

**SB & W Realty Corp. v M.B. Debt Corp**

2012 NY Slip Op 33342(U)

July 17, 2012

Sup Ct, NY County

Docket Number: 406503/2007

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

SB & W REALTY CORP. and NORMA GIBSON,  
Plaintiff,

Index No.: 406503/2007

Motion Date: 01/06/12

- v -

Motion Seq. No.: 001

M.B. DEBT CORP, UBS PRINCIPAL FINANCE, LLC  
and ALLEN GROSS,

Defendants.

The following papers, numbered 1 to 4 were read on this motion / cross motion to dismiss

Notice of Motion/ -Affidavits -Exhibits

No (s) . 1

Notice of Cross Motion/Answering Affidavits - Exhibits

No (s) . 2, 3

Replying Affidavits - Exhibits

No (s) . 4

**FILED**

**JUL 23 2012**

Cross-Motion:  Yes  No

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

Upon the foregoing papers, it is ordered that the <sup>NEW YORK</sup> motion and cross motion to dismiss pursuant to CPLR 3211 shall be granted with respect to the second, third, fourth, fifth, sixth, seventh, and eighth causes of action, but denied as to the first cause of action of the complaint.

Contrary to defendants' argument, "the fact that a plaintiff may have asserted the subject matter of [her] present claim as a defense to a former action does not foreclose the maintenance of [her] present action on the ground of res judicata." Lukowsky v Shalit, 110 AD2d 563, 566 (1<sup>st</sup> Dept 1985). Here, the assertion of affirmative defenses

- 1. CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER  DO NOT POST  FIDUCIARY

in the foreclosure action that mirror the claims interposed here have no preclusive effect. Therefore, the first cause of action for breach of contract is not barred by res judicata. Such cause of action is also timely pled.

### Breach of Contract

"It is well settled that the parties may contractually agree to shorten the period of limitations." Rudin v Disanza, 202 AD2d 202, 204 (1<sup>st</sup> Dept 1994). According to plaintiff's allegations, the initial breach of contract occurred when defendants commenced the foreclosure action on November 15, 2000. Defendant MB Debt is correct that the mortgage entered into by plaintiff provides for a two year limitation period for any matter sounding in contract or tort. Any breach of contract claims that accrued before July 27, 2003 interposed in the herein action (which was commenced on July 28, 2005) are clearly beyond the two year statute of limitations set forth in the mortgage. However, plaintiffs allege that defendant M.B. Debt Corp. "has refused to allow the full payment and satisfaction of the mortgage without extracting an onerous pre-payment penalty in the approximate sum of \$1 million dollars in addition to the accrued interest and default interest it continues to seek in order to issue a satisfaction of mortgage" and "recently issued a pay-off letter improperly and unlawfully charging default interest from the time of commencement of the foreclosure action". Plaintiffs may recover for all derelictions of duty by defendant(s) that they can prove took place after July 28, 2003. Bulova Watch Co v Celotex Corp, 46 NY2d 606, 611-612 (1979). "Where as here, the contract provides for a recurring obligation, a claim for damages accrues every time the contract is allegedly breached." New York Cent Mut Fire Insur

Co v Glider Oil Co, Inc, 90 AD3d 1638, 1642 (1<sup>st</sup> Dept 2011). Defendant UBS refers to no language in the note or mortgage that terminates its obligations and responsibilities thereunder upon its assignment of such. On that basis, notwithstanding the assignment from UBS to MB Debt, effective June 28, 2001, the breach of contract is timely interposed against UBS as well as MB Debt.

Although not barred by res judicata, the second (conversion), third (trespass), fourth (negligence), fifth (malicious prosecution), sixth (abuse of process), seventh (prima facie tort) and eighth (champerty and maintenance) causes of action are insufficiently pled.

#### Conversion

Since plaintiffs' conversion claim does not stem from a wrong that is independent of the alleged breach of the mortgage documents, it does not lie. Wolf v National Council of Young Israel, 264 AD2d 416 (2d Dept 1999).

#### Trespass

As for trespass, plaintiffs allege that a receiver of the rents was appointed. The order appointing the receiver refers to the mortgage provision for the assignment to the mortgagee of the rents. Therefore, the irrefutable documentary evidence makes out a defense to the claim of trespass, as a matter of law. Compare 118 Anderson Avenue Realty Corp v Mina Equities, Corp, 195 AD2d 169, 174 (1<sup>st</sup> Dept 1983); and see Wembach Corp v Emigrant Industrial Savings Bank, 264 AD 161, 162 (1<sup>st</sup> Dept 1942).

