Diener v Diener
2015 NY Slip Op 32843(U)
November 18, 2015
Supreme Court, Rockland County
Docket Number: 032277/12
Judge: Gerald E. Loehr

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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MARILYN DIENER,

Plaintiff,

DECISION AND ORDER
Index No.: 032277/12
Action 1

-against-

ROBERT DIENER a/k/a ROBERT E. DIENER and WELLS FARGO BANK, N.A.,

Defendants.

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MARILYN DIENER,

Plaintiff,

Index No.: 032713/2015
Action 2

-against-

ROBERT DIENER a/k/a ROBERT E. DIENER,

Defendant.

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LOEHR, J.

The following papers numbered 1-10 were read on the motion of Plaintiff to confirm the Referee's Report and to enter a deficiency judgment in the amount of $49,940.87 in Action 1, and Plaintiff's motion for summary judgment in lieu of complaint and Defendant's cross-motion (really opposition) to Plaintiff's motion for summary judgment in lieu of complaint in Action 2.

	Papers Numbered
Notice of Motion (#10) - Affidavit - Affirmation - Exhibits	1
Memorandum of Law in Support (#10)	2
Affidavit/Affirmation in Opposition (#10) - Exhibits	3
Memorandum of Law in Opposition (#10)	4
Reply Memorandum of Law (#10)	5
Summons - Notice of Motion - Affidavit/Affirmation (#1) - Exhibits	6
Memorandum of Law in Support (#1)	7
Notice of Cross-Motion - Affirmation (#2) - Exhibits	8
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Memorandum of Law in Opposition/Reply (##1-2)	10

Upon the foregoing papers, Plaintiff became the sole owner of 21 Valshire Circle, Nanuet, New York (the "Premises") in 1980. The Premises are a "mother-daughter" home. In 1995, the Defendant Robert Diener moved into the upstairs portion of the Premises with the Plaintiff, his mother, living in the downstairs portion. According to the Defendant, when he moved in, in 1995, he and his mother agreed that he would pay for the "maintenance" of the Premises and she would sell it to him for its appraised value: $120,000. Plaintiff denied this. In any event, it is undisputed that Defendant moved in and made payments to Plaintiff. In 2005, the Premises needed renovations which were funded, in whole or in part, by a home equity line of credit from PNC Bank. On January 1, 2006, Plaintiff and Defendant entered into a written Lease Agreement with respect to the Premises. The Lease provided, pertinent part, that the Plaintiff and Defendant would have joint possession of the Premises, that the Defendant had the option to purchase the Premises for $290,000 plus the amount of the outstanding home equity line of credit (payable in the form of $125,000 in cash and the balance secured by a five year second mortgage), and that the deed conveying the Premises to the Defendant would provide that the Plaintiff could occupy the Premises rent free for life. The option had to be exercised by December 31, 2010. In 2008, it is undisputed, the Premises needed major renovations, allegedly costing some $300,000 and funded through PNC Bank home equity lines of credit, later replaced by a Mortgage with Wells Fargo Bank, N.A. ("Wells Fargo"). Defendant never exercised the option to purchase. Rather, on January 4, 2009, Plaintiff conveyed the Premises to herself and

Defendant, each holding a 50% interest.[1] The agreed purchase price – rather than $290,000 plus the outstanding mortgage for the entire Premises – was $198,700 for half, calculated as follows: $290,000 minus rent/mortgage payments made by the Defendant and $75,000 for repairs made to the Premises and paid for by Defendant. Defendant executed and delivered a Promissory Note to Plaintiff dated January 4, 2009 in the principal amount of $198,700. The Note provided for monthly payments of $500 for five years, an $80,000 balloon payment on December 15, 2013, and the balance ($93,515) payable over five additional years secured by a second mortgage on Defendant's interest in the Premises. The Note does not contain an acceleration clause.

Plaintiff commenced this action on May 1, 2012, alleging that Defendant had defaulted under the Note by failing to make the payments due in June 2011 and thereafter.[2] The Defendant answered, counterclaimed for partition and moved for summary judgment on his counterclaim. Plaintiff then moved to amend the Complaint to reform the deed so as to provide that it was subject to a life estate in Plaintiff, whereupon the Defendant moved to amend his answer to assert a counterclaim for fraud: that Plaintiff had lied to Defendant when she allegedly orally promised to sell the Premises to him for $120,000. In a Decision and Order dated November 16, 2012, Judge Jamieson denied Defendant summary judgment on his counterclaim for partition. Plaintiff had argued that Defendant had acquired his interest in the Premises pursuant to the option in the Lease and that, therefore, Defendant's interest was subject to Plaintiff's life estate. Judge Jamieson rejected this theory on the basis that the option was for the purchase of the entire Premises, not a 50% interest, and that, therefore, the parties had entered into a different transaction. Judge Jamieson nevertheless denied partition based on there being questions of fact concerning the parties' intentions. Judge Jamieson granted both parties' motions to amend the pleadings. The Plaintiff then filed an Amended Complaint and Defendant filed an Amended Answer with an amended counterclaim. Thereafter, at a conference, the Court granted Plaintiff leave to again amend her Complaint to assert a claim for an equitable mortgage. On February 25, 2013, Plaintiff filed a Second Amended Complaint in which she both added a claim for an

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[1] Inasmuch as the conveyance is silent, the parties are presumed to be tenants in common (EPTL 6-2.2[a]; *Estate of Vadney,* 83 NY2d 885, 886 [1994]) and neither party has disputed that.

[2] Since there was no acceleration clause, Plaintiff sued for only the defaulted payments: $5,500 at that time.

equitable mortgage while also, without leave of Court, adding Wells Fargo as a party Defendant and prayed for a declaration that her equitable mortgage should have priority over Wells Fargo's Mortgage. Defendant then moved, pursuant to CPLR 3211, to dismiss all of the causes of action in the Second Amended Complaint (except for the First Cause of Action for the defaulted Note payments) as failing to state a claim, Wells Fargo moved to dismiss the Second Amended Complaint as asserted against it for a lack of jurisdiction in that it was added as a party without leave of Court, and Plaintiff cross moved to amend the Amended Complaint to add Wells Fargo as a party Defendant.

In a Decision and Order dated January 9, 2014, this Court ruled:

"In the Second Amended Complaint, Plaintiff seeks to reform the deed on the basis that Defendant misled her into believing that the transfer of her 50% interest in the Premises was being done pursuant to the option and, therefore, subject to a life estate in her favor. The documentary evidence disproves any such assertion (*Cives Corp. v George A. Fuller., Inc.*, 97 AD3d 713, 714 [2d Dept 2012]). In the option, Defendant was to be acquiring 100% of the Premises and so there would be a reason for Plaintiff to retain a life estate. In the actual sale, as Plaintiff was selling only a 50% interest, what possible reason would she have for seeking a life estate – something that would be less than she already had and was retaining: an undivided interest in fee. Thus, there was never any misrepresentation about Plaintiff retaining a life estate, and Plaintiff could not possibly have thought the sale was under the option inasmuch as the terms of the two transactions were completely different. Moreover, in her Affidavit, the Plaintiff sets forth in detail the terms of each agreement demonstrating that she fully understood them. Furthermore, the reformation Plaintiff is ostensibly seeking is meaningless. Even if Plaintiff had a life estate on top of her fee interest, Defendant could still cut such interest off by a partition sale. What, the Court is sure, Plaintiff is actually seeking, is a finding that Defendant, as part of the actual sale, agreed not to seek partition. The problem with that is, first, that Plaintiff has not sought such a finding, and, two, she has not even alleged that Defendant ever agreed to such a limitation. Based thereon, the claims seeking reformation or fraud with respect to a life estate are dismissed as failing to state a claim. Having said that, the Court notes that if, as alleged, the Defendant is in default of the agreement pursuant to which he purchased his interest in the Premises – the Note – that may well provide a basis

for refusing partition (*see Chew v Sheldon,* 214 NY 344, 349 [1915]; *Ripp v Ripp,* 38 AD2d 65, 68 [2d Dept 1971], *affd on opn below* 32 NY2d 755 [1973]).

"On the other hand, the Note provides that Defendant would provide Plaintiff with a second mortgage to secure at least part of the Note, and Defendant failed to do so. This alleges a valid claim for an equitable mortgage vis-a-vis Defendant (*M&B Joint Venture, Inc. v Laurus Master Fund, Ltd.,* 12 NY3d 798, 800 [2009]). Defendant's motion to dismiss the Sixth Cause of Action is therefore denied. As to Wells Fargo, inasmuch as Plaintiff added Wells Fargo as a party Defendant without leave of Court, a jurisdictional defect (*Peterkin v City of New York,* 292 AD2d 244 [2d Dept 2002]; *Crook v E.I. du Pont de Nemours Co.,* 181 AD2d 1039 [4th Dept 1992], *affd on opn below* 81 NY2d 807 [1993]), the Second Amended Complaint must be, and hereby is, dismissed vis-a-vis Wells Fargo. As to the Plaintiff's motion to add Wells Fargo, motions to amend are to be freely granted unless the proposed amendment is palpably insufficient (*Carroll v Motola,* 109 AD3d 629, 630 [2d Dept 2013]). The proposed claim, vis-a-vis Wells Fargo, is that Plaintiff's equitable mortgage is entitled to priority over Wells Fargo's Mortgage. As Wells Fargo's Mortgage was filed, for Plaintiff's equitable mortgage to have priority over it, Well's Fargo would have had to have been on notice of Plaintiff's equitable mortgage when it filed its Mortgage (*see, e.g., Barretti v Detore*, 95 AD3d 803 [2d Dept 2012]; *DJL Mortgage Capital, Inc. v Windsor,* 78 AD3d 645 [2d Dept 2010]). As that is not even alleged, the claim is palpably insufficient and the motion is denied.

"As stated above, Plaintiff gave Defendant a $75,000 credit in the Note for repairs to the Premises Defendant has ostensibly paid for. Plaintiff now alleges that Defendant did not pay for the renovations but financed them under the Mortgage and misled Plaintiff concerning same to obtain the credit in the purchase price he was not entitled to. That alleges a valid claim for fraud. Similarly, Plaintiff alleges that Defendant borrowed, or caused Plaintiff to borrow, substantial sums of money under the Mortgage for renovations but then diverted a portion thereof for his own purposes. Again, deeming the allegations as true as the Court must on a 3211 motion, this alleges a valid claim for fraud. Except as stated herein, the balance of the Second Amended Complaint is dismissed as failing to state a claim; Defendant's motion is otherwise denied.

"At this point, although not raised by the parties, the Court feels compelled to note that

> Defendant's second counterclaim is for fraud based on Plaintiff's alleged oral misrepresentation that she would sell the Premises to Defendant. Inasmuch as the alleged oral misrepresentation, even if made, was unenforceable under the statute of frauds (a defense raised by the Plaintiff), the second counterclaim fails to state a claim (*Lilling v Slauenwhite,* 145 AD2d 471, 472 [2d Dept 1988]; 61 NY Jur2d Fraud § 312; *cf Thomas v Thomas,* 70 AD3d 588, 590 [2d Dept 2010])."

The Court then converted the motion to one for summary judgment (CPLR 3211[c]) with respect to all issues remaining in the case and gave the parties time to make further submissions. In a Decision and Order dated December 8, 2014, this Court ruled:

> "The Plaintiff is entitled to summary judgment in the amount of $10,000 plus interest from June 1, 2011 for breach of the Promissory Note (the First Cause of Action).[3] Plaintiff has also established that she has an equitable mortgage on the half interest in the Premises she conveyed to Defendant, in the amount of $93,415.92, which is in default (the Sixth Cause of Action). Plaintiff may submit a Judgment of Foreclosure and Sale with respect thereto. Based thereon, Defendant's First Counterclaim for partition is dismissed: it would be inequitable to auction off the Premises when, on this record, it does not appear Defendant would receive any of the proceeds (*see Chew v Sheldon,* 214 NY 344, 349 [1915]; *Baldwin v Humphrey,* 44 NY 1871 [1871]; *Cook v Petitio,* 208 AD2d 886 [2d Dept 1994]; *Ripp, Ripp,* 38 AD2d 65. 68 [2d Dept 1971, *affd on opn below,* 32 NY2d 755 [1973]; *Tramontano v Catalano,* 23 AD2d 894 [2d Dept 1965]; *Andron v Funk,* 194 AD 258, 260 [1st Dept 1920]; *Casolo v Nardella,* 193 Misc 378, 379 [Sup Ct, Saratoga Co 1948]). As to the Second through Fifth Causes of Action, to the extent not already dismissed, they are now dismissed upon Defendant's un-refuted evidence that all amounts borrowed were used on renovations to the Premises. Defendant's Second Counterclaim is dismissed based on the Statute of Frauds (*Lilling v Slauenwhite,* 145 AD2d 471 [2d Dept 1988]).
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> "Finally, Defendant moves to dismiss claims which Plaintiff asserted in her Amended Complaint. A plaintiff can have only one complaint. Here, Plaintiff's Second Amended

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[3] While Plaintiff now seeks $95,500 under the Note – for amounts that have since come due – as Plaintiff never amended the Complaint to include such amounts, the Court cannot award Judgment therefor.

Complaint is her complaint. All claims in the Second Amended Complaint have been decided. If Plaintiff asserted claims in her Amended Complaint which were not carried forward into her Second Amended Complaint, there were abandoned as a matter of law."

The Court then prepared and issued a Judgment of Foreclosure and Sale with respect to Plaintiff's equitable mortgage when the parties could not agree on the form. The mortgage debt as fixed in the Judgment of Foreclosure was $93,415.92.

The Defendant's half-interest in the Premises were sold at auction on May 6, 2015 to Plaintiff for $10,000. The Referee's Deed was delivered to Plaintiff on June 8, 2015 and Plaintiff now timely moves to enter a deficiency judgment. RPAPL 1371(2) provides"

> "Upon such motion [for a deficiency judgment] the court . . . shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sales price of the property whichever shall be the higher."

Plaintiff calculates the deficiency judgment as follows:

$98,631.62: as the mortgage debt as determined by the Court together with costs and disbursements and statutory interest and the Referee's fee plus

$106,309.25: as one-half the first mortgage to Well Fargo

$204,940.87: minus

$155,000.00: as one-half the fair market value of the Premises when auctioned.

$49,940.87: deficiency judgment.

Defendant objects first that Plaintiff is not a mortgage lender and is therefore not entitled to a deficiency judgment under the statute. Any person who is liable to the plaintiff for the payment of the debt secured by the mortgage and who has been made a defendant in the action and served

is liable for a deficiency judgment under the statute (RPAPL 1371[1]). Thus, purchase mortgage second mortgagees have, in the proper case, obtained deficiency judgments (*see, eg, Realty Associates Securities Corporation v Hoblin,* 247 AD 904 [2d Dept 1936]). Here, it has already been determined that Defendant executed and delivered a Note to Plaintiff and agreed to provide a mortgage on the half-interest in the Premises he was receiving as security for a portion thereof. Plaintiff is therefore a purchase mortgage second mortgagee and is entitled to seek a deficiency judgment under the statute.

As to the calculation of the deficiency judgment, the Judgment of Foreclosure determined the mortgage debt to be $93,415.92 together with "$_____, as taxed by the Clerk of the Court and inserted herein . . . for costs and disbursements."[4] While the Judgment of Foreclosure was efiled, it does appear to have been submitted to the Clerk for the taxation of costs and disbursements. Accordingly, the Court finds the debt as determined by the Judgment of Foreclosure to be $93,415.92 + $500 (Referee's fee) = $93.915.92. RPAPL 1371(3) next requires the addition of prior liens. As the Wells Fargo Mortgage encumbered the Premises, and the mortgage property was a half-interest in the Premises, at least half the Well Fargo Mortgage must be added to the debt because Plaintiff is purchasing the Premises subject to the Mortgage (35 NY Practice, Mortgage Liens in New York § 23:4). As Plaintiff has sought to add exactly half the Mortgage ($106,309.25), the Court will accede.

As to the fair marked value of Defendant's half interest in the Premises, there are significant questions. Plaintiff sold a half interest in the Premises to Defendant in January 2009 for $198,700, payable over time with interest and with a portion of the debt secured by a purchase money second mortgage on the half interest. From the inception of this case in 2012, the Court was told this was a "mother-daughter" house and that hundreds of thousands of dollars were spent on renovations after Defendant moved in. In connection with this motion, an appraisal valuing the *Premises* as of January 24, 2015 at $375,000, and an appraisal valuing the *Premises* as of May 12, 2015 at $310,000 were submitted. Why or how the Premises decreased in value some $65,000 in four months was not explained. Be that as it may, there are more significant problems. The Court was told this was a two family house but it was appraised as a one family without explanation. Even more significantly, the *Premises* are not what was to be valued as such

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[4] The Court also fixed the Referee's fee at $500.

was not sold. What was sold was the Defendant's half interest in the Premises and no one has attempted to value it. As there is no ready market for half interests in real estate, the best evidence is its value the parties put on it: $198,700 (RPAPL 1371[2]; *Flushing Savings Bank, FSB v Bitar,* 25 NY3d 307, 314 [2015]). Accordingly, the deficiency judgment is: $93,915.92 + $106,309.25 - $198,700 = $1,525.17.

As indicated above, Plaintiff amended the Complaint to recover $10,000 which had become due and were unpaid under the un-accelerated, unsecured portion of the Note during the pendency of Action 1 and was granted summary judgment with respect thereto in this Court's Decision and Order dated December 8, 2014. Thereafter, Plaintiff moved to once more amend the Complaint to include additional amounts ($85,000) which had come due and were unpaid under the Note. In a Decision and Order dated March 31, 2015, the motion was denied, without prejudice, based on Plaintiff's failure to submit a proposed amended Complaint (*see Codrington v Wendell Terrace Owners Corp.,* 118 AD3d 844 [2d Dept 2014]).

Thereafter, on June 24, 2015, without leave of this Court, Plaintiff commence Action 2, seeking to recover an additional $85,000 under the Note. Defendant objects, inter alia, on the basis of the prior action. RPAPL 1301(3) provides:

> "While an action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgaged debt, without leave of the court in which the former action was brought."

Both this section and RPPL 1371(2) were designed to prevent multiple suits to recover the same debt and to prevent a secured lender from obtaining a double recovery (*Resolution Trust Corporation v J.I. Sopher & Co., Inc.,* 108 F3d 329 [2d Cir 1997]; *Lehman v Roseanne Investors Corp.,* 106 AD2d 617, 618 [2d Dept 1984]; see *Gelfert v National City Bank of New York,* 313 US 221, 233 [1941]). Thus, where RPAPL 1301(3) is applicable, the failure to obtain prior permission requires dismissal of the action (*Shaw Funding, L.P. v Grauer,* 98 AD3d 660 [2d Dept 2012]). Moreover, no special circumstances as would require another action have been set forth: the Note sued for here was before the Court in Action 1 and Plaintiff has failed to set forth a reason why she could not obtain the relief sought here in the first filed action (*cf Rainbow Venture Associates, L.P. v Parc Vendome Associates, Ltd.,* 221 AD2d 164 [1st Dept 1995]) except, perhaps, that she has been paid in full. Thus, here, Plaintiff has recovered property valued at $198,700 in addition to Judgments for $10,000 and $1,525.17 on a Note for $198,700.

Anything more would appear to be a double recovery. Accordingly, Action 2 is dismissed.

This constitutes the decision and order of the Court.

Dated: New City, New York
November 12, 2015

HON. GERALD E. LOEHR
J.S.C.

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