavit in support of plaintiffs’ motion, that he is “not an institutional lender or an exempt organization and . . . [is] not in the business of making mortgage loans,” annexed as an exhibit to Lazzaruolo’s cross motion papers is a computer printout from the website of New York State Department of State, Division of Corporations listing Robert LoRusso as the Chief Executive Officer of Jericho Mortgage Associates, Inc., which was incorporated in July 1987 and is still currently active. Thus, an issue of fact exists as to whether LoRusso was in the business of making mortgage loans thereby making Banking Law §§ 6-1 and 590 applicable to him, whether the loan made by him to the defendants constituted a high-cost home loan within the meaning of Banking Law § 6-1 and, if so, whether the loan conformed to the statutory requirements set forth in Banking Law § 6-1 (*see Wells Fargo, NA v Savinetti, supra*).

With respect to the branch of Lazzaruolo’s cross motion which seeks dismissal of the complaint based on the plaintiffs’ alleged wilful failure to provide answers to her discovery demands, it is well settled that the determination as to whether to strike or dismiss a pleading based on a party’s failure to comply with discovery lies within the sound discretion of the trial court (*see Orgel v Stewart Tit. Ins. Co.*, 91 AD3d 922, 938 NYS2d 131 [2d Dept 2012]). “However, the drastic remedy of striking a pleading pursuant to CPLR 3126 should not be imposed unless the failure to comply with the discovery demands or orders is clearly willful and contumacious . . . Willful and contumacious conduct may be

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inferred from a party's repeated failure to comply with court-ordered discovery" (*id.* at 923, 938 NYS2d at 133 [internal citations and quotation marks omitted]). Here, the Court does not find the plaintiffs' act of making the instant motions for summary judgment prior to providing discovery responses to Lazzaruolo's discovery demands to be willful and contumacious warranting the dismissal of the complaint.


Turning to Lazzaruolo's request to amend her answer to assert a counterclaim for violation of Banking Law § 6-1, leave to amend a pleading should be freely granted in the absence of prejudice or surprise resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or devoid of merit (*see Sabatino v 425 Oser Ave., LLC*, 87 AD3d 1127, 930 NYS2d 598 [2d Dept 2011]; *Jablonski v Jakaitis*, 85 AD3d 969, 926 NYS2d 137 [2d Dept 2011]). Here, since the Court finds issues of fact exist as to whether the aforementioned statute is applicable to LoRusso, whether the instant loan constituted a high-cost home loan as defined in Banking Law § 6-1 and whether the plaintiffs complied with the statutory requirements regarding said loans when issuing this loan to the defendants, the proposed counterclaim is not palpably insufficient or devoid of merit. In addition, the plaintiffs have not established prejudice or surprise. Thus, the branch of Lazzaruolo's cross motion seeking leave to amend her answer to include this counterclaim is granted.

As for the plaintiffs' second motion for summary judgment (002) on the issue of liability against defendant Deluca, Mr. Deluca's death, prior to the commencement of this action, rendered the action, insofar as asserted against him, a nullity and the Court has no jurisdiction to grant any relief against Mr. Deluca (*see Rivera v Bruchim*, 103 AD3d 700, 959 NYS2d 448 [2d Dept 2013]). Thus, the plaintiffs' motion for summary judgment against Mr. Deluca is denied.

In addition, the cross motion made by the Estate is also denied as the Estate is not a party to this action and cannot submit an answer or move on behalf of the deceased. The Estate cannot be substituted as a party for Mr. Deluca due to the fact that Mr. Deluca was never a party to the action as he died prior to its commencement and, as a result, there is no party for whom substitution can be effected (*see Marte v Graber*, 58 AD3d 1, 867 NYS2d 71 [1st Dept 2008]; *Arbelaez v Chun Kuei Wu*, 18 AD3d 583, 795 NYS2d 327 [2d Dept 2005]).

Accordingly, the motions by the plaintiff are denied, the cross motion by defendant Lazzaruolo is granted to the extent of permitting her to amend her answer to include a counterclaim of violation of Banking Law § 16-1, and the Estate's cross motion is denied.

Dated: JUL 09 2014


 J.S.C.
HON. JEFFREY ARLEN SPINNER

 FINAL DISPOSITION X NON-FINAL DISPOSITION