SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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268 ROUTE 59 WEST LLC,272 ROUTE 59 LLC,

Plaintiff,

- v -

LOUIS GALPERN, INDIVIDUALLY AND AS TRUSTEE OF THE LOUIS GALPERN RETIREMENT PLAN AND TRUST DEFINED BENEFIT, ROSE MOROVATI, FARIBORZ MOROVATI, J&S CONSULTING LLC, HESHY GOTTDIENER

Defendant.

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INDEX NO. 652634/2020

MOTION DATE 03/31/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 54, 55, 56, 57, 58, 59, 60, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 105, 106, 107, 108, 109, 110 were read on this motion to/for DISMISSAL.

The motion by defendants Louis Galpern, individually and as trustee of the Louis Galpern Retirement Plan and Trust Defined Benefit ("Galpern Trust"), Rose Morovati and Fariborz Morovati (collectively, "Movants") for summary judgment is granted in part and denied in part.

Background

This is a case about whether plaintiffs successfully paid off two separate mortgages. Plaintiffs own two separate properties in Monsey, New York. Plaintiff 268 LLC alleges that on June 24, 2014 (along with a non-party), it borrowed $350,000 and executed a mortgage to defendant Galpern Trust (the "First Mortgage"). On March 11, 2015, plaintiffs borrowed $500,000 and executed another mortgage (the "Second Mortgage"). Then, in October 2016, plaintiffs contend that they obtained another loan from Ulster Savings Bank (the "USB loan").

In order to obtain this loan, plaintiffs say they asked for, and obtained, a pay-off statement from Movants' counsel for both the First and Second Mortgages.

Plaintiffs observe that there was an issue with the payoff—the interest of the nonparty (18 Horton). They claim that payoff statement allowed plaintiffs to satisfy all of their obligations but allowed a lien to remain against 18 Horton. Plaintiffs complain that despite receiving the payoff, Movants failed to timely issue a satisfaction of mortgage for each of the mortgages. Eventually, a satisfaction of mortgage was issued for the First Mortgage in 2017. They claim that when they tried to sell the properties to a third party in February 2020, they discovered that Movants had still not issued a satisfaction of mortgage for the Second Mortgage.

Plaintiffs contend that they reached out to Movants who demanded that a second payoff amount had to be paid; plaintiffs insist that this money was owed by entities wholly unaffiliated with plaintiffs. Plaintiffs claim that they had no choice but to pay the additional money demanded by Movants in order to complete their pending sale of the properties.

Movants emphasize that the payoff letter from October 7, 2016 states that the sum required to pay off both loans was $560,283.44 and, therefore, plaintiffs' claim that the $358,983.34 payment somehow satisfied the mortgages fails. Movants notes that this amount successfully paid off the First Mortgage and a satisfaction of mortgage was filed for this mortgage in 2017. Movants argue there was never any agreement in which they agreed to take less than what was owed on these loans. They emphasize that plaintiffs made regular interest payments from October 2016 to February 2020, which they claim shows plaintiffs knew they did not satisfy the Second Mortgage. Movants maintain that when they received the remaining amount due on the Second Mortgage on February 28, 2020, they issued a satisfaction of mortgage for this loan on March 12, 2020.

Movants claim that this case should be dismissed based on plaintiffs' failure to name a necessary party (18 Horton) and their decision to discontinue the action against Land Track Title Agency LLC, the title company. With respect to the merits, Movants argue that the voluntary payment doctrine compels dismissal of this case. They assert that plaintiffs made the second pay off with full knowledge of the facts and there was no fraud; Movants argue they simply demanded what was owed. Movants also demand an award of reasonable attorneys' fees as provided for in the First and Second Mortgages.

In opposition, plaintiffs contend that Movants agreed to release all liens against the properties and issue a satisfaction of mortgage for both loans in exchange for the first payoff amount. Plaintiffs point to an email from Movants' counsel which claimed that nothing was owed. They claim that 18 Horton is not a necessary party because it has nothing to do with the money paid by plaintiffs to Movants and that they properly discontinued the case against Land Track Title Agency LLC.

Plaintiffs contend that the voluntary payment doctrine is inapplicable because they made the second payoff payment in 2020 under economic duress; plaintiffs emphasize that they wanted to sell the property and had no choice but to pay Movants.

In reply, Movants emphasize that plaintiffs have misrepresented the suggestions that a lien would remain against 18 Horton in connection with the payoff. They point out that the payoff letter only stated that the lenders were "willing" but did not actually agree to it. Movants argue that there is no evidence that such a lien was ever placed against 18 Horton or an agreement with this non-party.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Despite the parties' voluminous briefs, the question in this case is whether there was an agreement that the payoff amount paid by plaintiffs in 2016 satisfied both mortgages or whether it paid off only the First Mortgage. That letter states that the total payoff amount is $560,283.34 (NYSCEF Doc. No. 42). This amount covers both loans at issue in this case. The key issue is the statement at the bottom of the letter that provides that "Mortgagee is willing to allow the

$200,00.00 mortgage to remain as a lien against 18 Horton Street LLC, and accept the payoff of the $350,000 mortgage" (*id*.). There is no dispute that plaintiff paid $358,983.34, which appears, at least facially, to be the amount owed for the First Mortgage.

Unfortunately for plaintiffs, the Court is unable to find that they raised an issue of fact sufficient to deny the instant motion. The First and Second Mortgages expressly require in paragraph 17 that any change to these agreements had to be in writing. The language in the payoff letter states a willingness by Movants to take certain action, but plaintiffs did not attach any documentation to show that an agreement was ever reached with 18 Horton or that this offer was ever formalized in writing. A hope or desire to do something is not the same as formally changing the amount due on a mortgage.

For similar reasons, the email from Movants' former counsel stating that nothing is owed (NYSCEF Doc. No. 85) does not create an issue of fact. Counsel could not have modified or bound his client to a position in a vague email; moreover, the context of this email thread does not make it clear that counsel for Movants was confirming that nothing was owed on *both* loans. An email at the beginning of the thread mentions a satisfaction for the *First Mortgage* (*id*. at 3).

The Court observes that the payments allegedly made by plaintiffs after the alleged payoff did play not a role in the Court's decision. Defendant Gottdiener (who is also a member of plaintiffs) disputed that these checks were sent in connection with the Second Mortgage and denies any affiliation with the entity that sent these checks.

Voluntary Payment Doctrine

The Court also grants the motion on the basis of the voluntary payment doctrine. "The voluntary payment doctrine bars recovery of payments voluntarily made with full knowledge of the facts, in the absence of fraud or mistake of material fact or law. The onus is on a party that

receives what it perceives as an improper demand for money to take its position at the time of the demand, and litigate the issue before, rather than after, payment is made" (*DRMAK Realty LLC v Progressive Credit Union*, 133 AD3d 401, 403, 18 NYS3d 618 [1st Dept 2015] [internal quotations and citations omitted]).

The facts of this case justify the applicability of this doctrine. As alleged by plaintiffs, they discovered in 2017 that a satisfaction of mortgage had not been filed for either of the loans at issue. Then, in 2020, when they discovered that a satisfaction of mortgage had not been filed for the Second Mortgage, they ultimately decided to *pay the money demanded by Movants* instead of bringing this case.

Movants sent a series of payoff letters in 2020 (NYSCEF Doc. No. 86-88). The final one claims that it was sent at plaintiffs' request and that $324,883.32 is owed. Plaintiffs admit that after receiving this letter, they eventually paid this amount despite believing that they had paid off both mortgages in 2016. On these papers, there is no evidence of fraud or mistake although plaintiffs characterize these payoff letters as extortionate. Movants did not make up the amount owed or the existence of the mortgages, nor are plaintiffs confused about what Movants demanded. There is also no evidence that plaintiffs mistakenly made the payment or misunderstood their contractual duties.

Clearly, plaintiffs realized that a satisfaction of mortgage had not been filed with respect to the Second Mortgage and, after discussion with Movants, they received these payoff letters. Instead of bringing a lawsuit that supported their position, they paid the money so they could sell the properties. This calculated decision bars plaintiffs' recovery (*DRMAK Realty, LLC*, 133 AD3d at 403).

Plaintiffs suggestion that they made the decision to pay under duress or coercion is without merit. "The existence of economic duress is demonstrated by proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand" (*805 Third Ave. Co. v M.W. Realty Assoc*., 58 NY2d 447, 451, 461 NYS2d 778 [1983]). Plaintiffs' desire to sell the properties to third parties does not constitute duress under contract law. And there is no basis to find that Movants coerced plaintiffs into paying the money. Plaintiffs could have refused to pay and brought a case (as they did here). Certainly, they might have missed the chance to sell the properties to certain buyers, but that does not save their claims from the voluntary payment doctrine. Instead, plaintiffs freely decided to make the payments so they could complete the sale.

The voluntary payment doctrine compels dismissal of all of plaintiffs' claims against Movants that relate to the mortgages (counts 1, 2, 6, 7, 9 and 10).

Fifth Cause of Action

In this claim, plaintiffs seek damages based on Movants' failure to timely file a satisfaction of mortgage for both mortgages. The Court dismisses the portion of this cause of action based on the Second Mortgage. Plaintiffs paid off this mortgage on February 28, 2020 and Movants filed a satisfaction of mortgage on March 12, 2020, well within the applicable deadline. However, the Court denies the motion with respect to the First Mortgage. Plaintiffs raised an issue of fact as to whether Movants timely filed a satisfaction of mortgage for the First Mortgage based on Real Property Law § 275 and RPAPL § 1921.

Defendants claim that these provisions do not apply to them because they do not make more than five mortgage loans in a calendar year (a requirement under the applicable statutes). Plaintiffs claim in opposition that Movants have not met their burden through an affidavit to

show that these statutes are inapplicable. Movants do not address this point in reply, so the Court denies this branch of the motion only with respect to the First Mortgage.

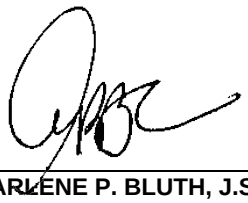
Summary

The Court observes that the facts alleged here involve numerous parties and transactions. But the heart of the case is whether the payoff in 2016 satisfied both mortgages. Plaintiffs failed to raise an issue of fact to show that an agreement was reached, in writing, that permitted them to pay less than what was owed. And, even if the Court could find an issue of fact, the voluntary payment doctrine prohibits plaintiffs' recovery of the money they paid. Plaintiffs believed that they had paid off both mortgages, demanded that Movants file a satisfaction of mortgage for the Second Mortgage and then received another payoff letter from Movants. Plaintiffs, with full awareness of these facts and circumstances, decided to pay the requested amount. That plaintiffs now regret this decision is not a basis for them to get the money back. Moreover, the motive behind making the payment—selling the properties to third parties—is not a sufficient justification to render the voluntary payment doctrine inapplicable.

Accordingly, it is hereby

ORDERED that the motion by Louis Galpern, individually and as trustee of the Louis Galpern Retirement Plan and Trust Defined Benefit ("Galpern Trust"), Rose Morovati and Fariborz Morovati for summary judgment dismissing the claims against them is granted to the extent that counts 1, 2, 6, 7, 9 and 10 are severed and dismissed, and denied to the extent that the motion sought dismissal of count 5 and legal fees (this claim is premature).

Remote Conference: May 27, 2021 at 3 p.m.



4/5/2021
DATE

ARLENE P. BLUTH, 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