

TDD Irrevocable Trust v J & A Saporta Realty Corp.
2014 NY Slip Op 33391(U)
June 24, 2014
Supreme Court, Nassau County
Docket Number: 1816-13
Judge: Steven M. Jaeger
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

TDD IRREVOCABLE TRUST,

Plaintiff,

-against-

J & A SAPORTA REALTY CORP.,

Defendant.

TRIAL/IAS, PART 39
NASSAU COUNTY
INDEX NO.: 1816-13

MOTION SUBMISSION
DATE: 5-21-14

MOTION SEQUENCE
NOS. 002 & 003

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Notice of Cross-Motion, Affirmation, and Exhibits	X
Memorandum of Law in Reply (Deft.)	X
Affirmation in Reply and Exhibits (Deft.)	X
Memorandum of Law in Support (Pltf.)	X
Plaintiff's Reply Affirmation	X
Memorandum of Law (Deft.)	X
Affidavit of Leo McGinity, Jr.	X

Motion by defendant for an order pursuant to CPLR 2221(d) granting it leave to reargue the Decision and Order dated November 27, 2012 (the "order") and upon reargument, vacating the order and granting the underlying motion dismissing the amended complaint pursuant to CPLR 3211(a)(1) and (7) is denied.

Cross-motion by plaintiff for an order granting it partial summary judgment as to liability by declaring that: (1) the Trust has a beneficial interest in the property, (2) the property continues to be the subject of the Trust's interest, and (3) for other items of relief is denied.

By order dated November 27, 2013, this Court denied defendant's motion to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (7).

In support of its motion to reargue, defendant contends that the documentary evidence establishes that the Trust Agreement did not create a real property interest or equitable lien. The real property was never transferred into the Trust and the property to be transferred to the Trust is merely described as an unspecified sum of money to be paid only after the sale of the property.

Defendant further contends that dismissal pursuant to CPLR 3211(a)(7) was warranted for the same reasons supporting dismissal on documentary grounds.

In addition, defendant argues that East Coast was not J&A's agent, but rather Stewart Title's agent as a matter of law and that "[t]he Court respectfully misapprehended the nature and purpose of a title search and report." (§ 17 of Stuart Siris' Affirmation in Support).

In opposition to the motion, plaintiff argues that "defendant does not meet the standard for reargument and, even if it did, it again is wrong in the law." (§ 2 of

Timothy DiResta's Affirmation in Opposition to Defendant's Motion to Dismiss). Plaintiff claims that defendant "merely is rehashing what it stated before" (*Id.* at ¶ 5). Specifically, plaintiff asserts that this Court already decided that the Trust "had some claimed interest in the property," that the recorded trust agreement "is evidence of some claimed interest in the property" and that there "is no dispute that the trust was of record as to the property and its existence revealed prior to the subsequent sale to [defendant]. (*See Order*)

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]; *Grimm v Bailey*, 105 AD3d 703 [2d Dept 2013]; *see Matter of American Alternative Ins. Corp. v Pelszynski*, 85 AD3d 1157, 1158 [2d Dept 2011], *lv to app denied* 18 NY3d 803 [2012]). "While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Ahmed v Pannone*, 116 AD3d 802 [2d Dept 2014] quoting *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011]).

No grounds for reargument exists here.

In denying defendant's dismissal motion pursuant to CPLR 3211(a)(1) and (7), this Court determined that defendant did not conclusively establish that the documentary evidence submitted "utterly refutes" plaintiff's allegations and/or that plaintiff has no [claim] or cause of action. Specifically, this Court expressly stated that: "The Trust Agreement dated August 3, 2007 and recorded February 3, 2009 is evidence of some claimed interest in the property. There is no dispute that the trust was of record as to the property and its existence revealed prior to the subsequent sale to movant J&A."

Accordingly, the court found that the allegations in plaintiff's amended verified complaint sufficiently pleaded that the parties intended to create a lien on the subject property (*Ryan v Cover*, 75 AD3d 502 [2d Dept 2010]).

Contrary to defendant's contention, this Court correctly stated that the 2011 title report was issued by Stewart Title Insurance Company, by East Coast Abstract Inc. as its authorized agent on behalf of the buyer J&A.

While it may be true that J&A did not expressly select Stewart Title Insurance Company as its title insurer, the title insurance purchase was placed with East Coast Abstract Inc. on J&A's behalf. Nevertheless, this issue has no bearing on whether plaintiff has a claimed interest in the subject property.

In support of its cross-motion for summary judgment on the issue of liability, plaintiff argues, *inter alia*, that “[t]he Trust’s beneficial interest exists in the property and if the defendant is forced to have valid title, it follows that defendant at a minimum took the property ‘subject to’ the Recorded Declaration of Trust, so partial summary should at least be granted as to liability in that respect for plaintiff. . . .” (¶ 86 of Timothy DiResta’s Affirmation in Support of its Cross-Motion for Partial Summary Judgment as to Liability).

In opposition to the cross-motion, defendant submits various exhibits and seven affidavits of: Leo McGinity, Jr., the transactional attorney for James D. MacDonald and JDM Corporation; Susan Odery, Mr. DiResta’s former law and business partner (and former owner of the subject property); Michael Forman, the President of All State Abstract, Inc.; Stanley Levine, the President and CEO of East Coast Abstract, Inc.; Vincent Georgetti, an attorney for the law firm of Braunstein Turkish, LLP (who represented J&A); Frank Odery, a former owner of the subject property and Susan Odery’ husband; and Jeffrey Saporta, the President of the defendant, J&A.

Overall, defendant asserts that “[t]here are serious questions, including, but not limited to, whether or not DiResta can enforce this surreptitious Trust Agreement; whether or not it was properly obtained and recorded; what, if any,

proceeds of sale were derived from the Oderys' conveyance to MacDonald; and DiResta's complete and utter failure to make any claim or object to the transfer of title (McGinity Afd ¶¶ 20-21) until after J&A paid \$1.1 million for the Property and invested hundreds of thousands of dollars more to improve the Property after closing and then to repair and restore it after Superstorm Sandy." (¶ 46 of Stuart Siris' Affirmation in Reply to Opposition to Plaintiff's Motion for Summary Judgment).

On a motion for summary judgment, the moving party has the burden to establish "a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Voss v Netherlands Ins. Co.*, 22 NY2d 728 [2014], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Jacobsen v New York City Health & Hosps. Co.*, ___ NE3d ___, 2014 WL 1237421, quoting *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]). If the moving party meets this burden, the burden then shifts to the non-moving party to "establish the existence of material issues of fact which require a trial of the action" (*Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (*Lee v Second Ave. Vil. Partners*, 100 AD3d 601 [2d Dept 2012], citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 852 [1985]). The motion court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Giraldo v Twins Ambulettes Serv., Inc.*, 96 AD3d 903 [2d Dept 2012]). Further, "[t]he courts function on a motion for summary judgment is 'to determine whether material factual issues exist, not to resolve such issues (citations omitted)' " (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

"The existence of an equitable lien requires an express or implied contract concerning specific property wherein there is a clear intent between the parties that such property be held, given or transferred as security for an obligation" (*Ryan v Cover, supra; Datlot v Turetsky*, 111 AD2d 364, 365 [2d Dept 1985]).

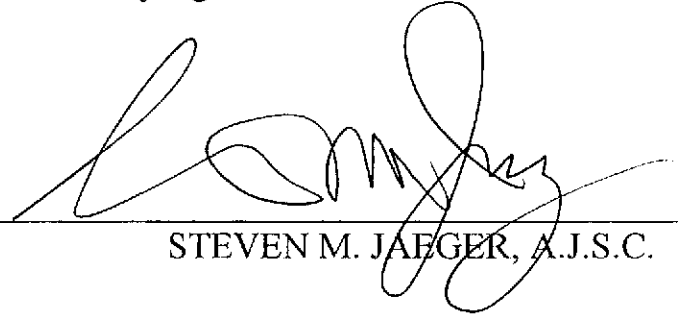
Based upon the voluminous record submitted, this Court finds that plaintiff has failed to make a *prima facie* showing of entitlement as a matter of law on the issue of liability. Factual issues exist concerning the preparation, negotiation, execution and recordation of the Trust. These issues cannot be resolved on the papers submitted.

In view of the foregoing, the motion and cross-motion are both denied.

All matters not respectfully addressed herein are denied.

This constitutes the order and judgment of this Court.

Dated: June 24, 2014



STEVEN M. JAEGER, A.J.S.C.

ENTERED

JUN 26 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE