936 Coogans Bluff, Inc. v 936-938 Cliffcrest Hous. Dev. Fund Corp.
2017 NY Slip Op 31843(U)
August 30, 2017
Supreme Court, New York County
Docket Number: 850011/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----------X **Decision and Order**

936 COOGANS BLUFF, INC.

Plaintiff,

-against- Index No. 850011/13

936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION, THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, AND JOHN AND JANE DOES\ 1-10, ABC LLC 1-10, XYZ CORP. 1-10,

Defendants.

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936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION,

Third-Party Plaintiff

-against-

THE WAVECREST MANAGEMENT TEAM LTD., COMMUNITY CAPITAL BANK n/k/a CARVER FEDERAL SAVINGS BANK, LEE WARSHAVSKY, SHUHAB HOUSING DEVELOPMENT FUND CORPORATION, JOHN AND JANE DOES 11-20, the identity of such persons being unknown to the Third-Party Plaintiff, but intended to describe those persons who corruptly influenced their employer, THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK to look away from their defalcations of the Third-Party Plaintiff's funds,

Third-Party Defendants.

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JOAN A. MADDEN, J.

In this foreclosure action, third-party defendants the Wavecrest Management Team, Ltd. (Wavecrest) Shuhab Housing Development Fund Corp. (Shuhab), and Lee Warshavsky

(Warshavsky) (together "the Shuhab defendants"), move for an order granting them leave to reargue the court's decision and order dated May 12, 2017 ("the May 2017 order"), with respect to motion sequence no. 015, which denied the Shuhab defendants' motion to dismiss the fraud claims asserted against them in the Second Amended Third-Party Complaint, and vacating that part of the May 2017 order, finding that the law of the case doctrine precluded them from challenging the sufficiency of the pleadings. Defendant/third-party plaintiff 936-938 Cliffcrest Housing Development Fund Corp ("Cliffcrest") opposes the motion.

Background

Cliffcrest is tenant owned development company and the owner of the property located at 938 St. Nicholas Avenue, New York, New York ("the Building"). Cliffcrest became the owner of the Building through third-party defendant Department of Housing Preservation and Development of the City of New York's (HPD's) Third-Party Transfer Program ("TPT"), which provides an alternative to in-rem foreclosure. Pursuant to the TPT, residential properties, on which the City holds tax liens, are transferred, first, to a private not-for-profit entity and, then, to a sponsor which agrees to provide construction or permanent financing, typically, in conjunction with partial funding by HPD, in accordance with HPD guidelines. In this case, the Building was originally taken by the City in rem and transferred to a not-for-profit Neighborhood Restore Housing Development Fund Corporation ("Neighborhood Restore") on May 17, 2001. On December 19, 2002, Neighborhood Restore transferred the Building to Shuhab, a sponsor selected by HPD through a Request for Proposal process. Shuhab appointed Wavecrest as the managing agent for the Building, and it is alleged that Wavecrest acted in that capacity from December 2002 until September 2010. Warshavsky is Shuhab's principal and acted as Secretary and Treasurer of Cliffcrest.

HPD holds two mortgages on the Building which were initially provided as part of a joint construction loan, originated in 2002, with Fleet National Bank ("Fleet"), to provide construction financing to rehabilitate the Building (hereinafter "the HPD mortgages").[1] In connection with this financing, on December 19, 2002, HPD and Fleet executed a Construction Loan Participation Agreement ("Participation Agreement") to fund HPD's share of the construction loan by providing funds to the lead lender, in this case Fleet.

The rehabilitation of the Building was purportedly completed in September 2006; however, Cliffcrest alleges in its third-party action that substantial portions of the funds from the loan were not used to rehabilitate the Building. On or about January 27, 2007, title to the Building was transferred to Cliffcrest and the conversion closed. The individual units in the Building were sold to the current unit owners as low-income cooperative apartments at prices below market value. As part of the transfer, Cliffcrest assumed the obligations under all the mortgages on the Building, including the HPD and Fleet mortgages, and the construction loan was converted to a permanent loan.

