

Paulino v Espinal

2018 NY Slip Op 34127(U)

January 12, 2018

Supreme Court, Suffolk County

Docket Number: Index No. 602888/2017

Judge: Joseph Farneti

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ORIGINAL

SHORT FORM ORDER

INDEX NO. 602688/2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

ANGEL PAULINO and ANAIS PAULINO,

Plaintiffs,

-against-

LISA ESPINAL,

Defendant.

ORIG. RETURN DATE: JULY 31, 2017
FINAL SUBMISSION DATE: OCTOBER 12, 2017
MTN. SEQ. #: 001
MOTION: MD

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 5 read on this motion _____
FOR SUMMARY JUDGMENT

Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers
4, 5; it is,

ORDERED that this motion by plaintiffs ANGEL PAULINO and ANAIS PAULINO (collectively "plaintiffs") for an Order, pursuant to CPLR 3212, granting plaintiffs summary judgment, is hereby **DENIED** for the reasons set forth hereinafter. The Court has received opposition to this application from defendant LISA ESPINAL.

The underlying facts of this matter as alleged by plaintiffs are as follows:

In or about May of 2007, plaintiff ANGEL PAULINO purchased the property commonly known as 303 Cabota Avenue, Copiague, New York ("Property"). On or about May 8, 2007, plaintiff executed a mortgage and note in the amount of \$396,000 in favor of Wells Fargo Bank, NA ("Wells Fargo").

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In or about April of 2009, plaintiffs requested the services of defendant to perform a modification of the mortgage, which efforts failed. In or about September of 2010, plaintiffs entered into an agreement with defendant, allegedly under duress, whereby defendant would purchase plaintiffs' mortgage debt for \$220,000. In return, plaintiff ANGEL PAULINO and defendant would execute a promissory note in the amount of \$220,000 plus interest, and defendant would obtain a lien on the Property. Also in or about September of 2010, plaintiff ANGEL PAULINO, "under pressure and persuasion" from defendant, was charged \$50,000 for the purpose of paying current property taxes and any taxes in arrears on the Property. Any remainder of such payment would be applied towards repayment of the principal on the promissory note. Plaintiff ANGEL PAULINO allegedly paid the \$50,000 charge.

On or about November 1, 2010, plaintiff ANGEL PAULINO allegedly entered into a promissory installment note with defendant in the principal amount of \$220,000, for a 20-year term. The agreement indicates payments of \$2,500 monthly would be paid to defendant.

Previously, on or about November 5, 2009, Wells Fargo assigned the subject mortgage to Kondaur Capital Corporation ("Kondaur"). On or about November 29, 2010, Kondaur assigned the mortgage to defendant.

On or about September 29, 2014, defendant sent a letter to plaintiffs stating in sum and substance that plaintiffs were at risk of losing their home due to defaulting on the mortgage. Plaintiffs allege that they were not given a payoff letter or an accounting of their payment history regarding the promissory note. Plaintiffs further allege that defendant has refused to furnish the original mortgage and/or note to plaintiffs, and has refused to furnish documents regarding the payment of property taxes relating to the \$50,000 payment by plaintiff ANGEL PAULINO.

On or about May 27, 2014, plaintiffs received a letter from the Suffolk County Treasurer stating that payment for 2009/2010 taxes on the Property were not made. The statement reflected a balance of \$15,362.78. Plaintiffs contend that defendant refuses to pay the property taxes as promised, and therefore commenced the instant action against defendant. Plaintiffs assert six causes of action, to wit: unjust enrichment, conversion, fraud, breach of contract (two causes of action), and violation of General Business Law § 349.

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Plaintiffs have now filed the instant motion for summary judgment presumably on the first through fifth causes of action. Plaintiffs seek \$500,000 on the first cause of action, \$2 million on each of the second and third causes of action, \$100,000 on each of the fourth and fifth causes of action, and "a money judgment for actual damages to be determined at trial" on the sixth cause of action. Plaintiffs contend that the foregoing facts are undisputed, and therefore summary judgment is appropriate. Plaintiffs inform the Court that they are at risk of losing their home in a tax lien sale by the County of Suffolk.

In opposition, defendant alleges that plaintiffs have failed to submit a promissory note signed by plaintiff ANGEL PAULINO; that plaintiffs have not suffered any damage as a result of defendant purchasing their \$396,000 mortgage for \$220,000; and that the payment or non-payment of taxes on the Property does not evidence any wrongdoing on the part of the defendant, or any damage to plaintiffs, who are non-paying mortgagors.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Andre v Pomeroy*, 35 NY2d 361 [1974]). On a summary judgment motion, the court's function is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. If such issues exist, or "a material issue of fact is arguable, summary judgment should be denied" (*Celardo v Bell*, 222 AD2d 547 [1995]). Court may only grant a motion for summary judgment when a moving party makes a *prima facie* showing of entitlement to a judgment as a matter of law and offers sufficient evidence to demonstrate absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY3d 320 [1986]; *Napolitano v Suffolk County Dept' of Public Works*, 65 AD3d 676 [2009]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463 [1999]).

Here, the Court finds that plaintiffs failed to make a *prima facie* showing of entitlement to judgment as a matter of law. As discussed hereinabove, plaintiffs and defendant allegedly made an agreement with respect to the mortgage on the Property, but no such agreement has been submitted to the Court, and the promissory note submitted is not signed by plaintiff ANGEL PAULINO. Furthermore, plaintiffs have not established that they are entitled to the damages sought in the instant application. Inasmuch as plaintiffs failed to meet their *prima facie* burden, it is unnecessary to consider whether the papers

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submitted by defendant in opposition to the motion were sufficient to raise a triable issue of fact (see *McMillian v Naparano*, 61 AD3d 943 [2009]; *Yong Deok Lee v Singh*, 56 AD3d 662 [2008]).

Accordingly, this motion by plaintiffs for summary judgment is **DENIED.**

The foregoing constitutes the decision and Order of the Court.

Dated: January 12, 2018



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION