

328 Grand St. ,LLC v 328 Grand, LLC
2019 NY Slip Op 32573(U)
July 19, 2019
Supreme Court, Queens County
Docket Number: 707072/2019
Judge: Denis J. Butler
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ORIGINAL

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IAS PART 12

FILED
JUL 25 2019
COUNTY CLERK
QUEENS COUNTY

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328 GRAND STREET, LLC

Index
Number: 707072/2019

Plaintiff(s),

-against-

Motion Date:
May 28, 2019

328 GRAND, LLC, CHOY LING LAM,
Individually and CHING LAM, Individually

Motion Seq. No.: 001

Defendant(s).

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The following papers were read on this motion by plaintiff for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the counterclaims against plaintiff, or, in the alternative, pursuant to 3212, granting summary judgment dismissing the counterclaims, and, pursuant to 22 NYCRR 130.1-1, awarding plaintiff the costs and fees in making this motion; and cross-motion by defendants for an order, pursuant to CPLR 6301, granting a preliminary injunction for all rental income of Units 2A, 3A, 4A, 5A and 6A of the property received by plaintiff be paid to defendants to be applied to the property's mortgage, tax, insurance, and other costs, and directing plaintiff to provide an accounting of all such rents received.

	<u>Papers Numbered</u>
Notice of Motion, Affirmation, Exhibits.....	E11
Notice of Cross-Motion, Affirmation, Affidavit	
Memorandum of Law and Exhibits.....	E13-32
Affirmation In Opposition, Affidavit,	
Memorandum of Law, Exhibits.....	E33-34

Upon the foregoing papers, the motion and cross-motion are determined as follows:

Pursuant to an agreement dated January 5, 2017 (the "Agreement"), defendants Choy Ling Lam and Ching Lam sold plaintiff a 49% membership interest in defendant 328 Grand, LLC, holding ownership to a six-story building located at 328 Grand Street, New York, New York (the "Premises"), with two commercial units and five residential units. A subsequent agreement dated September 22, 2017 (the "Amendment"), amended the Agreement to the extent that the purchase price for the 49% membership interest was reduced to \$3,082,500.00, of which plaintiff had already paid \$57,500.00 simultaneously upon execution of the Agreement, leaving a balance of \$3,025,000.00 to be paid by the assumption of liability in that amount of the underlying mortgage upon the Premises. The Amendment also provided that the "assumption and any costs associated with the Mortgage shall not take effect until such time as the Offering Plan Approved for 328 Grand Street Condominium is declared effective and the amendment declaring the plan effective is submitted; reviewed and accepted by the New York State Attorney General Office." The 49% membership interest was specifically allocated to the residential units 2A, 3A, 4A 5A, 6A and all of the residential common areas.

Furthermore, while Article XII of the Agreement provided that closing of said Agreement "shall take place simultaneously with execution of this agreement," Article V specified the "closing of title" (emphasis added). Article V stated as follows:

"The closing of title shall take place on no less than thirty (30) days written notice to PURCHASER at such place as Seller may designate, at an hour and on a date (hereinafter called the "Closing Date") to be specified by Seller. Such date shall be no earlier than thirty (30) days after the date on which written notice is given to PURCHASER that the [Offering] Plan has been declared effective and a certificate of occupancy has been issued covering the residential units (unless Purchaser and Seller shall agree on an earlier Closing Date). The closing of title may be adjourned to such later date as the parties may agree upon in writing, or otherwise as set forth in the following paragraph, and such adjourned date shall then be deemed the Closing Date hereunder. Purchaser shall be entitled to one reasonable adjournment of up to fifteen days, on five days written notice. The seller may be entitled to conditions, strikes or material shortages, or delays in inspections and reports thereon, or other requirements."

Defendants allege that, although they satisfied their obligations, pursuant to both the Agreement and Amendment, closing

of title never occurred because plaintiff was unable to obtain financing for the \$3,025,000.00 balance. Defendants further allege that plaintiff, without paying the full purchase price, nonetheless took possession of the residential units, entered into lease agreements with their tenants, and have kept all the rental income, and the property is at substantial risk of being foreclosed upon due to plaintiff's failure to assume its portion of the mortgage and pay 50% of the property's mortgage and other costs required by the Agreement. Defendants further allege that, as plaintiff has been unable to close on title, they remain the rightful owners of the residential units and are entitled to the rental income therefrom. Defendants further allege that, even if plaintiff had closed as plaintiff alleges, plaintiff would still be required to pay 50% of the property's carrying costs.

According to the affidavit of Silvio Spallone, a manager of plaintiff, at the closing, defendant Choy Ling Lam conveyed possession to plaintiff by handing the keys to the residential lobby door, the digital security access code, and five individual complete sets of keys for each one of the five residential units 2A, 3A, 4A, 5A, 6A and all residential common areas to Mr. Spallone.

Plaintiff now moves, pursuant to CPLR 3211 (a) (1) and (7), for dismissal of the counterclaims asserted in the answer, or, in the alternative, pursuant to 3212, for summary judgment dismissing the counterclaims.

On a motion to dismiss under CPLR 3211, the pleadings must be liberally construed, accepting the facts pleaded as true and according them every favorable inference (see *Leon v Martinez*, 84 NY2d 83 [1994]; *Jacobs v Macy's E., Inc.*, 262 AD2d 607 [2d Dept 1999]). In order to prevail on a CPLR 3211 (a) (1) motion, the documentary evidence must resolve all factual issues and conclusively and definitively dispose of the claim (see *Held v Kaufman*, 91 NY2d 425 [1998]; *Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *Vanderminden v Vanderminden*, 226 AD2d 1037 [3d Dept 1996]; *Bronxville Knolls, Inc. v Webster Town Ctr. Partnership*, 221 AD2d 248 [1st Dept 1995]; *Fernandez v Cigna Prop. & Cas. Ins. Co.*, 188 AD2d 700, 702 [3d Dept 1992]). A motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7) addresses merely the sufficiency of the pleadings. 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]), and the court will not examine affidavits for the purpose of determining whether there is evidentiary support for the pleading (see *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]). 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 claimant will ultimately prevail on the merits (*Given v County of Suffolk*, 187 AD2d 560 [2d Dept 1992]).

In order to award summary judgment, it must clearly appear that there are no material issues of fact (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any material issues of fact from the case (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In the instant matter, defendants have set forth sufficient facts for their counterclaims, and the documentary evidence relied upon by plaintiff is insufficient to conclusively dispose of them. Additionally, a upon review of the pleadings, the court finds plaintiff has failed to demonstrate that no significant dispute exists as to the facts alleged by defendants. As the documentary evidence submitted is insufficient to resolve all factual issues, plaintiff has also failed to establish a prima facie case entitling it to judgment as a matter of law.

Accordingly, plaintiff's motion is denied in all respects.

Turning to the cross-motion, defendants seek injunctive relief to apply rental income from the residential units to mortgage payments, insurance premiums, and real estate taxes of the Premises.

Pursuant to CPLR 6301, in order to obtain a preliminary injunction, the moving party must establish a likelihood of success on the merits, irreparable harm absent provisional relief, and a balance of the equities in the moving party's favor (see *Aetna Ins. Co. v. Capasso*, 75 NY2d 860, 862 [1990]).

Here, Article VI of the Agreement provided as follows:

"Once the [Offering] Plan has been declared effective and a certificate of occupancy has been issued covering the residential units the costs and income shall be allocated as follows:

- a. Seller - Fifty (50%) percent of the Mortgage Real Estate Taxes and Insurance. All others cost [sic] including Utilities associated with the Commercial Units. Seller shall entitle [sic] to receive all

rental income from the Commercial Unit;

b. Purchaser - Fifty (50%) percent of the Mortgage Real Estate Taxes and Insurance. All others cost [sic] including Utilities associated with the Residential Units. Seller shall [sic] entitled to receive all rental income from the Residential Units;

c. If at any time separate tax lots are established for the Premises and the Commercial Units and Residential Units are billed separately, then SELLER shall be solely responsible for the Real Estate Taxes on the Commercial Units and the PURCHASER shall be solely responsible for the Real Estate Taxes on the Residential Units."

As set forth in the affidavit of Choy Ling Lam, and further supported by documentary evidence, the offering plan for the Premises was approved and declared effective on or about July 11, 2017, the condominium declaration was filed and recorded on or about September 5, 2018, and a final certificate of occupancy was obtained on or about March 17, 2017. Defendants have therefore established a likelihood of success on the merits.

Defendants have also established the elements of irreparable harm and the balance of equities in their favor. Defendants allege that there is a substantial risk of the Premises being foreclosed upon due to plaintiff collecting the rental income on the residential units but failing to assume its portion of the mortgage and pay 50% of the mortgage and other costs required by the Agreement. Moreover, the purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (see *Board of Mgrs. of the Britton Condominium v C.H.P.Y. Assoc.*, 101 AD3d 917 [2d Dept 2012]; *Dixon v Malouf*, 61 AD3d 630 [2d Dept 2010]).

"[T]he mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction" (*Egan v New York Care Plus Ins. Co.*, 266 AD2d 600, 601 [3d Dept 1999]) for "even when facts are in dispute, the nisi prius court can find that a [party] has a likelihood of success on the merits, from the evidence presented, though such evidence may not be 'conclusive'" (*Sau Thi Ma v Xuan T. Lien*, 198 AD2d 186, 187 [1st 1993]).

Accordingly, the cross-motion for a preliminary injunction is granted, solely to the extent plaintiff shall pay to defendants all rental income derived from Units 2A, 3A, 4A, 5A and 6A of the

Premises as is necessary to fulfill the obligations plaintiff would be held to under Article VI of the Agreement.

Settle order.

Dated: July 19, 2019



Denis J. Butler, J.S.C.

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