On September 28, 2006, Cliffcrest executed and delivered to Community Capital Bank ("CCB"), which was the predecessor in interest to Carver, a Mortgage Note ("the Note") evidencing a separate commercial loan made to it in the principal amount of $1,650,000, plus

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[1]According to HPD, on September 29, 2006, three mortgages originally made and dated December 19, 2002, in the principal amount of $2,512,103, were consolidated into one mortgage under which Cliffcrest was required to pay interest at a rate of .62% per annum starting on November 1, 2006, in monthly installments through November 1, 2036. Also, on September 29, 2006, two mortgages originally made and dated December 19, 2002 in the principal amount of $947,500, were consolidated into a second HPD mortgage, which is "a standing loan" with no interest or payments required with the debt to be forgiven barring a default. Cliffcrest paid the interest under the first HPD mortgage until April 2012 but has not made any payments since that time.

interest as set forth in the Note. Simultaneously with the execution of the Note, Cliffcrest executed and delivered to CCB a Mortgage, Assignment of Leases and Rents and Security Agreement, which provided partial security for the money due and owing CCB under the Note. That same day, CCB assigned to Peny & Co. (Peny), the original plaintiff in this action, the Note and the Mortgage along with the Leases and Rents (together "the Loan Documents"). There is evidence in the record that Peny paid CCB $1,650,000 for the assignment of the Loan Documents. Pursuant to a subordination agreement HPD and CCB entered into on September 29, 2006, HPD agreed that the HPD mortgages, would be subject to and subordinate in time and payment to the liens, terms and covenants in the Loan Documents.

From 2006 until 2012, Cliffcrest made payments to Peny as agreed to under the Note and Mortgage without objection or reservation. However, it is alleged that beginning in March 2012, Cliffcrest ceased making monthly payments of principal and interest due under the Loan Documents, and that Cliffcrest failed to make payments for real estate taxes assessed against the Building and failed to provide proof of insurance covering the Building. When Cliffcrest failed to cure its alleged defaults, Peny commenced this foreclosure action in 2013.[2] Cliffcrest moved for leave to serve an amended verified answer, counterclaims, and third-party complaint ("Proposed First Amended Pleading"), which motion was opposed by Peny and HPD. The Proposed First Amended Pleading asserted counterclaims, cross claims and third party claims for (1) rescission of the Note and Mortgage that are the basis of Peny's action on the ground that Cliffcrest was fraudulently induced into entering the Note and Mortgage; (2) fraud; (3) a permanent injunction barring Peny from proceeding to a judgment of foreclosure and sale and

[2]Peny also filed an application for the appointment of a temporary receiver, which the court granted by order dated March 17, 2015.

enjoining HPD, and the proposed third-party defendants to take all steps necessary to satisfy and discharge the note and mortgage and the notice of pendency filed in this action; (4) violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC § 1961 *et seq.;* and (5) violation of 42 USC § 1983 based on allegations that the RICO scheme specifically targeted African-Americans, Latino and immigrant citizens. Cliffcrest also sought to interpose the following four affirmative defenses: (1) failure to name a necessary party; (2) fraud; (3) failure to state a cause of action; and (4) unclean hands.

By decision and order dated June 20, 2014 (hereinafter "the June 20 order"), this court denied Cliffcrest's motion to amend as to the proposed counterclaims and affirmative defenses asserted against Peny; denied the motion to amend as against HPD as premature without prejudice to renewal in accordance with the June 20 order; and granted the motion as to the proposed third-party defendants, which included the Shuhab defendants and Carver, which had not yet been served with the pleading, and directed that Cliffcrest serve an amended pleading in conformance with the court's decision within 45 days without prejudice to a further order as to the proposed cross claims against HPD.

