

Almonte v Medaro

2019 NY Slip Op 34249(U)

December 16, 2019

Supreme Court, Westchester County

Docket Number: Index No. 50899/19

Judge: Gerald E. Loehr

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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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LUIS ALMONTE, LUMAL REALTY LLC, AVAAR
ADVISORY, INC.,

Plaintiffs,

DECISION AND ORDER

Index No.: 50899/19

-against-

MEDARDO , PALMA, a/k/a MERDADO ANTHONY PALMA,
24 WB REALTY CORP., VICTOR ABREU, GRENACHE
HOLDINGS CORP., SOUTHBRIDGE RE LLC, LENDINGHOMES
FUNDING, CORP. HUNTER FOOTE, JOHN DOE AND JANE DOE
in possession, being a fictitious name as the true names are unknown,

Defendants.

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LOEHR, J.

The following papers numbered 1-11 were read on the pre-answer motion of Defendants Grenache Holdings Corp. ("Grenache") and Southbridge RE LLC ("Southbridge") and the pre-answer motion of Defendant LendingHomes Funding Corp. ("LendingHomes") to dismiss the Complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Affidavit - Exhibits	1
Memorandum of Law in Support	2
Affirmation - in Opposition - Exhibits	3
Memorandum of Law in Opposition	4
Reply Affirmation	5

Reply Memorandum of Law	6
Notice of Motion - Affidavit - Exhibits	7
Memorandum of Law in Support	8
Affirmation in Opposition - Exhibits	9
Memorandum of Law in Opposition	10
Reply Memorandum of Law	11

Upon the foregoing papers, and as alleged in the Complaint and supported by the submitted documentary evidence, it appears that on an unspecified date prior to November 20, 2015, Luis Almonte loaned Victor Abreu and Medaro Pena¹ (collectively, the “Borrowers”) \$220,000 so that the latter could close on the property located at 6 Crest Place, Elmsford, New York (the “Property”), evidenced by a Mortgage Note. Inasmuch as it was understood that the Borrowers were going to take title to the Property in Abreu’s closely held corporation, Avaar Advisory Group, Inc. (“Avaar”), as security for the loan, Abreu pledged his shares (all of the stock) in Avaar, delivering all the shares to Almonte. Avaar purchased the Property on November 20, 2015 using the borrowed funds. The terms of the outstanding loan and the pledge of Avaar’s stock notwithstanding, on July 12, 2017 Avaar purported to borrow \$160,000 from Southbridge and purported to grant Southbridge a Mortgage on the Property to secure same. The Mortgage was executed by Medardo Palma, purporting to be the President of Avaar. Then, on July 26, 2017, Medardo Palma, again claiming to be the President and Secretary of Avaar, purported to execute and deliver a Deed on behalf of Avaar transferring title to the Property to Grenache. Although the sale was, allegedly, of substantially all of Avaar’s assets and not made in the regular course of its business, the documents show that Grenache was aware the sale was without shareholder approval. In order to finance the foregoing, in July 2017, Grenache allegedly borrowed \$246,000 from ABL One, LLC which was granted a Mortgage on the Property in that amount, with \$169,333 thereof being used to satisfy the July 12, 2017 Mortgage. By Deed dated January 30, 2018, Grenache then transferred the Property to Southbridge, a related corporation, which financed the transaction with a Mortgage loan in the amount of \$320,000 from

¹ While not clear, it appears that Borrower Medaro Pena and Defendant Medardo Palmer may be the same person.

LendingHomes.

Plaintiffs then commenced this action on January 15, 2019. The Complaint contains nine causes of action. With respect to the movants, the First Cause of Action is against Palma, Abreu and Grenache based on their fraudulent conspiracy to transfer the Property from the former to the latter upon a forged/unauthorized Deed. The second Cause of Action is against Grenache and Southbridge with respect to the transfer of the Property from Grenache to Southbridge based on the latter being part of the fraud, but even if not, having acquired nothing under the original invalid Deed. The Fifth Cause of actions seeks a declaration that LendingHomes' Mortgage is a nullity as based on an invalid Deed. The Ninth Cause of Action seeks to rescind Avar's 2017 Deed and all subsequent Deeds of the Property and all Mortgages placed on the Property subsequent to the 2017 Deed.

Grenache and Southbridge move to dismiss the Complaint as to them as failing to state a claim. First, they argue that the moving Defendants' fraud is not pleaded with sufficient specificity. Second, they argue that Palmar had actual authority to transfer the Property; and if not, then apparent authority. Third, that as a bona fide purchaser for value of the Property without knowledge of the Palma's and Abreu's fraud, their title to the Property is insulated pursuant to Real Property Law § 266. Fourth, because all of the Plaintiffs are not claiming title to the Property, they lack the capacity to bring this action. And Fifth, that the moving Defendants were not properly served.

