Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

x

45-34 PEARSON STREET LIC, LLC and 45-34 PEARSON SHLAF LLC,

Plaintiff(s)

-against-

SHAI OHANA, YECHESKEL ELIAS, CADIT JACOBI a/k/a CADIT ELIAS, RENOVATIONS ARE US LLC, PEARSON STREET FUNDING LLC, SANTANDER BANK, N.A., AM FEURMAN LLC, MJA FINANCIAL LLC, JOHN DOES 1 through 30 and ABC CORPS. 1 through 30.

Defendant(s)

x

Index No.: 706833/2016

Motion Date.: February 26, 2019

Motion Cal. No.: 50 & 49

Motion Seq. No.: 15 & 16

FILED
APR 25 2019
COUNTY CLERK
QUEENS COUNTY

PEARSON STREET FUNDING LLC, AM FEURMAN LLC and MJA FINANCIAL LLC,

Third-Party Plaintiff(s)

-against-

ALAN GERSON and BRUCE MONTAGUE & PARTNERS

Third-Party Defendants(s)

x

The following papers numbered EF294 - EF 345, EF 358 - EF 469, and EF 476 - EF 498 read on this motion by Pearson Street Funding, LLM, AM Feurman LLC and MJA Financial LLC ("the Lender defendants"), for summary judgment dismissing the tenth (declaratory judgment), and eleventh (quiet title) causes of action against Pearson Street LIC, and twelfth (unjust enrichment) cause of action as against Feurman and MJA; and motion by Shai Ohana, Yecheskel Elias, Cadit Jacobi a/k/a Cadit Elias and Renovations Are Us LLC (the Ohana defendants), for summary judgment in their favor pursuant to CPLR §3212.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits.....	EF294 - EF345, EF358 - EF377
Answering Affidavits - Exhibits.....	EF378 - EF450
Reply Affidavits.....	EF452 - EF469, EF476 - EF498
Other.....	EF451

Upon the foregoing papers it is ordered that the motions are combined herein for disposition, and determined as follows:

Plaintiffs in this, *inter alia,* fraud action seek damages based upon an alleged fraudulent scheme by defendants Shai Ohana, Yescheskel Elias and Cadit Jacobi (collectively herein "the Ohana defendants"), to refinance property located at 45-35 Pearson Street, in Long Island City, New York ("the property"). The vacant land property is owned by 45-34 Pearson Street LLC ("the Company") but, in obtaining the fraudulent loans, Ohana, Elias and Jacobit represented that Ohana was the sole owner of the Company. Specifically, the complaint alleges that Ohana, Elias and Jacobi used fake documents to take out four successive fraudulent mortgage loans in the Company's name from the Lender defendants.

Facts

The undisputed record indicates that in mid to late 2014, a group of investors led by Arik Mor and Uriel Zichron, entered into a joint venture to invest in and purchase vacant land located at 45-35 Pearson Street, with the intention of developing it into a residential building. Certilman Balin Adler & Hyman LLP ("Certilman"), a law firm based in Long Island, represented Mor and Zichron, and acted as counsel to the Company, and caused the Company's Articles of Organization to be filed with the New York Department of State on November 14, 2014.

Prior to the Company's acquisition of the property, Zichron and Mor had retained a company called Renovations Are Us, LLC ("Renovations"), as a contractor to perform work on other properties in which Zichron and Mor were involved. Before it ultimately decided to sell the property, the Company planned to retain Renovations to serve as the general contractor to construct an apartment building on the property. Since the Company had no office or other place of business in New York or the United States, Zichron and Mor had asked Ohana and Elias, and they agreed, to permit the Company to use the address of their company, Renovations, as the Company's address in the United States. Ohana & Elias further agreed to forward to Zichron and Mor in Israel, any communications and correspondence received on behalf of the Company. Zichron & Mor had also asked Ohana

to assist them in retaining Certilman and filing for the Articles of Organization of the Company. However, Ohana never had an ownership interest in the Company or the Property, and the Company never authorized Ohana or any of the Ohana defendants to take out any mortgage loans on the Company's behalf.

The Company's Operating Agreement effective as of November 19, 2014 ("the Company Operating Agreement"), names 45-34 Pearson Shlaf LLC as the "Managing Member" and an entity entitled Shlaf 1 LLC ("Shlaf 1"), as the "manager", to "take any action of any kind ... and to sign any document on behalf of the Company. The Company Operating Agreement further states: "The Manager undertakes Uriel Zichron and Arik Mor shall [sic] manage the Company on behalf of the Manager." Zichron and Mor have been the sole managers of the company, Pearson Shlaf and Shlaf 1, from their respective formations through the present.

The Company purchased the Property on February 12, 2015, for $3,500,000, all cash with no financing. Mor signed the Real Property Transfer Report that was publically filed with the Deed on ACRIS on the Company's behalf. The Company decided to sell the Property in or around September, 2015. Around the same time, it is alleged, Ohana and Elias developed a scheme to steal the Company's assets by fraudulently presenting Ohana as the sole member and manager of the Company, and by taking out mortgage loans on the Property.

Specifically, the complaint alleges that the Ohana defendants fraudulently took out four successive mortgage loans in the Company's name from the Lender defendants against the premises. It further alleges that Ohana implemented the scheme by creating a wholly fake operating agreement stating that he was the sole member of the Company ("the fake Operating Agreement"). In addition to the fake operating agreement, Ohana allegedly also created (or caused to be created) in an attempt to cloak himself with apparent authority to act on behalf of the Company: (1) a fake and fraudulent Consent and Certification of the Company, also allegedly drafted and signed by Ohana, without the knowledge or consent of the Company ("the Fake Consent") and (2) a fake and fraudulent Certificate of Authority allegedly drafted and signed by Ohana attaching the Fake Operating Agreement and the Fake Consent. Herein a False Opinion Letter, the Fake Operating Agreement, the Fake Consent, and the Fake Certificate of Authority, are collectively referred to as "the Fake Documents."

Then, it is alleged that, between September 15, 2015 and February 19, 2016, Ohana and or Elias used the Fake Operating Agreement to take out three purported loans (the "Original Feurman Loans"), secured by three purported mortgages (the "Original Feurman Mortgages"), on the Property totaling $725,000, purportedly between the Company, as mortgagor, and defendants AM Feurman and MJA Financial, as nominees for various

undisclosed mortgagees, without the knowledge, or actual or apparent authority of anyone associated with the Company. It is further alleged that Ohana also used the Fake Documents to take out a fourth mortgage loan for $525,000, this time from another "hard money" lender, Pearson Street Funding, which is an affiliate of Hirschmark Capital (Hirschmark). This loan was then consolidated, amended and restated into a $1,250,000 purported mortgage loan, the net loan proceeds of which were used in part to pay off the first three loans made by AM Feurman and MJA Financial. Pearson Street recorded the Consolidated Pearson Mortgage on April 26, 2016.

It is further alleged that Gerson, Esq. was never retained by the Company or 45-34 Pearson Shlaf LLC (Pearson Shlaf); that Gerson, Esq. never had any contact with anyone at the Company or Pearson Shlaf, but was instead hired by Ohana; and that the False Opinion Letter stated that Ohana had authority to act on behalf of the Company.

Plaintiffs submit that AM Feurman and MJA Financial made the Original Feurman Loans and Original Feurman Mortgages even though they were on notice of indicia of fraud or "red flags". While the Fake Operating Agreement that Ohana used to obtain the fraudulent Original Feurman Loans and Original Feurman Mortgages, which was backdated to the date that the Company was formed, purport to state that Ohana is and therefore always was, the sole member and manager of the Company, the Real Property Transfer Report, publicly filed on ACRIS, attached to the Deed transferring the Property to the Company and which would customarily be reviewed by any lender prior to entering into any mortgage, bears Mor's name as the Company's sole representative. Plaintiffs submit that in making the loans, the Lender defendants ignored several "red flags" that should have alerted a prudent lender that the transactions were potentially fraudulent. In opposing the motion, plaintiffs submitted a copy of the Deed and Real Property Transfer Report that Mor signed on the company's behalf.

Plaintiffs further submit that a cursory review of the Fake Operating Agreement, which is printed with a typeface and font different from all other documents presented to the Lender defendants in connection with the mortgage loans, and which bears a vertical line running through the document that appears to be the result of it being faxed from a faulty fax machine, and which makes no reference to Mor, should have also raised "red flags" and have alerted the Lender defendants to potential fraud.

With regards to the first three mortgage loans aggregating $725,000, the record indicates that AM Feurman and MJA Financial, who closed the loans as "nominees" for undisclosed "hard money" lenders, wired or deposited the net proceeds of these first three loans directly into the account in the name of Renovations, a business owned by Ohana and Elias, instead of to the Company. Plaintiffs submit that the request to deposit the loan

proceeds into an account other than in the name of the Company, should also have raised a "red flag" and alerted the Lender defendants to potential fraud.

The Lender defendants move for summary judgment dismissing the tenth and eleventh causes of action against Pearson Street LIC, and for dismissal of the twelfth cause of action as asserted against Feurman and MJA. The Ohana defendants move for summary judgment dismissing the complaint, insofar as asserted against them. The motions are opposed by the respective parties.

Motion by Pearson Street Funding, LLC, AM Feurman LLC and MJA Financial, LLC

The branches of the motion by the Lender defendants which are for summary judgment dismissing the tenth (declaratory judgment), and eleventh (quiet title) causes of action against Pearson Street, are denied. " 'One who deals with an agent does so at his [or her] peril, and must make the necessary effort to discover the actual scope of authority' " *(Fitzgibbon v Abatelli Real Estate*, 214 AD2d 642, 644 [1995], *quoting Ford v Unity Hosp.*, 32 NY2d 464, 472 [1973]). "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority" (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]). "It is axiomatic that apparent authority must be based on the actions or statements of the principal" (*ER Holdings, LLC v 122 W.P.R. Corp.*, 65 AD3d 1275, 1277 [2009]; *56 E. 87th Units Corp. v Kingsland Group, Inc.*, 30 AD3d 1134, 1135 2006]). Here, the Lender defendants failed to identify any act or word by which Pearson LIC conferred apparent authority upon Ohana (*see Hallock v State of New York*, 64 NY2d at 231; *56 E. 87th Units Corp. v Kingsland Group, Inc.*, 30 AD3d at 1135). Moreover, the Lender defendants failed to make a prima facie showing that they had conducted due diligence on the transactions (*see Fitzgibbon v Abatelli Real Estate*, 214 AD2d at 644). Accordingly, the branches of the motion by the Lender defendants which are for summary judgment dismissing the tenth and eleventh causes of action against Pearson Street, are denied *(see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The branch of the motion by the Lender defendants which is to dismiss the twelfth cause of action for unjust enrichment, as against Feurman and MJA, is denied. " 'The essential inquiry in any action for unjust enrichment ... is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered' " (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011], *quoting Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], *cert. denied* 414 U.S. 829 [1973]). A plaintiff must show "that: (1) the other party was enriched; (2) at that party's expense and (3) that 'it is against equity and good conscience to permit [the other party] to

retain what is sought to be recovered' " (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 182, *quoting Citibank, N.A. v Walker*, 12 AD3d 480, 481[2004]; *Branch Services, Inc. v Cooper*, 102 AD3d 645, 647 [2013]). Here, plaintiffs have a cause of action for unjust enrichment against Feurman and MJA if they can establish that Feurman and MJA received a benefit that they should not have, since it is not disputed that both of them issued mortgage loans to Ohana, in the name of the company, with the proceeds going to Renovations, allegedly without plaintiffs' knowledge or approval. The Lender defendants contend that there can be no unjust enrichment if the Feurman and MJA loans were valid. Since there is an issue of fact as to the validity of the said loans, summary judgment dismissing the unjust enrichment claim at this stage is improper (*see Hughes v BCI Int'l Holdings*, 452 F. Supp 2d 290, 304 [S.D.N.Y. 2006]).

Motion by the Ohana defendants

The motion by the Ohana defendants for summary judgment, made more than 120 days after the filing of the note of issue, is untimely (see CPLR §3212[a]) and cannot be entertained without a showing of good cause for the delay (*see Brill v City of New York*, 2 NY3d 648 [2004]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 496-97 [2005]). "Good cause" in CPLR §3212(a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy. That reading is supported by the language of the statute—only the movant can show good cause—as well as by the purpose of the amendment, to end the practice of eleventh-hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be "good cause" (*Brill v City of New York*, 2 NY3d at 652). Here, it is undisputed that the Ohana defendants did not file its motion within the requisite 120 days specified by the statute, and they did not submit any reason for the delay. Thus, there was no "leave of Court on good cause shown," as required by CPLR §3212(a). Accordingly, the motion by the Ohana defendants for summary judgment in their favor is denied.

Conclusion

The branch of the motion by the Lender defendants which is for summary judgment dismissing the tenth and eleventh causes of action against Pearson Street, is denied. The branch of the motion by the Lender defendants which is to dismiss the twelfth cause of action as against Feurman and MJA, is denied.

The motion by the Ohana defendants for summary judgment in their favor is denied.

FILED
APR 25 2019
COUNTY CLERK
QUEENS COUNTY

Dated: APR 16 2019

J.S.C.