

True Gate Holding Ltd v Baroukhian

2017 NY Slip Op 32081(U)

October 2, 2017

Supreme Court, New York County

Docket Number: 850142/2012

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

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TRUE GATE HOLDING LTD,

Plaintiff,

-against-

**NOURALLAH BAROUKHIAN; NOURALLAH
BAROUKHIAN d/b/a EAST 115th STREET
ASSOCIATES a/k/a EAST 115th STREET
ASSOCIATES, MANUCHEHR MALEKAN,
REISMAN PEIREZ and REISMAN, LLP,
FLUSHING SAVINGS BANK FSB, THE CITY OF
NEW YORK, and MEHRY NOGHREI**

Defendants.
----- X

**Index No. 850142/2012
Motion Seq: 003**

DECISION & ORDER

HON. ARLENE P. BLUTH

The motion to dismiss and the cross motion for *inter alia* sanctions are denied.

Background

This foreclosure action arises out of a property located at 75-79 East 115th Street, New York, NY. There was a prior foreclosure action on this property brought by Yousef Yahudaii, (individually) before Justice Friedman in 2008. On December 12, 2011, Justice Friedman ruled, after a bench trial, that there was a valid assignment of a prior mortgage (the Sims mortgage) to plaintiff True Gate, but found that a purported assignment of the mortgage from True Gate to Yahudaii was invalid. Justice Friedman dismissed that 2008 action because True Gate was not named as a party; Justice Friedman

held that a new action could be brought consistent with the terms of the Court's decision. This decision after trial was affirmed by the First Department.

After plaintiff brought the instant action in accordance with Justice Friedman's post-trial decision, Yahudaii sought to dissolve plaintiff True Gate, and that dissolution action was transferred to Nassau County. The dissolution action stayed the instant foreclosure action. The dissolution was completed on November 7, 2014.

Contentions in this Motion

Defendant Mehry Noghrei seeks to dismiss this foreclosure action on the ground that plaintiff lacks standing to bring this action because it acted in an *ultra vires* manner in commencing this case without Noghrei's consent.

Noghrei is defendant Baroukhian's mother-in-law and agreed to co-own plaintiff True Gate with Joseph Yahudaii with equal 50-50 shares. Noghrei observes that the complaint states that Noghrei "is made a party defendant herein in that said defendant is 50% owner of the plaintiff" and "said defendant has not consented to the bringing of the instant action and therefore is a necessary party" (NYSCEF Doc. No. 1, ¶ 21).

Noghrei claims that this admission shows that Noghrei never consented to the filing of this case and, therefore, the commencement of this action should be rendered null and void. Noghrei also insists that other Yahudaii actions, including making himself president of the corporation and holding a special meeting of the corporation, violate New York's Business Corporation Law.

In opposition, plaintiff claims that Noghrei agreed on numerous occasions to commence this action. Plaintiff asserts that Noghrei is acting as an agent for defendant Baroukhian in an effort to

frustrate the instant foreclosure proceeding.

Discussion

“On a pre-answer motion to dismiss for lack of standing, the burden lies with the defendant to establish prima facie that plaintiff has no standing to sue” (*Credit Suisse Fin. Corp. v Reskakis*, 139 AD3d 509, 510, 32 NYS3d 93 [1st Dept 2016]).

The question for this Court is whether plaintiff has standing to pursue a foreclosure action where a 50 percent shareholder of a close corporation does not consent.¹ Plaintiff’s complaint clearly states that Noghrei does not consent to the commencement of this action and Noghrei claims that True Gate never had any valid bylaws that would permit Yahudaii to start a foreclosure action without her consent.

Despite these contentions, the motion to dismiss is denied because Noghrei has not met her burden to demonstrate the plaintiff lacks standing to sue. Justice Driscoll of Nassau County in connection with the dissolution proceeding of True Gate issued a decision in which he noted that plaintiff is a single asset corporation whose only asset is the mortgage on the subject property (NYSCEF Doc. No. 73). He further stated that Noghrei failed to respond or show up for a corporation meeting on November 19, 2012 in order to commence the instant foreclosure action (*id.*). Justice Driscoll further noted that the statute of limitations to start the foreclosure case expired on January 4, 2013, meaning that True Gate had to act quickly in late 2012 (*id.*).

¹ And, contrary to plaintiff’s contention, this Court has not ruled on the validity of Noghrei’s ability to object to the instant action. In fact, the Court observed that Noghrei had legal options available to her if she objected to the commencement of this matter (*see* NYSCEF Doc. No. 148 at 5). Now, Noghrei has exercised her legal options.

Noghrei submits a letter she allegedly sent to Yahudaii in which she acknowledged receipt of a notice about the November 19, 2012 meeting but claimed that she could not attend the meeting (NYSCEF Doc. No. 222). The notice about the meeting clearly states that one of its two purposes was to commence a foreclosure action (NYSCEF Doc. No. 221). The minutes of the meeting on November 19, 2012 state that Noghrei failed or refused to attend the meeting (NYSCEF Doc. No. 223).

The True Gate Shareholders Agreement seems to suggest that the corporation would commence a foreclosure proceeding without any further action by plaintiff (NYSCEF Doc. No. 42, ¶ 4). Critically, this document is not between True Gate and the borrower, but rather it is between Yahudaii and Noghrei. Although Noghrei disagrees with the meaning of paragraph 4, discovery is needed to explore if the parties intended this provision to remove the requirement of a meeting in order for plaintiff to start the foreclosure action.

These documents and Justice Driscoll's decision generate numerous questions about whether Noghrei actively refused to cooperate with Yahudaii's efforts to commence the foreclosure action on behalf of True Gate. "The relationship between shareholders in a close corporation, vis a vis each other, is akin to that between partners and imposes a high degree of fidelity and good faith" (*Brunetti v Musallam*, 11 AD3d 280, 281, 783 NYS2d 347 [1st Dept 2004] [internal quotations and citation omitted]).

Here, Noghrei offers no legitimate reason why she would oppose True Gate's efforts to ensure recovery of its only investment. Even if it turns out that plaintiff fails to show it is entitled to recover, that does not mean that Noghrei can frustrate those efforts. If Noghrei truly believed that Yahudaii was

acting improperly on behalf of True Gate, then she should have started a shareholder derivative action against True Gate. Instead, she attempts to dismiss this action, which due to the statute of limitations, would prevent True Gate from recovering its mortgage loan.

The conflicting contentions in the motion and cross-motion lead to one question: Why would Noghrei seek to dismiss an action in which she could possibly recover some portion of the proceeds from a foreclosure sale? (*see* NYSCEF Doc. No. 20, 42). The Court, obviously, cannot ignore the fact that Noghrei is defendant Baroukhian's mother-in-law. What significance this may have in the instant matter is yet to be determined, but on a motion to dismiss, it is another issue that compels this Court to deny the motion.

Remaining Contentions

The remaining portions of the motion and the relief sought in the cross-motion are denied. Sanctions are not appropriate in the instant action. Although there appears to be intense acrimony between the parties, the filing of a motion does not automatically mean there should be sanctions. Further, the Court has already rejected claims that the instant action is time-barred. And Noghrei's claim that she was not properly served is denied because she does not dispute service in her affidavit²—only her counsel claims service was improper and he only provided a conclusory objection to service.

² Even if such a statement were contained in Noghrei's affidavit, it would be ignored because the Court is not satisfied that she has enough command of the English language based on her counsel's statements. Noghrei's counsel claims in reply that Noghrei's limited English proficiency is easily remedied by translating documents before they are signed—but there is no indication anywhere in her affidavit that it was translated for her.

As the Court has stated previously, it does not consider letters from anyone, especially those containing substantive arguments. Those contentions must be included in motion papers. But there is no need to affirmatively restrain Baroukhian from personally filing letters, affidavits, pleadings or anything else. The solution is simple—because Baroukhian is represented by counsel (*see* NYSCEF Doc. No. 243) the Court will simply ignore papers filed by Baroukhian personally.

Summary

Noghrei is correct that ordinarily the consent of a 50 percent shareholder in a close corporation is required in order for a close corporation to act especially where the bylaws (or lack thereof) do not provide alternatives. But, here, discovery is needed to explore the events that led to filing the instant action. It may be that Noghrei consented to the commencement of the instant action in the True Gate Shareholders Agreement. Or it could be that Noghrei withheld her consent and Yahudaii improperly initiated this action on behalf of True Gate.

The Court also observes that a foreclosure case is an equitable action and triggers this Court's equitable powers. And, as a matter of equity it seems wholly inconsistent with the purposes of a close corporation to permit a 50 percent shareholder to frustrate a corporation's ability to pursue a remedy to recover its only asset without providing any legitimate reason for her objection. Noghrei may believe that True Gate is not entitled to recover, but that determination should be made through the foreclosure action rather than through her ability to stall True Gate's actions as a 50 percent shareholder.

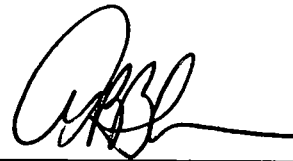
Accordingly, it is hereby

ORDERED that the motion and cross-motion are denied. Noghrei is directed to answer

pursuant to the CPLR and the parties are to appear for a preliminary conference on January 9, 2018 at
2:15 p.m.

This is the Decision and Order of the Court.

Dated: October 2, 2017
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH