SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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ADRIAN GEORGE,

Plaintiff,

- against -

ROBERT RUBIN, KEITH STILES, and 34 HOLDING CORP.,

Defendants.

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Index Number: 154189/2018

Motion Seq. No. 001

DECISION AND ORDER

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on defendants Keith Stiles and 34 Holding Corp.'s motion to dismiss the complaint as against them and to cancel the Notice of Pendency:

	Papers Numbered:
Notice of Motion - Affirmation - Affidavit - Exhibits (memorandum of law)	1
Affirmation in Opposition - Exhibits (memorandum of law)	2
Reply Affidavit - Exhibits (memorandum of law)	3

Upon the foregoing papers, the motion is granted.

Background

In this action plaintiff Adrian George ("George") seeks to recover $317,829 in surplus monies allegedly due to him from an October 5, 2016 foreclosure auction bid on the residential building located at 34 West 128th Street, New York, New York ("the Building"). Simultaneously with filing the summons and complaint, George filed a Notice of Pendency against the Building. Defendants Keith Stiles ("Stiles") and 34 Holding Corp. ("34 Holding"), now move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint as against them and to cancel the Notice of Pendency. This Court presided over the underlying foreclosure action brought by defendant Robert Rubin ("Rubin") against George, which resulted in the subject foreclosure auction and alleged surplus monies arising therefrom, and is therefore familiar with the underlying facts upon which the instant action is now based.

Briefly, the pertinent facts are as follows. Rubin loaned George the sum of $300,000; George gave Rubin a mortgage on the Building to secure the loan. George failed to repay the loan and Rubin commenced a foreclosure action (entitled Rubin v George, Index No. 101786/2011). In the summer of 2014, this Court presided over the trial, at the close of which this Court issued a Judgment ("the Judgment of Foreclosure") in which it: (1) found that George failed to pay the mortgage when due, and that his affirmative defenses lacked merit; (2) awarded Rubin the sum of $823,000, which included pre-judgment interest, plus post-judgment interest from July 21, 2014 and attorney's fees; (3) directed a foreclosure sale of the Building; and (4) appointed Andrew Kulak, Esq. ("Kulak") as Referee to conduct the foreclosure sale.

By a document entitled "Assignment of Judgment," dated January 29, 2016, Rubin assigned to Stiles the $823,000 Judgment of Foreclosure "in consideration of Ten Dollars and other sums paid to the Assignor and other valuable consideration set forth in a certain agreement between the parties dated January 29, 2016" ("the Assignment"). In pertinent part, the Assignment states:

> The Assignor irrevocably appoints the Assignee his attorney, with the power of substitution and revocation, to ask, demand and receive, and to sue out executions, and take all lawful ways for the recovery of the money due or to become due on said judgment, and, on payment, to acknowledge satisfaction or discharge of the same.

On October 5, 2016, Kulak held a foreclosure sale at which Stiles, ostensibly on behalf of Rubin pursuant to the Assignment, made a bid of $1,320,000 that Kulak accepted ("the 2016 Bid"). On that date, Kulak executed Terms of Sale for the successful $1,320,000 bid ("the 2016 Terms of Sale"), which set the closing date as November 7, 2016, and provided, in pertinent part that:

> . . . in case any purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down to him will be again put up for sale under the direction of the Referee under these same terms of sale, without application to the Court, unless the plaintiff's attorney(s) shall elect to make such application; and such purchaser will be held liable for any deficiency there may be between the sum for which said premises shall be struck down upon the sale, and that for which they may be purchased on the resale, and also for any costs or expenses occurring on such re-sale. . .

The 2016 Terms of Sale also contains a Memorandum of Sale, signed by "Robert S. Rubin, Plaintiff," by which he acknowledges his purchase of the Building for the sum of $1,320,000 and "promises and agrees to comply with the terms and conditions of the sale." Jeffrey Klein, Esq. ("Klein"), signed the Memorandum of Sale as attorney for Rubin. The $1,320,000 purchase price went above the "upset price of the property" (i.e., the amount needed to pay the Judgment of Foreclosure), leaving surplus monies in the sum of $317,829 ($1,320,000 bid minus $1,002,171 upset price = $317,829). Klein, as attorney for Rubin, signed the Foreclosure Action Surplus Monies Form which indicated surplus monies of $317,829 as a result of Rubin's bid.

According to Stiles, Rubin intended to sell the property to someone else and use the sales proceeds to pay himself on the Judgment of Foreclosure as well as any other open liens on the Building. However, the November 7, 2016 closing did not take place, as Rubin did not have the funds to close, and a prospective purchaser that Rubin had located backed away from the purchase (because a prior lien-holder had surfaced). Thus, by Order dated November 21, 2017, this Court authorized a new auction "under the same terms of sale as were used upon the auction of October 5, 2016."

