

Onglingswan v Chase Home Fin., LLC

2010 NY Slip Op 30410(U)

February 24, 2010

Supreme Court, New York County

Docket Number: 115505/2009

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE
JUDITH J. GISCHE, J.S.C. Justice

PART 10

ONGLINGSWAN, ALASTAIR

INDEX NO. 115505/09

MOTION DATE _____

- v -
CHASE HOAR FINANCE, LLC,
ETAL.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

§ 3212 and
Vacate

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
MAR 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Feb 24, 2010

[Signature]
JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
ALASTAIR ONGLINGSWAN,

Plaintiff,
-against-

CHASE HOME FINANCE, LLC,
CENTURY OPERATING CORPORATION,
ARMORY OWNERS, INC., ADAM
PLOTCH AND LINDA SOLOMON,

Defendants.
-----X

Decision/Order

Index No.: 115505/2009
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
OSC, AO affd., exhibits	1
Notice of Cross-Motion, LPM affirm., TER affd., exhibits	2
BR affd. in partial opp, exhibits	3
SF affirm. in opp to cross-motion	4

FILED
MAR 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows

Plaintiff seeks to vacate and set aside the auction sale of 1,100 shares of stock ("stock") of defendant Armory Owners Corp. ("Armory") allocated to apartment 1A ("apartment") in the building known as 532 West 43rd Street, New York, NY 10035¹ ("building"). The buyers are Adam Plotch and Linda Solomon and the auction sale was held on September 16, 2009. Plaintiff's motion was made simultaneously with the commencement of this action. Defendant Chase Home Finance, LLC ("Chase Home") has interposed an answer.

¹The building is also known as 529 West 42nd Street, New York, NY 10035.

The following facts are either admitted, undisputed or established by the documents submitted. The building is a co-operatively owned, multi-family, residential dwelling owned by Armory. It is managed by defendant Century Operating Corp. ("Century"). For twelve years prior to the auction, plaintiff Alastair Onglingswan, owned the stock and was the proprietary lessee and actual resident of the apartment. Chase Home Finance LLC ("Chase Home"), as successor by merger to Chase Manhattan Mortgage Corp., claims to have a security interest in the stock and proprietary lease based upon financing provided to the plaintiff. Plaintiff does not dispute that he obtained financing in 2003 from JP Morgan Chase and that the loan was secured by the stock and proprietary lease.

Beginning on November 1, 2008, plaintiff defaulted in the monthly payments due under the loan. Chase Home then exercised its right to accelerate the entire amount due under the loan and demanded payment from plaintiff but he did not make the payment. As a consequence, Chase Home caused a public sale to be noticed and scheduled for September 16, 2009. Plaintiff does not dispute that he actually received the Notice of Sale or that he otherwise knew about the time and place of the sale.

The auction was conducted in accordance with the Notice of Sale. Defendants Adam Plotch and Linda Solomon were the successful bidders. A contract was sined and a down payment was given to the auctioneer. No closing has yet been held and plaintiff remains in residence of the apartment.

Plaintiff claims that he now has the money to immediately cure any default and to reinstate the loan. He seeks an immediate order to set aside that sale because the Notice of Sale failed to include a statement of the estimated value of the personal property. He claims that this omission was in violation of Lien Law §201.3. He also claims

that the original loan was made by JP Morgan Chase Bank and not Chase Home. He claims that he was never provided with notice that another entity would be servicing the loan. He questions whether Chase Home LLC has the right to enforce the lender's rights.

Defendant Chase Home has cross-moved to dismiss the action based on documentary evidence and failure to state a cause of action. CPLR §3211(a)(1); (7). Alternatively, Chase Home moves for summary judgment dismissing the complaint. CPLR §3212. Chase Home claims that it took all of the steps required to properly sell the apartment and that plaintiff's positions in this action, as a matter of law, are insufficient to warrant vacating the sale.

Defendants Armory and Century submit partial opposition to plaintiff's application. Although they take no position on whether the sale should be set aside, they want it understood that any outstanding cooperative maintenance and assessments will have to be paid by the successful party. In addition, they reserve their right to approve any purchaser's application.

Defendants Plotch and Solomon did not interpose any written position with respect to the motions however, Mr. Plotch appeared for oral argument and asserted his support for Chase Home's motion.

Discussion

Plaintiff's motion seeks the ultimate relief requested in the underlying action. Chase Home's cross-motion to dismiss the complaint or, alternatively, for summary judgment will be considered by the court before plaintiff's motion because the outcome of such cross-motion will necessarily impact plaintiff's right to relief.

Since issue has been joined between plaintiff and defendant Chase Home, and no note of issue has yet been filed, the court can consider the motion for summary judgment on the merits. CPLR §3212; Brill v. City of New York, 2 NY3d 648 (2004).

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept 2003).

At bar, Chase Home has set forth a *prima facie* case that the sale was made according the to the requirements of UCC article 9. UCC §9-610 et. seq. The only issues in dispute between it and plaintiff are ones of law. Thus, plaintiff claims that the rights to service the loan were improperly transferred to Chase Home without notice to him. He argues that he does not know if Chase Home had the right to compel the sale. He also claims that the Notice of Sale was defective because it did not contain an estimated value of the personal property. Defendant argues that Chase Home has the right to enforce the

lenders rights in the event of a default because it was a successor by merger to the original lender. It also argues that the sale in this case was made under UCC article 9 and that the lien law has no application to the Notice of Sale requirements.

Transfer of the Rights to Service the Loan

Plaintiff originally obtained financing from JP Morgan Chase. At the same time that the Note was issued, it was "paid over" to Chase Manhattan Mortgage Corp. That transaction is indicated on the note itself. Chase Home claims, through its vice president, that it is the successor by merger of Chase Manhattan Mortgage Corp. It is undisputed that plaintiff did not receive notice of the merger.

Plaintiff claims that failure to notify him was in violation of the JPMorgan Chase Bank transfer of servicing disclosure statement. Assuming, without deciding, that a merger would have required notification to plaintiff under such statement, the failure to so notify plaintiff does not invalidate the sale. Plaintiff's argument, that without such notification he would not have known that Chase Home was the proper party to enforce the security agreement, is unavailing. Once plaintiff received the Notice of Sale it should have been obvious to him that Chase Home was acting to enforce the lender's rights. He had ample opportunity to stop the sale at that time if he believed that Chase Home LLC was acting improperly. Even at this stage, there is no plausible argument presented by plaintiff that Chase Home had no right to proceed with the sale, only his claim that he should have known about the transfer to Chase Home prior to the lender enforcing its rights on default.

Lien law

Plaintiff argues that the stock of a corporation allocated to an apartment is personal

property and not real estate. Plaintiff further argues that as such, Lien Law §201 applies when that property which has a lien against it is sold. Lien Law §201 requires that when personal property is sold the Notice of Sale must include "the estimated value of such property."

There is no dispute that the Notice of Sale did not contain such information. Nonetheless, plaintiff's argument is rejected. Stock allocated to an apartment is not clearly personal property, nor is it real property. In the seminal case of State Tax Commission v. Shor, (43 NY2d 151 [1977]) and then later in Estate of Carmer, (61 NY2d 781 [1988]), the Court of Appeals recognized:

"The interest in a cooperative apartment is *sui generis* in modern property law, because it does not fit neatly into traditional property classifications; the interest is represented by shares of stock, which are personal property, yet in reality what is owned is not an interest in an ongoing business enterprise, but instead a right to possess real property. Characterization of an interest in a cooperative apartment, therefore, is not resolved by uncritical resort to the rubrics governing real property or those governing personal property."

Consequently the courts, have, on a case by case basis, determined whether to treat this hybrid form of ownership as one or the other depending on the circumstances. Measom v. Greenwich and Perry Street Housing Corporation, 8 Misc3d 50 (AT 1st dept. 2005); Newman v. Valmar Electric Co., 9 Misc3d 450 (Sup. Ct. NY Cty., 2005)(and cases cited therein); Barnello v. 700 Shore Road Waters Edge Inc., 159 Misc2d 1040 (Sup. Ct. Nass. Cty. 1993). There is no basis, for the purposes of ensuring a commercially reasonable sale of the stock appurtenant to an interest in a cooperative apartment, to treat the sale as one of personal property. Here, the sale and the form of the Notice of Sale are governed by UCC §9-613. The additional requirement of Lien Law §201, that there be an estimated value of the stock, is not necessary for the sale to draw competitive bidders.

This is because the stock is really in the nature of buying an interest in real property. Since there is a readily ascertainable market for the sale of an interest in a cooperative apartment, a Notice of Sale which, as this one does, reflects the address of the apartment, is sufficient to attract competitive bidding. The court, therefore, declines to characterize the sale as one of personal property for the purpose of having the additional notice requirements of the lien law apply.

Right of Redemption

Plaintiff has, in the most general terms, indicated that he is now in a financial position to redeem the apartment (collateral) and reinstate the loan. Chase Home questions the credibility of such a general statement. Even if true, Chase Home argues that is it just too late.

UCC §9-623(c)(2) provides in pertinent part that a redemption may occur at any time before a secured party has entered into a contract for its disposition under UCC §9-610. At bar, it is undisputed that the auctioneer made a contract with defendants Plotch and Solomon to sell the stock allocated to the apartment and that the auctioneer received a down payment from them. Consequently, it is too late for redemption by the plaintiff in this case.²

Since Chase Home is entitled to summary judgment dismissing the complaint, the court need not and will not consider the motion to dismiss the complaint under CPLR §3211. By granting Chase Home summary judgment, plaintiff's motion to vacate the sale

²The court recognizes that the new purchasers are still subject to board approval. The Court's ruling does not necessarily apply if the contract is vitiated by reason of the board not approving of the sale for some reason. In that case, it may be that the right of redemption is revived.

must fail. Finally, in finding that the sale was legally appropriate, the claims against the other defendants must also fail and the court, in the interest of justice, dismisses such claims as well, notwithstanding that there is no formal motion for such relief.

Conclusion

In accordance wherewith, it is hereby:

ORDERED that the cross-motion made by defendant Chase Home Finance LLC is only granted to the extent that summary judgment dismissing the complaint is granted, and it is further

ORDERED that plaintiff's motion for an order vacating the sale of 1,100 shares of stock of defendant Armory Owners Corp. allocated to apartment 1A in the building known as 532 West 43rd Street, New York, NY 10035 to Adam Plotch and Linda Solomon, pursuant to an auction held on September 16, 2009 is denied and it is further

ORDERED that the complaint against defendants Century Operating Corporation, Armory Owner Corp., Adam Plotch and Linda Solomon is dismissed, and it is further

ORDERED that the Clerk of the Court shall enter a judgment dismissing the action as to all defendants, together with an award of the costs and disbursements of this action, and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied and that this shall constitute the decision and order of the court.

Dated: New York, NY
February 24, 2010

FILED
MAR 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

SO ORDERED:

J.G. J.S.C. 