

Kenwood Commons LLC v TBG Funding LLC
2020 NY Slip Op 32511(U)
July 28, 2020
Supreme Court, Kings County
Docket Number: 526029/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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KENWOOD COMMONS LLC ET AL,

Plaintiff,

Decision and order

- against -

Index No. 526029/19

TBG FUNDING LLC,

Defendant,

July 28, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to reargue a decision which granted defendants motion to dismiss pursuant to CPLR §3211. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

This matter concerns an approximately 74-acre historic site situated in a designated Federal Opportunity Zone in the Central Business District of Albany, New York. Plaintiff, Kenwood purchased the Property without any mortgage debt in August 2017. In December 2017, Kenwood sought to place a loan on the Property, and in connection therewith, obtained a \$5 Million "bridge loan" (the "TBG Loan") from Plaintiff evidenced by the Note and Mortgage which provided for short-term needs and was anticipated by all parties to be repaid from the proceeds of a larger refinancing, which would provide the funding not only to repay the TBG Loan, but also the funds necessary to complete construction and develop the property.

Defendant, TBG, through its words and actions, gave Plaintiffs reason to be assured that Kenwood, as Borrower, would not suddenly, and without warning, be declared in "default" and subjected to the consequences that follow therefrom. Nonetheless, on April 13, 2019, TBG commenced a foreclosure action in Albany County entitled *TBG Funding LLC v. Kenwood Commons, LLC et al*, Index No. 902353-19 (The "Albany Foreclosure Action") against all the plaintiffs in this Action. The plaintiffs chose to not assert any counterclaims in the Albany Foreclosure Action and instead commenced the instant action. The plaintiff's complaint alleges six separate causes of action: 1) Fraudulent Inducement; 2) Breach of Contract; 3) Intentional Interference with Prospective Economic Advantage; 4) Slander Per Se; 5) Malicious Prosecution; and 6) Declaratory Judgment.

The court granted defendant's request to dismiss the action and the plaintiff has now moved seeking to reargue that determination. Since the previous decision did not address any of the legal issues presented this decision will provide a fuller explanation of the basis for its determination. Essentially, the defendants have moved seeking to dismiss the complaint on the grounds there is a pending lawsuit governing the same facts and circumstances in Albany County and that all matters must be raised there. The plaintiff opposes the motion.

Conclusions of Law

CPLR §3211(a)(4) provides that a motion to dismiss a lawsuit on the grounds another lawsuit is pending should be granted when "both suits arise out of the same subject matter or series of alleged wrongs" (id, Aurora Loan Services LLC v. Reid, 132 AD3d 778, 17 NYS3d 894 [2d Dept., 2015]). Thus, where the reliefs sought in the two actions are "substantially the same" then dismissal is proper (Scottsdale Insurance Company v. Indemnity Insurance Corp., RRG, 110 AD3d 783, 974 NYS2d 476 [2d Dept., 2013]). The term "substantially the same" is defined as a cause of action as sufficiently similar to a simultaneously pending cause of action, when the ruling of one may directly conflict with the ruling of the other (see, Diaz v. Philip Morris Companies, Inc., 28 AD3d 703, 815 NYS2d 109 [2d Dept., 2006]). Thus, a motion to dismiss made in this case should be granted where an identity of parties and causes of action in the pending action raises the danger of conflicting rulings. "CPLR 3211(a)(4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action" (Whitney v. Whitney, 57 NY2d 731, 454 NYS2d 977 [1982]).

In this case all the causes of action should be addressed in the pending litigation in Albany County. First, there is no requirement for identical legal theories to be presented in both actions as long as the two actions are 'substantially similar'

(Cheric, Cherico & Associates v. Midollo, 67 AD3d 622, 886 NYS2d 914 [2d Dept., 2009])). The causes of action in this case essentially challenge whether the Albany Foreclosure Action was commenced at the proper time and with a proper contractual basis. Thus, the first cause of action alleges the guaranty was fraudulently induced. That directly relates to whether the foreclosure was properly commenced. The second cause of action alleges the defendant breached the contract by accelerating the debt and commencing the foreclosure. That issue, again, directly relates to whether the foreclosure in Albany was properly commenced. The third cause of action, intentional interference with prospective economic gain is actionable if effected by unlawful means or, under the theory of prima facie tort, by lawful means without justification (Rad Advert., Inc. v. United Footwear Org., Inc., 154 AD2d 309, 60 NYS3d 472 [2d Dept., 2017])). To determine whether the plaintiff has adequately pled a prima facie claim, the court must first determine if the initiation of the Albany Foreclosure Action was unlawful or without justification. The fourth cause of action for slander alleges statements were made by TBG that the plaintiff was in default. The fifth cause of action alleges malicious prosecution in commencing the foreclosure action without any basis. The last cause of action for a declaratory judgement is essentially a determination the foreclosure action was improperly commenced. Thus, all the causes of action in this lawsuit address whether the other action was

proper and thus the Albany Foreclosure Action can adequately address these claims. Thus, there is no basis for dual lawsuits that deal, essentially, with the same issues. Moreover, the danger of a conflict of rulings raised by a parallel pending action addressing the exact same issues is apparent.

Because this lawsuit is substantially the same as the pending action in Albany County and that a finding in this action may conflict with the rulings of the Albany Foreclosure Action, the court exercises its discretion pursuant to CPLR §3211(a)(4) and dismisses this action.

Therefore, based on the foregoing, the motion seeking to dismiss the complaint is granted and the motion seeking reargument is denied.

So ordered.

ENTER:

DATED: July 28, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC