Inman v Scarsdale Shopping Ctr. Assoc. LLC
2016 NY Slip Op 32744(U)
July 27, 2016
Supreme Court, Westchester County
Docket Number: 60115/2012
Judge: Lester B. Adler

To commence the statutory time period for appeals as of right (CPLR §5513[a]), you are advised to serve a copy of this order with notice of entry upon all parties.

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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CYNTHIA R. INMAN and **ALAN J. INMAN**,

Plaintiffs,

-against-

DECISION & ORDER

SCARSDALE SHOPPING CENTER ASSOCIATES LLC d/b/a Golden Horseshoe Shopping Center, **LEAH FINE**, and **MANUEL FINE**,

Index No.: 60115/2012
Motion # 5

Defendants.

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ADLER, J.

In this post-judgment motion, defendants move under CPLR 4404 and 5015(a) (2) for an order setting aside the jury verdict for plaintiffs and directing a new trial "on the ground of newly discovered evidence." For the reasons set forth below, the motion is denied. This Court reviewed the following papers in connection with the motion:

Order to Show Cause
Affirmation in Support of Benjamin N. Gonson, Esq., with Exhibits
Affirmation in Opposition of Matthew J. Conroy, Esq. with Exhibits
Reply Affirmation of Benjamin N. Gonson, Esq.

Background – In June 2012, plaintiffs Cynthia and Alan Inman, who then owned and resided in a home in Scarsdale, New York, commenced this action against (1) a Delaware limited liability company (LLC) that owns a shopping center located on real property adjacent to plaintiffs' and (2) principals of the LLC. The Inmans claimed that defendants allowed invasive Japanese knotweed growing on the shopping center's

premises to spread onto and damage plaintiffs' grounds and residence.

In January 2013, and in response to defendants' summary judgment motion, the Court (Smith, J.) upheld the Inmans' causes of actions sounding in negligence and private nuisance (grounded on negligence.)

In September 2014, this Court presided over the jury trial of this action. On September 16, 2014, the jury returned a verdict for the Inmans and awarded damages of $ 535,000, plus interest from the date of the verdict. Judgment was entered on November 25, 2014. On December 18, 2014, defendants filed an appeal from the judgment; that appeal is still pending.

Motion – On May 11, 2016, about one and one-half years after judgment was entered, defendants filed this motion to set it aside on the ground that they had "recently learned" that, when the Inmans commenced this lawsuit, a mortgage foreclosure proceeding was pending against them in connection with the Scarsdale premises (*Deutsche Bank Natl. Trust Co., as Trustee of the Residential Asset Securitization Trust 2007-A1, Mtge. Pass-Through Certificates, Series 2007-A Under the Pooling and Servicing Agreement Dated January 1, 2007 v Inman* [index no. 2488-11, Sup Ct, Westchester County]). Henceforth, that proceeding will be referred to as the Foreclosure Proceeding.

Defendants submit Court filings indicating that Deutsche Bank commenced the Foreclosure Proceeding against the Inmans, among others, on January 11, 2011. The Foreclosure Proceeding complaint alleges that the Inmans had stopped making mortgage payments in or about August 2009. On January 31, 2011, the Inmans filed a verified answer. By decision and order dated January 9, 2014, the Court (DiBella, J.)

granted Deutsche Bank's motion for an order granting it summary judgment and appointing a referee to compute the amount due. On January 8, 2015, a Final Judgment for Foreclosure and Sale was entered, and on December 9, 2015, the Court-appointed referee sold the mortgaged premises.

Defendants allege that they have only recently learned about the Foreclosure Proceeding. According to defendants, the Inmans never disclosed it to them and "falsely represented that they had been paying their mortgage." Defendants point out that, during Alan Inman's deposition, he was asked "How much is your current mortgage payment?" and answered "Around $3500." Inman was also asked what lender held the mortgage and answered "Indymac" instead of Deutsche Bank. Defendants claim that "both of these statements were false."

Defendants argue that, during the pendency of this action, the Inmans lacked standing to sue because (1) the Foreclosure Proceeding deprived them of their ownership interest in the premises and (2) they allegedly owed more on their mortgage than their premises were worth. Defendants seem to imply that, if the existence of the Inmans' mortgage and debt had been known, the complaint would have been dismissed for their lack of standing and the lawsuit never would have been submitted to the jury.

As grounds for setting aside the jury verdict, defendants also contend that evidence of the Foreclosure Proceeding should have been available to the jury "to consider the amount of damages based on diminution in fair-market value and/or the cost of restoration of the Property and the fair value of use and enjoyment of the Property."

In opposition, the Inmans argue that (1) the motion is untimely, (2) evidence of the Foreclosure Proceeding is not "newly discovered" within the meaning of CPLR 5015(a)(2) because it was a matter of public record, and (3) in any event, defendants failed to demonstrate that evidence of the Foreclosure Proceeding, if it had been introduced at trial, would have changed the jury verdict.

Discussion – Defendants' arguments are unavailing. As a threshold matter, this motion is untimely to the extent defendants seek relief under CPLR 4404. In the case of a jury trial, a post-trial motion under CPLR 4404 must be made within 15 days after the verdict was rendered (CPLR 4405). In unusual circumstances, courts have extended the 15-day deadline where (1) the delay is brief and good cause is shown (*see e.g. Johnson v Suffolk Co. Police Dept.*, 245 AD2d 340 [2d Dept 1997] [three-day delay]) or (2) in other unusual circumstances (*see Brown v Two Exch. Plaza Partners*, 146 AD2d 129 [1st Dept 1989], *affd* 76 NY2d 172 [1990]). In this case, however, defendants waited about 18 months before moving and no special circumstances warrant an extension (*see Brzozowy v Elrac, Inc.*, 39 AD3d 451 [2d Dept 2007] [CPLR 4404 motion made two months after verdict held to be untimely]; *Rapaport v Flushing Sav. Bank*, 266 AD2d 197 [2d Dept 1999] [motion made five months after verdict was untimely]).

With respect to defendants' motion under CPLR 5015(a)(2), the statute requires a movant seeking relief from a judgment because of newly-discovered evidence to show that (1) the movant could not have discovered the evidence in time to move for a new trial under CPLR 4404 and (2) the evidence, if introduced at trial, would probably have produced a different result.

To satisfy the first requirement as to the time of discovery, the movant must establish that, even if he had exercised due diligence, he could not have discovered the evidence before entry of judgment (*Ferdico v Zweig*, 82 AD3d 1151, 1152 [2d Dept 2011]; *Sieger v Sieger*, 51 AD3d 1004, 1006 [2 Dept 2008], *appeal dismissed* 14 NY3d 750 [2010], *lv denied* 14 NY3d 711 [2010]). Evidence which is "a matter of public record" generally is not deemed evidence which could not have been discovered before trial with due diligence (*Federated Conservationists of Westchester County, Inc. v County of Westchester*, 4 AD3d 326, 327 [2d Dept 2004]). Here, the existence and history of the Foreclosure Proceeding against the Inmans was a matter of public record, and defendants could have readily discovered them by searching the records of the Westchester County Clerk, which are freely available online.

Defendants contend that the Inmans concealed the Foreclosure Proceeding from them, but Alan Inman's deposition answer that the Inmans' "current mortgage payment" was "[a]round $3500" can reasonably be interpreted as a statement about the monthly amount that the Inmans' lender charged them, rather than a statement about how much the Inmans were paying the lender. While Alan Inman incorrectly named Indymac as the Inmans' lender, that misstatement would not have kept defendants, if they had used due diligence, from finding out about the Foreclosure Proceeding. Moreover, defendants failed to prove that the Inmans concealed the Foreclosure Proceeding's existence because defendants do not establish that they ever sought that information from the Inmans during discovery.

Defendants also failed to satisfy the second statutory requirement that they establish that the newly-discovered evidence probably would have produced a different

result if had been introduced at trial. As a threshold issue, despite defendants' claim to the contrary, the pending Foreclosure Proceeding had no bearing on the Inmans' standing to bring this lawsuit. The Inmans' mortgage of their property, their payment default, the commencement of the Foreclosure Proceeding, the Court's grant of summary judgment for Deutsche Bank, and the entry of judgment against the Inmans, did not affect their ownership interest in the mortgaged premises (*see Carnavalla v Ferraro*, 281 AD2d 443, 444 [2d Dept 2001]). In fact, the Inmans retained title to and interest in the mortgaged property until the actual foreclosure sale in December 2015, which occurred after the jury verdict and entry of judgment in this action (*see id.*).

Defendants also claim that the Inmans lacked standing because they were "underwater," i.e., they owed more on their mortgage than their premises were worth. However, the mortgage was simply a lien on the premises, which secured the Inmans' payment obligations with respect to Deutsche Bank's loan to them. The default on the Inmans' indebtedness to Deutsche Bank had no effect on the Inmans' ownership interest in the mortgaged property (*see Holmes v Gravenhorst*, 263 NY 148, 152 [1933]).

Turning to the question whether the newly-discovered evidence would have affected the jury verdict, this Court finds that it is improbable that it would have had any impact. To show that newly-discovered evidence probably would have made a difference, the new evidence must have, among other things, "gone to the heart of the factual issues in the case" (*Federated Conservationists of Westchester County, Inc.*, 4 AD3d at 327). Here, the pending Foreclosure Proceeding would have had no bearing on the issue whether defendants' negligence caused property damage to the Inmans'

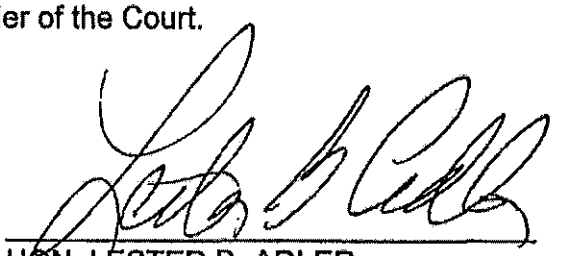
property. As for the awarded damages, evidence that Deutsche Bank sought to foreclose on the Inmans' property is irrelevant to the issues that the jury considered, namely, what amount would compensate the Inmans for diminished property value that defendants' negligence caused, or the amount needed to restore the property, and the value of any loss of use and enjoyment.

Accordingly, it is hereby

ORDERED that defendants' motion for an order setting aside the jury verdict in this action and directing a new trial is denied.

The foregoing constitutes the Order of the Court.

Dated: White Plains, New York
July 27, 2016



HON. LESTER B. ADLER
SUPREME COURT JUSTICE