

Sentry At QB, LLC v Xi Hui Wu

2020 NY Slip Op 35773(U)

August 25, 2020

Supreme Court, Queens County

Docket Number: Index No. 701659/2019

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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SENTRY AT QB, LLC, SENTRY OPERATING
CORP., BENJAMIN WAI, as Temporary
Administrator of the Estate of DING
KWONG WAI a/k/a JOHN WAI, and BENJAMIN
WAI,

Index No.: 701659/2019
Motion Date: 8/13/2020
Motion No.:

Plaintiffs,

Motion Seq.: 11

FILED

- against -

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XI HUI WU a/k/a STEVEN WU, CHUN PETER
DONG, 9008 QUEENS BLVD LOFT LLC, SUM
TSANG CHENG, WING FUNG CHAU, WING FUNG
HOME REALTY GROUP, INC., HOK KWAI
CHAU, WAN BIN LU, XUI QIN LIN, and
CHOI YIM CHI,

**COUNTY CLERK
QUEENS COUNTY**

Defendants.

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The following electronically filed documents read on this Order to Show Cause by defendants Sum Tsang Cheng, Wing Fung Home Realty Group, Inc., Hok Kwai Chau, Wan Ban Lu, Xui Qin Lin, and Choi Yim Chi for an Order entering judgment in favor of the non-settling co-defendant note assignees, precluding the distribution of any and all funds held in the escrow account, and granting an order of attachment on the funds held in the escrow account; and on this cross-motion by plaintiffs for an Order pursuant to CPLR 3212, granting summary judgment in favor of plaintiffs and against defendants-counterclaimants Sum Tsang Cheng, Wing Fung Home Realty Group, Inc., Hok Kwai Chau, Wan Ban Lu, Xui Qin Lin, Choi Yim Chi, Hong Ying and Ling Song, dismissing the counterclaims filed by such defendants:

	Papers <u>Numbered</u>
Order to Show Cause-Affirmation-Exhibits.....	EF 236 - 251
Notice of Cross-Motion-Affirmation-Exhibits- Memo. of Law.....	EF 288 - 299
Affirmation in Reply and Opposition to Cross-Motion-Exhibits.....	EF 300 - 302
Affirmation in Reply-Exhibits.....	EF 304 - 306

The affidavit of Benjamin Wai, an officer of Sentry Operating Corp., the sole member of Sentry at QB, LLC, sets forth the relevant background facts. In early 2016, Xi Hui Wu a/k/a Steven Wu and Chun Peter Dong, the managing members of 9008 Queens Blvd Loft LLC, as well as 9008 Queens Blvd Loft LLC and plaintiffs were engaged in negotiations for the sale and purchase of the subject premises. 9008 Queens Blvd Loft LLC had purchased the premises, which was formerly St. John's Hospital and an adjacent five-story parking garage, several years earlier and had commenced renovations to convert the premises to residential apartments, commercial office space, and retail space.

Pursuant to a Contract of Sale dated March 2016, Sentry At QB, LLC (hereinafter Purchaser) purchased from 9008 Queens Blvd Loft LLC (hereinafter Seller) the mixed-use property located at 89-52/90-02 Queens Blvd. Since construction was not complete, the Seller agreed to use its best efforts to obtain a Permanent Certificate of Occupancy and committed to correct and clear all violations made on the premises by the closing date. The Seller also agreed to make all principal and interest payments under its existing mortgage until it delivered a Temporary Certificate of Occupancy for the entire premises.

In addition to a cash purchase price and assumption of an existing first mortgage loan, the Purchaser executed the following three Mortgage Notes and Affidavits of Confession of Judgment as additional non-cash consideration: the first in the principal sum of \$5 million was assigned to Chun Peter Dong (the Dong Note); a second in the principal sum of \$10 million; and a third in the principal sum of \$10 million. Each Note was secured by a separate mortgage. Copies of the Notes (collectively hereinafter the Seller Notes) and Purchase Money Mortgages were e-filed with the motion papers.

The Note Assignees' claims are predicated on partial assignments of an interest in Note B and the Purchase Money Mortgage which secures Note B, totaling a sum of \$3,490,000. Specifically, each Note Assignee's Assignment of Note and Mortgage provides that the Seller herein is the holder of "a certain Mortgage Note B and Purchase Money Mortgage B both dated December 1, 2016". Section 4(c) of each Note provides that "the liabilities due under this Note shall be subject to the provisions, including set-offs, contained in the parties' Second Amendment".

Two amendments were made to the original Contract of Sale. The Second Amendment dated December 2016, provides that the Seller shall give the Purchaser three purchase money notes in the

total amount of \$25 million, subordinate to the first mortgage to be extended by the Purchaser's lender, without interest, and payable twelve months after closing. The Second Note and Third Note, each in the amount of \$10 million, were held in escrow by the Seller's attorney and were not be recorded except upon default by the Purchaser under the terms of the Second Amendment or the Notes and related loan documents. The Second Amendment also provides that the Purchaser's default under one Note will be considered a default under all Notes.

