

Powercap Partners LLC v Beaux Equities LLC
2019 NY Slip Op 32561(U)
August 26, 2019
Supreme Court, Kings County
Docket Number: 524411/2017
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of August, 2019¹

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HONORABLE FRANCOIS A. RIVERA

-----X
POWERCAP PARTNERS LLC,

Plaintiff,

DECISION & ORDER
Index No. 524411/2017

- against -

BEAUX EQUITIES LLC, YAAKOV POLLAK,
MOSHE POLLACK, SHORIVGER TRUST and
RAPHAEL GROSSMAN as Trustee of the
SHORIVGER TRUST,

Defendants.
-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on defendants Beaux Equities LLC and Yaakov Pollak notice of motion filed on April 22, 2019, under motion sequence four, for an order pursuant to CPLR 2304:

- (1) quashing non party subpoenas dated March 22, 2018 served by plaintiff Power Cap Partners LLC upon Gutman Weiss, P.C., Arthur Gutman Esq., and David Gutman, Esq.;
- (2) quashing non party subpoenas dated April 4, 2019 served by defendants Shorivger Trust and Raphael Grossman as Trustee of the Shorivger Trust upon Gutman Weiss, P.C., Arthur Gutman Esq., and David Gutman, Esq.

¹This is also the date the decision and order was mailed to the parties.

This motion is opposed by plaintiff and defendants Shorivger Trust and Raphael Grossman as Trustee of the Shorivger Trust.

- Notice of Motion
- Movants Affirmation in Support
- Exhibits A to E
- Affirmation in Reply
- Plaintiff's Affirmation in Opposition
- Exhibits A to O
- Plaintiff's Memorandum of Law in Opposition
- Defendants Shorivger Trust & Grossman Affirmation in Opposition
- Defendants Shorivger Trust & Grossman Memorandum of Law in Opposition
- Exhibit A to G

Recitation in accordance with CPLR 2219 (a) of the papers considered on defendants Beaux Equities LLC and Yaakov Pollak notice of motion filed on May 2, 2019, under motion sequence five, for an order, pursuant to CPLR 3212, granting summary judgment:

- (1) dismissing all causes of causes of actions against it;
- (2) as to its first counterclaim;
- (3) canceling and discharging the Declaration of Restriction set forth in the collateral note dated April 13, 2017.

This motion is opposed only by plaintiff.

- Notice of Motion
- Affidavit of Yaakov Pollak
- Exhibits A to M
- Affirmation in Opposition
- Exhibits A to G
- Memorandum of Law in Opposition
- Affirmation in Reply

BACKGROUND

On December 19, 2017 plaintiff Power Cap Partners LLC (hereinafter plaintiff)

commenced an action against the defendants, pursuant to RPAPL Article 15, to determine claims to real property, by filing a summons, verified complaint, and notice of pendency with the Kings County Clerk's Office (KCCO).

On the same day, plaintiff filed an order to show cause seeking a preliminary injunction pursuant to CPLR 6301, to enjoin the defendants from selling or transferring three properties located in Brooklyn, New York identified as Block number 5487 and Lot numbers 6, 7, and 8 (hereinafter subject properties).

On February 14, 2018, defendants Shorivger Trust (hereinafter the Trust) and Raphael Grossman (hereinafter R. Grossman) as Trustee of the Shorivger Trust (hereinafter collectively as ST) jointly filed a pre-answer motion pursuant to CPLR 3211 (a) (1) to dismiss the causes of action against it.

By decision and order of this Court dated July 28, 2018, the Court denied plaintiff's order to show cause for a preliminary injunction and ST's motion to dismiss.

On June 7, 2017 defendants Beaux Equities LLC (hereinafter Beaux), Yaakov Pollak (hereinafter Y. Pollak) and Moshe Pollak (hereinafter M. Pollak) (collectively as the Beaux defendants) jointly filed a verified answer with counterclaims and a notice of pendency on the subject properties.

On August 16, 2018, ST joined issue by filing their verified answer with counterclaims.

On September 6, 2018, plaintiff filed a separate answer to the counterclaims

asserted by the Beaux defendants and ST.

Plaintiff's complaint contains eighty-eight allegations of fact in support of seven causes of action. The plaintiff's complaint alleges the following salient facts. Plaintiff alleges that on or about April 13, 2017, it loaned \$750,000.00 to Y. Pollak, the sole member of Beaux, to be paid on or before June 13, 2017 (hereinafter the First Loan). The First Loan was secured by Y. Pollak's pledge of 100 percent of his membership interest in Beaux. When the loan was secured, Beaux owned the subject properties. Plaintiff alleges that Beaux executed a Deed In Lieu of Foreclosure and a Declaration of Restriction (hereinafter the Declaration) to provide additional security for the First Loan. Plaintiff further alleges that the Declaration included language whereby Beaux agreed that it shall not "mortgage, assign, lease, convey, transfer...take any action creating a security interest in Beaux" and/or the subject properties. The Declaration was recorded with the City Register on May 16, 2017. On May 16, 2017, plaintiff loaned \$265,000.00 to Y. and M. Pollak (hereinafter the Second Loan). The Second Loan was also secured by Y. Pollak's membership interest in Beaux.

The First and Second Loan became due on October 31, 2017. Plaintiff alleges that Y. and M. Pollak defaulted on the loans. Plaintiff contends that the Declaration was violated when the subject properties were conveyed to the Trust by a deed recorded on November 27, 2017. Plaintiff seeks, among other things, a declaration that the deed is void.

The Beaux defendants' verified answer raised nine affirmative defenses. The affirmative defenses allege: (1) that the complaint fails to state a cause of action; (2) the doctrine of unclean hands; (3) any damages are due to plaintiff's negligence, misconduct and/or breach of contract; (4) plaintiff is not owed any money; (5) plaintiff's action is frivolous; (6) the doctrine of estoppel and illegality; (7) fraud and misrepresentation; (8) unjust enrichment; and (9) the loans alleged in the complaint are usurious.

The Beaux defendants asserted two cross claims against ST and two counterclaims against plaintiff that allege the following salient facts. Y. Pollak and M. Pollak (hereinafter the Pollaks) are brothers. The Pollaks are members of a entity called YGM Group LLC (hereinafter YGM), involved in e-commerce, among other things. In order to expand the business, the Pollaks received capital advance totaling 2.5 million dollars from Israel Grossman, brother of defendant Raphael Grossman. These advances were memorialized in an agreement which identified the Trust as the lender, R. Grossman as trustee and YGM as the borrower. The Beaux defendants allege that the Trust attempted to collect interest on these capital advances with interest rates ranging from 2.5 % to 18%. The Beaux defendants further allege these capital advances were illegal and usurious.

Furthermore, the Beaux defendants allege that the capital advances caused extreme financial distress to YGM such that the Pollaks sought the services of plaintiff in order to relieve their financial stress. The Beaux defendants acknowledge that plaintiff advanced a loan in the amount of \$750,000.00 on about April 13, 2017, which they refer to as the

First Loan. The Beaux defendants acknowledge that the First Loan is memorialized in a collateral note and a Declaration of Restriction. On or about May 16, 2017, plaintiff advanced a second loan to Y. Pollak and M. Pollak, which was also memorialized in a collateral note.

Although Beaux had not received any benefit from the capital advances, the plaintiff wrongfully attempted to use Beaux's assets as collateral for these loans. The Beaux defendants contend that the plaintiff acted in bad faith in knowingly and intentionally advancing illegal and usurious loans that would result in a default in repayment.

The Beaux defendants' first counterclaim and cross claim allege that the loans from the Trust and plaintiff are usurious and are in violation of New York Penal Law § 190.40. Furthermore, the second cross claim alleges that Israel Grossman (hereinafter Grossman) and ST forced Y. Pollak to sign a deed that transferred the subject properties to the Trust. The Beaux defendants allege that Grossman and ST agreed not to record the deed, but did so without Y. Pollak knowledge or consent. The Beaux defendants allege that the deeds, mortgages and liens are fraudulent and therefore void.

ST's verified answer raises five affirmative defenses: (1) failure to state a cause of action; (2) the plaintiff's loans are usurious violating the Penal Law and General Obligations Law; (3) the Trust is a bona fide purchaser; (4) lack of standing by plaintiff; (5) documentary evidence warrants dismissal as to the Trust.

ST's answer asserts three cross claims against the Beaux defendants and two counterclaims against plaintiff premised upon the following salient facts. At the request of R. Grossman, his brother, Yisroel Grossman, made an investment with Y. Pollak, as the sole member of Beaux and was led to believe that M. Pollak was a beneficial owner of Beaux. The investment involved the purchase of assets which included the subject properties for \$2,939, 207.00. The Trust made installment payments beginning in November 2013. ST alleges that having paid 50% of the investment, on or about March 26, 2016, Y. Pollak on behalf of Beaux executed a Bargain and Sale deed which conveyed title to the subject properties to the Trust. The deed was recorded on November 17, 2017. ST further alleges that the Beaux defendants intentionally interfered with the Trust investment and ownership of the subject properties. In that notwithstanding the transfer of the subject properties, Y. Pollak recorded a Declaration of Restriction, that directed that the subject properties were not to be transferred, among other things, without the written consent of David Fleischmann, Esq., alleged to be counsel to plaintiff. ST alleges that Y. Pollak made material representation to ST that it relied upon to its detriment and has caused it to suffer damages.

LAW AND APPLICATION

In reviewing the motion papers submitted under motion sequence four and five, the Court has discovered an ambiguity as to the identity of counsel for the movants and for the opponents. The verified answer annexed to both motion sequence four and five,

identifies Gutman Weiss PC as counsel for Beaux, Y. Pollak and M. Pollak.

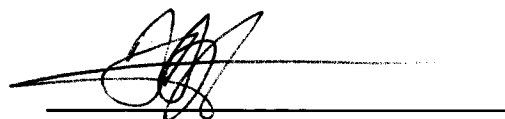
In motion sequence four, the notice of motion is signed by Gutman Weiss PC specifically Dov Medinets, Esq., as counsel for defendants Beaux, Y. Pollak and M. Pollak. However, the affirmation in support states that its counsel for Beaux and Y. Pollak, but does not indicate that its counsel for M. Pollak.

Similarly under motion sequence five, Beaux and Y. Pollak jointly seek summary judgment. In the notice of motion and in the affirmation in support, Gutman Weiss PC identifies itself as counsel to Beaux and Y. Pollak and not as counsel to M. Pollak. The motion papers present an ambiguity as to whether or not Gutman Weiss PC was and continues to be counsel for M. Pollak.

Inasmuch as one of the motions involves a subpoena of a defendants' attorney, this Court cannot proceed until the ambiguity is resolved. Therefore, the proceedings are stayed pursuant to CPLR 2201. All parties are directed to appear on October 8, 2019 at 10:00 a.m. Gutman Weiss PC is directed to appear and be prepared to address this issue.

The foregoing constitutes the decision and order of this Court.

Enter:



J.S.C.

HON. FRANCOIS A. RIVERA
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