

Patmos Fifth Real Estate Inc. v Mazl Bldg. LLC

2015 NY Slip Op 30861(U)

May 20, 2015

Supreme Court, New York County

Docket Number: 108421/11

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
PATMOS FIFTH REAL ESTATE INC. and PATMOS
WESTBURY, LLC,

Plaintiffs,

-against-

MAZL BUILDING LLC, RABA HAIM ABRAMOV,
NYA BUILDING CONSTRUCTION CORP., SHIMON
WOLKOWICKI, and HIGH LINE HOLDINGS, LLC,

Defendants.
-----X

BARBARA JAFFE, JSC:

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Plaintiffs move pursuant to CPLR 3212 for an order granting them summary judgment on their second cause of action and vacating, pursuant to Real Property Law 320, the deed recorded by defendants on December 23, 2009 (CRFN 2009000421459) naming Wolkowicki and Mazl Building LLC as owners of property known as and located at 214-216 East 52nd Street in Manhattan, and restoring plaintiff Patmos Fifth Real Estate Inc.'s (Patmos Fifth) ownership interests in and to the property, and summarily dismissing defendants' counterclaims and third-party claims. Defendants Mazl, NYA Building Construction Corp. and High Line Holdings LLC oppose.

I. BACKGROUND

The background of this action is set forth in my decision and order dated July 29, 2013

(NYSCEF 20) as follows:

On June 21, 2006, Patmos Fifth purchased from Mazl the property at issue with a \$9,350,000 loan from Mazl secured by a mortgage on the building due to be paid by December 21, 2007 (June mortgage). On December 6, 2006, as Patmos Fifth failed to maintain insurance for or pay taxes on the building, it borrowed \$1,000,000 from defendant NYA, secured by a second mortgage on the building (December mortgage). The December mortgage contains terms identical to those set forth in the June mortgage.

On December 7, 2007, plaintiff Patmos Westbury, LLC (Patmos Westbury), an affiliate of Patmos Fifth, purchased a condominium unit in a building located at 15 East 69th Street in Manhattan with a \$2,722,500 loan from Citimortgage, secured by a mortgage on the unit (Citi mortgage).

On January 21, 2008, as plaintiffs had defaulted on the June, December, and Citi mortgages, Mazl agreed to extend the time for payment of the June and December mortgages and lent plaintiffs an additional \$5,650,000 secured by a mortgage on the building and the condo, due to be paid in full by December 21, 2008 (January mortgage). Plaintiffs also pledged as security their interest in a building at 70 Greene Street in Manhattan. The January mortgage contains terms identical to those set forth in the December and June mortgages.

The same day, and as part of the same transaction, NYA assigned to Mazl the December mortgage, and plaintiffs and Mazl agreed to consolidate the June, December, and January mortgages into a single \$16,000,000 mortgage, due to be paid in full by December 31, 2008, and containing terms identical to those sets forth in the December, June, and January mortgages (consolidated mortgage).

On September 30, 2008, Wolkowicki lent Patmos Westbury \$750,000 in exchange for a mortgage on the condo, with the first payment due on October 30, 2008 (condo mortgage).

Plaintiffs defaulted on the consolidated mortgage, and on February 27, 2009, they executed with Mazl an agreement (Deed agreement) providing, in pertinent part, that:

WHEREAS, the lender has agreed to an extension of time to repay the [consolidated] mortgage in accordance with the terms and provisions set forth herein;
NOW THEREFORE, it is hereby agreed as follows:

...

3. Entire Agreement. . . . This agreement may not be modified, amended, altered or supplemented except upon the execution and delivery of a written agreement executed by the parties hereto.

4. Maturity Date. Lender agrees to extend the maturity date of the [consolidated] mortgage until October 1, 2009 and further agrees to advance an additional sum of \$250,000.00 to be secured by a lien of said mortgage and to be used by borrower to complete the construction of the improvements on the premises. Borrower agrees to pay any additional sums needed to complete the improvements to the point at which it would be possible to obtain a temporary certificate of occupancy . . . and to commence sales of individual condominium units

5. Payment due by October 1, 2009. If the borrower has not completely repaid the loan on or before October 1, 2009 . . . , the borrower will have the ability to pay the sum of \$2,500,000.00 and lender will grant an additional 9 month extension until June 30, 2010 to repay the loan.
...

