

Benaim v S2 Corona, LLC

2020 NY Slip Op 32253(U)

May 21, 2020

Supreme Court, Queens County

Docket Number: 710580/19

Judge: Leonard Livote

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This opinion is uncorrected and not selected for official publication.

FILED

**5/22/2020
10:42 AM**

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE
Acting Supreme Court Justice

IA Part 33

**COUNTY CLERK
QUEENS COUNTY**

X
Ralphy Benaim, individually and on behalf of 112
Northern Development LLC, Tovit Benaim, The
Benaim Group, LLC and 112 Retail Building, LLC,
Plaintiffs,

Index Number 710580 /19

- against -

Motion Date October 8, 2019

S2 Corona, LLC, Torchlight Debt Opportunity
Fund III, LLC, Lev Development Group II, LLC,
Lev Asset Management LLC, and
Amir Eddie Shapiro,
Defendants.

Motion Seq. No.1

X

The following papers read on this motion by plaintiffs pursuant to CPLR 6301 to vacate the undated notice of sale of certain real property, issued by the referee appointed pursuant to a judgment of foreclosure and sale obtained in an action entitled *Torchlight Debt Opportunity Fund III v 112 Northern Dev. LLC* (Supreme Court, Queens County, Index No. 18514/2011), or in the alternative to stay the foreclosure sale of such real property, pending the outcome of this action.

Papers
Numbered

Order to Show Cause - Affidavits - Exhibits	EF Doc #1-#27
Answering Affidavits - Exhibits	EF Doc #33-#51,
Reply Affidavits	EF Doc. #52-#60
Sur-Reply Affidavits - Exhibits.....	EF Doc. #64-#70
Supplemental Summons and Amended Complaint.....	EF Doc. #61-#62

Upon the foregoing papers it is ordered that the motion is denied as more fully set forth below:

Plaintiffs commenced this action on June 18, 2019, by filing a summons and complaint, naming S2 Corona, LLC (S2 Corona), Torchlight Debt Opportunity Fund III, LLC

(Torchlight), Lev Development Group II, LLC (Lev Development), Lev Asset Management LLC (Lev Asset) and Amir Eddie Shapiro as party defendants. Plaintiffs asserted causes of action against defendant Shapiro for alleged breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, breach of contract, and causes of action against defendants S2 Corona and Torchlight for breach of contract, breach of implied covenant of good faith and fair dealing, for aiding and abetting Shapiro's breach of his fiduciary duty, and an accounting.

In the complaint, plaintiffs allege, among other things, that 112 Northern Development LLC (112 Northern) obtained two commercial mortgage loans from Bank of Smithtown for the purpose of acquiring the real property located at 112-02 Northern Boulevard, Corona, New York and building thereon, a condominium, with 33 residential condominium units, one commercial unit and parking spaces. Plaintiffs also alleged that People's United Bank, F.S.B. (People's United) (the successor in interest to Bank of Smithtown) commenced a foreclosure action, entitled *People's United Bank, FSB v 112 Northern Dev. LLC* (Queens County, Supreme Court, Index No. 18514/2011) (the Foreclosure Action) against 112 Northern as borrower and mortgagor, and against Raphy Benaim, Tovit Benaim and Shapiro, as guarantors, predicated upon the default in payment of the mortgages upon maturity. Plaintiffs further alleged that a judgment of foreclosure and sale was entered in the Foreclosure Action, and thereafter, 112 Northern, Raphy Benaim, Tovit Benaim, Shapiro, 112 Retail LLC (112 Retail)¹ and the Benanim Group, LLC, entered into a forbearance agreement dated as of September 24, 2013 with defendants S2 Corona and Torchlight. Plaintiffs additionally alleged that as of June 17, 2019, 27 residential condominium units had been sold,² and the proceeds of such sales had been received by defendants S2 Corona and Torchlight, along with rent from the commercial condominium unit and income from the parking condominium units. Plaintiffs alleged that defendants S2 Corona and Torchlight breached the forbearance agreement by refusing to transfer title to the commercial condominium unit and the parking condominium units to 112 Retail as required pursuant to the agreement. It was alleged that plaintiffs demanded an accounting from defendants S2 Corona and Torchlight relative to the amounts: (1) owed with respect to the mortgage loans, (2) received by S2 Corona and Torchlight as sale proceeds for the 27 residential condominium units, and (3) received by S2 Corona and Torchlight as

¹112 Retail is a limited liability company in which Raphy Benaim is the sole member.

²

The judgment of foreclosure and sale in the Foreclosure Action was amended pursuant to order dated December 21, 2015 and entered on December 28, 2015, to provide, in effect, that as the condominium units were sold, the plaintiff, in turn, would release them from its mortgage lien, and those units would be deemed no longer encompassed by the judgment.

rent/income from the commercial condominium unit and parking condominium units. In response, defendants S2 Corona and Torchlight allegedly provided plaintiffs with a document, purporting to be an accounting, which plaintiffs rejected as inaccurate and unsubstantiated. Plaintiffs alleged they have no adequate remedy at law, and thus are entitled to an accounting.

Plaintiffs learned that the plaintiff in the Foreclosure Action caused the scheduling of a foreclosure sale on June 21, 2019 of the six remaining unsold residential condominium apartment units at the mortgaged premises (i.e. Apts. 3C, 3E, 5E, 5F, 6E and Penthouse G), the commercial condominium unit and parking condominium units. Plaintiffs obtained the instant order to show cause, seeking to vacate the undated notice of sale, indicating such sale, or alternatively, to preliminarily enjoin defendants S2 Corona and Torchlight from foreclosing on those units, pending the outcome of this action. The order to show cause set an initial return date of July 9, 2019, and included a temporary restraining order staying the sale of the condominium units. The return date was adjourned until October 8, 2019.

On September 6, 2019, prior to final submission of the instant motion, plaintiffs served a supplemental summons and amended complaint upon defendants, deleting: (1) reference to defendants Torchlight, Lev Development, Lev Asset and Shapiro in the caption, (2) the causes of action insofar as asserted against those defendants, and (3) the causes of action asserted against defendant S2 Corona based upon breach of implied covenant of good faith and fair dealing, and for aiding and abetting Shapiro's alleged breach of his fiduciary duty.

In the amended complaint, plaintiffs reassert the causes of action for breach of contract and an equitable accounting against defendant S2 Corona. Plaintiffs additionally allege that (1) on November 15, 2010, Bank of Smithtown merged with People's United, (2) on September 20, 2011, People's United transferred or assigned its interest in the mortgage loans to defendant S2 Corona, and (3) defendants S2 Corona and Torchlight entered into a repurchase agreement, whereby S2 Corona agreed to transfer and/or assign its interest in the mortgage loans to Torchlight, and thereafter repurchase the underlying mortgage loans from Torchlight. Plaintiffs further allege that pursuant to the repurchase agreement, Torchlight was substituted as plaintiff in the Foreclosure Action, but Torchlight has not transferred or assigned any of its interest in the judgment of foreclosure and sale to S2 Corona. In the amended complaint, plaintiffs seek money damages and an equitable accounting.

Defendant S2 Corona served an answer dated October 7, 2019, to the amended complaint, admitting certain allegations, and denying others, and asserting various affirmative defenses.

To the extent plaintiffs move to vacate the notice of sale issued by the referee appointed pursuant to the judgment in the Foreclosure Action, on the ground the judgment in that action has been satisfied through the proceeds of the sale of the 27 condominium units and the rent/income generated by the commercial condominium unit and the parking condominium units, the proper procedure would be for plaintiffs 112 Northern, Raphy Benaim and Tovit Benaim to move for such relief in such foreclosure action. (This court notes that the judgment of foreclosure and sale in the Foreclosure Action is predicated upon those defendants' default in answering).

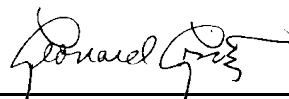
To the extent plaintiffs seek to enjoin preliminarily the sale of such units on the ground that the sale would be in violation of the forbearance agreement, it is well established that to obtain a preliminary injunction, the movant must demonstrate (1) a likelihood of ultimate success on the merits, (2) the prospect that irreparable injury will result unless the injunction is granted, and (3) a balance of the equities in the movant's favor (*see* CPLR 6301; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]). “ ‘Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient’ (*Matter of Walsh v Design Concepts*, 221 AD2d 454 [2d Dept 1995]; *see McLaughlin, Piven, Vogel v W.J. Nolan & Co.*, 114 AD2d 165, 174 [2d Dept 1986])” (*DiFabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 636-637 [2d Dept 2009]). The decision to grant or deny a preliminary injunction lies within the sound discretion of the court (*see Doe v Axelrod*, 73 NY2d at 750).

In this case, plaintiffs' action, as set forth in the amended complaint, is essentially one for money damages, based upon defendant S2 Corona's alleged breach of the forbearance agreement (*see* CPLR 6301). Plaintiffs do not seek specific performance of such agreement, notwithstanding their claim that the agreement requires defendant S2 Corona to transfer title to certain condominium units to them. Plaintiffs, therefore, have failed to meet their burden of showing that the act which defendant S2 Corona purportedly threatens to do, i.e. cause those condominium units to be sold at a foreclosure sale, will tend to render any judgment in this action ineffectual (*see* CPLR 6301).

Any other or further relief not specifically addressed herein is denied.

Accordingly, the motion by plaintiffs is denied in its entirety.

Dated: May 21, 2020



Leonard Livote, A.J.S.C.

FILED

5/22/2020

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4

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QUEENS COUNTY**