

Zarnighian v Mason

2012 NY Slip Op 30766(U)

March 14, 2012

Sup Ct, Nassau County

Docket Number: 11474/09

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____x

**SHAHRAM ZARNIGHIAN a/k/a SAM
ZARNIGHIAN,**

Plaintiff(s),

-against-

MADELYNN R. MASON,

Defendant(s).

_____x

Action No. 1

Index No. 11474/09

Motion Submitted: 1/17/12

Motion Sequence: 003

MADELYNN R. MASON,

Plaintiff(s),

-against-

**SHAHRAM ZARNIGHIAN a/k/a SAM
ZARNIGHIAN,**

Defendant(s).

_____x

Action No. 2

Index No. 17044/09

Motion Submitted: 1/17/12

Motion Sequence: 002

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....XX
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Plaintiff in Action 2, Madelynn R. Mason (hereinafter "Mason"),¹ moves this Court for an Order granting summary judgment sounding in foreclosure against defendant Zarnighian, appointing a referee to compute the amount due, and dismissing Action 1. Defendant opposes the requested relief, and cross-moves for summary judgment dismissing both actions as time-barred, discharging the mortgage, and cancelling the notice of pendency filed by Mason against the subject property. Mason opposes the relief requested by Zarnighian.

These actions arise as the result of Mason's taking of a Note and Mortgage on the subject property located in Kings Point, New York to secure a \$200,000 loan made to Zarnighian in April 2002. The Note and Mortgage were executed on April 2, 2002.

It is undisputed that Zarnighian made some interest payments from the period on or about and between April 2, 2002 and August 16, 2002, and that Zarnighian made a lump sum payment of \$100,000 in principal on or about August 16, 2002. Zarnighian apparently did not make any further payments after the August lump sum payment. It is further undisputed that Zarnighian made the lump sum payment with a third party check.

The mortgage was not recorded until November 1, 2002, following Zarnighian's arrest on federal money laundering charges. By Zarnighian's own admission made at deposition, he was ultimately convicted of a federal charge related to failure to file a Cash Transaction Report, which is required to be filed by trades or businesses receiving cash payments in excess of \$10,000. Zarnighian testified that he received a sentence of five years' probation, in addition to forfeiture of cash and cars.

Zarnighian was in the business of selling used cars at or about the time of his arrest, and prior thereto, including at the time that the aforementioned loan was made.

Mason's husband Steven Baron was in the business of repairing cars at that time, and he and Zarnighian were in business in close proximity to each other, apparently in the same building. Zarnighian rented his business space from an entity called Split Rock Developers, in which Mason had an interest.

Zarnighian commenced Action 1 in order to discharge the mortgage and cancel the notice of pendency filed by Mason against the Kings Point property. Thereafter, Mason filed the foreclosure action against Zarnighian.

¹According to Office of Court Administration records, Madelynn Russell Mason is an attorney licensed to practice law in New York, whose business address is listed as Mason & April, LLC, in Garden City, New York.

The Court will first address that branch of Zarnighian's cross-motion moving for summary judgment in his favor with respect to both actions.

It is undisputed that the Note of Issue in Action 1 (Index No. 11474/2009) was filed on May 19, 2011. It is further undisputed that the Note of Issue in Action 2 (Index No. 17044/2009) was filed on September 13, 2011.

Each Note of Issue contains the language that, "[m]otions for summary judgment must be *filed* within 90 days of the *filing* of the note of issue" (emphasis added).

Zarnighian's cross-motion for summary judgment was filed in the Nassau County Clerk's Office on December 30, 2011.

Mason has raised the issue of the untimeliness of defendant's motion in her opposition papers, asserting that Zarnighian's motion must be denied on that ground, because he has failed to demonstrate "good cause" for the late filing.

A court may not consider the merits of a summary judgment motion filed after the time prescribed for such motion, unless good cause for the delay is demonstrated. This "good cause" requirement is strictly construed, and the movant must demonstrate a satisfactory reason for the delay (*Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431, 781 N.Y.S.2d 261 [2004]).

In this case, Zarnighian has not offered any excuse for the delay, and has not replied to Mason's opposition on this ground. Thus, that branch of Zarnighian's cross-motion pertaining to summary judgement is untimely, and is, therefore, denied.

The Court now turns to Mason's motion for summary judgment made in Action 2.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (*Cauthers v. Brite Ideas, LLC*, 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). With respect to Mason's motion, the Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein defendant Zarnighian. (*Makaj v. Metropolitan Transportation Authority*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

In support of her motion, Mason has submitted, *inter alia*, copies of the Note and Mortgage, three letters (dated January 31, 2005, March 19, 2008, and March 27, 2008), and the deposition testimony of defendant Zarnighian and of Steven Baron, Mason's husband. Mason has not submitted her own deposition testimony for consideration upon the instant motion.

The Note and Mortgage securing the \$200,000 loan from Mason to Zarnighian were executed on April 2, 2002.² The maturity date of the Mortgage was April 1, 2003. On or about August 16, 2002, Zarnighian made a lump sum payment of \$100,000, and made no further payments. Zarnighian was arrested by federal law enforcement authorities in September 2002. The Mortgage was recorded on November 1, 2002.

Apparently, Mason engaged in discussions with Zarnighian's previous attorney, Murray Honig, Esq., which resulted in a letter dated January 31, 2005, sent by Mr. Honig to Mason. In that letter, Mr. Honig acknowledged that Mason is holding a mortgage on the subject premises, but that, "[Zarnighian] has advised me that your husband [Steven Baron] is presently holding collateral that covers all of the outstanding balance of same. In my conversation with you earlier today, you professed no knowledge of this fact and that accordingly, you are taking the position that the mortgage has not been satisfied. I strongly urge you to speak with your husband and get the story straight."

The March 19, 2008 letter is authored by Mason and sent to Zarnighian at the subject premises. That letter, in sum and substance, sets forth Mason's position with respect to the Mortgage, which is that Zarnighian prepaid \$100,000, and some monthly interest payments, but failed to pay the unpaid principal balance of \$100,000, together with interest at the rate of sixteen percent (16%) per annum, for a total outstanding balance of \$233,855.30.

Zarnighian did not personally respond to the March 19th letter. Instead, Zarnighian's present counsel, Arnold L. Kert, Esq. responded by letter dated March 27, 2008, which states, "[p]lease be advised that I have been retained by Shahram Zarnighian relative to your

²The Mortgage indicates that it should be returned by mail to Lori S. April, Esq. of Mason & April, LLC, at the same Garden City, New York address currently listed as Mason's business address.

correspondence to him dated March 19, 2008. I ask that you or your attorney contact me to discuss the issues raised therein.”

To satisfy her burden, Mason must submit proof of the existence of the Note, the unconditional terms of repayment and defendant’s failure to make payment. (*Gullery v. Imburgio*, 74 A.D.3d 1022, 905 N.Y.S.2d 221 (2d Dept., 2010); *Gera v. All-Pro Athletics, Inc.*, 57 A.D.3d 726, 870 N.Y.S.2d 87 (2d Dept., 2008); *Famolaro v. Crest Offset, Inc.*, 24 A.D.3d 604, 807 N.Y.S.2d 387 (2d Dept., 2005); *MDJR Enterprises, Inc. v. LaTorre*, 268 A.D.2d 509, 703 N.Y.S.2d 54 [2d Dept., 2000]).

While it is undisputed that Zarnighian signed the Note and Mortgage in exchange for the \$200,000 loan from Mason, Mason’s own submissions upon the instant motion raise a triable issue of fact with respect to whether or not Zarnighian failed to make payment on that debt.

Mason’s own papers also raise the spectre that her claim is barred by the six-year statute of limitations with respect to the bringing of the foreclosure action (Action 2). Mason asserts that her action is not time-barred because Zarnighian acknowledged the existing debt by the January 31, 2005 letter, which writing contained nothing inconsistent with an intention on the part of Zarnighian to pay the debt (*see General Obligation Law § 17-101*).

The parties acknowledge that Zarnighian made “some” interest payments on the loan, and that Zarnighian also made a lump sum payment of \$100,000 in August 2002. Zarnighian testified at his deposition, however, that he does not owe Mason any money because he gave Mason’s husband, Steven Baron, \$200,000 in cash, in exchange for a \$200,000 check from Mason. Zarnighian testified that when he made the lump sum payment in August 2002, Baron gave him back \$100,000. Zarnighian further testified that he needed the \$200,000 as a downpayment on a house (not the subject property), but, for unspecified reasons, did not deposit his own cash and write a check for the downpayment based on that money. The Court notes that these activities occurred within the approximately six months prior to Zarnighian’s arrest, which culminated in his conviction for failing to file Cash Transaction Reports.

Zarnighian also stated that Baron accused Zarnighian of “shorting” him by \$25,000 on the cash collateral. Zarnighian refused to pay Baron \$25,000. Zarnighian also testified that his dealings with respect to this loan were with Baron, not Mason, and that Baron stated that he was not going to record the mortgage, but that Baron wanted it “to have it as a back up,” “because his wife [Mason] is worried.”

Furthermore, Zarnighian testified that he asked Baron for a “release” with respect to the subject property in December 2002, but did not speak with Mason. In addition, a Mercedes Benz automobile was transferred from Zarnighian to Mason in 2002. Zarnighian testified that Baron bought the car for Mason, and that another car, a Bentley, was transferred to Mason that same year. According to Zarnighian, Mason was in the business of motor vehicle financing.

Baron’s testimony reveals that he and Mason became somewhat estranged at or about the commencement of these actions, and that other family problems also contributed to the estrangement. Baron confirmed that he acted as the go-between for Zarnighian and Mason, carrying the documents giving rise to these actions back and forth. He also confirmed that he carried information between the parties, testifying that when Zarnighian would propose terms regarding the loan, he would always tell Zarnighian that he would have to check with his wife, Mason, because she “wears the pants.”

Baron denied the existence of any cash collateral for the \$200,000 loan, but he admitted that, when the Mortgage was originally given it was “probably not” intended that it be recorded. Baron also admitted that Zarnighian may have given certificates of title to cars along with the Mortgage: “As to whether he gave us titles, I have a recollection that there might have been titles.” Baron also admitted that Zarnighian made the lump sum principal payment of \$100,000 via a third-party check.

Mason’s affidavit dated August 17, 2009, which was submitted on a previous motion and resubmitted on the instant motion, restates the fact that the Note and Mortgage were given, and that defendant owes \$233,855.30, plus interest. Mason’s affidavit does not mention the lump sum payment of \$100,000, or the January 31, 2005 letter authored by Zarnighian’s former counsel.

Based on the foregoing, a factual issue has been raised as to whether Zarnighian satisfied the Note and Mortgage with cash or other collateral. Further in view of the foregoing, there is a factual issue raised as to whether the January 31, 2005 letter contains anything inconsistent with an intention on the part of Zarnighian to pay the debt, thereby affecting the tolling of the statute of limitations for Action 2.³

It is evident that substantial issues of fact exist in this matter.

Accordingly, Mason has failed to establish her entitlement to summary judgment as

³Certainly, the March 27, 2009 letter is neither an acknowledgment of the debt, nor does it evidence any intent by Zarnighian to pay it.

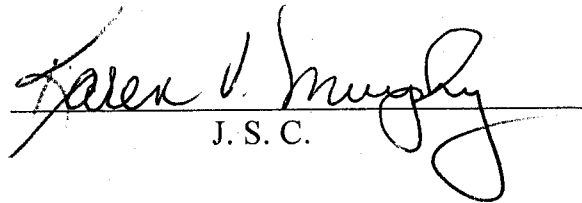
a matter of law.

Also, it is evident to the Court that issues of credibility abound in these two actions. Such issues of credibility generally require the denial of summary judgment and are to be resolved by the trier of fact. *Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR §3212:6*, at 14; *Donato v. ELRAC, Inc.*, 18 A.D.3d 696, 794 N.Y.S.2d 348 (2d Dept., 2005); *Frame v. Markowitz*, 125 A.D.2d 442, 509 N.Y.S.2d 372 (2d Dept., 1986).

Since the defendant has failed to meet her *prima facie* burden, it is unnecessary to determine whether the defendant's papers submitted in opposition are sufficient to raise a triable issue of fact (See *Levin v. Khan*, 73 A.D.3d 991, 904 N.Y.S.2d 73 (2d Dept., 2010); *Kjono v. Fenning*, 69 A.D.3d 581, 893 N.Y.S.2d 157 [2d Dept., 2010]).

The foregoing constitutes the Order of this Court.

Dated: March 14, 2012
Mineola, N.Y.


J. S. C.

ENTERED
MAR 21 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE