

Sharestates Invs. DACL LLC v XYZ Dev. II LLC

2021 NY Slip Op 31731(U)

May 17, 2021

Supreme Court, Kings County

Docket Number: 526262/19

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of May, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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SHARESTATES INVESTMENTS DACL LLC,

Plaintiff,

- against -

Index No. 526262/19

XYZ DEVELOPMENT II LLC, AARON JOHNSON, XYZ HOLDINGS LLC, XYZ GROUP LLC, XYZ PARTNERS LA LLC, XYZ HOLDINGS LA LLC, XYZ 42 VAN BUREN LLC, XYZ 1555 PACIFIC LLC, XYZ 1535 PACIFIC LLC, 1523 DOHENY LLC, XYZ PARTNERS LLC, BABAK POURTAVOOSI PC, BABAK POURTAVOOSI, Individually, CASSAFORTE LTD., FRE 348 QUINCY LLC, JOSHUA LEWSKI, CRIMINAL COURT OF THE CITY OF NEW YORK, NYC PARKING VIOLATIONS BUREAU, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, NYC ENVIRONMENTAL CONTROL BOARD, ALEKSANDER VINAR, and JOHN DOE 1-10, said names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in, or lien upon the premises described in the complaint,

Defendants.

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<u>The following e-filed papers read herein:</u>	<u>NYSCEF Doc Nos.</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>51, 53-58</u>
Opposing Affidavits (Affirmations)_____	<u>65-73</u>
Reply Affidavits (Affirmations)_____	<u>78-81</u>

Upon the foregoing papers in this action to foreclose a mortgage on the commercial property at 348 Quincy Street in Brooklyn (Property), defendants XYZ Development II LLC (Development II or borrower), XYZ Holdings LLC (Holdings), XYZ Partners LA LLC (Partners LA), XYZ Holdings LA LLC (Holdings LA), XYZ 42 Van Buren LLC (Van Buren), XYZ 1555 Pacific LLC (1555 Pacific), XYZ 1535 Pacific LLC (1535 Pacific), 1523 Doheny LLC (Doheny), XYZ Partners LLC (Partners), Cassaforte Ltd. (Cassaforte), FRE 348 Quincy LLC (FRE 348 Quincy) and Joshua Lewski (Lewski) (collectively, Moving Defendants) move (in motion sequence [mot. seq.] one) for an order: (1) dismissing the verified complaint filed by the plaintiff, Sharestates Investments DACL LLC (Sharestates), pursuant to CPLR 3211 (a) (3), (a) (4), and (a) (7) or, alternatively, (2) staying this action, pursuant to CPLR 2201, pending the resolution of the prior pending action in Nassau County Supreme Court captioned *Cassaforte Ltd., et al. v Sharestates Investments DAC LLC, et al.*, Nassau County index No. 614558/19 (Prior Pending Nassau Action).

Background

On December 3, 2019, Sharestates commenced this commercial foreclosure action by filing a summons, a verified complaint and a notice of pendency against the Property. The complaint seeks to foreclose on a \$2,015,000.00 consolidated mortgage encumbering the Property, which was allegedly executed by Development II, the owner of the Property, in favor of Sharestates on April 9, 2019 (complaint at ¶¶ 10-11). The complaint alleges that “the defendants have failed to comply with the conditions of said mortgage by omitting to pay the installments of \$15,112.50 each and the escrow money for taxes which became due on 09/01/19 and subsequent thereto, or within 10 days thereafter, and same not having been paid, plaintiff has declared the entire amount due” (*id.* at ¶ 15). Notably, the complaint alleges that:

“no other action or proceeding at law, in equity or otherwise has been had or taken for the recovery of the whole or any part of the principal sum, and interest, or either of them secured by said mortgage note and mortgage.” (*id.* at ¶ 17).

Moving Defendants’ Instant Dismissal Motion

Moving Defendants assert that dismissal of the complaint is warranted because “[t]he mortgage loan at issue in this foreclosure action is currently the subject of two other actions, both of which were filed before this foreclosure.”

The Moving Defendants assert that Cassaforte, the owner of Development II, commenced a related action in New York County Supreme Court on June 10, 2019, captioned *Cassaforte Ltd., et al. v Aaron Johnson, et al*, New York County index No.

653387/19 (Prior Pending New York Action), but that no notice of pendency was filed against the Property in the Prior Pending New York Action.

On October 18, 2019, Cassaforte commenced the Prior Pending Nassau Action against Sharestates and others to quiet title to the Property based on an alleged fraudulent scheme to refinance the Property without Cassaforte's consent, in which Cassaforte seeks a declaratory judgment that the Sharestates mortgages on the Property are null and void. The complaint in the Prior Pending Nassau Action alleges that the very same mortgage at issue here is unenforceable because the defendants therein had no actual or apparent authority to cause Development II to refinance the mortgage without Cassaforte's consent. The Moving Defendants submit an affidavit of service in the Prior Pending Nassau Action reflecting that Sharestates was served with process therein on October 29, 2019. The Moving Defendants assert that "[r]ather than respond to the Nassau Complaint in a timely manner, Plaintiff filed this action on December 3, 2019 – over six weeks after the Nassau Complaint was filed." The Moving Defendants also annex Sharestates' pending motion to dismiss the complaint in the Prior Pending Nassau Action, which was filed on or about January 16, 2020.

The Moving Defendants argue that this foreclosure action should be dismissed, pursuant to CPLR 3211 (a) (4), because the Prior Pending Nassau Action was filed 46 days prior to this foreclosure action and "it is undisputed that the legal issue of the enforceability of the Quincy Mortgage is central to both this action and the Nassau Action." The Moving Defendants also argue that "[i]f this action moves forward, there is

a significant risk of inconsistent outcomes between this action and the Nassau Action — one court may rule [that] the Quincy mortgage is enforceable, but the other may rule the opposite.” The Moving Defendants further contend that dismissal is warranted, pursuant to CPLR 3211 (a) (3), because plaintiff Sharestates lacks legal capacity to sue, since the mortgage is unenforceable. Alternatively, if the court determines that dismissal is not warranted, the Moving Defendants assert that the court should stay these proceedings pending the outcome of the Prior Pending Nassau Action, pursuant to CPLR 2201.

Sharestates' Opposition

Sharestates, in opposition, asserts that dismissal is not warranted, pursuant to CPLR 3211 (a) (4), because “there is no issue regarding ‘the validity and enforceability’ of the instant mortgage loan” as “no decision has been made regarding MOVING DEFENDANTS’ claims in the Nassau County Action.” Sharestates also contends that “most all [sic] defendants in the instant foreclosure are entirely absent from the Nassau County action” and that this foreclosure action and the Prior Pending Nassau Action seek substantially different relief. Sharestates also argues that it would be prejudiced if this foreclosure action is dismissed based on the pendency of the Prior Pending Nassau Action because it cannot seek foreclosure of the Property in Nassau County.

Moving Defendants' Reply

Moving Defendants, in reply, advise that on February 11, 2020, the complaint in the Prior Pending Nassau Action was amended to add Development II as a plaintiff. Additionally, by a March 3, 2020 order, the Prior Pending Nassau Action was transferred

to New York County and consolidated with the Prior Pending New York Action under New York County index No. 653387/19. Moving Defendants argue that the validity and enforceability of the mortgage is the central issue in both this foreclosure action and the Prior Pending Nassau Action. Moving Defendants reiterate that “Plaintiff is not entitled to foreclose in this action if the Quincy Mortgage is determined to be null and void as the plaintiffs have asserted in the previously-filed Nassau Action.” At a minimum, Moving Defendants seeks a stay of this foreclosure action pending the outcome of the Prior Pending Nassau Action, which has now been consolidated with the Prior Pending New York Action.

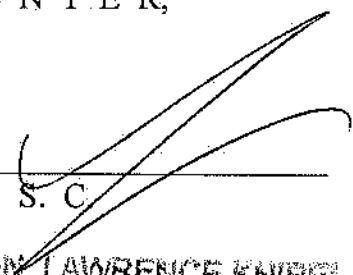
Discussion

CPLR 2201 provides that “[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.” Here, to prevent inconsistent rulings regarding the enforceability of the consolidated mortgage, a stay of this foreclosure action is warranted pending the outcome of the Prior Pending Nassau/New York Action (Consolidated Action). Accordingly, it is hereby

ORDERED that Moving Defendants’ motion (mot. seq. one) is only granted to the extent that this foreclosure action is stayed until there is a final determination regarding the enforceability of the subject mortgage in the Consolidated Action, and the parties shall promptly notify this court upon a final determination in the Consolidated Action regarding the enforceability of the subject mortgage.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPPEL
ADMINISTRATIVE JUDGE