

Chondrite Asset Trust v 9 Jewels, LLC
2019 NY Slip Op 31334(U)
April 29, 2019
Supreme Court, New York County
Docket Number: 850005/2018
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X INDEX NO. 850005/2018

CHONDRITE ASSET TRUST,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 002

- v -

9 JEWELS, LLC, JEAN AHQUENOU AGBODJOGBE, BOARD OF MANAGERS OF 325 FIFTH AVENUE CONDOMINIUM, NYC ENVIRONMENTAL CONTROL BOARD, NYC DEPARTMENT OF FINANCE, JOHN DOE TENANTS,

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE

The motion to intervene and to dismiss this action by non-party Alia Salem Al-Sabah (“Movant”) is denied.

Background

This mortgage foreclosure case relates to an apartment located at 325 Fifth Avenue in Manhattan. Plaintiff claims that defendant 9 Jewels LLC (“Jewels”) owns the property and took out a \$1,522,000 note and mortgage on the property from non-party Sharestates Investments, LLC Series BS2016-00500 (“Sharestates”) on December 14, 2016. The mortgage and note were purportedly assigned to plaintiff on February 8, 2017. Plaintiff alleges that Jewels failed to make the mortgage payments beginning on November 1, 2017 and that the loan matured on January 1, 2018 and has not been paid.

Movant claims that she is the rightful owner of the property because she paid for the property, her daughter lives there, and she did not authorize Jewels to take out a mortgage on the property. Unlike in many mortgage foreclosure actions where the mortgage is used to buy the

property, the apartment here was purchased with cash in September 2015 and the mortgage was executed in December 2016. Movant argues that defendant Agbodjogbe engaged in a fraudulent scheme with this apartment and other properties. Movant admits that she entrusted Agbodjogbe to establish an LLC in which Movant would be the sole member so that she could make investments in the United States (Movant is a Kuwaiti national).

In fact, Agbodjogbe named himself as the sole member of Jewels and purportedly took out a mortgage without Movant's permission and kept the money by allegedly telling Sharestates that Movant gifted the money to purchase the apartment. Movant claims Sharestates knew this was a lie. Movant also contends that Sharestates knew that Movant's daughter lives in the property and that any reasonable lender's due diligence would have revealed Agbodjogbe's scheme.

Movant claims that this Court should dismiss or, in the alternative, stay this action because her contentions about this mortgage are part of a federal litigation in Maryland. Movant argues that the Maryland action will determine whether the mortgage at issue in this case was a legitimate transaction or whether it must be annulled because it was secured by fraud.

In opposition, plaintiff claims that Sharestates performed due diligence before entering into the transaction with 9 Jewels. Plaintiff claims that a credit search was performed, there was an appraisal and a title report was created. Plaintiff claims that at the closing, Agbodjogbe and his counsel, as well as counsel for Sharestates, were present. Plaintiff points out that Agbodjogbe executed a residency affidavit in which he admitted that he was not using the apartment as his primary residence and he produced a lease for the property (*see* NYSCEF Doc. Nos. 59-60). Agbodjogbe also executed a personal guaranty in favor of Sharestates (NYSCEF Doc. No. 63).

Plaintiff claims that Movant should have known what Agbodjogbe was doing because the organizational documents for Jewels clearly show that Agbodjogbe is the sole member and it makes no sense that she became suspicious in spring 2016 when the property was purchased in September 2015. Plaintiff also points out that Movant did nothing to prevent the closing in December 2016 despite the fact that she was allegedly already suspicious. Plaintiff claims that Movant has no right to intervene and asserts that all the relevant documents establish that Agbodjogbe was the sole member of Jewels and was acting on behalf of Jewels.

Discussion

“CPLR 1012(a), specifically, subdivisions 2 and 3, provides that upon timely motion, any person shall be permitted to intervene in an action when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment (subdivision 2) or when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment (subdivision 3). CPLR 1013 provides that upon timely motion, a court may, in its discretion, permit intervention when, inter alia, the person's claim or defense and the main action have a common question of law or fact, provided the intervention does not unduly delay determination of the action or prejudice the rights of any party” (*Yuppie Puppy Pet Products, Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 200-01, 906 NYS2d 231 [1st Dept 2010] [internal quotations and citations omitted]).

“Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action. Distinctions between intervention as of right and discretionary intervention are no longer sharply applied” (*id.* at 201) [internal quotations and citations omitted]).

Here, the Court must consider the allegations contained in the proposed pleading by Movant to assess whether she has a bona fide interest in this action. According to Movant, Agbodjogbe told Movant he formed Jewels on her behalf and that she was the sole member and owner of Jewels (NYSCEF Doc. No. 34, ¶ 18). Jewels was formed in Maryland in March 2015 (*id.*).

Movant then asked Agbodjogbe to buy an apartment for her daughter in New York City in July 2015 (*id.* ¶ 19). Movant claims that she toured the condo at 325 Fifth Avenue and told Agbodjogbe to purchase the property (*id.* ¶ 20). Movant claims that Agbodjogbe sought to extract as much cash as possible by mortgaging the unit, but he was unable to get a mortgage on the property from a “reputable lender” because due diligence would have shown that he did not own the premises (*id.* ¶¶ 25-26).

Movant claims that an entity called World Business Lenders (“WBL”) allegedly failed to do proper due diligence and did not question Agbodjogbe’s financial records or the source of his funds (*id.* ¶¶ 30-34). WBL purportedly executed a mortgage on the property for \$600,000 with an extremely high interest rate (*id.* ¶ 37). Movant claims there are recorded telephone calls between Agbodjogbe and WBL in August 2016 that show that WBL knew that Movant was the source of the wire transfers to Agbodjogbe (*id.* ¶ 40). Allegedly two days after executing the first mortgage, Agbodjogbe sought another loan (*id.* ¶ 39). In August 2016, WBL allegedly entered into a second mortgage agreement on the property for \$639,528.31 which was consolidated with the first mortgage into a single \$1.2 million mortgage (*id.* ¶ 44).

Movant claims that a broker emailed Sharestates in October 2016 to see if Sharestates would be willing to refinance the property (*id.* ¶ 50). Movant alleges that “Given the modest cash flows Agbodjogbe’s restaurant business generated, the two recent loans from WBL, and the

willingness to pay \$150,000 in prepayment penalties on the Second WBL Mortgage, Sharestates should and would have had serious doubts as to Agbodjogbe's ability to repay such a large loan" (*id.* ¶ 50).

Movant claims that she grew suspicious in the spring of 2016 and "demanded documentation relating to the entities purportedly formed and transactions purportedly entered into by Agbodjogbe on her behalf" (*id.* ¶ 59). However, Movant admits that Agbodjogbe delayed responding and eventually became unresponsive to Movant's communication (*id.* ¶ 60). Movant alleges that "Based on her suspicions and Agbodjogbe cutting off all communication with her, in November 2016, Ms. Al-Sabah conducted an investigation into Mr. Agbodjogbe and his businesses and discovered his fraud" and later commenced lawsuits against Agbodjogbe in March 2017 (*id.* ¶ 61). Movant also claims that Sharestates executed a mortgage on a property ostensibly owned by Agbodjogbe in Baltimore after Movant had already sued Agbodjogbe for fraud in 2017 (*id.* ¶ 64). This was another property Movant had asked Agbodjogbe to buy for her.

In considering these allegations, the Court finds that Movant has clearly pled a fraud case against Agbodjogbe. But completely absent from her allegations is any mention of plaintiff's role in the fraud. Movant attempts to address this point in her proposed pleading by claiming in a footnote that she treats Sharestates and plaintiff together because Sharestates allegedly retained an economic interest in the mortgage (*id.* n 2). Unfortunately, this conclusory assertion is not backed by any allegations detailing why the Court should essentially treat Sharestates and plaintiff as one entity. Movant does not allege, for example, that Sharestates and plaintiff share members or explain why it contends that plaintiff did not pay fair value for the mortgage.

Movant cannot combine the roles of Sharestates and plaintiff without more detailed allegations about the positions of each entity. This issue is critical because the lenders involved in this mortgage engaged in numerous transactions; while not dispositive, plaintiff was surely entitled to consider the fact that other entities previously loaned money to Jewels for this property when conducting its own due diligence. And Movant does not allege what due diligence plaintiff should have conducted or failed to do. Instead, she provides specific complaints about WBL and Sharestates.

If her allegations are true that she should have been named as the sole member of Jewels, then the central fraudulent occurrence was the formation of that LLC. The purchase of the property seems to have gone according to plan—Jewels bought the property in its own name. Movant's lack of interest in the property stems from how Jewels was created rather than the acquisition of the apartment. The Court must also consider the fact that Movant admits that she wanted to remain anonymous in these transactions. That preference required an extra layer of paperwork (the formation of the LLC) to conduct these transactions. Because Movant wanted to purchase real estate in a clandestine way, Movant should have ensured that she had the sole interest in that entity before directing Agbodjogbe to purchase the property through Jewels.

The Court also observes that a closer look at Movant's allegations concerning the purchase of the property reveals numerous omissions about this transaction. Notably absent is any explanation of how the transaction was completed (*see id.* ¶ 22). According to Movant she was the sole member of Jewels at the time of the purchase, but she does not claim that she signed anything related to purchase, that she authorized Agbodjogbe to sign on her behalf or that she attended the closing. Rather, she vaguely asserts that Agbodjogbe told her she was now the owner of the property (*id.*).

Bona Fide Purchaser for Value

“The rights of an encumbrancer for value are protected unless it appears that [the encumbrancer] had previous notice of the fraudulent intent of [its] immediate grantor, or of the fraud rendering void the title of such grantor. A mortgagee will be charged with constructive notice if it is aware of facts that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue. If a ‘reasonable inquiry’ would reveal some evidence of fraud, then failure to ‘make some investigation’ will divest the mortgagee of bona fide encumbrancer status. A mortgagee may make a prima facie showing that it is a bona fide encumbrancer by presenting a title search showing a clear chain of title” (*Miller-Francis v Smith Jackson*, 113 AD3d 28, 34, 976 NYS2d 34 [1st Dept 2013] [internal quotations and citation omitted]).

From plaintiff’s perspective, it simply took over the mortgage from Sharestates and nothing about the transaction was out of the ordinary. The property at issue was purchased in 2015 by an entity whose sole member was Agbodjogbe and plaintiff did a title search confirming that entity (Jewels) owned the property (NYSCEF Doc. No. 49). There was nothing to put plaintiff on notice that Movant’s purported interest in the property was fraudulently extinguished.

And, as the complaint alleges, payments were made on the property until November 1, 2017 and there is no contention Jewels defaulted on any payments prior to the assignment to plaintiff. If a borrower offers a property purchased for over \$2 million as collateral for a loan worth \$1.2 million and makes payments under the loan, then why should this Court second guess a lender’s decision? The due diligence Movant contemplates would require a lender to investigate and confirm the sources of all funds available to a borrower. While borrowers likely

expect that their assets, income and liabilities will be examined, they do not expect that they will have to justify every deposit entry in their accounts. That level of scrutiny would delay transactions beyond all acceptable timelines. The point of due diligence is to ensure that the lender can recoup the investment if the borrower defaults, not to explore every potential source of fraud.

Movant's contention that a reasonably diligent lender would not have given the loan had they properly investigated the source of the wire transfers used to purchase the property is not reasonable. There may be lenders who might have questioned Agbodjogbe's claim that this was a gift (as Movant contends) but, as stated above, the undisputed purpose of this LLC was to buy a property anonymously. Of course, there would be large wire transfers into an investment vehicle set up for one purpose—to buy real estate.

That the lender allegedly knew that the money came from someone else is not automatically evidence that the entity would be unable to repay or that some nefarious scheme was afoot. Here, the lender had the property as collateral, the personal guaranty from Agbodjogbe, high interest rates, and the fact that Agbodjogbe had not defaulted on the prior mortgages. It may have been a risky loan, but it was not unreasonable for the lender to do the transaction.

The Court finds that plaintiff was a bona fide purchaser for value of the note and the mortgage and Movant may not intervene on the claim that the mortgage should be cancelled. As the Court of Appeals has held, "a mortgage may not be set aside solely because the underlying transaction was tainted by a fraudulent representation" (*Jo Ann Homes at Bellmore, Inc. v Dworetz*, 25 NY2d 112, 122, 302 NYS2d 799 [1969]).

Laches

The doctrine of laches also compels the Court to deny Movant's motion to intervene. "Laches is an unreasonable delay by a plaintiff that prejudices a defendant. Because the effect of delay may be critical to an adverse party, delays of even under a year have been held sufficient to establish laches" (*Philippine Am. Lace Corp. v 236 West 40th St. Corp.*, 32 AD3d 782, 784, 822 NYS2d 25 [1st Dept 2006] [internal quotations and citations omitted]).

Here, Movant admits she became suspicious in spring 2016 and reached out to Agbodjogbe for answers at some unspecified time but he delayed responding before completely cutting off communications. According to Movant, she did nothing until November 2016, when she began an "investigation." Of course, Movant did not file a lawsuit against Agbodjogbe until March 2017. Although Movant contends *ad nauseam* that WBL or Sharestates should have known Agbodjogbe was up to no good, Movant sat on her suspicions for over a year. During that time period, multiple mortgages were executed on the property and plaintiff took over the note and mortgage in February 2017.

Had Movant promptly demanded something from Agbodjogbe that proved she had an interest in Jewels or in the property, she would have had her suspicions aroused. She could have demanded to see the articles of organization for Jewels when it was formed in 2015 and, if Agbodjogbe refused, reviewed publicly-filed documents for Jewels in Maryland. Or she could have done an ACRIS search for this property when she became suspicious in spring 2016.

In other words, there were many painless steps Movant could have taken to arouse or confirm her suspicions about Agbodjogbe long before plaintiff took over the note and mortgage for the property. Obviously, Movant put a lot of trust in Agbodjogbe. And that blind trust apparently prevented her from verifying anything about the transactions at issue here. It would

be incredibly prejudicial for the Court to allow Movant the ability to claim that the mortgage should be cancelled based on fraud where she did not take even the most basic steps that would have revealed the alleged fraud months before plaintiff ever got involved. Movant did absolutely no due diligence on her own behalf until it was too late. It is simply unfair to punish plaintiff because of Movant's delay; had she acted at all, she could have prevented any mortgage being placed on the property.

Summary

If Movant's claims are proved true, then she was the victim of an unfortunate fraudulent scheme. Nothing prevents her from seeking recovery against the purported wrongdoer (Agbodjogbe). But in this case, Movant wants to intervene and dismiss a case where a third-party entered into a transaction with Jewels. That the loan might have been procured by a series of underlying fraudulent acts is besides the point (*see Jo Ann Homes at Bellmore, Inc*, 25 NY2d at 122). This inquiry is whether the facts at the time plaintiff took over the loan raised red flags that a reasonable lender would not have ignored. There is nothing in this record to indicate that a reasonable lender would not have entered into the loan that forms the basis of this foreclosure action. The fact that the interest rate was high has nothing to do with whether a lender should have known about the alleged fraud. It might mean Agbodjogbe was not a good negotiator, but the fact that he agreed to terms favorable to the lender does not establish that the lender did not do its due diligence.

Plaintiff is not an investigative agency; its role is not to suspect fraud in all situations and pursue every lead. It is a lender and some lenders are willing to take more risks than others. Of course, in hindsight, it is easy to argue that Sharestates or WBL did shoddy due diligence and that if they had properly questioned the source of Jewels' funding to purchase the property, it

would have immediately revealed a massive fraud. But that revisionist history misses a key point—the property upon which the mortgage was secured was purchased for over \$2 million in 2015 by an entity in which Agbodjogbe was the sole member. And the mortgage was worth less than the value of the property. This is not a case where the Court should be skeptical because the loan amount is significantly greater than the property value. After all, that is the point of securing the note with a mortgage on the property—to make the investment worthwhile for the investor.

Accordingly, it is hereby

ORDERED that the motion to intervene by non-party Alia Salem Al-Sabah is denied.

Next Conference: July 30, 2019 @ 2:15 p.m. By that time the Court expects that plaintiff will have moved for an order of reference. Plaintiff’s previous summary judgment motion was denied for non-appearance (NYSCEF Doc. No. 29).

4.29.19

DATE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE