

First Citizens Community Bank v Fleet
2020 NY Slip Op 34400(U)
June 4, 2020
Supreme Court, Monroe County
Docket Number: E2019004308
Judge: J. Scott Odorisi
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Rochester, NY 14614

First Citizens Community Bank

Fleet, David L.
Fleet, Tracy L.

Total Fees Paid: \$0.00

Employee: RR

State of New York

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STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

FIRST CITIZENS COMMUNITY BANK,

Plaintiff,

-vs-

DAVID L. FLEET and TRACY L. FLEET,

Defendants.

Index #: E2019004308

Special Term
May 26, 2020

APPEARANCES
On Submission

Jeffrey D. Coren, Esq.
*Phillips Lytle LLP
Attorney for Plaintiff*

Michael Rothenberg, Esq.
*Rothenberg Law
Attorney for Defendants*

DECISION

Odorisi, J.

This action arises out of a Defendants' guaranty of five loans to CNY Homes Holdings, LLC and/or Cornerstone Homes, Inc. by Plaintiff. Pending before this Court is Defendants' motion for: (1) a stay of entry of judgment ending trial on the issue of damages, or in the alternative, (2) a stay pending appeal. Plaintiff, First Citizens

Community Bank ("First Citizens"), cross moves for an order entering judgment in its favor, or in the alternative for an order pursuant to CPLR 5529 restraining Defendants as if a restraining notice had been served on them after judgment, including restraining Defendants from selling or transferring any assets or property held by Defendants' wholly-owned entity Buck Hollow Outfitters & Tree Farm, LLC. First Citizens also seeks an award of attorneys' fees and costs.

Upon a review of: Defendants' Notice of Motion for a Stay dated March 10, 2020 (Dkt. #73), the Affirmation of Michael Rothenberg, Esq. dated March 10, 2020, with exhibits (Dkt. #81)- submitted in support of the motion; the Notice of Cross Motion dated May 12, 2020 (Dkt. #85), the Affirmation of Jeffrey D. Coren, Esq. dated May 12, 2020, with exhibits (Dkt. #86)- submitted in opposition to the motion and in support of the cross motion; and the Affirmation of David Rothenberg, Esq. dated May 15, 2020 (Dkt. #98)- submitted in reply on the motion and in opposition to the cross motion, and the Court having heard this matter on submission, it is hereby determined that the motion for a stay is DENIED, and the cross motion for entry of judgment is GRANTED.

Procedural History

This action was commenced on May 8, 2019. After both parties moved for summary judgment, by Decision dated October 29, 2019, the Court (Rosenbaum, J.) denied Plaintiff's motion for summary judgment and granted summary judgment to Defendants. Plaintiff thereafter filed a Notice of Appeal and moved to reargue. By Decision dated March 5, 2020, the Court granted Plaintiff's motion to reargue and upon reargument, granted Plaintiff's motion for summary judgment and denied Defendants' cross motion for

summary judgment. The Court also granted Plaintiff's motion for an award of attorneys' fees. The pending motion was subsequently filed.

Legal Discussion

Stay Pending Damages Trial

On this motion for a stay, Defendants contend that there are material issues of fact concerning the value of the collateral that serve to reduce any indebtedness owed to Plaintiff. Defendants request a stay pending a trial on the issue of damages.

The March 5, 2020 Decision granted reargument to Plaintiff and upon reargument granted summary judgment to Plaintiff and denied summary judgment to Defendants. The grant of summary judgment was not qualified in any way or limited to liability only. As such, summary judgment as to the amount of damages was also granted. There is no trial on damages contemplated by the March 5, 2020 Decision. Defendants' arguments set forth as to damages on this pending motion for a stay are procedurally improper and not properly before the Court given the posture this case is in following the March 5, 2020 Decision. This argument set forth in the alternative to the application for a discretionary stay pending appeal is DENIED.

Stay Pending Appeal

Defendants also seek a stay pending appeal pursuant to CPLR 5519(c), which provides:

(c) Stay and limitation of stay by court order. The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in

subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).

Where an appeal has not been taken, there is no jurisdiction to grant relief relating to the stay of an order. See Legarreta v. Neal, 108 AD3d 1067, 1069 (4th Dept. 2013).

Here, the order on the underlying motion from which Defendants plan to appeal at some point in the future was not even signed when this motion for a stay was filed. As such, this application for a stay pursuant to CPLR 5519(c) is premature. Of course, once Defendants appeal, they will be entitled to seek an automatic stay pursuant to CPLR 5519(a). See Kightlinger v. Kightlinger, 231 AD2d 969 (4th Dept 1996).

Defendants application for a stay pursuant to CPLR 5519(c) is DENIED.

Cross Motion for Entry of Judgment

First Citizens seek entry of judgment in the form attached to the Affirmation of Jeffrey D. Coren, Esq., or in the alternative, an order pursuant to CPLR 5529 restraining Defendants as if a restraining notice had been served on them after judgment, including restraining Defendants from selling or transferring any assets or property held by Defendants' wholly-owned entity, Buck Hollow Outfitters & Tree Farm, LLC.

In the March 5, 2020 Decision, the Court granted First Citizens's motion to reargue and upon reargument granted summary judgment. The Court did not limit the grant of summary judgment to liability only. As such, the only issue remaining for the Court to determine is the amount of attorneys' fees to be awarded to First Citizens.

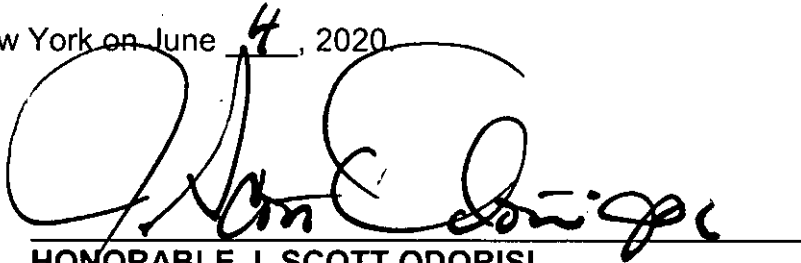
First Citizens' cross motion for entry of judgment in its favor in the form attached to the Affirmation of Jeffery D. Coren, Esq. is GRANTED. Plaintiff should submit an affidavit

to the Court with a proposed order in support of an award of attorneys' fees and costs.

In sum, Defendants' motion should be DENIED, and First Citizens' cross motion should be GRANTED.

As the prevailing party, Plaintiff is directed to E-file a proposed Order within 35 days.

Signed at Rochester, New York on June ⁴, 2020



HONORABLE J. SCOTT ODORISI
Supreme Court Justice