9. Delivery of Deed. Simultaneous with the execution of this agreement, borrower shall deliver an executed deed to the premises to lender conveying the premises to Shimon Wolkowicki, as to 62.5% interest and Mazl . . . as to a 37.5% interest. Said deed shall be delivered to lenders counsel [] to be held in escrow by [him] and not to be released for filing unless and until borrower shall fail to make any of the payments required hereunder on October 1, 2009 or June 30, 2010.
...

11. Monthly Interest Payments. Commencing on October 1, 2009, borrower agrees to begin to make monthly interest payments on the then outstanding principal balance of the consolidated mortgage.

On October 1, 2009, plaintiffs defaulted on the consolidated mortgage. Shortly thereafter, Mazl's counsel released the deed from escrow, and on December 23, 2009, it was recorded in the City register. On November 10, 2010, Wolkowicki conveyed to High Line his ownership interest in the building.

On or about July 21, 2011, plaintiffs commenced the instant action, alleging, as pertinent here, a claim for the violation of Real Property Law § 320, thereby seeking rescission of the consolidated mortgage, the condo mortgage, and the deed, a judgment declaring these instruments null and void, an injunction directing defendants to file a cancellation and/or satisfaction of the consolidated and condo mortgages, and an injunction prohibiting defendants from foreclosing on the mortgages. They also advance a claim for unjust enrichment based on

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defendants' failure to reimburse them for the \$1,000,000 in decorations and furnishings they purchased. (*Id.*).

In the July 2013 decision, I denied defendants' motion to dismiss the complaint as to plaintiffs' claims against all defendants but Abramov, based on their alleged violation of Real Property Law § 320(a) and for unjust enrichment, and otherwise granted the motion. (NYSCEF 20).

In October 2013, defendants filed an answer with counterclaims and third-party claims, as follows: (1) failure to state a claim; (2) laches; (3) waiver, estoppel, ratification and/or unclean hands; (4) accord and satisfaction and/or merger; (5) claims barred and extinguished upon the filing of the deed as authorized under the Deed agreement due to plaintiff's multiple defaults; (6) claims barred upon the foreclosure of plaintiffs' alleged interest in the property; and (7) claims subject to set-off by damages that may be awarded for defendants' counterclaims. (NYSCEF 26).

As counterclaims and third-party claims, defendants preliminarily assert that after plaintiffs repeatedly defaulted in making payments on the mortgages, the parties agreed to a final extension and deadline, pursuant to which Patmos Fifth delivered to defendants a deed, intended to be in lieu of foreclosure (deed agreement). Plaintiffs thereafter defaulted on the deed agreement, and after giving plaintiffs two and a half months to pay and advising plaintiffs' counsel of their intent to do so, defendants filed and recorded the deed, which defendants claim, "was intended to resolve all rights and obligations of the parties and their privies with respect to the Property." (*Id.*).

Defendants allege that for the next 19 months, they managed the property as the sole

owners with plaintiffs' full knowledge, and bore all of the obligations and expenses of ownership, and that plaintiffs acknowledged their ownership by offering to purchase or lease the property back from defendants. Plaintiffs then commenced this action even though they remain millions of dollars in default. Defendants assert the following counterclaims and third-party claims:

- (1) For foreclosure against plaintiffs and third-party defendants, on the grounds that plaintiffs are in default under the mortgage in an amount no less than \$16 million plus accrued interest and other amounts and have failed to pay; that after the deed was recorded, Mazl and High Line completed construction of the property and sold some units in the building, and also paid and continue to pay all maintenance and operating expenses; and that Mazl and High Line as holders of the mortgage are entitled to foreclose on the mortgage lien and to the entry of a judgment of foreclosure;
- (2) For breach of the guarantee against third-party defendant Reitano, as he personally guaranteed payment under the January mortgage and consolidated mortgage and failed to pay;
- (3) For a declaratory judgment against plaintiffs and Reitano, based on the Deed agreement, seeking a declaration that Mazl and High Line are the sole owners of the property and have so been since December 23, 2009;
- (4) For unjust enrichment against plaintiffs and Reitano, based on their alleged financial benefit in having defendants construct, maintain, manage and pay all expenses related to the property;
- (5) For attorney fees against plaintiffs and Reitano, as the mortgage agreement requires them to pay defendants' costs for collection and enforcement.

(NYSCEF 26).

Also in October 2013, defendants commenced a third-party action by third-party summons and complaint, in which they added as third-party defendants Augusto Reitano, A.T.A. Construction Corp., New York State Department of Taxation and Finance, Environmental Control Board of the City of New York, and "John Doe #1-50, intended to name all other parties

who may have some interest in or lien upon the premises sought to be foreclosed.” (NYSCEF 41).

On January 8, 2015, the Appellate Division, First Department, affirmed the July 2013 decision, finding that plaintiffs had sufficiently stated a cause of action for violation of their rights under Real Property Law § 320 by alleging that the deed was given as security for plaintiffs’ debt and that “defendants did not controvert that allegation as a matter of law.” It also found that defendants failed to establish that the deed agreement was a “deed in lieu of foreclosure” despite their agreement permitting defendants to record the deed if plaintiffs breached the agreement. (124 AD3d 422).

The Appellate Division also rejected defendants’ claim that the statute of frauds, parol evidence rule, and/or laches barred plaintiffs’ challenges to the recorded deed, observing that the deed agreement alone supports plaintiffs’ claim that it was intended as security and is thus sufficient to defeat defendants’ motion to dismiss, and that “[a]ssuming that issues remain at the summary judgment or trial stage as to whether the deed was intended to be security, parol evidence will be admissible . . .” The Court also determined, as to the claim for unjust enrichment, that defendants had not established that they took title under the deed agreement. (124 AD3d at 426-7).

II. ANALYSIS

Pursuant to Real Property Law § 320(a):

[a] deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a

mortgage, or conditional deed, is also recorded therewith, and at the same time.

It need not be conclusively shown that a transfer is intended as a security. Rather, the conveyance need only appear to be intended as “a security in the nature of a mortgage.” (*Leonia Bank v Kouri*, 3 AD3d 213, 216-17 [1st Dept 2004]).

Here, the parties dispute whether the deed was intended only as security in the nature of a mortgage. As the intention of the parties is controlling (*see* 77 NY Jur 2d, Mortgages § 34 [2015]), the issue may not be resolved summarily (*compare Bouffard v Befese, LLC*, 111 AD3d 866 [2d Dept 2013], *lv denied* 43 NY2d 792 [when determining whether deed was meant only as security, examination may be made of oral testimony bearing on parties’ intent and consideration of surrounding circumstances and parties’ acts; finding after non-jury trial that deed intended to act as security]; *Southwell v Middleton*, 67 AD3d 666 [2d Dept 2009] [triable issues as to whether deed was meant as security precluded summary judgment]; *Henley v Foreclosure Sales, Inc.*, 39 AD3d 470 [2d Dept 2007] [same]; *Pioneer Vill. Dev. Corp. v Xar Corp.*, 55 AD2d 769 [3d Dept 1976] [denying plaintiff’s motion for summary judgment for claim pursuant to Real Property Law § 320; while a deed may be considered a mortgage, “any such conclusion depends upon the intent of the parties which, in turn, requires a factual determination of the respective understanding of the principals to the agreement in question”]; *Finnegan v Brown*, 43 AD2d 812 [4th Dept 1973] [whether deed is mortgage depends on parties’ intent and thus presents question of fact requiring trial], *with Leonia*, 3 AD3d 213 [granting petition and observing that it was undisputed that parties intended deed to act as security and not to effect conveyance]; *Basile v Erhal Holding Corp.*, 148 AD2d 484 [2d Dept 1989], *lv denied* 75 NY2d 701 [declaratory judgment granted upon finding it “clear” that deed was not intended as absolute conveyance or

sale of property but rather security of debt]; *see also Booth v Landau*, 103 AD2d 733 [2d Dept 1984], *lv denied* 63 NY2d 764 [after non-jury trial and upon appeal, declaring deed to be mortgage]).

Any purported appellate findings reached in affirming the denial of defendants' motion to dismiss have no binding effect on summary judgment or at trial. (*See Moses v Savedoff*, 96 AD3d 466 [1st Dept 2012] [law of case does not apply when motion to dismiss is followed by summary judgment motion]; *191 Chystie LLC v Ledoux*, 82 AD3d 681 [1st Dept 2011] [holding made in relation to prior motion to dismiss "was based on the facts and law presented by the parties in that procedural posture, and no more."]).

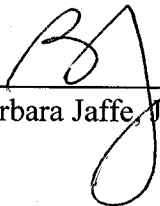
Absent a determination as to whether plaintiffs or defendants are the rightful owners of the property, dismissal of defendants' counterclaims and third-party claims is premature.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion is denied in its entirety.

ENTER:



Barbara Jaffe, JSC

DATED: May 20, 2015
New York, New York