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| 6901 LLC v Caputo |
| 2019 NY Slip Op 33498(U) |
| November 18, 2019 |
| Supreme Court, Kings County |
| Docket Number: 507756/17 |
| Judge: Leon Ruchelsman |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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6901 LLC,

Plaintiff,

Decision and order

- against -

Index No. 507756/17

ANDREA CAPUTO,

Defendant,

MS # 2,3 & 4
November 18, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved seeking summary judgement dismissing all the causes of action. The plaintiff opposes the motion. In addition, the plaintiff has moved seeking to compel discovery which the defendant has opposed. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

Prior to October 2004 the defendant Andrea Caputo along with Pierre Salameh and John Fahy owned property together including property located at 6901 Third Avenue in Kings County. During October 2004 Caputo transferred her interest in 6901 Third Avenue to her partners, Salameh and Fahy in exchange for promissory note and mortgage in the amount of \$775,000. An entity called Circles Bay Ridge Realty Corp., owned by Salameh and Fahy took possession to the property and executed a note and mortgage to Caputo. A few years later Caputo paid outstanding tax bills and other obligations on behalf of Circles and an additional note and mortgage in the amount of \$150,500 was executed by Circles. On May 21, 2009 Caputo entered into a consolidation agreement

whereby both mortgages were consolidated into one mortgage totaling \$900,500. The consolidated mortgage was recorded on June 10, 2009. Circles defaulted on another loan and the plaintiff purchased the shares of Circles at a judicial auction on February 5, 2017.¹ Two months later the plaintiff instituted the within lawsuit claiming that as the owner of the shares of Circles it can now maintain any action against Caputo that Circles could have maintained and can assert any defense the corporation could assert in any action by Caputo.

Thus, the complaint filed alleged that Circles failed to pay the loans as far back as 2011 and that as a result Caputo collected rents and profits and was also thereafter obligated to pay all necessary charges and expenses of the premises. Specifically, the complaint asserts nine causes of action. There are three causes of action where the plaintiff seeks declaratory judgements that Caputo cannot interfere with the plaintiff's collection of rents, that Caputo failed to pay the necessary expenses which caused plaintiff to suffer financial damages and that Caputo was only allowed to collect rents if she likewise paid all the necessary expenses. The remaining causes of action are for an accounting, an injunction mandating that Caputo pay

¹ It should be noted that Tim Ziss a member of the Plaintiff testified the auction took place in the summer prior to 2017 (see, Deposition of Tim Ziss, pages 12, 14, 19). To the extent there is a dispute concerning the exact date of the sale, such dispute does not alter the court's analysis.

real estate taxes owed and other necessary expenses owed, fraud, cancelling the mortgage, that the mortgage was a sham and a breach of fiduciary duty. The motion seeking summary judgement has now been filed.

Conclusions of Law

Summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

It is well settled that an assignee stands in the shoes of the assignor and is subject to all of the equities and burdens attached to the property (Madison Liquidity Investors 119 v. Griffith, 57 AD3d 438, 869 NYS2d 496 [1st Dept., 2008]). The plaintiff argues that as the assignee of Circles it stands in the shoes of Circles and can pursue any claims against Caputo. The defendant argues the plaintiff never obtained title to the property and thus has no standing to challenge the mortgages. Thus, the precise nature of the plaintiff's ownership of Circles must be examined. There is no dispute the plaintiff purchased the shares of Circles at a public judicial sale. The defendant argues the mere purchase of the shares did not confer any interest in the property since the rights of shareholders is

distinct from the rights of the corporation itself. While that is generally true (see, U.S. v. Wallach, 935 F.2d 445 [2d Cir. 1991]) that truism cannot bar the plaintiff from asserting any rights that Circles could have asserted. As the owner of the shares, the plaintiff has the full ability to pursue any claims which Circles would have had the ability to pursue. The fact Circles had been dissolved is likewise not a bar to commence this action. Therefore, procedurally the lawsuit is proper.

Turning to substantive issues, the consolidated mortgage was executed on May 21, 2009. Thus, any action seeking to void such agreement is subject to a six year statute of limitations. There can be no dispute the lawsuit was filed in 2017 which is beyond six years from the execution of the consolidated mortgage. The plaintiff argues that since Caputo moved to accelerate the mortgage in 2015 the date in which to file any action begins in 2015 making this lawsuit timely. It is true that once an acceleration occurs the entire debt is due and the statute of limitations begins to run on the entire debt (see, Deutsche Bank National Trust Co., v. Adrian, 157 AD3d 934, 69 NYS3d 706 [2d Dept., 2018]). The basis for this rule is grounded in an understanding of the statute of limitations to recover mortgage payments. Thus, generally, an action to foreclose a mortgage may be brought to recover unpaid sums that were due immediately preceding the commencement of the action. "With respect to a

mortgage payable in installments, separate causes of action accrued for each installment that is not paid, and the statute of limitations begins to run, on the date each installment became due" (see, Wells Fargo Bank, N.A., v. Burke, 94 AD3d 980, 943 NYS2d 540 [2d Dept., 2012]). However, once acceleration occurs "the borrowers' right and obligation to make monthly installments ceased and all sums [become] immediately due and payable" hence the six year statute of limitations begins to run from that date on the entire mortgage debt (see, EMC Mortgage Corp., v. Patella, 279 AD2d 604, 720 NYS2d 161 [2d Dept., 2001]).

Thus, any extension of time afforded by acceleration only applies to the party that accelerated the debt, namely Caputo. Further, the extension of time only applies to claims arising out of acceleration of the debt owed. The plaintiff, cannot benefit from the extension of time since the plaintiff's claims are not in any way connected to the foreclosure of the mortgages. The plaintiff's claims are essentially fraud and breach of duty and those claims have nothing to do with the foreclosure action commenced by Caputo. Indeed, other than the fortuitous coincidence Caputo initiated a foreclosure action there is no basis to permit the filing of the action beyond the statute of limitations. The plaintiff seeks to excuse its late commencement of this action based on Caputo's timely commencement of a foreclosure action. Since there is no connection whatsoever

there is no reason why the commencement of this action is somehow subsumed within Caputo's timely commencement of the foreclosure action.

Therefore, based on the foregoing, the lawsuit was not timely commenced and consequently the motion seeking summary judgement dismissing the lawsuit is granted. There is no need to consider the specific causes of action since none of the causes of action are viable. Likewise, the motion seeking additional discovery is denied as moot since the discovery sought did not in any way impact the timeliness of this lawsuit.

So ordered.

ENTER:



DATED: November 18, 2019
Brooklyn NY

Hon. Leon Ruchelsman
JSC

2019 NOV 25 AM 8:30
KINGS COUNTY
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