### Negligence

Plaintiffs allege no cognizable duty owed by the defendants separate and apart from those arising under the mortgage documents and therefore, the negligence cause of action fails. City of New York v 611 West 152<sup>nd</sup> Street, Inc, 273 AD2d 125, 126 (1<sup>st</sup> Dept 2000); Luxonomy Cars v Citibank, NA, 65 AD2d 549 (2d Dept 1978)

### Malicious Prosecution

"[I]t is clear that the only actionable wrong which may arise from the improper filing of a notice of pendency is a cause of action for malicious prosecution." 34-45 May Assoc v Mayloc Assoc, 162 AD2d 389 (1<sup>st</sup> Dept 1990). 'The elements of an action for malicious prosecution are (1) the initiation of a proceeding; (2) its termination favorably for the plaintiff; (3) lack of probable cause ; and (4) malice." Present v Avon Products, Inc., 253 AD2d 183, 189 (1<sup>st</sup> Dept 1999).

Contrary to the argument of defendant UBS Principal Finance, LLC's ("UBS"), the allegations of the complaint are sufficient as to the first, as well as, the second element of the malicious prosecution claim. The complaint alleges that UBS filed the notice of pendency on or about December 18, 2000, which was six months before it assigned all of its rights and interests in the foreclosure action, among other things, to defendant MB Debt Corp ("MB Debt"). The court disagrees with UBS that the assignment vitiates such element. Although MB Debt, UBS's assignee, may be held

liable for the torts of its predecessor "if it expressly or impliedly assumed the predecessor's tort liability" (Grant-Howard Assoc v General Houseware Corp, 62 NY2d 291, 297 [1984]), the plaintiffs here "can elect to proceed against the [predecessor] corporation, the successor corporation, or both. This right of election cannot be altered per se by the corporations. The companies may regulate how such liability will be allocated between themselves but they cannot affect the rights of a stranger to the contract." Ibid.

Nevertheless, as for the element of malice, the complaint is not sufficient in connection with either defendant. The complaint fails as to such cause of action since it "fails specifically to plead facts sufficient to overcome the presumption of probable cause for the [lis pendens. Such presumption] ... arose because the prior [lis pendens was] ... necessarily passed upon initially by the issuing court", in the order dated August 21, 2001 in the foreclosure action of UBS Principal Finance, LLC v S B & W Realty Corp, NY County Supreme Court, Index Number 123298/00 (Heitler, J.) , which Such order created the presumption since it denied SB & W Realty's motion for summary judgment, and plaintiffs allege no specific facts that tend to rebut such presumption. See Hornstein v Wolf, 67 NY2d 721 (1986).

#### Abuse of Process

The complaint does not allege a cognizable abuse of process claim since it contains no factual allegations that the process was used "in a manner ...[not] consonant with the purpose for which it was designed" (Andesco, Inc v Page, 137 AD2d

349 (1<sup>st</sup> Dept 1988).

Prima Facie Tort/ Champerty and Maintenance

Plaintiffs' prima facie tort cause of action fails as there is no allegation that defendants acted with "disinterested malevolence" [Havell v Islam, 292 AD2d 210 (1<sup>st</sup> Dept 2002)], or, in other words, "the genesis that will make an lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage to another" [Burns, Jackson, Summit, Spitzer v Lindner, 59 NY2d 314, 333 (1983)]. Likewise, the champerty and maintenance cause of action are defeated by plaintiffs' assertion that "The sole motivation of defendant MB Debt in perpetrating the foregoing acts is, and continues to be, to acquire the subject premises." Thus, plaintiffs does not allege that the motive of the assignment of the foreclosure action was solely for the purpose of commencing a lawsuit, and sharing in the benefits of the litigation, since defendant MB Debt has rights and duties under the mortgage, separate and apart from the litigation. Compare Ehrlich v Rebco Insurance Exchange, Ltd, 225 AD2d 75, 77 (1<sup>st</sup> Dept 1996).

Accordingly, it is

ORDERED that the motion of defendants M.B. Debt Corp. and Allen I. Gross and the cross motion of defendant UBS Principal Finance, LLC for summary judgment are granted as to the second cause of action for conversion, the third cause of action for trespass, the fourth cause of action for negligence, the fifth cause of action for malicious prosecution, the sixth cause of action for abuse of process, the seventh cause of action for prima facie tort, and the eighth cause of action for champerty and

maintenance and are denied as to the first cause of action for breach of contract, and it is further

ORDERED that defendants shall answer the complaint within twenty days of service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear in IAS Part 59, 71 Thomas Street, New York, New York for a preliminary conference on October 2, 2012, 9:30 AM.

Dated: July 17, 2012

ENTER:

~~Debra A. James~~  
J.S.C.  
**DEBRA A. JAMES**  
J.S.C.

**FILED**  
JUL 23 2012  
NEW YORK  
COUNTY CLERK'S OFFICE