

Total Venture Corp. v Post Is. Props., LLC
2013 NY Slip Op 31960(U)
August 9, 2013
Supreme Court, Richmond County
Docket Number: 102980/12
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:102980/12
Motion No.:001,002,
003**

**TOTAL VENTURE CORP. and
THOMAS NATIELLO,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**POST ISLAND PROPERTIES, LLC,
COMMUNITY HOME BUYERS, LLC,
JOSEPH L. TIRONE, JR.,
STEPHEN G. CASTAGNO,
ZAVATSKY, MEDELSON, GROSS SAVINO & LEVY, LLP,
PETER ZAVASKY,
MARIA SPERO,
STG ASSOCIATES,
FIDELITY NATIONAL TITLE INSURANCE, CO.,**

Defendants

The following items were considered in the review of the following motion and cross-motion to dismiss the plaintiffs' complaint.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion and Affidavits Annexed	2
Notice of Motion and Affidavits Annexed	3
Supplemental Affirmation	4
Affirmation in Opposition	5
Reply Affirmation	6,7
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on these Motions and Cross-Motion is as follows:

The defendants: Maria Spero, Joseph L. Tirone, Jr., Post Island Properties, LLC, Community Home Buyers LLC, Stephen G. Castagno, STG Associates and Fidelity National Title Insurance Company move to dismiss the plaintiffs' complaint. The motions to dismiss are granted.

Facts

In or about 2003, the plaintiff Total Venture Corp owned property at issue in this litigation located at 945 Post Avenue, Staten Island, N.Y. LaSalle National Bank held a mortgage against that property from Total Venture. On or about May 9, 2003 the plaintiffs' defaulted on its mortgage and LaSalle commenced a foreclosure action.

The plaintiffs then defaulted in answering or otherwise appearing in the foreclosure action, which led to a default Judgement of Foreclosure and Sale being entered in favor of LaSalle in or about April 5, 2004. In or about June 2004 the premises was scheduled to be sold pursuant to the judgment of foreclosure. However, before the premises could be sold the plaintiffs moved to vacate the foreclosure on the grounds of improper service. On October 1, 2004 after several adjournments where the court permitted the plaintiffs to attempt to redeem the property, this court issued a decision finding that the plaintiffs were properly served and that the plaintiffs failed to raise a meritorious defense to the foreclosure action. However, the foreclosure remained stayed because the plaintiffs attempted to file for bankruptcy on two occasions. The two petitions for bankruptcy resulted in two orders dismissing the bankruptcy proceedings dated September 27, 2005 and December 12, 2005.

In 2006 the plaintiffs once again moved this court to stay the foreclosure sale and disqualify Lasalle's attorney for an alleged conflict of issue. The plaintiffs argued that they stood to lose substantial equity in the property as a result of the foreclosure sale. This court held in a decision and order dated March 17, 2006 that payment of Lasalle's mortgage, the payment of administrator expenses for three years during the pendency of the foreclosure and all known liabilities would amount to \$1,100,000.00. Consequently, the motion to stay the sale and disqualify Lasalle's attorneys, Zavetsky, Mendelsohn, Gross, Savino, & Levy, LLP was denied.

The sale of the property took place on August 28, 2006 after being noticed for sale on June 9, 2004, August 5, 2005, November 21, 2005, January 30, 2006. Prior to the sale of the

property the court appointed Referee Maria Spero, Esq., moved the Supreme Court for additional compensation in the amount of \$3,650. At the closing Attorney Spero was paid the \$500 statutory fee along with the additional \$3,600 authorized by this court for a total of \$4,150. The referee's report dated October 20, 2006 demonstrates that there was a deficiency in the amount of \$26,671.76.

The plaintiffs' complaint alleges a vast conspiracy designed to defraud the plaintiffs' out of the equity of 945 Post Avenue, Staten Island, N.Y. The complaint further alleges that Attorney Spero's fee, which was ordered by this court, constituted "hush money." Specifically, the plaintiffs allege six causes of action: 1st) that the defendants wilfully and intentionally conspired to create false and misleading documentation in an effort to defraud plaintiff and creditors; 2nd) conversion of surplus monies at the foreclosure sale; 3rd) breach of fiduciary duty; 4th) breach of contract; 5th) attorneys fees and costs; and 6th) punitive damages.

Discussion

Motion to Dismiss made by Attorney Maria Spero

The motion to dismiss the complaint as against Attorney Maria Spero is granted. It is clear that Attorney Spero is entitled to immunity as she was acting in a quasi-judicial capacity. Moreover, there is no evidence that Attorney Spero performed her duties with misconduct, fraud, or malfeasance.¹ Consequently, the complaint is dismissed as to her.

Motion and Cross-Motion to Dismiss made by defendants: Joseph L. Tirone, Jr., Post Island Properties LLC, Community Home Buyers LLC, Stephen G. Castagno, STG Associates and Fidelity National Title Insurance Co.

¹*Schwartz v Kurlander*, 279 AD2d 465 [2d Dept 2001]

The motion to dismiss the complaint against the aforementioned defendants is granted. First, the complaint is barred by the doctrine of res judicata. The claims of fraud and irregularities in the foreclosure action were litigated during the foreclosure action. As is evident this court gave the plaintiffs' multiple chances to vacate the judgment of foreclosure, but repeatedly ruled against them. "A final judgment or order represents a valid and conclusive adjudication of the parties' substantive rights."² A judgment of foreclosure and sale entered against a defendant is thus ". . . final as to all questions at issue between the parties, and concludes all matters of defense which were or might have been litigated in the foreclosure action."³ Claims of fraud or irregularities in the foreclosure action itself are no exception.⁴ Consequently, these issues were addressed in the plaintiffs' multiple applications to stay the foreclosure sale. This court has already found that there was a deficiency at the time of the foreclosure sale, and that no surplus existed. Therefore the complaint is barred by res judicata.

Accordingly, it is hereby:

ORDERED, that the motion to dismiss made by Maria Spero is granted; and it is further

ORDERED, that the cross-motion to dismiss made by defendants: Joseph L. Tirone, Jr., Post Island Properties LLC, Community Home Buyers LLC and Stephen G. Castagno, is granted; and is further

ORDERED, that the motion to dismiss made by the defendants STG Associates and Fidelity National Title Insurance Co., is granted; and it is further

² *Da Silva v. Musso*, 76 NY2d 436 [1990].

³ *Long Is. Sav. Bank v. Mihaios*, 269 AD2d 502 [2d Dep't 2000].

⁴ *See, Chemical Bank v. McGill*, 262 AD2d 131 [1st Dep't 1999]; *Gray v. Bankers Trust Co. Of Albany, N.A.*, 82 AD2d 168 [3d Dep't 1981].

ORDERED, that plaintiffs complaint is dismissed as against the aforementioned defendants with costs and disbursements to the defendants as taxed by the Clerk; and it is further

ORDERED, that the defendants shall settle judgment on notice.

ENTER,

DATED: August 9, 2013

Joseph J. Maltese
Justice of the Supreme Court