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Overbay, LLC v Berkman, Henoch, Peterson, Peddy & Fenchel, P.C.
2018 NY Slip Op 51975(U)
Decided on November 8, 2018
Supreme Court, Suffolk County
Garguilo, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

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<p>Overbay, LLC, DEMETRIUS A. TSUNIS, Plaintiffs,</p> <p>against</p> <p>Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., HARBOUR TRIO MANAGEMENT LLC, Defendants.</p>

18/609537

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Jerry Garguilo, J.

Upon the following papers numbered 15 to 45 read on this motion *for summary judgment*; Notice of Motion/Order to Show Cause and supporting papers 15 - 32 ; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 33 - 38; Replying Affidavits and supporting papers 39 - 45; Other; and upon due deliberation; it is,

ORDERED that defendants' motion (001) for summary judgment dismissing the complaint in its entirety is granted; and it is further

ORDERED that the court declines to impose sanctions upon the non-moving party.

In this action, plaintiffs seek the reimbursement of attorney fees that was paid in settlement of the prior commercial foreclosure action. The record reveals that Harbour Trio Management LLC ("Harbour") obtained a judgment of foreclosure on March 28, 2018 (Garguilo, J.) and entered on March 29, 2018. Although the order directed the parties to appear at a hearing on May 15, 2018, plaintiffs settled the action and paid the total amount due including attorneys fees paid on April 20, 2018, the date of the closing of plaintiffs' construction loan. Plaintiffs exercised their right of redemption to the mortgaged premises with the proceeds of the construction loan and paid their mortgage arrears, together with the legal fees and costs due to Harbour under the mortgage, in full. Upon receipt of payment, Harbour released its lien from the property and discontinued its foreclosure action, at the plaintiffs' demand. A satisfaction of mortgage, dated April 24, 2018 was issued to Barrister Land LLC, a title company, on May 2, 2018. This action was commenced on May 17, 2018.

Defendants now move for summary judgment dismissing the complaint. In support, defendants submit the pleadings, a copy of the mortgage note, mortgage, assignment of mortgage, guaranty, judgment of foreclosure, and correspondence. Defendants contend that plaintiffs waived their opportunity to contest the amount of Harbour's charges for attorneys fees and disbursements at a hearing and cannot now claim economic duress. Defendant Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. ("Berkman PC") contends that the action should be dismissed as against it because an agent who acts on behalf of a disclosed principal will generally not be liable for a breach of contract and relies upon [Safety Env'tl. Inc. v Barberry Rose Mgt Co. Inc. \(94 AD3d 969, 942 NYS2d 200 \[2d Dept 2005\]\)](#). In addition, defendants point out that the attorneys' fees at issue were paid by plaintiffs to Harbour pursuant to Section 23 of the Mortgage, and were done so voluntarily so that Overbay could settle Harbour's foreclosure action and receive the benefit of construction financing to develop a multi-million dollar apartment complex. Neither Overbay nor Tsunis paid any

money to Berkman P.C. and there was no contractual privity between these parties. Any dispute as to the reasonableness of the amount of attorneys' fees should have been, and indeed, was scheduled to be, litigated by plaintiffs against Harbour during the pendency of the 2016 Foreclosure Action. Plaintiffs preempted any determination that could have been made by this Court as it pertains to the reasonableness of Harbour's claimed attorneys' fees by opting to procure separate financing, and make a total payoff of Harbour's loan without objection. Therefore, Berkman P.C. contends that the complaint should be dismissed as asserted against them.

Defendants also claim that the voluntary payment doctrine bars the recovery of payments voluntarily made with full knowledge of the facts and in the absence of fraud or mistake of material fact or law, and relies upon *Dillon v U-A Columbia Cablevision of Westchester, Inc.* [*2](100 NY2d 525, 760 NYS2d 726 [2003]), which holds: "The voluntary payment doctrine bars 'recovery of payments voluntarily made with full knowledge of the facts and in the absence of fraud or mistake of material fact or law.'" Defendants also contend that plaintiffs are equitably estopped from seeking recompense for Overbay's payment. Defendants claim that they relied upon plaintiffs' voluntary payment of the attorneys' fees and other amounts due, that Harbour changed its position, delivered a satisfaction of mortgage to plaintiffs and discontinued its 2016 Foreclosure action although it had already been granted a judgment of foreclosure and sale in the action.

In addition, defendants contend that Harbour is entitled to recover its legal fees pursuant to Section 23 of the subject mortgage, which defendants executed. Section 23 provides that "if the mortgagee shall remedy [Overbay's] default or appear in, defend, or bring any action or proceeding to protect its interest in the mortgaged property or to foreclose this mortgage or collect the debt, the costs and expenses thereof (including reasonable attorney's fees to the extent permitted by law), with interest as provided in this paragraph, shall be paid by the mortgagor to the mortgagee upon demand. . . ." Defendants further request sanctions against plaintiffs.

In opposition, plaintiffs failed to meet their burden of demonstrating that a triable issue exists. Plaintiffs submit similar documents as defendants and the personal affidavit of Demetrius A. Tsunis. Tsunis states that he is the managing member of Overbay, LLC. He states that throughout the mortgage foreclosure proceeding he attempted to settle the foreclosure with defendants and his efforts to do so were continuously rebuffed. The motion

for summary judgment included a request for the payment of attorneys' fees which he believed to be unreasonable and therefore, disputed. He acknowledged that this court granted Harbour's motion for summary judgment but reserved on the issue of attorneys' fees and scheduled a hearing for May 15, 2018. Tsunis states that Overbay was under extreme pressure to close a refinancing package which it had with the IDA and Sun Trust Bank. Its mortgage commitments were about to expire unless a closing of the loans took place. He states that defendants took advantage of the situation by refusing to close without full payment of the attorneys' fees and a discontinuance of the action. Tsunis states that as a result of the economic duress placed upon him by defendants, Overbay had no choice but to close its financing package and to make payment to Berkman P.C. of the full amount of the fees demanded and that the payment was made under protest. Tsunis states that a triable issue of fact exists as to whether the payment of attorneys' fees was voluntary inasmuch as plaintiffs exercised their right of redemption by paying the entire judgment amount with interest to the date of the closing plus attorneys' fees.

Not just any form of protest is sufficient to overcome the voluntary payment doctrine. Rather, "[i]n order for a protest to be characterized as appropriate, it must be in writing and must have been made at the time of payment" (*Neuner v Newburgh City Sch. Dist.*, 92 AD2d 888, 459 NYS2d 874 [2nd Dept 1983]). Additionally, this written protest must indicate that [plaintiff] was reserving his rights when [it] made payment" ([DRMAK Realty LLC v Progressive Credit Union](#), 133 AD3d 401, 405, 18 NYS3d 618 [1st Dept 2013]) and must be communicated to the party receiving the payment (cf [Walton v New York State Dept. of Correctional Services](#), 13 NY3d 475, 489, 893 NYS2d 453 [2009]). Here, the court notes that none of the correspondence submitted by the parties, including letters and emails, do not state that plaintiffs paid the settlement amount under protest at the time of payment, or state that they reserved their rights to [*3] later sue to recover it. The court also finds that plaintiffs offer no explanation as to the manner in which they purportedly communicated such protest, let alone how they satisfied the above requirements.

Nor have plaintiffs met their burden of demonstrating that an issue of fact exists with regard to whether they were under economic duress at the time of payment. 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] [citation omitted]). Conversely, a party cannot be guilty of economic duress for

refusing to do that which he or she is not legally required to do" (*805 Third Ave. v M.W. Realty Assocs.*, 58 NY2d 447, 453, 461 NYS2d 778 [1983]; *Friends Lbr. v Cornell Dev. Corp.*, 243 AD2d 886, 888, 663 NYS2d 327 [1997]). Here, there is no dispute that Harbour obtained a judgment of foreclosure. Although the parties discussed the amount of attorney fees attached to the judgment amount, defendants were not required to reduce the fees. Plaintiffs could have argued their objections to the legal fees at the hearing scheduled by the court, and chose to forego the hearing by paying the attorney fees with the settlement amount on April 20, 2018. In his affidavit, Tsunis concedes that he decided to pay the full settlement amount which included attorney fees in order to obtain his construction loan.

Accordingly, the motion for summary judgment dismissing the complaint in its entirety is **GRANTED**. The court declines to impose sanctions.

DATED: November 8, 2018

HON. JERRY GARGUILO, J.S.C.

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