

Gluck v Gross

2021 NY Slip Op 31634(U)

May 10, 2021

Supreme Court, Kings County

Docket Number: 526519/19

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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ISSAC GLUCK,
Plaintiff, Decision and order

- against - Index No. 526519/19

SHMUEL GROSS, GH REALTY LLC &
37 WOLCOTT LLC,
Defendants, May 10, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to extend the time in which to serve the answer. The plaintiff has opposed the motion and in the event that motion is granted has cross-moved for summary judgement arguing there are no questions of fact the plaintiff is entitled to judgement. The defendants oppose the motion for summary judgement. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the complaint, on January 17, 2017 the plaintiff, Isaac Gluck loaned \$217,000 to the defendant, Shmuel Gross and an entity he owned, defendant GH Gross Realty LLC. The parties signed a document, which pursuant to a certificate of accuracy from a translator states that "I Isaac Gluck, have given 217,000.00 to Shmuel Gross for 37 Wolcott St...when the house will be sold in about 6-8 months, I will receive the profit, 2 times 217.00 [sic], approximately \$400,000.00" (see, Agreement,

annexed as Exhibit A to the Complaint). The plaintiff asserts the property has not been sold and that in any event there are no questions of fact he is entitled to the amount he loaned in addition to approximately another \$200,000 as profit, pursuant to the agreement. The defendant argues there are questions of fact which foreclose a summary determination at this time.

Conclusions of Law

First, considering all the arguments, any motion seeking default is denied and the motion seeking time to serve a late answer is granted. Moreover, service upon all defendants was proper.

Turning to the motion seeing summary judgement, summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

The agreement between the parties states that the loan was intended to be "for" 37 Walcott Street (supra) establishing the plaintiff's connection to the property, the right to file a Notice of Pendency and the right to join 37 Wolcott LLC as a

party. Further, the written agreement, signed by both parties satisfies the requirements of the statute of frauds.

The agreement states that the plaintiff will be entitled to his initial investment in addition to an amount approximating that investment "when the house will be sold in about 6-8 months" (supra). The plaintiff argues the defendant has wilfully failed to sell the property. While that may be true it does not change the fact the condition precedent triggering the repayment of the loan with profit has not yet occurred. Further, the time frame of six to eight months was clearly not intended to be a definitive time frame which would constitute a breach if not fulfilled by that date. Therefore, the motion seeking summary judgement on the breach of contract cause of action is denied.

Concerning the cause of action alleging a breach of fiduciary duty, the defendant does not provide any explanation why he has failed to sell the property, what efforts, if any, were made to try and sell the property and if any reasonable excuse exists why the property was not sold. Thus, it would be premature to conclude the defendant committed a breach of a fiduciary duty without any other information. Therefore, the motion seeking summary judgement on the breach of fiduciary duty claim is denied without prejudice.

Turning to the cause of action seeking an equitable mortgage, it is well settled that "the whole doctrine of equitable mortgages is founded upon that cardinal maxim of equity which regards that as done which has been agreed to be done, and ought to have been done" (see, Onewest Bank, FSB v. Spencer, 145 AD3d 1488, 44 NYS3d 640 [4th Dept., 2016]). The imposition of an equitable lien is permitted if there is an express or implied agreement that there shall be a lien on specific property (Deutsche Bank Trust Co. Americas v. Cox, 110 AD3d 760, 973 NYS2d 662 [2d Dept., 2013]). Thus, "while [a] court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation, it is necessary that an intention to create such a charge clearly appear from the language and the attendant circumstances" (id). In this case the agreement clearly spells out the property was intended to secure the loan obligation. Therefore, the motion seeking summary judgement regarding the third cause of action is granted in the amount of \$217,000, the amount of the investment.


Lastly, as noted, the defendant has not fulfilled his obligation to try and sell the property. Although the court did not find any breach of duty, the defendant remains obligated to make diligent efforts to sell the property, yield a profit, if

possible, any pay back the plaintiff. Therefore, the parties shall reach out to the court within forty five days of this order to conduct a conference to determine the reasonable efforts being made to sell the property. The plaintiff may move again regarding breach of a fiduciary duty if the defendants efforts prove dilatory or unsatisfactory.

So ordered.

ENTER:

DATED: May 10, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC