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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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ALEXANDER RAZINSKI and TANYA RAZINSKI,

Plaintiffs,

INDEX NO. 652357/13

-against-

136 FIELD POINT CIRCLE HOLDING COMPANY, LLC,

Defendant.

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JOAN A. MADDEN, J.:

In this action involving a dispute as to the parties' rights regarding residential property located in Greenwich, Connecticut, defendant 136 Field Point Circle Holding Company, LLC ("Field Point Holding") moves for an order pursuant to CPLR 3212 granting summary judgment against plaintiffs Alexander Razinski and Tanya Razinski (the "Razinskis") on "all of the claims" in the complaint, and summary judgment in defendant's favor on its second and fourth counterclaims.[1] Plaintiffs oppose the motion.

The following facts are not disputed unless otherwise noted. The Razinskis are the tenants of a "luxury mansion" located at 136 Field Point Circle, Greenwich, Connecticut (the "property"). Defendant Field Point Holding took fee title to the property on May 17, 2012 via a Trustee's Deed from the previous owner, Michael Pontoriero, Trustee of the 136 Field Point

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[1]The court's records indicate that defendant e-filed a second summary judgment motion denominated as sequence no. "000." That motion is deemed a nullity, since it appears it was not properly e-filed, and is not listed as either a pending or submitted motion. The court notes, however, that the motion seeks the identical relief with respect to the complaint as the instant motion, but additionally seeks summary judgment on defendant's second counterclaim. The decision herein makes no determination as to the second counterclaim.

Circle Trust (the "Pontoriero Trust"). On the same day, Field Point Holding, as landlord, and the Razinskis, as tenant, executed a lease for the property which provided for a term ending on June 30, 2013, at a monthly rent of $25,000; $20,000 of that amount "may be deferred" without interest until the end of the rental term, at which time the amount "shall be paid in full." Simultaneously, Field Point Holding and the Razinskis executed a "Master Agreement," which incorporated the lease by reference. The Master Agreement provided, *inter alia*, that Field Point Holding "in its sole and absolute discretion" could extend the Razinskis' lease term for an additional six months. The Master Agreement also included a "Call Option," which gave the Razinskis certain rights with respect to purchasing the property.

By letter dated May 31, 2013, the Razinskis advised Field Point Holding that they "hereby exercise their option pursuant to Section 2.1 of the Master Agreement to extend the term of the lease an additional six (6) months to December 31, 2013." By letter dated June 11, 2013, Nicolas Prouty, CEO of Field Point Holding, responded that "Section 2.1 of the Master Agreement provides that the Purchaser [Field Point Holding], rather than the Razinskis, has the option of extending the Rental Term and the Purchaser alone may decide whether or not to do so, in its sole and absolute discretion," so "you have no right to extend the Rental Term" and "your letter has no legal effect."

Prouty's letter explained that in conversations with the Razinskis in January, February, March and April 2013, they "expressed optimism" about the "business prospects" of their company, Invar, so Prouty "once again deferred making a decision on the [lease] extension, but "[s]ubquent events have not supported your optimism . . . and it is unclear whether there will be any Invar Business Proceeds at any time in the foreseeable future." Prouty stated that "[i]n

response to your repeated requests, I deferred the decision on extension of the Rental Term, but I cannot responsibly further delay the decision," and "have regretfully come to the conclusion that the situation with Invar's business will be the same in six months as it is today and so my investors' capital would be needlessly tied up for that additional period, and your portion of the sale proceeds would be needlessly reduced since the delay will increase the Required Return Price under the Master Agreement if I were to agree to extend the Rental Term and defer listing the Property for sale." Prouty stated, "[t]o that end, I asked David Oglivy & Associates, which as you know is the designated real estate agent under Section 6.1(a) of the Master Agreement, to evaluate the Property in connection with the listing process." Prouty also stated that "[s]ince the Rental Term was not extended by the Purchaser, it expired on May 17, 2013," and to insure that "there is no ambiguity, this letter constitutes legal notice to you of the Purchaser's decision to not extend the Rental Term under Section 2.1 of the Master Agreement," and "[s]imilarly this letter constitutes legal notice to you of the Purchaser's decision to not extend the May 17, 2013 expiration date of the Call Option under Section 3.1 of the Master Agreement." Prouty further stated that even though the "Rental Term has ended, I am willing to give you sixty days from the date of this letter, which is August 10, 2013, to vacate the Property on the condition you continue to comply with you obligations" under the Master Agreement requiring "you to reasonably cooperate with listing and selling the Property."

On July 3, 2013, the Razinskis commenced the instant action seeking specific performance, and injunctive and declaratory relief. The complaint asserts six causes of action: breach of contract and specific performance requiring Field Point Holding to comply with the Master Agreement and extend the term of the lease and the Call Option for six months through

November 17, 2013 (Count I); an injunction "prohibiting" Field Point Holding "from seeking to improperly evict them from their Home, from asserting that the term of occupancy was not extended for an additional six-month period, and maintaining the status quo pending the outcome of this action" (Count II); equitable estoppel estopping Field Point Holding "from asserting that the term of occupancy and the Call Option were not extended for an additional six months" (Count III); a judgment declaring that the $1 million "no holdover" provision in the Master Agreement is an unenforceable penalty (Count IV); a judgment declaring that the "deed" for the property "was conveyed" to Field Point Holding "as security for the loan" and "is required to be treated as a mortgage under common law and RPL §320" (Count V); and a judgment declaring that the Razinskis "as statutory mortgagors, have a right of possession and occupancy" during the pendency of any mortgage foreclosure, and Field Point Holding "cannot dispossess the Razinskis of their possession and occupancy" of the property until it "obtains a judgment of foreclosure and sale and completes a foreclosure sale" (Count VI).

Field Point Holding answered asserting a first affirmative defense of failure to state a cause of action and four counterclaims. The first counterclaim for breach of the lease seeks damages in the amount of $1 million pursuant to section 2.3 © of the Master Agreement based on the Razinskis alleged failure to vacate the property at the end of the lease term. The second counterclaim for ejectment seeks a judgment of possession against the Razinskis. The third counterclaim seeks use and occupancy, and the fourth counterclaim seeks attorney's fees.

In addition to filing the complaint on July 3, 2013, the Razinskis filed a proposed Order to Show Cause for a preliminary injunction restraining and enjoining Field Point Holding from "improperly evicting" them and asserting the lease term was not extended for an additional six-

month period; and to maintain the status quo pending the outcome of this action. On July 7, 2013, the proposed Order to Show Cause was signed, and on October 3, 2013, this court issued an order that the Razinskis' "motion for a preliminary injunction is moot, as defendant has agreed to extend the lease term for the subject premises for the additional six-month extension period provided for in Section 2.1 of the Master Agreement."

Defendant Field Point Holding is now moving for summary judgment dismissing the complaint, and summary judgment on its second counterclaim for ejectment and its fourth counterclaim for attorney's fees.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. See CPLR 3212(b); Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to demonstrate that material issues of fact exist which require a trial. See Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

In support of the motion, Field Point Holding submits an affidavit of its principal Nicholas Prouty, an affidavit of its attorney, the pleadings, and documents including the Trustee's Deed conveying the property to Field Point Holding, the Closing Statement for Field Point Holding's purchase of the property, the parties' Residential Lease and Master Agreement, the Razinskis' Personal Financial Statement dated February 6, 2012, the parties' letter and email correspondence, and a Commitment for Title Insurance issued by First American Title Insurance

Company, showing Field Point Holding as the fee owner of the property.

In opposition to the motion, the Razinskis submit an affidavit of defendant Alexander Razinski, and documents including the Master Agreement, the Residential Lease, a Project Cost Report for the Razinskis' 2007-2011 renovation of the property, and a spread sheet showing the Razinskis' "Home Maintenance Fees" for the property. The Razinskis also submit a letter dated October 7, 2013 from Nicholas Prouty regarding Field Point's agreement to extend the lease term to November 17, 2013 "as you requested of the Supreme Court" and demanding payment of outstanding rent and real estate taxes; a letter from the Razinskis' counsel enclosing a check in the amount of $30,000 for rent due from June to November 2013; and a November 13, 2013 letter from the Razinskis' to the Greenwich, Connecticut tax collector, enclosing a check in the amount of $57,556.92 for real estate taxes.

The first three causes of action for specific performance (Count I), a preliminary injunction (Count II) and equitable estoppel (Count III), seek a six-month extension of the lease term and the "Call Option,"[2] based on Field Point Holding's alleged failure to extend the lease for an additional six months in accordance with Section 2.1 of the Master Agreement. As noted above, in response to the Razinskis' order to show cause for a preliminary injunction, Field Point Holding agreed to give the Razinskis the six-month extension of their lease. For that reason this court concluded in its October 3, 2013 order that the Razinskis' motion for a preliminary injunction was moot. Under these circumstances the Razinskis have already obtained the relief

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[2]Pursuant to Section 3.1 of the Master Agreement, the term of the Call Option was expressly tied to and contingent on the term of the lease, and was also "subject to extension for an additional six (6) months upon agreement by Purchaser [Field Point Holding] in its sole and absolute discretion."

sought in the first three counts, i.e. the lease extension for six additional months and the related extension of the Call Option, are moot, and those counts are dismissed.

In Counts V and VI, the Razinskis request a declaratory judgment that they have an equitable mortgage on the property pursuant to common law and Real Property Law §320. As equitable mortgagors, the Razinskis seek "the right to the protections afforded by law to a mortgagor, including the equity of redemption, which permits it to redeem the property by making payment of the debt owed to the mortgagee, a right which may only be extinguished by a valid foreclosure sale under RPAPL Article 13." D & L Holdings, LLC v. RCG Goldman Co, 287 AD2d 65, 69 (1st Dept 2001), lv app den 97 NY2d 611 (2002).

Under New York law, an equitable lien mortgage will be found "if there is an express or implied agreement that there shall be a lien on a specific property." Deutsche Bank Trust Co Americas v. Cox, 110 AD3d 760, 761 (2nd Dept 2013). "'While a court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation, it is necessary that an intention to create such a charge clearly appear from the language and the attendant circumstances.'" Id (quoting Tornatore v. Bruno, 12 AD3d 1115, 1117-119 [4th Dept 2004]).

Here, Field Point Circle argues the Razinskis are not equitable mortgagors as they never owned and do not own a fee interest in the property, so they had nothing to convey to secure a loan. Field Point Circle cites the First Department's decision in D & L Holdings, LLC v. RCG Goldman Co, supra. In that case, the Appellate Division held that the "terms of the parties' transaction amount to far more than the type of bare deed that leads to the . . . rule that a deed must be deemed a mortgage when it is held as security for a debt." Id at 70. The Court

determined that "[t]his commercial transaction, between sophisticated parties each of which was represented by counsel, is fully and unambiguously described in the documents," which demonstrate that defendant purchased the property pursuant to an assignment of plaintiff's rights, with plaintiff "having a right, conditioned upon payment of the agreed consideration within the stated time, to a six-month lease of the property with an option to purchase," and "[t]his clear arrangement cannot be twisted into a mortgage." Id.

The Appellate Division held that the "parties agreement, as a matter of law, sets forth a transaction that is not a mortgage," as defendant "was not providing funds to finance [plaintiff's] purchase of the property, thereby creating a debt on [plaintiff's] part that would be secured by the property." Rather, defendant "was itself purchasing the property, though leaving [plaintiff] the option to purchase it at a future date, upon timely payment made to obtain that purchase option." Id at 71. "This is what the Court of Appeals has termed an 'absolute sale and conditional resale.'" Id (quoting Matthews v. Sheehan, 69 NY 585, 590 [1877]). Here, Field Point Circle asserts the documentary evidence establishes that the transaction by which it purchased the instant property from the Pontoriero Trust was identical to the transaction in D & L Holdings, LLC v. RCG Goldman Co, supra, and that the Razinskis similarly obtained only "a conditional right to obtain an option to purchase the property at a later date" and not a fee interest that would grant them standing as equitable mortgagors.

In response, the Razinskis contend that issues of fact exist as to "whether the deed to the subject property was conveyed as security for the loan such that it must be treated" as an equitable mortgage pursuant to Real Property Law §320. The Razinskis assert that the Master Agreement was "a conveyance given to secure a debt" and must be treated as a mortgage.

Specifically, they argue that under section 1.1 of the Master Agreement, Field Point Holding "loaned" them $16 million, of which more than $13,451,818.14 was used toward the purchase" of the property. Their argument, however, is not supported by the language in section 1.1, which provides follows:

> Conditioned upon, and effective immediately prior to, occurrence of the Real Estate Closing, [the Razinskis] shall assign the Purchase Option Agreement to Purchaser pursuant to the Assignment and Assumption Agreement, a copy of which is annexed hereto as Exhibit A, in exchange for an 'Option Acquisition Payment' consisting of (a) $2,548,181.86 paid by Purchaser to the Razinskis at the Real Estate Closing pursuant to Section 1.2; and (b) an additional $1,000,000.00 if Purchaser is satisfied, in its sole and absolute discretion, with the progress of Invar's business. If the Real Estate Closing does not, for any reason, occur, this Agreement, the other Transaction Documents and the transactions contemplated hereby and thereby shall be null and void, ab initio. Notwithstanding the foregoing, the Parties agree and acknowledge that $1,000,000.00 was advanced by Purchaser to the Razinskis and Invar in anticipation of consummation of the transactions contemplated hereby pursuant to the Bridge Promissory Note, dated April 26, 2012, executed by the Razinskis and Invar in favor of Purchaser, which shall, upon occurrence of the Real Estate Transaction, automatically be terminated and the funds advanced by Purchaser thereunder deemed to have been paid by Purchaser to the Razinskis at the Real Estate Closing as provided above.

The foregoing provision plainly states that Razinskis assigned their option to purchase the property to Field Point Circle in return for an "option acquisition payment," and not for a loan of any type, as they incorrectly assert. This "clear arrangement" by the parties "cannot be twisted into a mortgage." D & L Holdings, LLC v. RCG Goldman Co, supra, at 70

While it is undisputed the lease required the Razinskis to pay the real estate taxes and other expenses for the property, those payments alone are insufficient to show or suggest that they had a loan or equitable mortgage. The Razinskis' reliance on Resseguie v. Adams, 55 AD2d 698 (3rd Dept 1976), aff'd 42 NY2d 1022 (1977) and Polish National Alliance v. White Eagle Hall Co, Inc, 98 AD2d 400 (2nd Dept 1983), is misplaced, as those cases are

distinguishable on their facts. In Ressequie v. Adams, supra, the equitable mortgagor was the original owner of the property who conveyed the deed and retained an option to *repurchase* the property. Polish National Alliance v. White Eagle Hall Co, Inc, supra, did not involve any issues as to an equitable mortgage. Rather, plaintiffs were seeking to set aside a foreclosure sale, and the court determined, *inter alia*, that the contract vendees who had contracted with the mortgagor to purchase the property and who had recorded their contracts, were necessary parties to the foreclosure and had a common-law right to redeem the mortgage.

Thus, on the authority of D & L Holdings, LLC v. RCG Goldman Co, supra, this Court determines as a matter of law that the Razinskis do not have an equitable mortgage.

In view of the foregoing determination, Field Point Holding is also entitled to judgment as a matter of law on its second counterclaim for ejectment. See Sheila Properties, Inc v. A Real Good Plumber, Inc, 74 AD3d 779 (2nd Dept 2010), lv app dism 17 NY3d 833 (2011); 247 East 32nd LLC v. Gasparich, 95 AD3d 790 (1st Dept), lv app den 20 NY3d 984 (2012); Merkos L'Inyonei Chinuch, Inc v. Sharf, 59 AD3d 408 (2nd Dept 2009). Other than their claim that they have an equitable mortgage, which the court has rejected, the Razinskis have not asserted any other legal ground for them to remain in possession of the property after the six-month lease extension expired on November 17, 2013. Consequently, since it is undisputed Field Point Holding is the fee owner of the property with a present right to possession, and the Razinskis' right to occupy the premises terminated upon the expiration of the six-month lease extension, Field Point Holding is entitled to recover possession of the property as against the Razinskis. See id at 410; Jannace v. Nelson, LP, 256 AD2d 385 (2nd Dept 1998). Field Point Holding is also entitled to an order vacating the notice of pendency filed against the property in the office of

the Town Clerk of the Town of Greenwich, Connecticut.

Field Point Holding, however, is not entitled to judgment as a matter of law with respect to Count IV of the complaint. In Count IV, the Razinskis seek a judgment declaring that the $1 million holdover liquidated damages clause in Section 2 of the Master Agreement is an unenforceable penalty.[3] Whether a contract provision "represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances." JMD Holding Corp v. Congress Financial Corp, 4 NY3d 373, 379 (2005). In moving for summary judgment against plaintiffs' Count IV, Field Point Holding essentially seeking a declaration that the foregoing liquidated damages clause is enforceable. Field Point Holding, however, fails to make a prima facie showing both that the damages flowing from the Razinskis' holdover, at the time the parties entered into the Master Agreement, were "difficult to ascertain, and that the provision fixing said damages was a

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[3]Section 2 of the Master Agreement states in relevant part as follows:

> [The Razinskis] are sophisticated parties with significant resources that would enable them to obtain other accommodations immediately upon end of the Rental Term (including using their residence located at 40 Central Park South, Apartment 12A, New York, NY 10019) and, accordingly, they each irrevocably waive any holdover or other right to reside in or otherwise occupy the Property at any point after the end of the Rental Term under any applicable landlord-tenant Law or other applicable Law and each agrees to vacate the Property immediately upon the end of the Rental Term; and (c) their failure to vacate the Property immediately upon the end of the Rental Term would have a material adverse effect on Purchaser's [Field Point Circle Holding LLC] ability to sell or lease the Property, which would cause significant and irreparable financial harm to Purchaser and, accordingly, any such failure will entitle Purchaser to receive an immediate cash payment from the Razinskis of $1,000,000, which shall be in addition to, and not in lieu of, any other remedies available to Purchaser relating to such failure.

reasonable measure of the anticipated probable harm." SMD Capital Group LLC v. EPR Capital LLC, 45 AD3d 314 (1st Dept 2007), lv app dism 10 NY3d 837 (2008); see Benjamin Partners, LLC v. 583-587 Broadway Condominium, 34 AD3d 311 (1st Dept 2006). Thus, Count IV in the complaint shall stand.

Finally, the branch of Field Point Holding's motion for summary judgment on its fourth counterclaim for an award of attorney's fees is denied without prejudice to renewal when this action is finally concluded.

Accordingly, it is

ORDERED that the motion by defendant Field Point Circle Holding Company LLC for summary judgment is granted to the extent that Counts I, II, III in the complaint are dismissed as moot, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, ADJUDGED AND DECLARED that with respect to Counts V and VI in the complaint, plaintiffs Alexander Razinski and Tanya Razinski do not hold an equitable mortgage or any other equitable interest in the property located at 136 Field Point Circle, Greenwich, Connecticut; and it is further

ORDERED that defendant's motion for summary judgment is denied as to Count IV in the complaint; and it is further

ORDERED that the branch of defendant's motion for summary judgment on its fourth counterclaim for attorney's fees is denied with leave to renew upon final conclusion of this action; and it is further

ORDERED that branch of defendant's motion for summary judgment on its second counterclaim for ejectment is granted, and defendant Field Point Circle Holding Company LLC

is entitled to a judgment of possession against plaintiffs Alexander Razinski and Tanya Razinski; and it is further

ORDERED that the Notice of Pendency filed by plaintiffs Alexander Razinski and Tanya Razinski on July 5, 2013 in the office of the Town Clerk of the town of Greenwich, Connecticut against BK 6601PG0129 as shown upon "Map of Field Point Greenwich, Conn." on file a Map No. 176, is cancelled and it is further

ORDERED that the balance of the action shall continue.

DATED: October 28, 2014

ENTER:

J.S.C.

HON. JOAN A. MADDEN
J.S.C.