On December 12, 2017, Kulak held a second foreclosure sale, at which Stiles again bid successfully, this time on behalf of himself, in the sum of $499,000 ("the 2017 Bid"). The Terms of Sale, dated December 20, 2017 ("the 2017 Terms of Sale"), sets forth the $499,000 purchase price, schedules the closing date as January 19, 2018, and otherwise contains the same terms and conditions as those in the 2016 Terms of Sale. The 2017 Terms of Sale also contains a Memorandum of Sale, signed by "Keith Stiles, Plaintiff," by which Stiles acknowledges his purchase of the Building for the sum of $499,000 and "promises and agrees to comply with the terms and conditions of the sale." Klein signed the Memorandum of Sale as attorney for Stiles.

Thereafter, pursuant to an undated "Assignment of Rights," Stiles assigned to 34 Holding all of his "right, title and privileges" to the 2017 Bid. Klein is the sole owner of 34 Holding. On April 18, 2018, Kulak closed on the sale of the Building to 34 Holding. The consideration paid on the sale appears to be the sum of $133,135, paid from Klein's IOLTA account to Ann Stiles; and Klein also paid open real estate taxes, water bills, transfer taxes and other closing expenses.

The Instant Action and Motion

On May 4, 2018, George commenced the instant action to recover the $317,829 in surplus monies from Rubin, Stiles, and/or 34 Holding. The complaint alleges, in the main, that George, as "the holder of the equity of redemption" on the Building, is entitled to the surplus monies due from Rubin's 2016 Bid; that Rubin is responsible for the $317,829 "deficiency" caused by the 2017 Bid; and that Stiles and/or 34 Holding are responsible for said deficiency as "assignees" of Rubin's 2016 Bid. The complaint also alleges: that 34 Holding is the "deed holder" of the Building; that Rubin and/or Stiles are the "beneficial owners" of 34 Holding, have an "equitable interest" in 34 Holding, and are the "alter-ego" of 34 Holding; and that George has an equitable lien on the Building because of his right to recover the surplus monies. The complaint seeks, inter alia, a judgment declaring that George has a lien against the Building for the sum of $317,829 plus interest; that the lien be foreclosed and George paid from the sales proceeds, with any deficiency to be paid by defendants; and that George be awarded a money judgment against defendants in the sum of $317,829. On June 12, 2018, George filed an Amended Verified Complaint ("the Amended Complaint"), containing the exact same allegations and prayer for relief as the initial complaint, but adding allegations that Rubin assigned the 2017 Bid to 34 Holding, making 34 Holding liable for the $317,829 deficiency.

By Order to Show Cause signed by this Court on June 28, 2018, Stiles and 34 Holding now move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the Amended Complaint as barred by the 2016 Terms of Sale and for failure to state a claim for an equitable lien, and to cancel the Notice of Pendency. Defendants argue that the 2016 Terms of Sale memorializing Rubin's $1,320,000 bid gave rise to George's "rights, if any," and that Rubin, as "purchaser" under the 2016 bid, would be solely responsible for any deficiency. Defendants argue that: (1) neither Stiles nor 34 Holding are liable for the deficiency because Rubin did not assign to either of them his $1,320,000 bid; and (2) the January 29, 2016 Assignment does not obligate Stiles to assume Rubin's liability for any surplus monies under the 2016 Terms of Sale. Defendants further argue that the allegations that Rubin and/or Stiles are the "alter-ego" and "beneficial owners" of 34 Holdings, and have a "beneficial interest" in 34 Holdings – all of which are "upon information and belief" – are conclusory and insufficient to state causes of action. Defendants also argue that the Notice of Pendency should be cancelled as George does not have an equitable lien on the Building, but has only a potential claim to damages (i.e., surplus monies) under the 2016 Terms of Sale.

George opposes the motion upon the ground that Stiles is the assignee of Rubin under the January 29, 2016 Assignment and, therefore, Stiles' assignment of the 2017 Bid to 34 Holding constituted an assignment by Rubin to 34 Holding, making 34 Holding liable for any surplus monies, and entitling George to an equitable lien on the Building. In reply, Stiles and 34 Holding reiterate, inter alia, their argument that George's rights solely arise out of the 2016 Bid.

Discussion

As an initial matter, the Court finds that the January 29, 2016 Assignment is an actual assignment, although it may also appoint Stiles as Rubin's agent, which is not inconsistent. In addition to the fact that the Assignment is entitled "Assignment of Judgment," even the language of agency quoted above refers to Rubin as the Asssignor and Stiles as the Assignee.

The law on the dismissal of a complaint pursuant to CPLR 3211 is clear and well-settled. Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dept 2013) ("[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"). Dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, supra, 84 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties "notice" of what is intended to be proved and the material elements of a cause of action. CPLR 3013.

Here, the documentary evidence conclusively establishes that the Amended Complaint fails to state a cause of action against Stiles and 34 Holdings to recover surplus monies in the sum of $317,829, or any other amount, due from Rubin's 2016 Bid. At the outset, this Court finds as a matter of law that George's rights to any surplus funds or "deficiencies" arise solely out of the 2016 Bid and 2016 Terms of Sale. This Court further finds as a matter of law that the 2016 Terms of Sale obligates Rubin, and Rubin alone, to pay George any surplus monies that arose out of his $1,320,000 bid. Rubin assumed sole responsibility for the 2016 Bid; he and he alone promised to pay the $1,320,000 bid price; he and he alone signed the Memorandum of Sale on the Terms of Sale. The clear, express, unambiguous language of the 2016 Terms of Sale provides that, in the event the Building is not sold in accordance with the bid, Rubin "will be held liable for any deficiency there may be between the sum for which said premises shall be struck down upon the sale [i.e., the $1,320,000], and that for which they may be purchased on the resale, and also for any costs or expenses occurring on such re-sale." The "deficiency" in this case includes, of course, the $317,829 surplus monies that would have remained after payment of the $1,002,171 upset price from the $1,320,00 purchase price had the 2016 Bid closed. Furthermore, pursuant to the doctrine of expressio unius, as the Terms of Sale provided only for a deficiency judgment, George does not have any other right or remedy.

Rubin did not assign the 2016 Terms of Sale to Stiles or to 34 Holdings or to anyone else. There is no document in the record, nor do the parties allude to one, pursuant to which Rubin purports to assign his 2016 Bid to anyone. Indeed, it is undisputed that the 2016 Bid did not materialize into a sale because Rubin lacked the funds to close and his potential purchaser backed out.

Moreover, contrary to George's claim, Rubin's January 29, 2016 Assignment of the Judgment of Foreclosure to Stiles did not obligate Stiles to fulfill the 2016 Bid, or otherwise render Stiles liable under the 2016 Terms of Sale. While it is true that Stiles bid at the October 5, 2016 foreclosure auction, Rubin ultimately assumed sole responsibility for the 2016 Bid. Indeed, Stiles did not sign, and his name does not appear anywhere on, the Terms of Sale, Memorandum of Sale, or Surplus Monies Form for the 2016 Bid.

Because George's claim to surplus funds begins and ends with the 2016 Bid and the Terms of Sale memorializing said bid, what transpired thereafter is wholly irrelevant. Stiles' successful $499,000 bid at the second foreclosure auction; the 2017 Terms of Sale memorializing the $499,000 bid; and Stiles' assignment of the $499,000 bid to 34 Holding, do not create a liability to George where one otherwise does not exist. It is undisputed that the 2017 Bid did not give rise to surplus monies but was well under the upset price, and the bid resulted in a sale. Thus, there was not another "resale" (i.e., a third

foreclosure auction) from which a "deficiency" could arise for which Stiles or 34 Holding could be liable. Even assuming arguendo, as George contends, that Rubin, not Stiles, was in effect the successful bidder at the 2017 auction (because Stiles was merely Rubin's "agent" under the Assignment), the result is still the same. Rubin is liable, if at all, to pay surplus monies under the 2016 Bid, not the 2017 Bid.

Rubin's Assignment of the Judgment of Foreclosure to Stiles does not support George's claims that Rubin and/or Stiles are the "alter-ego" of 34 Holding, and/or have a "beneficial interest" in or are "beneficial owners" of 34 Holding. These bare allegations, without more, are insufficient to support the corporate veil-piercing claims. See generally Cornwall Mgmt. Ltd. v Kambolin, 140 AD3d 507, 507 (1st Dept 2016) (allegations that corporate owners "controlled and dominated" corporation insufficient and complaint "did not allege any of the other factors that support a veil-piercing claim, such as a lack of corporate formalities or undercapitalization").

Moreover, the Assignment itself demonstrates the lack of merit to these claims – the Assignment is solely between Rubin and Stiles, there is no mention of 34 Holding in the Assignment. The mere fact that Klein represented Rubin and Stiles, without more, also does not support the allegations that Rubin and Stiles had some interest in 34 Holding. Even if Rubin and Stiles had a "beneficial interest" in or were "beneficial owners" of 34 Holding, under no construction of the facts as alleged is 34 Holding liable to George for the surplus monies from the 2016 Bid.

Finally, by virtue of the express terms of the Judgment of Foreclosure and subsequent sale thereunder that foreclosed all of George's rights, including any equity of redemption, in the Building, George does not have an equitable lien on the Building. At best, George has a claim to surplus monies due under the 2016 Bid, which is personal property. See Adirondack Tr. Co. v Snyder, 136 Misc2d 159, 161 (Sup. Ct. 1987) ("It has been established that surplus money resulting from the foreclosure of real property held by mortgagors as tenants by the entirety is considered personal property.").

The Court has considered the parties other arguments and finds them to be unavailing or non-dispositive.

Conclusion

Motion granted; the Clerk is hereby directed to: (1) enter judgment dismissing the Amended Verified Complaint against defendants Keith Stiles and 24 Holding Corp., *only*; and (2) cancel and vacate the Notice of Pendency filed in this action.

Dated: August 8, 2018

Arthur F. Engoron, J.S.C.