After a change of counsel,[3] to the extent relevant to the instant motion, Cliffcrest moved to amend its First Amended Pleading to assert claims, affirmative defenses, and allegations in a

[3]On or about September 30, 2014, Shuhab and Warshavsky moved to dismiss the third party complaint (motion seq. no. 006), and Wavecrest and Carver separately sought the same relief (motion seq. nos. 005 and 007, respectively). On or about October 30, 2014, Peny moved for an order granting it, *inter alia*, summary judgment against Cliffcrest, a default judgment against certain defaulting defendants and referring the matter to a referee to compute (motion seq. 008). The motions were not opposed by Cliffcrest, whose attorney subsequently moved to withdraw as counsel. By order dated April 20, 2015, the court found that the motion to withdraw as counsel for Cliffcrest was moot in light of the filing of a notice of appearance by substitute counsel.

proposed Second Amended Verified Answer, Counterclaim, Cross Claim and Third-Party Complaint ("the Proposed Second Amended Pleading") and to address the prior motions seeking various relief against Cliffcrest.[4]

The Proposed Second Amended Pleading asserted the following claims against Peny,[5] HPD and the Shuhab defendants: (1) fraud; (2) conspiracy to commit fraud, (3) violation of the Federal Fair Housing Act,42 U.S.C. 3604(b) et seq; (4) negligent misrepresentation; (5)&(6) violation of the New York City Human Rights Law (New York City Administrative Code ("Admin. Code"), pursuant to § 8-107(5)(a)(2) based respectively on the Building tenants' race and status as recipients of public benefits; (7) violation of the civil rights of the Building's residents, pursuant to 42 USC 1983;(8) breach of contract; (9) breach of warranty of habitability; and (10) conversion.

In the March 30 amend order the court, *inter alia*, denied Cliffcrest's motion for leave to amend in its entirety as to Peny (i.e. with respect to both its proposed counterclaims and affirmative defenses), and granted the motion as to HPD and the Shuhab defendants only to the extent of permitting the addition of the proposed causes of action for fraud and conspiracy to

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[4]As noted in footnote three, these motions (motion seq nos. 005, 006, 007, and 008), were previously submitted without opposition. Cliffcrest also sought an order discontinue without prejudice the third-party claims against Carver.

[5]The Proposed Second Amended Pleading also asserted the following affirmative defenses as to Peny : (1) failure to state a cause of action, (2) unclean hands, (3) lack of standing, (4) failure to allege conduct which rises to the causes of action pleaded; (5) failure to mitigate damages; (6) failure to plead its claims with sufficient particularity; (7) failure to allege prerequisite conduct necessary to sustain Peny's claims; (8) fraud and fraud in inducement and conspiracy to commit fraud by Peny and its predecessors.

commit fraud.[6]

On April 19, 2016, Cliffcrest efiled a Second Amended Verified Answer Counterclaim, Cross-Claim and Third-party complaint ("the Second Amended Pleading"). As permitted by the March 30 amend order, the Second Amended Pleading asserts fraud and conspiracy to commit fraud claims against third-party defendants HPD and the Shuhab defendants.[7]

Reargument Motion

At issue on this reargument motion is motion sequence number 015, in which the Shuhab defendants moved to dismiss the third-party claims for fraud and conspiracy to commit fraud asserted against them in the Second Amended Pleading. In opposition to this aspect of the motion to dismiss, Cliffcrest argued that the Shuhab defendants had not shown that the fraud claims fail to state a cause of action and pointed to the March 30 amend order which found that the claims had prima facie merit.

In the May 2007 order, the court denied Shuhab defendants' motion to dismiss the fraud claims. First, the court found that since the March 30 amend order found that the Second Amended Pleading stated a cause of action for fraud and conspiracy to commit fraud, the law of

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[6]By separate decisions and orders dated March 30, 2016, the court denied the motions to dismiss by Wavecrest and by Shuhab and Warshavsky (motion seq nos. 006 and 005 respectively) as moot in light of the partial grant of Cliffcrest's motion to amend. In addition, by order dated March 30, 2016, this court substituted State of New York Mortgage Agency SONYMA, after Peny assigned to it the Loan Documents and its rights in this action. Subsequently, SONYMA assigned the Loan Documents and its rights in this action to 936 Coogans Bluff, LLC ("Coogans Bluff"), which has since assigned the Loan Documents and its rights in the action to 938 St. Nicholas Avenue Lender LLC.

[7]The Second Amended Pleading also contained a section 1983 claim against the Shuhab defendants, which claim that court dismissed in the May 2017 order after finding that the claim was asserted in violation of the March 30 amend order which did not permit its addition.

the case doctrine precluded the Shuhab defendants from challenging the sufficiency of the same pleadings, citing Troy Pub Co., Inc. v. Dryer, 110 AD2d 327 (3d Dept 1985); 28 NYJur2d Courts and Judges, §266 [Nov 2016]). Next, while not specifically stating that the motion to dismiss was being denied on grounds of failure to state a cause of action, the court reviewed the allegations in the Second Amended Pleading and found that they were sufficient to state a cause of action for fraud and conspiracy to commit fraud.

On this motion to reargue the Shuhab defendants challenge that part of the May 2017 order which found that law of the case doctrine precluded them from arguing that the Second Amended Pleading failed to state a cause of action for fraud or conspiracy to commit fraud. In this connection, the Shuhab defendants argue that the court erred in holding that they "waived" the defense of failure to state a cause of action, citing case law which they argue holds that the defense can be raised any time, citing e.g. San-Dar Associates v. Fried, 151 AD3d 545 (1st Dept 2017)(noting that "[t]he motion court was free not to dismiss the "affirmative defense" of failure to state a claim, because failure to state may be asserted at any time even if not pleaded (CPLR 3211[e]) and is therefore mere surplusage" as an affirmative defense)(internal citation and quotation omitted).

Cliffcrest opposes the motion, arguing that the court did not hold that the Shuhab defendants waived the defense of failure to state a cause of action and that, in any event, the court found in the May 2017 order that it satisfied the pleading standard for fraud.

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party

successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992).

As a preliminary matter, contrary to the Shuhab defendants' argument, the court did not find that there was any "waiver" of the defense of failure to state a cause of action. That said, however, the court grants reargument and, upon reargument, vacates that part of the May 2017 order which denied Shuhab defendants' dismissal motion as precluded by the law of the case doctrine. In this connection, the court notes that the Shuhab defendants' previous motion to dismiss the fraud claims, which was denied in the March 30 amend order, was on statute of limitations grounds and not for failure to state a cause of action.[8]

Upon reargument, however, the court reaches the same conclusion and denies the Shuhab defendants' motion to dismiss the fraud claims against them for failure to state a cause of action. In addition, in the exercise of caution, the court clarifies that the May 2017 order, which stated that "even if the court were to consider the merits of the Shuhab defendants' motion to dismiss the fraud claims, the motion would be denied," was intended to address the merits of the motion and to state the reasons that the pleadings sufficiently state a cause of action.

As detailed in the May 2017 order, to establish a cause of action for fraud it must be alleged that party charged with fraud made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendants when made, for the purpose of inducing plaintiff's reliance, justifiable reliance on the alleged misrepresentation or omission by the plaintiff, and injury. Lama Holding Company v Smith Barney Inc., 88 NY2d 413, 421 (1996). Additionally, "[while] CPLR 3016 (b) requires factual

[8]However, HPD raised the issue of the sufficiency of the fraud claims and for that reason, that March 30 amend order contained a detailed discussion of the sufficiency of the pleading with respect to these claims.

allegations in support of each element of fraud... to meet such requirement a plaintiff need only provide sufficient detail to inform defendants of the substance of the claims" See Kaufman v. Cohen, 307 AD2d 113, 120 (1st Dept 2003)(internal citation and quotation omitted). In this connection, it has been held that the pleading requirements for fraud should "not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud." Bernstein v. Kelo & Co., 231 AD2d 314, 320 (1st Dept 1997)(internal citation and quotation omitted). Next, to state a claim for conspiracy to commit fraud there must be allegations of fact from which it can be inferred that the party at issue entered into an agreement or understanding with the other defendants (against which particular acts of fraud were alleged) to cooperate in any fraudulent scheme. Abrahami v UPC Construction Co., Inc., 176 AD2d 180 (1st Dept 1991).

In the May 2017 order, the court reviewed the allegations in the Second Amended Pleading under these legal standards, and found that the claims for fraud and conspiracy to commit fraud were sufficiently stated. Specifically, the court wrote:

> [The fraud claims allege], *inter alia*, that the Shuhab defendants, along with HPD, induced the Building residents to participate in HPD's TPT Program with promises of ownership and improving the quality of the Building, and that these third-party defendants would take all steps necessary to perform the rehabilitation and renovation process; that despite agreements outlining a scope of work and securing financing to pay for the work, at the completion of the process, the Buildings were in shoddy condition, uninhabitable and dangerous; that the residents relied on the third-party defendants' representations that the work would be completed in accordance with the scope of work and that the third-party defendants took loan proceeds which left the residents with an excess of $6,000,000 in debt, that the Building is in worse condition than before and requires $11,889,405.31 in repairs; that the representations were knowingly false and intended to induce reliance and defraud Cliffcrest of the benefits the residents believed they were receiving (Second Amended Pleading

> ¶'s 292-301). It is further alleged that the Building residents "justifiably relied on the third-party defendants' representations that they would not be saddled with a Building in which repairs were not made and be forced to repay loans that were stolen by ...Shuhab's contractor" (Id, ¶ 298), and that "the full extent of the debts and balances was not revealed until Wavecrest was removed as the management company [and that Wavecrest] continually made misrepresentations regarding the balance that was in the Building's accounts" (Id, ¶ 299).
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> The proposed claim for conspiracy to commit fraud is also sufficient as it alleges "a conspiracy to commit fraud against Cliffcrest by the third-party defendants which worked together with Shuhab's contractor, a defunct entity, to form a scheme or plan of misrepresenting and omitting material facts about the Building so as to induce them to purchase the units in the Building [and that] [t]his scheme or plan was furthered each time the third-party defendants evaded requests for information sufficient for the residents to understand the nature of the arrangement that they were entering into with third-party defendants" (Id, ¶ 303, 304). It is further alleged that "rather than make the desperately needed renovations and rehabilitation of the Building the third-party defendants continually and perpetually hid the truth from Cliffcrest and its residents" (Id, ¶ 308).

In sum, while, upon reargument, the court vacates that part of the May 2017 order, finding that the Shuhab defendants' dismissal motion was precluded under the law of the case doctrine, the court clarifies and adheres to that part of its May 2017 order which denied the Shuhab defendants' dismissal motion, finding that the Second Amended Pleading is sufficient to state a claim for both fraud and a conspiracy to commit fraud.

Conclusion

Accordingly, it is

ORDERED that the Shuhab defendants' motion to reargue is granted; and it is further

ORDERED that upon reargument, the court (i) vacates that part of the May 2017 order which denied the Shuhab defendants' dismissal motion based on the law of the case doctrine, and

(ii) clarifies that the May 2017 order considered and rejected the merits of the Shuhab defendants' motion to dismiss the claims against them for fraud and conspiracy to commit fraud, and (iii) adheres to the May 2017 order denying the motion to dismiss on the ground the Second Amended Pleading is sufficient to state claims for fraud and conspiracy to commit fraud .

DATED: August 30, 2017

J.S.C.

HON. JOAN A. MADDEN
J.S.C.