

893 4th Ave. Lofts LLC v 5AIF Nutmeg, LLC
2021 NY Slip Op 30643(U)
March 4, 2021
Supreme Court, Kings County
Docket Number: 511942/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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893 4th AVENUE LOFTS LLC & MICHAEL UHR,
Plaintiffs, Decision and order

- against - Index No. 511942/20

5AIF NUTMEG, LLC, 5AIF MAPLE 2, LLC,
and 5 ARCH FUNDING CORP.,
Defendants, March 4, 2021

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5AIF SYCAMORE 2, LLC, as assignee of
5 AIF MAPLE 2LLC,
Third Party Plaintiff,

- against -

WHP EQUITIES LLC,
Third Party Defendant,

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PRESENT: HON. LEON RUCHELSMAN

The defendant and third party plaintiff has moved by order to show cause seeking substitution, a preliminary injunction, a mandatory injunction, attachment and related relief. The plaintiffs and third party defendant oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior orders on December 31, 2018 the parties entered into an agreement whereby the plaintiff borrowed money from the defendants to fund a construction project at property located at 893 4th Avenue in Kings County. The plaintiff Michael Uhr signed a pledge and security agreement which provided the security for the loan would be an interest in the plaintiff

entity 893 4th Avenue LLC. The plaintiff fell behind in the payments and secured a loan extension on condition all arrears were satisfied. The Plaintiff paid the arrears of three months, namely, December 2019 and January and February 2020 and on February 27 satisfied all the conditions for the loan modification. However, plaintiff failed to make the March 2020 payment due a few days later on March 1. Since the failure to make that payment constituted a default the funds of the loan extension were not forwarded and the default remained. The court denied plaintiff's request to stop a UCC sale. Following that determination the plaintiff sold the property to the third party defendant for \$100,000. The defendant instituted a third party action against the purchaser of the property and has now filed this order to show cause seeking various reliefs.

First, the motion seeking to substitute 5AIF SYCAMORE 2, LLC, AS ASSIGNEE OF 5AIF MAPLE 2, LLC is granted without opposition. Likewise, the motion seeking an injunction prohibiting the plaintiff from transferring the property in the future is granted.

Section 3.2(b) of the pledge agreement states that "if an Event of Default shall exist, all rights of the Pledgor to exercise the voting and consensual rights and powers the Pledgor is entitled to exercise with respect to the Collateral pursuant to paragraph (a) of this Section 3.2 shall cease, and all such

rights shall thereupon become vested in the Lender, which shall have the sole and exclusive right and authority to exercise all voting powers and membership rights pertaining to the Collateral" (id). Further, pursuant to Section 1.1(b) of the pledge agreement "'Collateral' shall mean all Pledged Membership Interests, books and records relating to the Pledged Membership Interests and all rights, distributions, certificates, options, securities, security entitlements and other investment property or financial assets that may hereafter be received, receivable, distributed or exercised in respect of, or exchanged for, all or any of any of such Pledged Membership Interests, and all proceeds of all of the foregoing" (id). Thus, when an event of default exists the pledgor, the plaintiff in this case, loses all authority to exercise any voting powers and membership rights pertaining to the collateral. Essentially, upon an event of default the pledgor has no authority to transfer the property since to do so requires the exercise of voting and membership rights which the pledgor no longer possesses. Indeed, the authority to exercise such voting rights upon an event of default now rests with the lender, the defendant in this action.

The plaintiff argues the defendant is judicially estopped from pursuing this relief because the defendant has already conceded the shares of the entity which are the subject of any U.C.C. sale are not real property. The plaintiff asserts that

truism forecloses arguments here seeking to undo the transfer of real property. That argument is without merit. To be sure, the pledge agreement indeed pledged shares of the entity which owns the property. However, as noted the pledge agreement also prohibits the pledgor from exercising any decisions on behalf of the entity when an event of default occurs including the decision authorizing the sale of the property. Thus, quite simply, the pledgor had no authority to transfer the property. The mere fact the pledgor also pledged shares of the entity as collateral and not the actual real property does not somehow obviate the express language of the pledge agreement. Both mechanisms are simultaneously true, namely the pledge agreement pledged shares in the plaintiff entity and further the pledgor loses the ability to exercise rights in the entity upon an event of default. Thus, the pledgor could not, in light of the pledge agreement, transfer the property.

The next issues that must be addressed are the consequences that flow from such unauthorized transfer.

It is well settled that a bona fide purchaser for value is protected in its title unless the deed is void in which case no title is conveyed (Fasion v. Lewis, 25 NY3d 220, 10 NYS3d 185 [2015]). There are numerous instances where a deed is considered void conveying no title. For example, a forged deed conveys no title (Public Administrator of Kings County v. Evans, 298 AD2d

512, 750 NYS2d 301 [2d Dept., 2002]). Moreover, "where a purchaser of land has knowledge of any facts sufficient to put him upon inquiry as to the existence of some right, or some title, in conflict with that he [or she] is about to acquire, he [or she] is presumed, either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his [or her] claim to be considered a bona fide purchaser" (see, Booth v. Ameriquest Mortgage Company, 63 AD3d 769, 881 NYS2d 152 [2d Dept., 2009]). Thus, the existence of a notice of pendency filed concerning property prevents the transferee of that property from being considered a bona fide purchaser (Mannino v. Wells Fargo Home Mortgage Inc., 155 AD3d 860, 65 NYS3d 66 [2d Dept., 2017]). As the court observed in Burkhart v. George, 228 AD2d 536, 644 NYS2d 773 [2d Dept., 1996] "the appellant acquired title to the subject property and recorded his deed after the plaintiffs filed a lis pendens on that property and commenced an action against him and the vendor, asserting their claims to the subject property. Accordingly, the appellant was not a bona fide purchaser for value" (id). The Court of Appeals observed that "courts and commentators acknowledged the doctrine's potentially harsh impact on innocent purchasers, but they willingly accepted this as a necessary concomitant to preserving the judicial power" (id).

In this case a notice of pendency was filed concerning the property on July 8, 2020. Thus, the third party defendant was on notice of such claims and possessed "knowledge of facts that would lead a reasonably prudent purchaser to make inquiry" (Berger v. Polizzotto, 148 AD2d 651, 539 NYS2d 410 [2d Dept., 1989]). Thus, the third party defendant was not a bona fide purchaser for value and consequently the transfer of the deed was a nullity.

Another basis upon which to declare the transfer of the deed a nullity is the fact the pledgor had no authority, based upon the pledge agreement, to transfer the deed. Thus, "a deed that is void due to lack of authority for the transfer cannot convey title to property, even to a good faith purchaser for value" (In re Lowbet Realty Corp., 38 Misc3d 589, 956 NYS2d 400 [Supreme Court Kings County 2012]). In Greenpoint Savings Bank v. Guiliano, 238 AD2d 472, 656 NYS2d 646 [2d Dept., 1997] the court held that a mortgagee was not a bona fide encumbrancer because the transferor violated a restraining order entered in a matrimonial action rendering any transfers void. Thus, the lack of authority to transfer the property renders the transfer void. Again, in LaSalle Bank National Association v. Ally, 39 AD3d 597, 835 NYS2d 264 [2d Dept., 2007] the court held that where one has no authority to sign a deed on behalf of a corporation no such transfer occurs.

In this case, as explained, the pledgor had no authority to transfer the deed. The authority to do so was stripped when an event of default occurred. In fact, pursuant to the pledge agreement, the lender assumed all such rights. Thus, since the pledgor had no authority to transfer the property the transfer was void.


The court need not consider whether the elements of a fraudulent transfer took place to grant the relief sought. The continuation of the lawsuit will explore those issues. At this juncture the transfer of the deed was void ab initio thus the transfer to the third party defendant was void. Therefore, the transfer of the deed is hereby vacated and restored to the plaintiff entity. To the extent the third party plaintiff maintains any claims against the pledgor they do not affect this result. The request for an attachment is consequently unnecessary.

Therefore, the defendant's motion seeking to declare the transfer of the deed void ab initio and vacated is granted.

So ordered.

ENTER:

Dated: March 4, 2021
Brooklyn, N.Y.



Hon. Leon Ruchelsman
JSC