S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. ZELDA JONAS
Justice

METROPOLITAN BANK & TRUST COMPANY — TRIAL/IAS PART 30

Plaintiff,

- against -

AMEROPAN REALTY CORP., ROLF W. WITTICH, BELL OIL TERMINAL, INC., AMEROPAN OIL CORP., ALLNET REALTY, VIP COLLEGE PREP, GEORGE SHILLING, D.D.S., GEORGE ADOMAITES, CPA, EDMUND ADOMAITES, CFP, and "JOHN DOE 1-10",

Defendants.

Sequence # 002
Motion Date: 8/24/06
Index # 981/04



Motion (seq. No. 2) by the attorneys for the plaintiffs for an order granting the defendant Rolf Wittich leave to amend the verified answer interposed in this matter is determined as hereinafter set forth; the application for an order changing the venue from Suffolk County to Nassau County and consolidating the within foreclosure action and the foreclosure action entitled *Metropolitan Bank & Trust Company v Rolf W. Wittich, Bell Oil Terminal Inc., Ameropan Oil Corp., Ameropan Realty Corporation, and "John Doe 1-10"* bearing index No. 2193/04 commenced in Suffolk County is denied.

Cross-motion (seq. No. 2) by the attorneys for the defendants Ameropan Realty Corp., Bell Oil Terminal, Inc. and American Oil Corp. (referred to as the Ameropan defendants) for an order granting sanctions pursuant to 22 NYCR §130-1.1 in an amount deemed appropriate by the Court, together with the reasonable attorneys' fees incurred by defendant Ameropan Oil Corp. in responding to the motion filed by Marjory Cajoux, Esq., attorney for defendant Rolf Wittich, for an order granting defendant Rolf Wittich leave to amend his verified answer is denied without prejudice to renew prior to settlement or the final disposition of this action by a court of competent jurisdiction.

This is an action to foreclose two commercial mortgages. The initial mortgage loan was made in 1999. Additional funds were borrowed from the plaintiff in 2003. In the mortgage foreclosure action pending before this court, the collateral pledged as security for two mortgage loans consists of a commercial office building located in Syosset, New York known as 6500 Jericho Turnpike (the "Nassau County property"). The attorney for plaintiff claims the Nassau County property is fully rented and is worth in excess of $1.5 million. Plaintiff, Metropolitan, holds second and third mortgages respectively on the premises and is currently owed over $2,000,000. Plaintiff's attorney claims the first mortgage is held by Atlantic Bank & Trust Company; and the current amount owed is in the approximate amount of $500,000. Plaintiff's attorney believes the Atlantic Bank first mortgage is being paid in a timely manner. Plaintiff Metropolitan has not been paid for nearly four years.

Defendant Rolf Wittich is the sole owner of real property located at 2 Fenimore Road in Bayport, New York (the "Suffolk County Property"), which he pledged as additional collateral for

a series of loans made by plaintiff to Rolf Wittich, Ameropan Oil Company ("AOC"), ARC, and Bell Oil Terminal Inc. ("Bell").

On July 28, 1999, AOC, Bell and Wittich were co-borrowers of a $1.5 million loan advanced by Metropolitan as evidenced by a Promissory Note and Loan Agreement, each executed and delivered to the plaintiff bank. As partial security for the loan, ARC, as guarantor, secured its guaranty with a mortgage encumbering the Nassau County property. In addition to the $1.5 million loan, Metropolitan also made a loan to Rolf Wittich in the original principal amount of $100,000 in January 2003 secured by the same collateral pledged in 1999. Both loans went into payment default in 2003 and, as a result plaintiff Metropolitan commenced this action seeking to foreclose its mortgage liens. It is alleged that at the time the loans were made, plaintiff's attorney contends Rolf Wittich was the sole shareholder of ARC, the entity that owns the Nassau County Property.

The loans went into payment default in early 2003 after Rolf Wittich and his son Peter became embroiled in litigation involving the family shareholders of AOC, Bell, ARC and the related businesses. The attorney for plaintiff claims Rolf Wittich's son, Peter Wittich, took control of the companies and elected to stop paying the Metropolitan loans at issue alleging that they were improperly made and not corporate obligations. Peter Wittich further claimed that his father Rolf benefitted from the loans personally, and that Metropolitan could not foreclose against corporate real estate or assets owed by ARC, Bell or AOC to obtain repayment of what Peter Wittich claims was a personal loan.

The Nassau County and Suffolk County mortgage foreclosure actions were filed on January 23, 2004. Pursuant to CPLR 602 the issue of consolidating pending actions is left to the discretion of the court and may be granted on a motion when the actions involve common questions of law and

fact. The attorney for plaintiff opposes consolidation on the ground that the corporate defendants in the Nassau County action allege the plaintiff has no right to foreclose upon ARC's property since the mortgage loans were made for an improper non-corporate purpose. ARC further alleges that Rolf Wittich lacked the requisite corporate capacity to pledge corporate assets or encumber the Nassau County property. These defenses (which plaintiff claims lack merit) are inapplicable to the Suffolk County action since Rolf Wittich owns that property individually and, even if the allegations interposed by the corporate defendants were true, plaintiff contends Rolf Wittich benefitted from the loans and is liable to repay them whether through the foreclosure of the mortgages, the sale of his home or otherwise.

Pursuant to CPLR 507, real property actions affecting title to or possession, use or enjoyment of real property are to be brought in the county where the real property is located (*see Jablonski v Trost*, 245 AD2d 338; *Rampe v Giuliani*, 227 AD2d 605; *Carder v Ramos*, 163 AD2d 732, *Christian v Brown*, 151 AD2d 906; *Arnold Constable Corp. v Staten Island Mall*, 61 AD2d 826; *Jacoby v Algonquin Gas Transmission Co.*, 285 App. Div. 941; CPLR 507; 29 N.Y. Jur.2d Courts and Judges § 962).

The attorney for the plaintiff objects to a change of venue at this stage of the proceeding. The foreclosure action in Suffolk County involves real property located in Suffolk County. Neither ARC, AOC nor Bell have any ownership interest in the Suffolk County property . The within action was filed January 23, 2004 (over two years and nine months ago). The within motion to change venue and for consolidation was made in August, 2006. On or about June 14, 2006, the plaintiff submitted a motion for summary judgment in the mortgage foreclosure action in Suffolk County Supreme Court. A decision is still pending in the Suffolk County Supreme Court foreclosure action. As a

prerequisite to a motion pursuant to CPLR 510[3], on the ground that venue is improper, a movant must first serve a written demand that the action be tried in the county he specifies as proper, with the answer, or before the answer is served. *See Greenberg v Kruse*, 23 AD3d 347; *Galan v Delacruz*, 4 AD3d 449; CPLR 511[a] and [b]. The failure to timely move precludes an award of relief predicated on the claim that a movant is entitled to a change of venue as a matter of right. *Harleysville Ins. Co. v Ermar Painting and Contracting, Inc.*, 8 AD3d 229; *Lopez v Robbins*, 269 AD2d 364; *Runcie v Cross County Shopping Mall*, 268 AD2d 577. The application to change the venue of the Suffolk County Supreme Court mortgage foreclosure action to Nassau County Supreme Court and for consolidation for a joint trial is denied. The attorneys for the Ameropan Realty defendants take no position on the issues of consolidation and venue.

The attorney for defendant Rolf Wittich failed to annex a copy of a proposed amended verified answer to the motion to amend the answer pursuant to CPLR 3025. The attorney for the Ameropan defendants responded with a cross-motion for sanctions. The attorney for Rolf Wittich served a Reply Affirmation with a copy of a proposed amended answer. The attorneys for the Ameropan defendants served a further affirmation in opposition to the application to amend the answer and reiterated their request for sanctions. The attorneys for the plaintiff take no position on the motion to amend the answer as long as the new allegations are not against the plaintiff.

CPLR 3025 states that "a party may amend his pleadings or supplement it by setting forth additional or subsequent transactions or occurrences, at any time, by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just, including the granting of costs and continuances." The defendant Rolf Wittich seeks leave to serve an amended verified answer to assert a cross-claim based upon subrogation relating to Mr. Wittich's alleged payment in

1999 of a debt of Ameropan Oil purportedly owed at that time to Mr. Wittich's former wife, Lony Wittich. Defendant Rolf Wittich executed general releases in 2003 pursuant to a settlement previously made in actions pending before the Honorable Justice Leonard B. Austin of this court entitled *Ameropan Oil Corporation v Rolf Wittich, et al.,* (Index No. 6440/03) and *Peter Wittich, et al v Rolf Wittich, et al* (Index No. 2708/03). In that settlement, defendant Rolf Wittich acknowledged having taken in excess of $6.5 million from Ameropan Oil and Bell Oil Terminal Inc. Defendant Rolf Wittich signed general releases in favor of Ameropan Oil on November 6, 2003. It is not disputed that Rolf Wittich's signature was notarized by his former counsel in connection with the settlement of actions pending before Justice Austin of this court. It is settled that "[s]trong policy considerations favor the enforcement of settlement agreements" since they [ ] "avoid potentially costly, time-consuming litigation * * *, preserve [ ] scarce judicial resources * * * [and] produce [ ] finality and repose upon which people can order their affairs." *Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [1993]; *Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *see McCoy v Feinman*, 99 NY2d 295, 302 [2002]; *Desantis v Ariens Co.*, 17 AD3d 311 [2nd Dept. 2005]; *see also Booth v 3669 Delaware, Inc.*, 92 NY2d 934, 935 [1998]; *City of New York v 130/140 Essex Street Development Corp.*, 302 AD2d 292 [1st Dept. 2003]; CPLR 2104. Moreover, "[t]hese interests are advanced only if settlements are routinely enforced rather than becoming gateways to litigation." *Denburg v Parker Chapin Flattau & Klimpl, supra*, at 363.

The attorneys for the Ameropan defendants also argue that the assertion of a subrogation cross-claim by Rolf Wittich which accrued in 1999 is barred by the plain terms of the general release he executed in November, 2003. Co-defendants further argue that defendant Rolf Wittich is barred under the doctrines of collateral estoppel and *res judicata* from challenging the propriety of the

settlement agreement (and necessarily the general releases) he had executed while represented by prior counsel. *See, e.g. O'Brien v City of Syracuse*, 54 NY2d 353 ("once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred even if based on different theories or if seeking a different remedy"). *See also Matter of Amica Mutual Insurance Co.*, 85 AD2d 727.

A party may amend a pleading at any time by leave of court and that leave shall be freely given upon such terms as may be just (*see* CPLR 3025 [b]). It is likewise true that the merits of a proposed amendment will not be examined on the motion to amend–unless the insufficiency or lack of merit is clear and free from doubt. *See Goldstein v Brogan Cadillac Oldsmobile Corp.*, 90 AD2d 512; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:11, pgs. 360-361. In cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied. *See Taylor v Taylor*, 84 AD2d 947; *East Asiatic Co. v Corash*, 34 AD2d 432; 3 Weinstein-Korn-Miller, NY Civ Prac, par 3025.23; *see also Norman v Ferrara*, 107 AD2d 739.

The attorneys for the Ameropan defendants, while asking for sanctions, are in effect challenging the sufficiency of the proposed answer, and have chartered a course for a dismissal pursuant to CPLR 3211(a)(5), based on collateral estoppel, release, *res judicata*, statute of limitations. A CPLR 3025 motion to amend does not contemplate a challenge to the sufficiency of the pleadings at this stage of the proceedings. *Compare* CPLR 3211(c) when a motion to dismiss the pleadings may be treated as one for summary judgment. *See also* Siegel, Practice Commentaries, *supra* C3025:11 at page 361.

The submissions before this Court demonstrate that the defendant Rolf Wittich is no stranger to the judicial system. The Court notes that in the Judgment of Divorce in the action entitled *Lony Wittich v Rolf Wittich* (Exhibit H to motion in support at pages 9-10), Judge Tolub (Supreme Court New York County) stated:

> "At the outset of this discussion regarding the distribution of marital assets the Court notes that Mr. Wittich has taken any and all steps he could to frustrate the equitable distribution of marital assets. He [Rolf Wittich] has admitted defying orders of this Court, fraudulently transferring assets, hypothecating assets and removing hundreds of thousands of dollars from this country and depositing them in foreign accounts. The Court finds that he [Rolf Wittich] purposefully defaulted on loans and stonewalled discovery for almost five years. Indeed, many of the records of the corporate entities involved were only produced during the trial of this matter." (emphasis added)

Although the defendant Rolf Wittich is granted leave to serve the amended verified answer on all the opposing counsel pursuant to CPLR 2103(b) 1.2 or 3, no later than November 16, 2006, should they chose to do so, defendant Rolf Wittich and his attorney are admonished that the initiation and pursuit of frivolous causes of action may result in sanctions and an award of counsel fees. 22 NYCRR 130-1.1(c) states that "[i]n determining whether the conduct undertaken was frivolous, the court shall consider among other issues (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

The cross-motion for sanctions by the Ameropan defendants is denied without prejudice to renew prior to settlement or the final disposition of this action by a court of competent jurisdiction.

This decision is the order of the Court.

Dated: 10/23/06

J.S.C.