One who deals with an agent does so at his peril and must make the necessary effort to discover the actual scope of his authority (*ER Holdings, LLC v 122 W.P.R. Corp.*, 65 AD3d 1275, 1277 [2d Dept 2009]). As alleged, and in fact supported by documentary evidence, Abreu pledged all of the shares of Avar to Plaintiff to secure Plaintiff's loan to Abreu. Therefore, as alleged, Palma had no authority to sell the Property or execute a Deed therefor and deliver same to Grenache. Grenache says Palma had actual authority. The Complaint alleges he did not; and as this is a CPLR 3211 motion, Grenache cannot attempt to contradict same – although Grenache fails to explain how Palma could have actual authority in light of the pledge of all of Avar's shares. Grenache then argues that if Palma did not have actual authority, he had apparent authority to execute the Deed. Grenache bases this, with a straight face, on Palma's Affidavit. It is, of course, black letter law, that an agent cannot create his own authority (*id.*). Assuming the issue were before the Court on a 3211 motion, Grenache has failed to offer any act or word of

Almonte which would have conferred apparent authority on Palma to execute and deliver the Deed

As to fraud and title, while RPL 266 insulates a good faith purchaser for value under a voidable deed, it does not do so when the title is void. As alleged, and not contradicted by the documentary evidence submitted, Palma executed and delivered the Deed to the Property without corporate authority and without complying with Business Corporation Law § 909(a). This renders the 2017 Deed void and therefore Grenache's Deed, even if Grenache were unaware and innocent of the original fraud (*M.L.C. Construction, Inc. v Zhang*, 162 AD3d 410 [1st Dept 2018]; *Solar Line, Universal Great Brotherhood, Inc. v Prado*, 100 AD3d 862, 863 [2d Dept 2012]; *Fan-Dorf Properties, Inc. v Classic Brownstones Unlimited, LLC.*, 103 AD3d 589, 590 [1st Dept 2013]; *Kingston v Breslin*, 56 AD3d 430, 431 [2d Dept 2008]; *Karan v Hoskins*, 22 AD3d 638 [2d Dept 2005]; *Wu v Wong*, 288 AD2d 104, 105 [1st Dept 2001]; *see also First National Bank of Nevada v Williams*, 74 AD3d 740, 741-42 [2d Dept 2010]; *Bouffard v Befese, LLC*, 111 AD3d 866, 870-71 [2d Dept 2013]).

As to Grenache's fraud – which is only relevant if the 2017 Deed were voidable, instead of void, Grenache asserts that it was unaware of Palma's fraud and did its due diligence that Palma was authorized to execute the Deed. Assuming, again, that the issue is even before the Court on a 3211 motion, one wonders what due diligence Grenache could have done when Grenache knew there had been no shareholder meeting to approve the sale, never asked to see the sole shareholder's stock and the Avaar corporate seal does not appear on any of the documents. In fact, the foregoing can be seen as evidence of Grenache's participation in the fraud, if not knowledge of it (*see Williams v Mentore*, 115 AD3d 664 [2d Dept 2014]).

Thus, the Plaintiffs have stated valid causes of action as to all of the foregoing,² the motion to dismissed based thereon is denied. However, in that Defendants have also moved to dismiss on the basis of improper service and have submitted evidence that the person served was not authorized to receive service. That motion is granted to the extent of a traverse hearing. Such being without prejudice to Plaintiffs, if they are inclined, to seek an extension of time to reserve under CPLR 306-b.

As state above, the Fifth Cause of Action in the Complaint asserts that LendingHomes'

² And clearly Avaar has the capacity to sue for the return of its Property.

Mortgage is invalid as based on the invalid 2017 Deed. LendingHomes moves to dismiss because, it asserts, the documentary evidence establishes that, even if the 2017 Deed was invalid, they were a good faith encumbrancer for value. As the documentary evidence establishes no such thing, their motion is denied in full as well. All that the documentary evidence establishes is that the 2017 Deed was either void or voidable. If void, for the reasons stated above, LendingHomes Mortgage is void. If only voidable, the documents fail to establish that LendingHomes had no notice of the fraud.

The Plaintiff, Grenache and Southbridge shall appear in the Settlement Conference Part, courtroom 1600, on January 14, 2020 at 9:15am to schedule a traverse. Thereafter, the remaining parties shall appear in the Preliminary Conference Part, courtroom 800. This constitutes the decision and order of the Court.

Dated: White Plains, New York
December 16, 2019



HON. GERALD E. LOEHR
J.S.C.

SPOLZINO, SMITH, BUSS & JACOBS LLP
Attorneys for Plaintiffs
733 Yonkers Avenue
Yonkers, NY 10704

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
Attorneys for Defendants Granache and Southbride
1133 Westchester Avenue
White Plains, NY 10604

DELBELLO DONNELLAN WEINGARTEDN WISE & WIEDERKEHR, LLP
Attorneys for Defendant LendingHomes
One North Lexington Avenue
White Plains, NY 10601