The Second Amendment further states that the Seller expressly agrees that construction costs may, at the Purchaser's option, be deducted from the Purchaser's liability under the Second and Third Notes. Additionally, the Purchaser was entitled to deduct interest on all mortgages until a temporary certificate of occupancy or permanent certificate of occupancy was issued for the entire premises. The Purchaser was authorized to deduct mortgage interest first from the Third Note, and if and when the offsets exceeded the amount due from the Third Note, then from the Second Note, and last from the Dong Note.

The Seller never delivered a temporary certificate of occupancy or permanent certificate of occupancy for the entire premises. As a result, the Purchaser was unable to refinance the Superior Mortgage. A foreclosure sale of the premises occurred on May 10, 2019.

Plaintiffs each executed a guarantee of payment for each of the Seller Notes and each plaintiff executed an Affidavit of Confession of Judgment for each of the Seller Notes.

On February 4, 2019, the Seller filed the Affidavits of Confession of Judgment, seeking entry of judgments against each of the plaintiffs regarding the three Mortgage Notes in the principal amounts of \$10,000,000, \$10,000,000, and \$5,000,000. Thereafter, the Purchaser argued that the Confessions of Judgment were prematurely filed as money judgments without adjudication of the Purchaser's defenses and deductions, which the Purchaser contends eliminate or reduce the Note amounts. The Note Assignees counterclaimed for a declaratory judgment, declaring that the Confessions of Judgment that gave rise to their interest were valid and enforceable, and they were entitled to collect the amounts assigned to them plus interest.

On February 14, 2020, the Purchaser and the Seller negotiated a settlement without the Note Assignees. Among other things, the settlement provided that the Purchaser shall pay \$1.5 million with respect to Note B, which sum is currently held in

escrow. An additionally \$5 million was paid by the Purchaser with respect to the \$5 million Dong Note and Note A. All Seller Notes were marked "Paid in Full, Satisfied, and Cancelled", the original Seller Notes were returned to the Purchaser, and Satisfactions of Judgments were filed.

Mr. Wai affirms that pursuant to Section 2(c) of the Second Amendment, the Purchaser elected to deduct its \$4,142,000 in construction costs from Note B. The Purchaser also was entitled to deduct \$3,962,204 for interest on the Superior Mortgage. Thus, the total amount to be deducted, plus pre-judgment interest at the legal rate of 9% from December 1, 2016, was \$10,353,786. Additionally, Mr. Wai affirms that the Purchaser has a right of recoupment regarding the interest on the Seller Notes and the principal amount of the Superior Mortgage, which the Seller failed to pay as required by Section 3.03(a) of the Contract. Based on the deductions and recoupments, Mr. Wai states that the balance of Note B has been eliminated, and thus, the Note Assignees are not entitled to a Judgment.

The Note Assignees, including Sum Tsang Cheng, Wing Fung Home Realty Group, Inc., Hok Kwai Chau, Wan Ban Lu, Xui Qin Lin, and Choi Yim Chi, seek, inter alia, a declaratory judgment that the Confessions of Judgment are valid and enforceable.

As assignees, the Note Assignees "stand[] in the shoes of the assignor and take[] the assignment subject to any preexisting liabilities" (Stout Street Fund I, L.P. v Halifax Group, LLC, 148 AD3d 744, 746 [2d Dept. 2017]). Accordingly, although the Note Assignees have an interest in the Note and Mortgage, they also are liable for any liabilities. Thus, while the Note Assignees claim that they are entitled to Judgment in their favor, issues of fact preclude judgment. Specifically, issues of fact remain, including but not limited to, whether the note referred to in the Second Amendment as the Second Note is the same note labeled as Note B in the Assignments of Mortgage held by the Note Assignees, and if the Second Note and Note B are the same note, whether the deductions and recoupments, if any, exceed the balance otherwise due on Note B, and whether the Assignments of Mortgage grant the Note Assignees an interest in the Confessions of Judgment.

Similarly, the cross-motion for summary judgment must also be denied. While Mr. Wai affirmed that the Purchaser elected to deduct construction costs from Note B, no evidence has been submitted to demonstrate how, when or if the Purchaser exercised this option to deduct construction costs from Note B. Additionally, no evidence has been submitted regarding the total amount of the construction costs.

Accordingly, upon a review of the motion, cross-motion, oppositions and replies thereto, this Court finds that both motions are premature and discovery must proceed.

Regarding that branch of the motion seeking an attachment, the Note Assignees failed to demonstrate the existence of a ground for attachment (see CPLR 6201; Michaels Elec. Supply Corp. v Trott Elec. Inc., 231 AD2d 695 [2d Dept. 1996] ["Because of the harsh nature of attachment and because it is in derogation of the common law, the courts have strictly construed the attachment statute in favor of those against whom it may be employed]). Moreover, this Court already orally directed counsel to not distribute the \$6.5 million held in its escrow account until conclusion of this action.

Accordingly, it is hereby

ORDERED, that both the motion and cross-motion are denied; and it is further

ORDERED, that the \$6.5 million of the Settlement Agreement currently held in accordance with the terms of the Escrow Agreement shall not be distributed until a Court order directs the distribution of such funds.

Dated: August 25, 2020
Long Island City, NY



ROBERT J. McDONALD
J.S.C.

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