

Fraley v Black Star Line Realty Corp.

2023 NY Slip Op 33255(U)

September 19, 2023

Supreme Court, New York County

Docket Number: Index No. 155039/2022

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LORI S. SATTLER PART 02TR

Justice

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FRANK FRALEY

Plaintiff,

- v -

BLACK STAR LINE REALTY CORP.,

Defendant.

-----X

INDEX NO. 155039/2022

MOTION DATE 06/06/2023,
06/16/2023

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 71

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this action for damages purportedly resulting from usury, breach of contract, fraud, and unjust enrichment, Plaintiff Frank Fraley (“Plaintiff”) moves, in Motion Sequence No. 002, to restrain Defendant Black Star Line Realty Corp. (“Defendant”) from taking or attempting to take possession of a property located at 202 Spencer Street in Brooklyn (“Property”) and for an order directing the Office of the City Register to remove a deed recorded on May 5, 2023 which transferred title of the Property from Plaintiff to Defendant. In Motion Sequence No. 003, Defendant moves to vacate the Court’s December 15, 2022 Decision and Order finding it in default and seeks dismissal of the action. The motions are consolidated for disposition.

Prior to the incidents giving rise to this action, Plaintiff owned the Property, a two-family home in Bedford-Stuyvesant, with his now-deceased mother, Ollie Fraley (collectively, “the Fraleys”). In December 2019, the parties agreed to an arrangement whereby Defendant loaned the Fraleys \$950,000 to be repaid with interest within two years, and, as collateral, the Fraleys

signed a Deed transferring title of the Property to Defendant, which was to be held in escrow during the term of the loan. According to Defendant's papers, "[t]he purpose of the Note was to provide Plaintiff capital to make repairs to the Property. It was the intent of the Parties that upon completing the repairs to the Property, Plaintiff and his mother would refinance the Property and repay Defendant the principal amount of the Note along with any interest thereon" (NYSCEF Doc. No. 48, "Chilliest aff." ¶¶ 7-8).

On December 6, 2019, the Fraleys signed a note which provided that the loan matured on December 5, 2020 with an option to renew for an additional year (NYSCEF Doc. No. 53, "Note"). The loan was subject to a 13% interest rate in the first year and a 15% rate in the second year (*id.*). The Fraleys also signed the deed of sale (NYSCEF Doc. No. 55, "Deed") and a document entitled "Escrow Agreement" (NYSCEF Doc. No. 56, "Escrow Agreement"). The Escrow Agreement provides that in the event the Fraleys failed to satisfy the Note within the requisite period, Defendant "shall have all legal rights to record the Deed in lieu of payment of the outstanding debt payable in accordance with the Note. In the event that [Defendant] records the Deed, then the Note shall be considered satisfied and neither party shall have any further action, right or obligation to one another" (*id.* at ¶ 1[e]). The Escrow Agreement is signed by Plaintiff and his mother but is not signed by anyone on Defendant's behalf. Anthony Chilliest, Esq. ("Escrow Agent"), who represented Defendant in its corporate formation and in connection with this arrangement, signed the Escrow Agreement as the Escrow Agent.

In an affidavit annexed to Defendant's papers, the Escrow Agent explains, "the loan was funded into my firm's trust account. Plaintiff and his mother were authorized to draw down any amounts needed" (Chilliest aff. ¶ 22). He maintains that Plaintiff made three draws totaling \$105,000, and that he paid approximately \$150,000 from the account directly to Plaintiff's

contractor. These draws do not appear to be in dispute. The Escrow Agent also states that he disbursed \$571,359.61 to satisfy an existing mortgage on the property (*id.* ¶ 26). According to Plaintiff, that wire transfer was returned, and the mortgage was never satisfied (NYSCEF Doc. No. 68, ¶¶ 5-6). He annexes a letter from the mortgage servicer indicating a \$689,998.74 balance as of August 9, 2023 (NYSCEF Doc. No. 75). Plaintiff contends the loan is usurious insofar as Defendant has charged interest on the full loan even though Plaintiff has only drawn a small portion of it. It is undisputed that Plaintiff did not make any payments on the Note.

Plaintiff commenced this action in June 2022. After Defendant failed to appear, Plaintiff moved for judgment and on December 15, 2022 the Court granted the motion to the extent of finding Defendant in default, and directed an inquest to determine whether judgment should be granted. On May 2, 2023, the Escrow Agent recorded the Deed. A month later, he listed the Property for sale (NYSCEF Doc. Nos. 26, 27). Plaintiff filed Motion Sequence No. 002 seeking to restrain Defendant from taking possession of the Property and for an Order directing the Office of the City Register to remove the deed from its record. The Court restrained Defendant from taking possession of or attempting to sell the Property pending a decision on the motion (NYSCEF Doc. Nos. 32, 76). Defendant then appeared in the action and filed Motion Sequence No. 003 seeking to vacate the default and for dismissal of the action.

The Court may grant a motion to vacate a default where the defendant presents a reasonable excuse for the default and a meritorious defense (CPLR 5015[a][1]; *Matter of Rivera v New York City Dept. of Sanitation*, 142 AD3d 463, 464 [1st Dept 2016]). In its December 15, 2022 Decision, the Court found that Defendant was properly served via the Secretary of State. Defendant concedes Plaintiff completed service pursuant to Business Corporation Law § 306 and that the Escrow Agent, who is also Defendant's registered agent for service, received the papers.

According to the Escrow Agent, he attempted to reach his contact with Defendant by phone, but the number was not in service, and he did not have an e-mail or physical address. He states that in September 2022 he visited a restaurant in Los Angeles owned by this contact where he learned that the contact had died from Covid-related complications. The Escrow Agent states he was aware that this person had partners but did not know their names or contact information. He maintains “it was not until recently that one [of] the shareholders reached out to me” that he was able to inform Defendant that Plaintiff had not repaid loan and had commenced this action. He states, “I was instructed to protect the rights of the Company and file the Deed” (Chilliest aff. ¶¶ 40-49). Defendant’s papers do not include an affidavit from anyone on Defendant’s behalf.

A plaintiff’s service of process is complete when a defendant’s registered agent is served, regardless of whether it ultimately reaches the defendant (*Salish Lodge LLC v Gift Mgt. Inc.*, 192 AD3d 410, 411 [1st Dept 2021]). It is Defendant’s obligation to maintain a current address with its registered agent (*id.*; see also *NYCL 1999-1 Trust v 114 Tenth Ave. Assoc., Inc.*, 44 AD3d 576 [1st Dept 2007]), and the moving papers fail to include an affidavit from Defendant addressing its failure to do so. Under the circumstances, Defendant has not presented a reasonable excuse for its default and its motion to vacate the default and dismiss the action is denied.

In Motion Sequence No. 002, Plaintiff moves for a preliminary injunction. A party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in its favor (CPLR § 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Plaintiff establishes that he did not receive the full value of the loan and that Defendant has taken title to the Property. He therefore sufficiently demonstrates a likelihood of success on the merits. Furthermore, there is a danger of irreparable injury in the absence of an injunction restraining

Defendant from taking possession of and selling the Property, especially given that Defendant has already listed the Property for sale while this action was pending. Finally, the equities weigh in favor of Plaintiff, a homeowner who executed a Deed as collateral for a personal loan. Therefore, Defendant is restrained from taking possession of and/or attempting to sell the Property pending a Decision After Inquest.

Accordingly, for the reasons set forth herein, it is hereby:

ORDERED that pending a Decision After Inquest, Defendant is restrained from attempting to sell the Property and from taking or attempting to take possession of the Property or otherwise exercising control over the Property; and it is further

ORDERED that the remaining relief sought in Motion Sequence No. 002 is denied without prejudice; and it is further

ORDERED that Motion Sequence No. 003 is denied in its entirety; and it is further

ORDERED that the portion of the Court’s December 15, 2022 Decision and Order directing the Clerk of the General Clerk’s Office to place the matter on the calendar for inquest is vacated and an inquest shall be held by this Court on October 18, 2023 at 10:00 via Teams, unless Plaintiff requests that it be held in person.

This constitutes the Decision and Order of the Court.

9/19/2023
DATE


LORI S. SATTLER, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: