

Deutsche Bank Natl. Trust Co. v Titanium Acquisition, LLC
2016 NY Slip Op 30601(U)
March 29, 2016
Supreme Court, Queens County
Docket Number: 703689/15
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

 DEUTSCHE BANK NATIONAL TRUST COMPANY,
 AS TRUSTEE FOR MORGAN STANLEY ABS
 CAPITAL I INC. TRUST 2006-NC4 and
 WELLS FARGO BANK, N.A.,

Plaintiffs,

-against-

TITANIUM ACQUISITION, LLC a/k/a
 TITANIUM ACQUISITIONS, LLC, and
 CHI LAM CHAU,

Defendants.

Index No. 703689/15

Motion

Date December 14, 2015

Motion

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Upon the foregoing papers it is ordered that the branch of the motion by plaintiffs for an order granting a default judgment to plaintiffs pursuant to CPLR 3215 as against defendant Titanium Acquisition, LLC d/b/a Titanium Acquisitions, LLC ("Titanium") on all claims in the Complaint is hereby granted as to liability only as said defendant failed to appear, submit an Answer, or

move with respect to the Complaint herein (see, CPLR 3215). Plaintiffs demonstrated the merits of their claim by submitting an affidavit of merits as part of their motion (see, CPLR 3215[f]; *Henriquez v. Purins*, 245 AD2d 337 [2d Dept 1997]; *Woodson v. Mendon Leasing Corp.*, 100 NY2d 62 [NY 2003]). Additionally, defendant failed to respond to plaintiffs' instant motion.

Plaintiffs may proceed to a hearing on the assessment of damages (including reasonable attorneys fees, costs, and disbursements). The inquest to determine damages shall take place on June 1, 2016, 9:30 A.M., in the Trial Scheduling Part, courtroom 25, 88-11 Sutphin Blvd., Jamaica, New York. Counsel for plaintiffs is directed to file a note of issue/certificate of readiness on or before May 13, 2016.

Plaintiffs are directed to serve defendant with Notice of Entry of the Order as well as a Notice of Inquest with Certificate of Readiness.

That branch of plaintiffs' motion for an order granting summary judgment in favor of plaintiffs pursuant to CPLR 3212 as against defendant Chi Lam Chau ("Chau") on all claims in the Complaint is hereby granted.

In the underlying action, plaintiffs allege that defendants have fraudulently conveyed the property owned by them located at 86-73 78th Street, Woodhaven, New York 11421 ("the Property") with defendant Titanium purportedly selling and deeding the subject property to defendant, Chi Lam Chau. Via their Complaint, plaintiffs seek a declaratory judgment that Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABC Capital I Inc. Trust 2006-NC4 ("the Trust") is the sole fee owner and has title to the Property and the First Fraudulent Deed and the Second Fraudulent Deed, as described in the Complaint as well as any mortgages or other encumbrances premised upon those Deeds are null, void and invalid. Plaintiffs also seek a permanent injunction enjoining defendants from claiming any interest in the Property, transferring the Property and/or otherwise encumbering the Property or interfering with the Trust's ownership or possession of the Property.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc*

& *Indem. Co.*, 62 NY2d 916 [1984])). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964])). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986])). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980])). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991])). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987])). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000])).

Plaintiffs established a prima facie case in support of the motion. In support of the motion, plaintiffs present, inter alia, an affidavit of Ronaldo Reyes, Vice President of Plaintiff Deutsche Bank National Trust Company ("DBNTC"), wherein he avers, inter alia, that: "In connection with the preparation of this Affidavit, I have been provided with a photocopy of a document dated January 18, 2015 purporting to be a Warranty Deed executed on behalf of DBNTC as Trustee for the Trust by one Nicole De'Cario and which purports to convey the Subject Property from DBNTC as Trustee to one Titanium Acquisitions, LLC ("Titanium") for \$135,000 (the "First Fraudulent Deed"). The First Fraudulent Deed purports to have been notarized in Nassau County, NY by one Sylvester Henry. . . Based on a review of its employment records, DBNTC located no records of employment of an individual named Nicole De'Cario. Neither does DBNTC have any offices, officers or employees in Nassau County, NY. Furthermore, were DBNTC to ever execute deeds or similar instruments, such instruments would be executed by a DBNTC officer in DBNTC's Santa Ana, CA office before a notary employed by DBNTC in that office. DBNTC has no notary named Sylvester Henry." A prima facie case was additionally established that Titanium could not convey title to Chau by means of a Second Fraudulent Deed.

No issues of fact have been raised in opposition. Defendant, Titanium has submitted no opposition, and defendant Chau maintains that he has no first-hand knowledge to oppose the

motion and thus he does not oppose the motion. Accordingly, summary judgment is granted to plaintiffs.

That branch of plaintiffs' motion for an order dismissing Chau's ("Chau") counterclaim for failure to state a cause of action pursuant to CPLR 3211(a)(7) is hereby denied.

Chau asserts a first counterclaim against plaintiffs claiming, "In the event that the deed of the Property to Chau is declared to be null, void and/or invalid, plaintiff is liable to Chau for any sums paid by Chau on behalf of the Property or to repair, maintain and improve the Property."

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***" (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, *Rovello v. Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159).

It is well-established law that: "[t]o prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (internal quotation marks and citations omitted) (*Blue Wolf Group, LLC. v. Gaiam, Inc.*, 847 NYS2d 895 [Civ Ct, New York County 2007]).

The Court finds that this branch of the motion is denied, as the counterclaim adequately states a cause of action for unjust enrichment.

Additionally, plaintiffs have improperly sought to reach the merits of the counterclaim on this mere CPLR 3211(a)(7) motion (see, *Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; *Leon v Martinez*, 84 NY2d 83).

Plaintiffs may serve an Answer to the Counterclaim within twenty (20) days of service of a copy of this Order with Notice of Entry.

That branch of defendant, Chi Lam Chau's motion for an order pursuant to CPLR 3215 for a default judgment against plaintiffs on the first counterclaim in the amount of \$4,453.23 is hereby denied as defendant Chau fails to make a prima facie case in support of such relief, having failed to even establish proper service of his Answer with Counterclaim.

That branch of defendant, Chi Lam Chau's cross motion for an order pursuant to CPLR 3212 granting defendant Chi Lam Chau summary judgment on the first, second, and third cross-claims, for compensatory damages from defendant Titanium Acquisitions, LLC a/k/a Titanium Acquisition, LLC ("Titanium") in the amount of \$400,000 and, in payment of a portion of said damages, directing Peggy A. Foy, Esq. and the law firm of Darbee Foy to pay to defendant Chi Lam Chau the sum of \$360,000, plus any accrued interest, which said firm is currently holding in escrow pursuant to the Court's Order dated July 20, 2015 is hereby, sua sponte, converted to a motion for a default judgment and is granted without opposition as said defendant failed to appear, submit an Answer, or move with respect to the cross complaint herein (see, CPLR 3215). Plaintiff on the cross claims demonstrated the merits of his claim by submitting an affidavit of merits as part of his motion (see, CPLR 3215[f]; *Henriquez v. Purins*, 245 AD2d 337 [2d Dept 1997]; *Woodson v. Mendon Leasing Corp.*, 100 NY2d 62 [NY 2003]). Additionally, defendant on the cross claims, Titanium, failed to respond to the instant motion.

The first cross claim asserts in relevant part that: "In the event that plaintiffs successfully invalidate the April 10, 2015 deed to the Property given to defendant Chau by defendant Titanium . . . then the entire transaction between defendant Chau and defendant Titanium should be rescinded, and the purchase price in the amount of \$400,000 returned to defendant Chau by defendant Titanium."

Judgment is awarded on the first cross claim in the amount of \$400,000 plus costs and interest from April 10, 2015.

The remaining cross claims shall be determined at the time

of trial of Chi Lam Chau's Counterclaim. Upon proof of filing a copy of this order with the note of issue and statement of readiness and upon compliance with all the rules of this court, this action shall be placed on the trial calendar for inquest for the assessment of damages (including reasonable attorney's fees, costs and disbursements) at the time of the trial of the matter as to the remaining defendant (*Vierya v. Briggs & Stratton Corp.*, 184 AD2d 766 [2d Dept 1992] [inquest for damages against defaulting defendant to await end of trial against all defendants in interest of judicial economy]).

That branch of defendant, Chi Lam Chau's motion for an order severing and continuing the demands for attorney's fees and punitive damages contained in the second and third cross claims and third-party action is hereby granted without opposition.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: March 29, 2016

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Howard G. Lane, J.S.C.