Kouril v Muro
2013 NY Slip Op 32841(U)
October 18, 2013
Supreme Court, Westchester County
Docket Number: 52180/2012
Judge: Sam D. Walker
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FILED AND ENTERED
ON 10/19 2012
WESTCHESTER COUNTY CLERK

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER , J.S.C.

----------x
TARA KOURIL and KEVIN KOURIL,

Plaintiffs,

-against-

DANIEL MURO, MELANIE MURO, and AURORA LOAN SERVICES, LLC,

Defendants.
----------x

Index No. 52180/2012
DECISION & ORDER
Seq. 2

The following papers were read on defendant Aurora Loan Services LLC motion to dismiss Plaintiff's claims against Aurora with prejudice:

Notice of Motion/ Affirmation/Exhibit A	1
Affirmation in Opposition	2
Exhibits 1-5	3
Affirmation in Reply	4

PROCEDURAL & FACTUAL BACKGROUND

The instant action arises out of a dispute between neighbors who own properties within the Town of Cortlandt. The Defendants, Daniel and Melanie Muro are alleged to have converted their property to an illegal use by storing and operating heavy construction equipment upon the grounds of their home at 456 Croton Avenue, Cortlandt, NY. Many of the neighboring

homeowners, including the Plaintiffs herein, complain that in addition to the illegal use, there is an unsightly appearance to the property caused by the storage of the heavy duty equipment and construction debris. Defendants are also accused of acquiring many small animals, including chickens, rabbits, turkeys ad possibly pigs on their property and have been issued numerous local zoning and use violations by the Town of Cortlandt since 2009.

Plaintiffs commenced this action by summons and complaint alleging four (4) causes of action all relating to the allegations that Defendants have moved their heavy construction business to the residentially zoned property and that their operation of heavy construction equipment including excavators, dump trucks and construction trailers, their acquisition of small animals including rabbits, turkeys and chickens and their raising of said animals has interfered with Defendants' right to use and enjoy their own adjacent residential property. Plaintiffs seek damages, and a permanent injunction against all of the above activities that are objectionable and in violation of local zoning.

Defendant Aurora Loan Servicing LLC now move by notice of motion seeking to dismiss plaintiffs claims brought against them on the ground that the verified complaint fails to allege that Aurora has engaged in any wrongful conduct. Defendant Aurora LLC states that they are merely holder's of a mortgage on the affected property and that they are not a proper party to a claim of private nuisance. Plaintiff's oppose the motion arguing that Aurora is a necessary party to the action and that the CPLR § 1001 compulsory joinder rules require that Aurora Loan Servicing LLC be added as a party and remain a party to this action. In addition, Aurora's mortgage provides that Aurora is entitled to take steps to protect its rights in the property at issue. Plaintiff refers to ¶9 of the mortgage which states :

> " If...someone...begins legal proceeding that may significantly affect Lender's interest in the property...(such as a legal proceeding to enforce laws and regulations)...then Lender may do and pay for what ever is reasonable or appropriate to protect Lender's interest in the Property..."

Plaintiff insists that Aurora Lenders is not only a necessary party but has also has an interest in the use of the property that requires that it be named as a Defendant where the alleged illegal use of the property is at issue.

DISCUSSION

Under CPLR 1001(a), necessary parties to an action or proceeding fall into two distinct categories: persons "who ought to be parties if complete relief is to be accorded between the persons who are parties to the action," or "who might be inequitably affected by a judgment in the action." The joinder provisions are "intended to implement a requisite of due process—the opportunity to be heard before one's rights or interests are adversely affected." (*Matter of Martin v. Ronan*, 47 N.Y.2d 486, 490 (1979). Typically, those owning or holding interests in real property are necessary parties to a nuisance action affecting the property or to a proceeding to restrict its use (see *Java Lake Colony v. Institute of Sisters of St. Joseph of Diocese of Buffalo,* 262 A.D. 808 [4th Dept. 1941]). Following the Muro defendants alleged default in payment of the mortgage, a foreclosure proceeding was commenced by defendant Aurora Lenders and is currently pending. While Aurora Lenders LLC allege that they are not guilty of and have not been charged by plaintiffs with responsibility for the acts of private nuisance, it is clear they do in fact own a real property interest in 456 Croton Avenue. Furthermore, the foreclosure proceeding creates more than a speculative possibility that Aurora could acquire both title to and the right to possess and occupy the premises.

This Court notes that given the potential for local code violations and possible liens to be lodged against the property in addition to Aurora's lien, a third party may not be highly

motivated to acquire Aurora's interest in the property. The mortgage clearly provides for notice to Aurora should this type of litigation be commenced. With that notice flows the corresponding right to be heard. Whether Aurora elects to affirmatively exercise that right or not, this Court will not dismiss the action and prohibit their option to address whether or not the Muro defendants are in compliance with local laws and ordinances with regard to the maintenance and use of the property. This action could have a pecuniary impact on Aurora's investment in the property. This Court also notes that Aurora has declined Plaintiffs offer to discontinue the action as against them in exchange for Aurora's stipulation to be bound by any determination in this action, as to the lawful use of 456 Croton Avenue.

For the foregoing reasons it is clear that while the Aurora defendant is not an indispensable party to this action it is a necessary party. *Stanley v. Amalithone Realty, Inc.*,31 Misc.3d 995 (Sup. Court, New York County, 2011).

The motion to dismiss as to Aurora Lenders LLC is DENIED.

The parties are directed to appear at 9:30 AM in Courtroom _____on January 3, 2013

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, NY
October 16, 2012

HON. WILLIAM SAM D. WALKER, J.S.C.