

6901 LLC v Caputo
2020 NY Slip Op 32509(U)
July 20, 2020
Supreme Court, Kings County
Docket Number: 507756/17
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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6901 LLC,

Plaintiff,

Decision and order

- against -

Index No. 507756/17

ANDREA CAPUTO,

Defendant,

July 20, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to reargue portions of a decision dated November 18, 2019 which essentially granted summary judgement to the defendant dismissing the complaint. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The facts were adequately recorded in the prior order and need not be repeated.

The reargument is based on a single premise, namely that since 2011 Caputo collected rents at the premises and thus acted as a Mortgagee in Possession requiring her to pay necessary expenses for the property. Indeed, plaintiff argues that pursuant to the mortgage itself Caputo was not allowed to retain any of the rental income without first paying all necessary expenses.

In order for a mortgagee to be a mortgagee in possession the mortgagee must maintain possession and control of the property (Stern v. Syracuse Mall Associates, 1998 WL 52022 [S.D.N.Y.

1998])). The assignment of the right to collect rent, standing alone, does not establish possession and control (Witschger v. J.K. Marvin & Co., 255 AD 70, 5 NYS2d 910 [2d Dept., 1938])). As one authority stated concerning when a mortgagee is considered to be in possession, "perhaps the standard is best expressed in terms of whether the mortgagee exercised "dominion and control" over the mortgaged real estate" (Real Estate Finance Law, §4.25 6th Ed. 2016])). Likewise, the Restatement (Third) of Property (Mortgages) §4.2 'Mortgaging Rents' states in Comment C that "the mere collection of rents pursuant to such a mortgage does not constitute the mortgagee a "mortgagee in possession," with the duties and liabilities attendant to that status" (id).

Thus, John Fahy submitted an affidavit wherein it states that "Circles continued to control and operate the premises, and remain responsible for building expenses subsequent to March 2015, when at Circles' request Caputo began collecting rents from the residential tenants. Circles did not request and/or demand that Caputo pay any expenses of the building from the residential rents collected as a condition of collection of the residential rents" (see, Affidavit of John Fahy, dated May 6, 2019, ¶¶40, 41). Further, Pierre Salameh submitted an affidavit which contains the identical representation offered by Fahy (see, Affidavit of Pierre Salameh, dated May 6, 2019, ¶¶40, 41). Thus, clearly, Caputo was not a mortgagee in possession as defined by

the mortgage and the applicable law. The plaintiff argues that as the sole 'rent collector' she automatically became a mortgagee in possession and in fact breached her fiduciary duties by failing to account for the rents she received, by failing to use those rents for expenses and by failing to likewise collect commercial rents as well. However, those are not issues of fact, rather they are truisms that further support the understanding Caputo was never a mortgagee in possession. Thus, although Caputo did collect rents from the property, there is no evidence that Caputo took "possession or control" of the property in any way. Paragraph 13 of the mortgage, on which the plaintiff stakes its claim, states that if the mortgagors default on the mortgage, Caputo is permitted to take control of the property (Reply, at 7). This in turn triggers certain conditions, including that the mortgagee must apply the rent money to expenses before it is applied to the loan. However, since Caputo did not take possession of the property, this condition was never triggered. (see, Affidavit of John Fahy (supra) and Affidavit of Pierre Salameh (supra)).

The plaintiff further insists that "a fiduciary cannot pick and choose which of the rents and profits she collected" (see, Memorandum in Reply, ¶10). The failure to collect certain rents and collect others is direct evidence that no such mortgagee in possession status was ever conferred upon Caputo. Moreover,

there are no issues of fact raised by the affidavits of Fahy and Salameh. Again, those affidavits provide direct evidence they continued to maintain the operation and control of the premises and not Caputo. Thus, the uncontroverted facts demonstrate that Caputo only collected a portion of rents, something a mortgagee in possession would not do. Moreover, there is uncontroverted evidence that others, and not Caputo, continued to manage the property, again, something a mortgagee in possession cannot permit. Moreover, it is curious indeed, that plaintiff purchased the shares of Circles with knowledge of the condition of the premises, the outstanding expenses and obligations. The plaintiff now seeks to recoup some of those expenses from Caputo on the grounds she is responsible for those expenses because she sought to secure her loan. A scenario where Caputo is permitted to collect rents without the conditions mentioned in Paragraph 13 of the Mortgage is not mentioned in the contract. However, any arrangement upon default whereby the mortgagors would maintain control over the property, and Caputo would be allowed to apply the rent money directly to the loan was surely not precluded. This subsequent arrangement, which remains undisputed by all parties, cannot be retroactively overridden by a third party who was not present when such arrangement was negotiated. Furthermore, even if it were possible to enforce the specific terms of Paragraph 13 of the Mortgage, such action would need to

be initiated by Caputo, not the mortgagors, because the clause is triggered by Caputo taking possession upon default.

Therefore, based on the foregoing, the motion to reargue is denied and the previous decision dismissing all the causes of action remains.

So ordered.

ENTER:

DATED: July 20, 2020
Brooklyn NY



Hon. Leon Ruchelsman
JSC