

LNV Corp. v Giroux
2019 NY Slip Op 33901(U)
September 1, 2019
Supreme Court, Saratoga County
Docket Number: 2017-1110
Judge: Ann C. Crowell
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 ORIGINAL

SUPREME COURT
STATE OF NEW YORK

COUNTY OF SARATOGA

LNV CORPORATION,

Plaintiff,

-against-

DECISION and ORDER

Index No: 2017-1110

RJI No: 45-1-2017-0828

ROBERT L. GIROUX, CINDY L. GIROUX f/k/a
CINDY L. CONDON, ARGENT MORTGAGE COMPANY,
LLC, "JOHN DOE #1" through and including "JOHN
DOE #25", the defendants last named in quotation marks
being intended to designate tenants or occupants in
possession of the herein described premises or portions
thereof, if any there be, said names being fictitious, there
true name being unknown to plaintiff,

SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

2019 SEP 10 AM 11:38

FILED

Defendants.

APPEARANCES:

Stein, Wiener & Roth, LLP
Attorneys for Plaintiff
One Old Country Road, Suite 113
Carle Place, New York, New York 11514

The Legal Project
Attorneys for Defendants Giroux
24 Aviation Road, Suite 101
Albany, New York 12205

By Notice of Motion, dated April 4, 2018, and returnable April 25, 2018, plaintiff moved for an Order Discontinuing this foreclosure action and canceling the Notice of Pendency. By Notice of Cross-Motion, dated April 16, 2018, and returnable April 25, 2018, defendants Robert L. Giroux and Cindy L. Giroux f/k/a Cindy L. Condon ("Giroux") cross moved for an Order finding that plaintiff has capitalized unjustified fees and costs to Giroux's loan balance; finding plaintiff has failed to negotiate in good faith and imposing sanctions; and awarding attorney's fees. For a period far in excess of a year, the parties

mutually agreed to adjourn their respective motions in an attempt to mutually resolve the issues raised by defendants. The parties were unable to reach a resolution. On February 21, 2018, defendant Cindy Giroux filed a Chapter 7 Bankruptcy proceeding. By letter dated February 9, 2019, plaintiff's counsel informed the Court of the bankruptcy filing. By letter dated June 5, 2019, plaintiff's counsel informed the Court that the automatic bankruptcy stay had been lifted with respect to this action.

The foreclosure action was commenced on April 20, 2017, alleging a default in payment since November 1, 2013. On January 12, 2018, plaintiff offered the defendants a loan modification to resolve the pending foreclosure action. The loan modification required a \$40,000.00 lump sum payment (which defendants received through the New York State Mortgage Assistance Program ("MAP")); capitalization of arrearages; 3.75% interest for 36 months, then a reversion to the note rate of 7.375%; amortization over 480 months with a balloon payment due on October 1, 2036; and a first payment due on March 1, 2018 with an estimated payment of \$943.53.

Defendants' counsel immediately inquired as to the amount of the principal balance on the offered modification. By email dated January 12, 2018, defendants' counsel was informed that the principal balance was \$203,660.20, minus the \$40,000.00 payment leaving a remaining balance of \$163,660.20. By email dated January 17, 2018, defendants' counsel requested some modifications to the proposed offer and requested a breakdown of the principal balance and capitalized amounts. By email dated February 2, 2018, plaintiff rejected defendants' proposed changes to their offer. By email dated February 2, 2018, defendants' counsel requested a breakdown "of the \$15,000+ in corporate advances."

By email dated February 8, 2018, defendants' counsel asked plaintiff's counsel

whether her questions regarding the capitalized amounts could be addressed after the modification agreement was signed and stated her clients would not waive their rights to make sure the amounts were correct. By email dated February 12, 2018, plaintiff's counsel responded that: "There will be a full accounting of the cap amounts prior to the Final Mod." By email dated February 13, 2018, defendants' counsel stated her clients were coming to sign the modification tomorrow and inquired whether an accounting of the capitalized amounts would be available by then. By email dated February 14, 2018, plaintiff's counsel stated: "We will do our best."

On February 14, 2018, defendants signed the loan modification documents and forwarded them to MAP. By email dated February 15, 2018, defendants' counsel informed plaintiff's counsel that the documents had been executed, but indicated: "we are still interested in seeing the full accounting." The established deadline for returning the executed loan modification documents was February 20, 2019. By emails dated February 28, 2018, March 14, 2018, and March 23, 2018, defendants' counsel continued to inquire into the capitalized amounts. On April 4, 2018, the Foreclosure Settlement Part Referee directed the plaintiff to provide a breakdown of the capitalized costs by May 16, 2018. Any Court Orders or proceedings, including this Court's proceedings on the instant motion from February 21, 2018 to April 17, 2019, are null and void as a result of defendant Cindy Giroux's bankruptcy filing. Defendants' counsel has continued to request a breakdown of the capitalized amounts and remains unsatisfied with the information provided by plaintiff.

Defendants' cross-motion seeking various aspects of relief can be summed up by defendants' memorandum of law at page 5: "Defendants executed and returned the loan modification documents despite not knowing how the new balance had been calculated,

because not to do so would have been to lose the opportunity to save their house.” Defendants were free to not accept the terms of the modification or request an adjournment from plaintiff and/or the Court. On February 14, 2018, defendants, while represented by counsel, chose to accept the terms of the modification agreement. No request for an adjournment was made to the plaintiff and/or the Court. Almost immediately thereafter, defendant Cindy Giroux filed a Chapter 7 Bankruptcy proceeding on February 21, 2018. The Court was not informed of the bankruptcy filing by defendant. By letter dated February 9, 2019, plaintiff’s counsel informed the Court of the bankruptcy filing.

The loan modification agreement entered into by defendants on February 14, 2018 represents a binding contract. Defendants do not contend that the contract was entered into by mutual mistake. A contract entered into by mutual mistake is voidable and subject to rescission. *Gould v Bd. of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446 [1993]. Essentially, defendants seek to enforce that portion of the contract which saves their house from foreclosure, while at the same time making the monetary terms of that agreement more favorable to them. The remedy requested by defendants’ counsel is not available. A unilateral mistake may be grounds for rescission of a contract to prevent unjust enrichment. *Rosenblum v Manufacturers Trust Co.*, 270 NY 79 [1936]. Defendants have not requested this relief. If this relief were requested, equity would require the Court to consider defendant’s action of immediately filing for bankruptcy protection and their payment history under the modification agreement.

Defendants’ cross-motion is denied in all respects. Plaintiff’s motion for an order of discontinuance and order cancelling the Notice of Pendency is granted. The proposed Order submitted by plaintiff’s counsel is issuing concurrently herewith. Any relief not

specifically granted is denied. No costs are awarded to any party. This Decision shall constitute the Order of the Court. The original Decision and Order shall be forwarded to the attorney for plaintiff for filing and entry. The underlying papers will be filed by the Court.

Dated: September 1, 2019
Ballston Spa, New York


ANN C. CROWELL, J.S.C.

2019 SEP 10 AM 11:42
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY
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ENTERED

Papers Received and Considered:

Notice of Motion, dated April 4, 2018

Affirmation of Pranalli Datta, Esq., dated April 4, 2018, with Exhibits A-B

Notice of Cross-Motion dated April 16, 2018

Affirmation of Michelle F. Lee, Esq., dated April 16, 2018, with Exhibits A-M

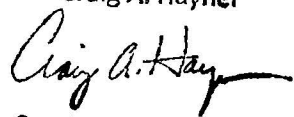
Memorandum of Law, dated April 16, 2018

Karen B. Migdal, Esq.'s letter February 9, 2019, with attachment

Karen B. Migdal, Esq.'s letter June 5, 2019, with attachment

Affirmation of Karen B. Migdal, Esq., dated August 12, 2019, with Exhibits A-O

Gayle E. Hartz, Esq.'s letter dated August 30, 2019

Craig A. Hayner

Saratoga County Clerk