

Valiotis v Bekas

2018 NY Slip Op 31891(U)

July 16, 2018

Supreme Court, Queens County

Docket Number: 23426/10

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

 EFSTATHIOS VALIOTIS,

Index No. 23426/10

Plaintiff,

Motion

Date April 4, 2018

- against-

Motion

DEMETRIOS BEKAS, VAIA BEKAS, MARATHON
NATIONAL BANK OF NEW YORK, ZELOUF
INTERNATIONAL CORP., NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, GEORGE
KOUVARAS, and PIROS,

Cal. No. 108

Motion

Seq. No. 24

Defendants.

The following papers read on this motion by defendant, Demetrios Bekas, pursuant to CPLR 3212, to dismiss the complaint insofar as asserted against him on the grounds that plaintiff failed to serve properly the notices required, pursuant to RPAPL 1303 and 1304, or to dismiss the complaint insofar as asserted against him on the grounds of fraud in the inducement, oral modification, waiver, estoppel, and laches, and to proceed to trial on his counterclaims for fraud in the inducement and predatory lending, and for an accounting an inquest on the issue of liability and damages, pursuant to CPLR 3017(a), and or in the alternative, pursuant to CPLR 3001, for a judgment declaring the rights and other legal relations of the parties to a justiciable controversy.

Papers
Numbered

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Upon the foregoing papers, it is ordered that the motion is determined as follows:

In August 2004, Demetrios Bekas and his wife, Vaia Bekas, executed a promissory note in favor of Efstathios Valiotis in the principal amount of \$400,000.00, plus interest. As security for the note, Demetrios Bekas and Vaia Bekas gave a mortgage on their real property known as 25-36/25-38 31st Avenue, Astoria, New York (comprised of two tax lots, i.e. Block 598, Lots 40 and 41). Demetrios Bekas thereafter transferred his ownership interest in the property

to Vaia Bekas by deed dated March 1, 2005, and recorded on March 23, 2005.

Plaintiff commenced this action on September 15, 2010, alleging that defendants, Demetrios Bekas and Vaia Bekas, defaulted in payment under the terms of the mortgage and note by failing to make the payment of interest on moneys advanced which became due and payable since January 1, 2005. In the complaint, plaintiff alleges that as a consequence, it elects to accelerate the amount due under the mortgage. Plaintiff seeks foreclosure of the mortgage and to adjudge defendants, Demetrios Bekas and Vaia Bekas, to be liable for any deficiency remaining after foreclosure sale of the mortgaged premises.

Defendant, Demetrios Bekas, and his wife, defendant, Vaia Bekas, each appearing in a self-represented capacity, served answers, asserting various affirmative defenses and interposing counterclaims. Plaintiff moved for summary judgment against defendants, Demetrios Bekas and Vaia Bekas, pursuant to CPLR 3212, to strike the answers and counterclaims of defendants, Demetrios Bekas and Vaia Bekas, for leave to amend the caption and for leave to appoint a referee. Defendant, Demetrios Bekas, appearing in a self-represented capacity, submitted papers in opposition, on behalf of himself and purportedly on behalf of defendant, Vaia Bekas. Defendant, Vaia Bekas, failed to submit any opposition papers herself, or otherwise appear in relation to the motion. By memorandum decision dated June 2, 2011, the Hon. David Elliot rejected Demetrios Bekas's submission of opposition papers on behalf of defendant, Vaia Bekas, by noting the absence of proof that defendant, Demetrios Bekas, was an attorney admitted in good standing and licensed to practice law in New York, or was acting as attorney-in-fact for Vaia Bekas pursuant to an executed power of attorney. By order dated February 9, 2012, and entered on February 10, 2012, Justice Elliot granted the motion by plaintiff.

Defendant, Demetrios Bekas, appealed, as limited by his brief, from so much of the order of Justice Elliot entered on February 10, 2012, as granted those branches of plaintiff's motion which were for summary judgment on the complaint insofar as asserted against him and to strike his answer. By order of the Appellant Division, Second Department, the order entered on February 10, 2012, was reversed insofar as appealed from, on the law, and those branches of plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant, Demetrios Bekas, and to strike that defendant's answer were denied (*Valiotis v Bekas*, 106 AD3d 992 [2d Dept 2013]). The Appellate Division determined that plaintiff had established his *prima facie* entitlement to summary judgment on the complaint insofar as asserted against defendant, Demetrios Bekas, but that in opposition, Demetrios Bekas, raised a triable issue of fact regarding his affirmative defense that he was fraudulently induced into executing the note and mortgage by plaintiff's misrepresentations, upon which Demetrios allegedly relied because of his relationship of trust and confidence with plaintiff (*see id.* at 993).

Defendant, Demetrios Bekas, subsequently commenced a third-party action against Valiotis, his wife Stamatiki Valiotis (hereinafter Stamatiki), Rivercity, LLC, and Top Cove Associates, Inc. (Top Cove) (hereinafter collectively the Valiotis defendants), asserting

numerous claims sounding in fraud and breach of fiduciary duty and seeking to impose a constructive trust on real property to which Stamatiki holds title.¹ The Valiotis defendants moved, pursuant to CPLR 3211(a), to dismiss the third-party complaint insofar as asserted against them. By order of the Hon. David Elliot, entered on June 5, 2014, that branch of the motion of the Valiotis defendants which was, pursuant to CPLR 3211(a), to dismiss the third-party complaint insofar as asserted against each of them, was granted. Defendant, Demetrios Bekas, appealed. By order of the Appellate Division, Second Department, the order entered on June 5, 2014, insofar as was appealed from, was affirmed (*see Valiotis v Bekas*, 145 AD3d 707 [2d Dept 2016]). The Appellate Division determined that Demetrios Bekas's third-party claims, alleging fraud and breach of fiduciary duty with regard to the judgment of confession and the sale of stock in Top Cove were barred by the doctrines of *res judicata* and collateral estoppel. (The claims by Demetrios Bekas alleging fraud and breach of fiduciary duty with regard to the judgment by confession and the sale of stock in Top Cove were raised and summarily dismissed in *Zelouf Int. Corp. v Rivercity, LLC*, [Supreme Court, Queens County, Index No. 18790/2010] [123 AD3d 1114 (2d Dept 2014)]). The Appellate Division additionally determined that Demetrios Bekas third-party plaintiff lacked standing to pursue a derivative action on behalf of Top Cove and that the third-party complaint failed to state a cause of action for a constructive trust.

The case was assigned for a non-jury trial,² and on the scheduled trial date of November 27, 2017, both defendants, Demetrios Bekas and Vaia Bekas, appeared in court, each acting in a self-representative capacity. The other named defendants did not appear. At such time, plaintiff's counsel orally moved for an order of reference and a judgment of foreclosure and sale, asserting that the answer of defendant, Vaia Bekas, had been stricken by order entered on February 10, 2012, that defendant, Demetrios Bekas had transferred his ownership interest in the property to defendant, Vaia Bekas (prior to the institution of the action), and the Appellate Division, Second Department had ruled against defendant, Demetrios Bekas in his appeal relative to his fraud claims (in his third-party complaint) (*Valiotis v Bekas*, 145 AD3d 707). Defendant, Demetrios Bekas, opposed the motion, asserting that he should be permitted to try his defense based upon fraudulent inducement and be compensated for damages he suffered. The court orally granted plaintiff's motion, so ordered the minutes and instructed plaintiff's counsel to settle judgment on notice. Plaintiff and defendants, Demetrios Bekas and Vaia

¹ Bekkas also asserted claims against Valiotis's attorney, third-party defendant Michael Papagiannopoulos, for aiding and abetting the alleged fraud with regard to the judgment by confession and the sale of stock in Top Cove Associates, Inc. Such claims were dismissed (*see Valiotis v Bekas*, 145 AD3d 707).

² *See* Order dated October 10, 2017 and entered on October 13, 2017, granting plaintiff's motion to strike the separate jury demands of defendants, Demetrios Bekas and Vaia Bekas dated May 24, 2017.

Bekas, have served notices of settlement of proposed orders/judgment.³

Defendant, Demetrios Bekas, now moves for an order granting summary judgment, pursuant to CPLR 3212. Plaintiff opposes. The remaining defendants have not appeared in relation to the motion.

A motion for summary judgment may be made by any party to an action after the joinder of issue (CPLR 3212[a]). The court may set a date after which no such motion may be made, provided that the date is no earlier than 30 days after the filing of the note of issue (*id.*). In this case, the preliminary conference order dated November 22, 2010, directed that any motion for summary judgment be made no later than 120 days after the filing of the note of issue. By order dated August 9, 2016, and entered on August 17, 2016, plaintiff was directed to serve and file a note of issue on or before September 30, 2016. The note of issue was served on August 23, 2016 and filed on August 25, 2016.

To the extent defendant, Demetrios Bekas, moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint insofar as asserted against him, such branch of the motion is untimely, having been made more than 120 days after the filing of the note of issue (*see* CPLR 3212[a]). In addition, defendant, Demetrios Bekas, has failed to offer any explanation for not serving the motion within 120 days after the filing of the note of issue (*see Wang v Chei Fong Lee*, 110 AD3d 1060 [2d Dept 2013]; *St. John's University v Butler Rogers Baskett Architects, P.C.*, 105 AD3d 728 [2d Dept 2013]). That branch of the motion by defendant, Demetrios Bekas, pursuant to CPLR 3212, for summary judgment dismissing the complaint insofar as asserted against him on the grounds of fraud in the inducement, oral modification, waiver, estoppel, and laches, is denied.

To the extent defendant, Demetrios Bekas, moves, in effect, pursuant to CPLR 2221(d), for leave to reargue the court's order,⁴ granting the oral motion by plaintiff for an order of reference and judgment, 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]). " 'Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision' " (*E.W. Howell Co., Inc. v. S.A.F. La Sala Corp.*, 36 AD3d 653, 654 [2d Dept 2007], quoting *Carrillo v PM Realty Group*, 16 AD3d 611, 611 [2d Dept 2005]).

³ No judgment has been signed as of this date.

⁴ The so-ordered minutes were filed on January 18, 2018.

Defendant, Demetrios Bekas, has failed to demonstrate that the court overlooked or misapprehend a matter of fact or law in determining that plaintiff is entitled to an order of reference and judgment, and that defendant Demetrios Bekas is not entitled to assert any claim based upon fraud for damages. Summary judgment was previously granted against defendant, Vaia Bekas, by order dated February 9, 2012, and the Appellate Division, Second Department, determined in *Valiotis v Bekas* (106 AD3d 992 [2d Dept 2013]), that plaintiff established his *prima facie* entitlement to summary judgment on the complaint insofar as asserted against the defendant, Demetrios Bekas, in this foreclosure action by submitting the mortgage, note, and evidence of the mortgagors' default thereunder. Defendant, Demetrios Bekas, transferred his ownership interest in the subject property before the action commenced, but remains jointly and severally liable with defendant, Vaia Bekas, as obligor on the note. Defendant, Demetrios Bekas's defense based upon claim of fraud in the inducement relative to the note and mortgage arises out of his broader claim that plaintiff induced him, through fraud, into entering into several transactions, including the note and mortgage, the judgment by confession, and the sale of Top Cove stock. Since the earlier ruling by the Appellate Division, Second Department in relation to the appeal by defendant, Demetrios Bekas, from the order entered on February 10, 2012 (*see Valiotis v Bekas*, 106 AD3d 992 [2d Dept 2013]), the Appellate Division determined that Bekas's third-party claims against Efsthathios Valiotis, alleging fraud and breach of fiduciary duty with regard to the judgment by confession and the sale of Top Cove stock were barred by the doctrines of *res judicata* and collateral estoppel, having been raised and summarily dismissed in *Zelouf Int. Corp. v Rivercity, LLC*, (123 AD3d 1114 [2d Dept 2014]) and *Bekas v Valiotis*, (123 AD3d 1070 [2d Dept 2014]) (*see Valiotis v Bekas*, 145 AD3d 707 [2d Dept 2016]). Defendant, Demetrios Bekas, makes no distinction with respect to the fraud purportedly committed by plaintiff in relation to the inducement vis-a-vis the note and mortgage, versus the judgment by confession and the sale of stock, and therefore, his claim of fraud in relation to the note and mortgage must also be considered to be barred by the doctrines of issue and claim preclusion. Furthermore, the order entered on February 10, 2012 granted the motion for summary judgment and to strike the answer and counterclaims of defendant, Demetrios Bekas, and defendant, Demetrios Bekas, did not appeal from that portion of that order which dismissed his counterclaims. Defendants, Marathon National Bank of New York, Zelouf International Corp., New York City Environmental Control Board, George Kouvaras and Piros are in default in appearing or answering.

To the extent defendant, Demetrios Bekas, asserts that plaintiff has failed to show plaintiff complied with RPAPL 1303, RPAPL 1303 requires that a notice titled "Help for Homeowners in Foreclosure" be delivered with the summons and complaint in residential foreclosure actions involving owner-occupied, one-to-four family dwellings (*see HSBC Bank USA, Nat. Assn. v Ozcan*, 154 AD3d 822 [2d Dept 2017]; *Onewest Bank, N.A. v Mahoney*, 154 AD3d 770, 771 [2d Dept 2017]). Plaintiff's process server caused defendant, Demetrios Bekas, to be served with process by leaving the papers with defendant, Vaia Bekas, a person of suitable age and discretion at Demetrios's dwelling place at 16-48 201st Street, Bayside, New York, on September 25, 2010, and by mailing an additional copy of the papers on September 29, 2010 to Demetrios at the same address. At the time of such delivery of process, defendant,

Demetrios Bekas, no longer was an owner of the subject property, and in addition, defendant, Demetrios Bekas, admitted in his answer dated October 13, 2010, that he resides at 16-48 201st Street, Bayside, New York. As a consequence, plaintiff was not obligated to delivery a notice, pursuant to RPAPL 1303, to defendant, Demetrios Bekas, as a condition precedent to the commencement of this action.

To the extent defendant, Demetrios Bekas, asserts that plaintiff has failed to show it complied with RPAPL 1304, the subject mortgage loan is not a “home loan” for purposes of RPAPL 1304(5) (L 2009, c 507, § 25, subd. a). The record shows that defendant, Demetrios Bekas, did not reside at the premises at the time of the commencement of the action, and he admitted during his deposition testimony that he directed plaintiff to draw a check for the mortgage proceeds to the “P.I. Sport,” a company owned by his son, and which was in need of funds. Such debt therefore was not incurred by defendant Demetrios Bekas “primarily for personal, family or household purposes” (RPAPL 1304[5][a][ii]).

That branch of the motion by defendant, Demetrios Bekas, pursuant to CPLR 3017(a), for an accounting, an inquest “for liability and damages,” and a declaratory judgment, is denied. Defendant, Demetrios Bekas, did not assert a counterclaim seeking an accounting or declaratory relief. The counterclaims seeking rescission and damages, were dismissed pursuant to the order entered on February 10, 2012, and defendant, Demetrios Bekas, did not appeal from that portion of the order entered on February 10, 2012, dismissing the counterclaims. Although the court has the discretion to “grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just” (CPLR 3017[a]; *see Rock v Rock*, 100 AD3d 614, 617 [2d Dept 2012]), defendant, Demetrios Bekas, has failed to demonstrate that an accounting, declaration of rights or other legal relations of the parties, or an award of damages is appropriate. To the extent a dispute may exist as to the amount due and owing to plaintiff pursuant to the mortgage, it may resolved after a reference pursuant to RPAPL 1321 (*see Crest/Good Mfg. Co. v Baumann*, 160 AD2d 831, 832 [2d Dept 1990]).

Dated: July 16, 2018

DARRELL L. GAVRIN, J.S.C.