New York City Energy Efficiency Corp. v Suria
2019 NY Slip Op 30331(U)
February 11, 2019
Supreme Court, New York County
Docket Number: 655339/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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NEW YORK CITY ENERGY EFFICIENCY CORPORATION,

Plaintiff,

- v -

RAVINDRANATH SURIA, BFC002 11 WEST 126TH STREET LLC,BUILDFORWARD CAPITAL LLC,11 WEST 126TH HOLDINGS LLC,VAMANA REAL ESTATE EQUITIES I, LP, DAVID FINEHIRSH, URBAN ARTISAN DM1 LLC,11 WEST 126TH STREET LENDER 1 LLC,11 WEST 126TH STREET LENDER 2 LLC,AND JOHN AND JANE DOES 1-100,

Defendants.

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INDEX NO. 655339/2017

MOTION DATE

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for CANCEL/EXTEND LIS PENDENS.

In this action to set aside allegedly fraudulent mortgage transactions, defendants Ravidranath Suria, BFC002 11 West 126th Street LLC, Buildforward Capital LLC, 11 West 126th Holdings LLC, and Vamana Real Estate Equities I, LP move by order to show cause to vacate and/or cancel a notice of pendency filed by plaintiff New York City Energy Efficiency Corporation (NYCEEC). Defendants move pursuant to CPLR §§ 6501 and 6514(a) to vacate the notice of pendency for failure to strictly comply with the requirements of the statute. In the alternative, defendants move pursuant to CPLR § 6514(b) to cancel the notice of pendency because it was allegedly filed for a bad faith purpose. As a third option, defendants move pursuant to CPLR § 6515 to cancel the notice of pendency and secure plaintiff with defendants' undertaking. Plaintiff strenuously objects to vacating and/or canceling the notice of pendency. The decision and order is as follows:

PLAINTIFF'S COMPLAINT

Plaintiff in this matter is NYCEEC, a not-for-profit specialty finance company. Defendant Suria is a former hedge fund manager and now real estate investor. Plaintiff alleges that Suria controls the defendant entities BFC002, Buildforward, Vamana and 11 West Holdings (NYSCEF # 1 – Complaint at ¶4-7). Defendant BFC002 is a special purpose entity owned and/or controlled by Suria (*id.* at ¶4). Defendant Buildforward is the sole member and manager of BFC002 and is also owned and/or controlled by Suria (*id.* at ¶5). Defendant 11 West Holdings is a special purpose entity formed to acquire and hold the Property. There are two

members in 11 West Holding: defendants Vamana and Urban Artisan DMI LLC (UA).

Defendant David Finehirsh, a real estate developer, is the founder and principal of UA, which is the administrative member of 11 West Holdings (*id.* at ¶10). Defendants 11 West 126th Street Lender 1 LLC (11 West Lender 1) and 11 West 126th Street Lender 2 LLC (11 West Lender 2) are, collectively, special purpose entities formed by Millbrook Realty Capital (Millbrook), a lender of last resort owned and operated by brothers Charles and Marc Yassky (*id.* at ¶10).

This action concerns a project to develop a "passive house" -- a highly energy efficient structure -- in Harlem in the city, county, and state of New York. The property was acquired by Suria entity 11 West Holdings on June 26, 2014, with a plan to create a six-unit condominium. In or about Fall 2014, Suria's entity Buildforward approached NYCEEC to solicit a loan for the project (*id.* at ¶17). NYCEEC agreed to lend up to $2.9 million (*id.*).

NYCEEC's financing took the form of a participation loan extended in name and secured by a first mortgage on the property in favor of BFC002 (*id.* at ¶23). On or about November 21, 2014, BFC002 and NYCEEC entered into a participation agreement pursuant to which NYCEEC purchased from BFC002 an undivided 100% interest in the loan for a price of $600,000 (*id.* at ¶24). BFC002 did not contribute to the loan (*id.*).

Plaintiff alleges that following substantial delays and cost overruns in the project, Suria approached NYCEEC in the first quarter of 2016 for the remaining $2.3 million of NYCEEC's up to $2.9 million commitment. Plaintiff claims that at this point in the project, the cost had ballooned from $5.9 million in 2014 to over $7.8 million in 2016. To accommodate the expanded debt financing needs of the project, on March 8, 2016, 11 West Holdings and BFC002 executed a series of documents to increase the loan amount up to $4,600,000, which was secured by a modified first mortgage on the Property in favor of BFC002 (*id.* at ¶39). The loan was to be advanced in installments requisitioned by 11 West Holdings for payment of construction costs as incurred (*id.* at ¶42).

Contemporaneously with the increase in the loan, BFC002 and NYCEEC entered into an amended and restated participation agreement, dated March 8, 2016 (Participation Agreement), in which NYCEEC agreed to purchase from BFC002 an undivided interest in the loan of not less than a minimum percentage of 63.043% of the loan and not more than a maximum amount of $2.9 million (*id.* at ¶45). As before, while legal title to the loan and mortgage remained in the name of BFC002, NYCEEC, at all relevant times, maintained a 100% beneficial ownership of the loan and mortgage (*id.* at ¶ 55). Moreover, NYCEEC maintained control over the mortgage insofar as BFC002 was required to and relinquished in the

Participation Agreement any power to transfer, assign or modify the Loan or Mortgage to NYCEEC (*id.* at ¶¶ 46, 50). Indeed, BFC002 incorporated its lack of capacity to sell, compromise or extinguish NYCEEC's ownership of the Loan and Mortgage into BFC002's fundamental governance document, the BFC002 Limited Liability Company Agreement (*id.* at ¶¶31-33).

Plaintiff claims that between March 8 and November 10, 2016, it fulfilled the loan request and provided $1.8 million to the project, bringing its funding to $2.4 million. At that time, plaintiff claims that NYCEEC's funding was the sole source of debt on the project and that it funded 100% of the loan. Plaintiff alleges that a mere month after NYCEEC increased its funding to $2.4 million, Buildforward requested the final $500,000 to bring NYCEEC's total to its maximum amount of $2.9 million. Plaintiff at this point demanded additional information from Suria and Suria-entities. Plaintiff alleges that despite the withholding of information, it agreed to advance an additional $200,000 and a second payment of $300,000 at a later date. Suria promised a bridge loan as well, but it never materialized, and Suria allegedly disappeared until February 2017.

In February 2017, plaintiff claims that Suria admitted to NYCEEC that the project was underwater and that losses were forthcoming (*id.* at ¶64). NYCEEC responded that it would not be willing to restructure the financing or convert into equity any portion of their lien. Suria was then again silent until April 2017, when he again informed NYCEEC that the project was stopped because of cost overruns and that he was trying to obtain financing. NYCEEC offered to finance more of the project, but requested more information that Suria refused to provide.

Unbeknownst to plaintiff, Suria was attempting to refinance the loan instead of seeking equity investors. Suria worked with the Yassky defendants to form the 11 West Lender 1 and 11 West Lender 2 entities that would later refinance the original loan.

Plaintiff alleges that on or about June 23, 2017, the defendants engaged in a series of transactions designed to (i) refinance the loan and (ii) assign and modify the mortgage in order to eliminate the mortgage owned by NYCEEC and to encumber the property with new mortgage debt provided by the new lenders. The transactions involved: (a) 11 West Holdings, with BFC002, Buildforward, Vamana, Suria, UA, and Finehirsh – executing a new mortgage granting to 11 West Lender 1 a first mortgage lien on the property, free and clear of any liens or encumbrances, including the mortgage in which NYCEEC owned a 100% interest, in order to secure new debt of $944,502.44; (b) contemporaneously, BFC002 assigned the NYCEEC mortgage to 11 West Lender 1; (c) 11 West Holdings then executed a Consolidated, Amended and Restated Mortgage, Assignment of Leases and Rents and Security Agreement (11 West Lender 1 Mortgage) in favor of 11 West Lender 1, purporting to consolidate the Mortgage (securing up to $4.6 million, $2.6 million of

which had been funded by NYCEEC) with the new mortgages granted to 11 West Lender 1 Assignment, in order to secure a modified amount of debt owing to 11 West Lender 1 totaling $2 million; and (d) 11 West Holdings, acting in concert with BFC002, Buildforward, Vamana, Suria, UA and Finehirsh, executed in favor of 11 West Lender 2 both a "Building Mortgage, Assignment of Leases and Rents and Security Agreement" and a "Project Mortgage, Assignment of Leases and Rents and Security Agreement" (collectively, the "11 West Lender 2 Mortgages"), granting to 11 West Lender 2 a second mortgage lien, junior to the 11 West Lender 1 Mortgage, to secure purported loans of $3,660,888.80 and $339,111.20 (*id.* at ¶¶85-94). In effect, defendants assigned and eliminated NYCEEC's mortgage and NYCEEC alleges that it has received nothing for the elimination of its mortgage worth $2.6 million.

Plaintiff proceeded on August 8, 2017, to file the notice of pendency at issue in this motion and initiated this lawsuit on August 14, 2017. Plaintiff's pleadings allege: (1) fraudulent conveyance of the mortgage under New York Debtor-Creditor Law (DCL) §§ 276, 278, or 279; (2) attorneys' fees pursuant DCL §§276 and 276-a; (3) conversion against BFC002, 11 West Holdings, and 11 West Lender 1; (4) unjust enrichment or constructive trust against BFC002, 11 West Holdings, and 11 West Lender 1.

DISCUSSION

To maintain a notice of pendency, strict compliance with CPLR § 6501 is required (*see 5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320-321 [1984]). On a motion to cancel a notice of pendency, the court is limited to reviewing plaintiff's "pleading to ascertain whether the action falls within the scope of CPLR 6501" (*id.*). In the instant matter, the critical issue is whether the mortgage in question affects "the title to, or the possession, use or enjoyment of, real property" (CPLR 6501). As a notice of pendency is such an "extraordinary privilege", the scope of actions affecting "the title to, or the possession, use or enjoyment of, real property" is narrow (*5303 Realty Corp.*, 64 NY2d at 320-321). The "usual object of filing a notice of *lis pendens* is to protect some right, title or interest claimed by a plaintiff in the lands of a defendant which might be lost under the recording acts in event of a transfer of the subject property by the defendant to a purchaser for value and without notice of the claim" (*Braunston v Anchorage Woods, Inc.*, 10 NY2d 302, 305 [1961]).

Plaintiff's notice of pendency is valid pursuant to CPLR §§ 6501 and 6514(a), and the first branch of defendants' motion to vacate the notice of pendency due to non-compliance with the statute is denied. Defendants argue that because the primary issue here is the conveyance of the mortgage from plaintiff to 11 West Lender 1, the notice of pendency cannot stand because the cause of action would not directly affect the property or title. Defendants point to *Singh v Becher* for the

proposition that when a plaintiff seeks to impose a constructive trust on the assignment of a mortgage, it does not "affect the title" of the real property (*Singh v Becher*, 249 AD2d 154, 154-155 [1st Dept 1998]).

Plaintiff counters that *Singh* bolsters its case for maintaining the notice of pendency because *Singh* also states that "the execution of a new mortgage or the foreclosure of an existing mortgage" would affect the underlying property (*id.*). The court notes that *Singh* addresses the language of CPLR § 507 and not CPLR § 6501, however, the language between the two statutes regarding whether "the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property" is identical and both statutes relate to real property issues.

Plaintiff's assessment is correct. If plaintiff had merely alleged that its interest in the mortgage was improperly transferred or assigned, then the notice of pendency would be vacated. However, plaintiff has alleged more here – namely, that its interest in the mortgage was fraudulently conveyed and that defendants entered into new mortgage arrangements that altered title to the property. Furthermore, a notice of pendency properly lies in a proceeding where the cause of action seeks to set aside a fraudulent conveyance of a mortgage under the DCL (*see Freudman v Freudmann*, 26 AD2d 968 [2d Dept 1971]).

The following cases relied upon by defendants are inapposite here: *Chambi v Navarro, Vives & Cia Ltd.* (95 AD2d 667 [1st Dept 1983]), *Ostad v Nehmadi*, (31 Misc. 3d 1211(A) [Sup Ct, NY County, 2011]), *Poguntke v Corrier* (2015 WL 1928603 [Sup Ct, NY County, 2015]). These cases all relate to issues regarding lis pendens and ownership of corporate shares, which is distinct from the instant matter which regards the fraudulent conveyance of a mortgage instrument and the issuance of new mortgages that potentially impact title. Additionally, defendants point to *Johnson v. Augsbury* 167 AD2d 783 (3d Dept 1990), *Mortgage Elect. Registr. Sys. v Bukowski* (2016 WL 909523 [Sup Ct, NY County, 2016]), and *Smith v Bank of America* (103 AD3d 21 [2d Dept 2012]), for the proposition that a mortgage is personal property and does not affect title for purposes of CPLR § 6501. However, none of the cases relate to the propriety of a notice of pendency.

Defendants' CPLR § 6514(b) motion is also denied. CPLR § 6514(b) allows the court to cancel a notice of pendency "if the plaintiff has not commenced or prosecuted the action in good faith." Defendants' basis for the allegation of bad faith is that due to the filing of the notice of pendency, the 11 West Lender entities have initiated foreclosure proceedings, and the project is currently stopped (NYSCEF #46 – Pl's Memo of Law at 16). Defendants claim that the only logical conclusion is that plaintiff is using the notice of pendency as a sword, and not a shield (*id.*; *see also Chambi*, 95 AD2d at 667 ["a notice of pendency is used as a shield and not as a sword"]). There is nothing in the record to indicate that NYCEEC is operating in

bad faith here and its allegations are serious. Accordingly, the branch of defendants' motion to cancel the notice of pendency on CPLR § 6514(b) grounds is denied.

As to defendants' CPLR § 6515 motion, it is granted. CPLR § 6515 provides the court two options to cancel a notice of pendency at its discretion, provided that

> "(1) the court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking; or (2) in such action, the plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for the damages that he or she may incur if the notice is not cancelled."

"Although the language of CPLR 6515 makes both subsections applicable to actions where 'the judgment demanded would affect specific real property,' the preferred course in a claim for specific performance is the utilization of subdivision 2 by cancelling the notice of pendency upon an undertaking by the defendant seller unless plaintiff buyer posts an undertaking which will indemnify defendant" (*Andesco, Inc. v Page*, 137 AD2d 349, 357 [1st Dept 1988] [citations omitted]; *see also Ansonia Realty Co. v Ansonia Associates*, 117 AD2d 527 [1st Dept 1986]). Accordingly, CPLR § 6515(2) is the preferred approach here as plaintiff seeks specific performance to void the allegedly fraudulent mortgage transactions at issue.

However, while defendant might be entitled to relief under CPLR § 6515(2), it is unclear from the record before the court what the bond amounts would need to be in this matter to sufficiently protect the interests of both parties (*see Jacobs v Abramoff*, 148 AD2d 497, 499 [2d Dept 1989] ["As the court did not have sufficient evidence before it for the purposes of determining what would constitute an adequate undertaking, it did not improvidently exercise its discretion in denying the relief sought."]. Additional information is required for this court to utilize the preferred CPLR § 6515(2) bonding process. Indeed, defendants citing to *Matter of CDR Creances S.A.S. v First Hotels & Resorts Invs., Inc.* (140 AD3d 558 [1st Dept 2016]) argue in their brief that the notice of pendency can be canceled under CPLR § 6515 without having to put up any undertaking, However, defendants' assertion is flatly incorrect – the *CDR Creances* case did not address an application under CPLR 6515, and there is nothing in that case that would indicate that this court could ignore the very clear procedures outlined in CPLR § 6515.

As such, this court is unable to utilize the double bonding process outlined in CPLR § 6515(2). Instead, the court will utilize the single bonding process of CPLR § 6515(1). While from the record it appears that plaintiff has expended $2.6 million on the project, the court needs more information from the parties to determine the amount of defendants' undertaking. The parties will appear in Part 33 for a conference to determine the amount.

Accordingly, it is hereby ORDERED that, the court having determined that adequate relief can be secured to the plaintiff by the giving of an undertaking, the motion of defendants Ravidranath Suria, BFC002 11 West 126th Street LLC, Buildforward Capital LLC, 11 West 126th Holdings LLC, and Vamana Real Estate Equities I, LP for an order for the cancellation of a notice of pendency filed against them pursuant to CPLR § 6515(1) is granted to the extent that these defendants shall give and file an undertaking; it is further

ORDERED that the parties are to appear in Part 33, 71 Thomas St., New York, New York 10013 on March 6, 2019, at 10:00 AM for a conference to determine the amount of defendants' undertaking to facilitate the cancelation of the notice of pendency; and it is further

ORDERED that the branches of defendants' motion to cancel the notice of pendency pursuant to CPLR §§ 6501 and 6514 are denied.

This constitutes the Decision and Order of the court.

2/11/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE