

Touch of Class Bldrs., Inc. v S & C Invs. II, LLC

2011 NY Slip Op 30192(U)

January 20, 2011

Sup Ct, Suffolk County

Docket Number: 05-4911

Judge: Ralph T. Gazzillo

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SHORT FORM ORDER

INDEX No. 05-4911

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 7-2-10
ADJ. DATE 7-29-10
Mot. Seq. # 003 - MD
004 - XMD

-----X		
TOUCH OF CLASS BUILDERS, INC.,	:	WOLINSKY, PARNELL &
	:	MONTGOMERY, LLP
Plaintiff,	:	Attorneys for Plaintiff
	:	329 Hawkins Avenue
- against -	:	Lake Ronkonkoma, New York 11779
	:	
S & C INVESTORS II, LLC,	:	BALFE & HOLLAND, PC
	:	Attorneys for Defendant
Defendant.	:	135 Pinelawn Road, Suite 125 North
-----X		Melville, New York 11747

Upon the following papers numbered 1 to 30 read on this motion and cross-motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1- 10 ; Notice of Cross Motion and supporting papers 11- 27 ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 28 - 30 ; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint is denied; and it is further

ORDERED that this cross motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment on its complaint is denied.

This is an action to void three mortgages held by the defendant on vacant land on Seatuck Cove Court, known on the Suffolk County Tax Map as District 0200, Section 723.00, Block 03.00, Lot 003.004, in Eastport, New York. On March 3, 2003, the plaintiff's sole officer and director, Robert Marquette (Marquette), entered into a joint venture agreement with Pasquale (Pat) Novelli (Novelli) to improve the subject property whereby they agreed that the property was to be purchased with funds supplied by Novelli's company, International Holdings, LLC; that title to the property would be held in the name of International Holdings, LLC, and the plaintiff; and that the funds for construction on said property and a \$25,000.00 down payment were to be supplied by the plaintiff.

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On May 13, 2003, Novelli in his purported capacity as president of the plaintiff executed a note for a loan in the sum of \$267,000.00 secured by a first mortgage on said property and executed a note for a loan in the sum of \$300,000.00 which was secured by a second mortgage on the subject property. The first and second mortgages were filed at the Office of the Suffolk County Clerk on November 24, 2003. By deed dated May 13, 2003, non-party Stanley Pine conveyed the subject property solely to the plaintiff. Then, on April 22, 2004, Novelli in his purported capacity as president of the plaintiff executed a note for a loan in the sum of \$120,00.00 secured by a subordinate mortgage, which mortgage was filed at the Office of the Suffolk County Clerk on August 18, 2004. Subsequently, the defendant commenced a related foreclosure action entitled *S&C Investors II, LLC. v Touch of Class Builders, Inc.* under index number 12286/2005 alleging that the plaintiff defaulted on the mortgages and seeking a judgment of foreclosure.

The plaintiff commenced the instant action on February 24, 2005. The first three causes of action allege that said notes and mortgages were forged and fraudulent inasmuch as Novelli was never an officer or employee of the plaintiff and never had the authority to execute said notes and mortgages on behalf of the plaintiff. The fourth cause of action alleges negligence by the defendant in failing to, among other things, make a proper inquiry as to whether Novelli had been authorized to act on behalf of the plaintiff. The plaintiff seeks to have said mortgages voided, to obtain a receipt of satisfaction of said mortgages, and damages.

The defendant now moves for summary judgment dismissing the complaint on various grounds including that the plaintiff is estopped from denying that Novelli had apparent authority to act on behalf of the plaintiff inasmuch as the plaintiff used the loan proceeds to its benefit to purchase said property without inquiring into their source. The defendant asserts that in the event that the mortgages are found invalid, the defendant is entitled to an equitable first priority lien in the sum of \$511,684.00, which was used in the purchase and improvement of the subject premises.

The plaintiff cross-moves for summary judgment on its complaint vacating the subject mortgages and declaring that said mortgages are null and void as against the subject premises on the grounds that the joint venture agreement expressly provided that the funds to purchase the property would be from International Holdings, LLC, not the plaintiff; that Novelli was not an agent, employee or officer of the plaintiff and had no authority to act on behalf of the plaintiff in obtaining said funds; and that Novelli forged his capacity as president of the plaintiff on the loan and mortgage documents.

The proponent of a summary judgment motion 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 (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316 [1985];

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Zuckerman v City of New York, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Center*, *supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see, *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

“Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction” (*Standard Funding Corp. v Lewitt*, 89 NY2d 546, 551, 656 NYS2d 188 [1997], quoting *Hallock v State of New York*, 64 NY2d 224, 231, 485 NYS2d 510 [1984]). An agent cannot, through his own acts, cloak himself with apparent authority and this rule holds especially true where a party fails to conduct a reasonable inquiry into the scope of the purported agent’s authority (see, *150 Beach 120th St., Inc. v Washington Brooklyn Limited Partnership*, 39 AD3d 722, 723, 833 NYS2d 667 [2d Dept 2007]).

In support of its motion, the defendant submits copies of the subject mortgage documents and the affidavit dated May 21, 2010 of Sloan Cooper (Cooper), a member of the defendant. Cooper stated that the defendant had prior dealings with the plaintiff wherein the defendant provided loans to the plaintiff to develop and sell properties which resulted in business profits for all parties involved. In addition, he stated that in each of the prior dealings, Novelli executed the relevant loan documents on behalf of the plaintiff. Cooper also stated that there is no question that the mortgages are valid, that they were entered into with the knowledge and consent of the plaintiff, and that the loan proceeds have been used for the benefit of the property. He pointed to the deposition testimony of Marquette indicating that Marquette was aware that Novelli was attending the closing to purchase the subject property and that Marquette provided funds to Novelli to be applied to the mortgage. Cooper asserted that the plaintiff did nothing to rescind the transaction.

The defendant also submits the deposition testimony from July 2, 2007 of Marquette indicating that Marquette entered into approximately eight joint venture agreements with Novelli in which Novelli would find homes, fund them and resell them and Marquette would perform the construction and repair of the homes. Marquette testified that he was paid by Novelli for his work and that at the end of the transaction they were supposed to split the profit. In addition, Marquette testified that he had seen the subject vacant property prior to closing and had given the deposit sum of \$25,000.00 at contract but that he did not attend the closing. According to Marquette, although it was his obligation to build a modular home on said property, Novelli told him that he was getting a modular home and Novelli brought in his own people to build. Marquette also testified that he never asked Novelli as to the source of the financing; that Novelli never gave him a closing statement; and that Marquette only kept records of the funds that he

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himself invested. Marquette further testified that he first became aware that the defendant was the mortgage holder when he received the foreclosure notice, that he never met or spoke to Cooper prior thereto, and that Novelli was never authorized to sign on behalf of the plaintiff.

In support of its cross motion and in opposition to the motion, the plaintiff submits the affidavit dated June 28, 2010 of Marquette who states that he was not told about the closing of title on the subject property and did not attend the closing since Novelli handled the administration aspects of the joint venture and Novelli's corporation was required under the agreement to obtain the monies to purchase the property. In addition, he states that he learned about the three mortgages on the property, which were obtained by Novelli using Marquette's corporation, after Marquette received a summons and complaint from William Claussen (Claussen) alleging that Claussen had a joint venture agreement with Novelli for the subject property. Marquette also states that he and Claussen contacted the district attorney, who prosecuted Novelli sometime in 2006, resulting in a felony conviction of criminal possession of a forged instrument in the third degree. Marquette further states that he never held Novelli out as an agent, subcontractor, servant, owner of shares, officer, director, or employee of the plaintiff and that he did not maintain joint bank accounts with Novelli. He submits a copy of the entity information from the New York State Department of State Division of Corporations which demonstrates the existence of Touch of Class Builders Inc., whose chairman or chief executive officer is Robert Marquette and that there is no registered agent for the corporation.

Among the plaintiff's other submissions is a copy of the joint venture agreement dated March 3, 2003 relating to the subject property. Said agreement provided that no joint venturer shall act as general agent for any other joint venturer or have the authority to undertake or assume any obligation on behalf of another joint venturer except as specifically set forth in the agreement, and that all joint venturers shall indemnify each other against such action.

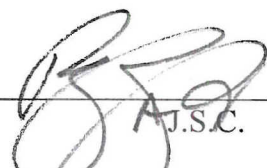
Here, the proffered proof raises triable issues of fact as to the validity of the plaintiff's deed to said property and the subject mortgages (*see, James v Arango*, 72 AD3d 899, 898 NYS2d 527 [2d Dept 2010]). A deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid (*see, GMAC Mtge. Corp. v Chan*, 56 AD3d 521, 867 NYS2d 204 [2d Dept 2008]). The adduced evidence indicates that Novelli lacked apparent authority to execute the subject loan and mortgage documents to bind the plaintiff as obligor (*see, Lindenbaum v Albany Post Property Associates*, 297 AD2d 661, 747 NYS2d 118 [2d Dept 2002]). There is no evidence of any words or conduct by Marquette communicated directly to the defendant or Cooper giving rise to the appearance or reasonable belief that Novelli possessed the authority to bind the plaintiff in said mortgage loan transactions (*see, id.*). In addition, there is no evidence that the defendant or Cooper conducted a reasonable inquiry into the scope of Novelli's alleged authority (*see, 150 Beach 120th St., Inc. v Washington Brooklyn Limited Partnership*, 39 AD3d 722, 724). However, the proffered proof raises issues of fact that include whether Marquette ratified the May 13, 2003 loan and deed

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transactions through his conduct of being completely uninvolved in finding out about the resulting details of any mortgage loan or deed transactions when he himself provided the down payment for the closing of the loan to purchase the subject property and he agreed that his company would share title to the subject property (cf. *Lindenbaum v Albany Post Property Associates*, 297 AD2d at 663).

Accordingly, the instant motion and cross motion are denied.

Dated: 1/20/11



A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION

