Scan

INDEX
NO. 7585-04

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 16 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 10-13-05
Submission Date: 12-13-05
Motion Sequence No.: 007,008,009/
MOT D

RICHARD KURTZ,
Plaintiff,

- against -

MARSHALL LELCHUK, JOAN LELCHUK, TJB EQUITIES INC., STEVEN CRAWFORD, and IPE ASSET MANAGEMENT LLC,
Defendants.

COUNSEL FOR PLAINTIFF
Koenig & Samberg, Esqs.
300 Old Country Road - Suite 351
Mineola, New York 11501

COUNSEL FOR DEFENDANTS
Lester & Fontanetta, P.C.
(for Lelchuk)
600 Old Country Road - Suite 229
Garden City, New York 11530

Kleinman, Saltzman & Bolnick, P.C.
(for IPE Asset Management LLC)
151 North Main Street
P.O. Box 947
New City, New York 10956

Ahern & Ahern, Esqs.
(for Crawford and TJB Equities, Inc.)
One Main Street
Kings Park, New York 11754

ORDER

The following papers were read on the motion of Defendants Lelchuk for an order of preclusion; the cross-motion of Defendants TJB Equities, Inc. and Steven Crawford to dismiss the complaint; and the cross-motion of Defendant IPE Assest Management for summary judgment or to dismiss the complaint:

KURTZ v. LELCHUK, et al.,
Index No. 7585-04

Motion Sequence No. 7

Notice of Cross-motion dated October 11, 2005;
Affirmation of Dennis P. Ahern, Esq. dated October 11, 2005;

Motion Sequence No. 8

Notice of Motion dated September 26, 2005;
Affirmation of Steven Weitz, Esq. dated September 26, 2005;

Motion Sequence No. 9

Notice of Cross-motion dated November 14, 2005;
Affirmation of Laurence D. Kleinman, Esq. dated November 14, 2005;

Other Papers

Affirmation of Steven Weitz, Esq. dated November 4, 2005;
Sur-Reply Affirmation of Steven Weitz, Esq. dated November 4, 2005;
Affirmation of Laurence D. Kleinman, Esq. dated December 5, 2005;
Affirmation of Steven Weitz, Esq. dated November 28, 2005;
Affidavit of Marshall Lelchuk sworn to on November 28, 2005.

Defendants Marshall Lelchuk and Joan Lelchuk (collectively "Lelchuk") move for an order pursuant to CPLR 3101 and 3126 precluding Defendant TJB Equities Inc. ("TJB") from introducing documents as a result of their failure to comply with their Request for Production of Documents dated August 15, 2005.

Defendants Steven Crawford ("Crawford") and TJB cross-move for an order dismissing the complaint, the third party complaint[1] and the cross-claims or for a stay of all proceedings.

Defendant IPE Asset Management LLC ("IPE") moves to dismiss the complaint pursuant to CPLR 3211 or for summary judgment pursuant to CPLR 3212.

---

[1]A third party action had been commenced but was later discontinued in favor of the cross-claims interposed herein.

BACKGROUND

Lelchuk were the owners of a one-family residence located at 32 Amherst Road, Great Neck, New York ("the Property").

In August, 2001, the Property was encumbered by a first mortgage initially held by Metropolitan Savings Bank ("Metropolitan"), which had been assigned to HSBC Bank ("HSBC"), a second mortgage held by Chase Manhattan Bank ("Chase"), a federal tax lien, a New York State tax lien and several liens resulting from unsatisfied judgments obtained against them.

Lelchuk was in arrears on the HSBC and Chase mortgages. Chase had commenced a foreclosure proceeding and had obtained a judgment of foreclosure. The property was scheduled to be sold pursuant to the judgment of foreclosure on August 30, 2001.

In an effort to avoid foreclosure, Lelchuk entered into an agreement dated August 27, 2001 with TJB (the "Option"). Under the terms of the Option, TJB agreed to convey the Property back to Lelchuk upon Lelchuk's exercise of the option to purchase the property and compliance with the terms of the Option. The Option designated Lelchuk as the Purchaser.

Lelchuk also executed a deed dated August 28, 2001 by which Lelchuk conveyed title to the Property to TJB.

The Option provided that as consideration for the Option and the transfer of the Property, TJB would bring Lelchuk's mortgage with HSBC and Chase current.

The Option granted Lelchuk the opportunity to repurchase the Premises at any time up to May 31, 2002 for the amount stated in the Option provided that Lelchuk did not file for bankruptcy during the term of the Option and is not in default under its terms or the terms of a lease between TJB and Lelchuk dated September 1, 2001.[2]

The deed conveying title to the Premises from Lelchuk to TJB was recorded with the Nassau County Clerk on November 30, 2001.

In March 2004, Plaintiff Richard Kurtz ("Kurtz") loaned Lelchuk the sum of $86,297.88. The loan was evidenced by a mortgage note and a mortgage secured by Lelchuk's interest in the Property.

Kurtz alleges he did not discover that Lelchuk had conveyed the Property to TJB in August 2001 until after Lelchuk had executed the Kurtz Mortgage and Kurtz had loaned Lelchuk the money evidenced by the note.

When Lelchuk defaulted in the payment of the note, Kurtz commenced this action.

Kurtz' action against Lelchuk has been settled. Lelchuk has consented to the entry of a judgment against them for the full amount of the note. The settlement permitted Kurtz to proceed against TJB on the complaint and Lelchuk to proceed against TJB on their cross-claims. The action against HSBC has been discontinued.

---

[2]Although the Option makes reference to a lease for the Premises dated September 1, 2001 with TJB as landlord and Lelchuk as tenant, none of the parties have provided the Court with a copy of the lease in connection with these motions.

By deed dated May 13, 2005, TJB conveyed the Property to Defendant IPE Asset Management, LLC ("IPE"). This deed reflects that the Property was being transferred subject to the existing mortgages and judgments.

After the transfer of title from TJB to IPE, Lelchuk served a third party summons and complaint upon IPE. (See Footnote 1.) The third party complaint seeks to set aside the transfers of the Property from Lelchuk to TJB and from TJB to IPE on the grounds of fraud, duress, undue influence or mistake. Third party plaintiff also seeks damages for loss of the property, punitive damages from Crawford, TJB and IPE or to impose a constructive trust on the property. The ultimate goal of the current third party pleading is to set aside the transfer of the property from Lelchuk to TJB and to reinstate Lelchuk as the owner of the property or to recover value of the property.

DISCUSSION

A. IPE's Cross-Motion for Summary Judgment

A motion for summary judgment must be supported by a copy of the pleadings. CPLR 3212(b). If the party moving for summary judgment fails to attach a copy of the pleadings to the motion papers, the motion must be denied. Wider v. Heller, 24 A.D.3d 433 (2nd Dept. 2005); Sted Tenants Owners Corp. v. Chumpitaz, 5 A.D.3d 663 (2nd Dept. 2004); and Lawlor v. County of Nassau, 166 A.D.2d 692 (2nd Dept. 1990).

Pleadings include the summons and complaint, answer, third-party complaint, answer to third party complaint, cross-claim, answer to the cross-claim, counter-claim and reply to the counterclaim. CPLR 3011.

A copy of the third-party summons and complaint is attached to Lelchuk's motion and TJB/Crawford's cross-motion. While IPE indicates that it has served an answer, it has not attached a copy of its answer to its papers and a copy of its answer is not attached to any of the other parties' moving papers. Since IPE has failed to submit a copy of the pleadings to the Court in support of its motion for summary judgment, its motion for summary judgment should be denied. However, based upon the submission on this motion, the Court will consider the merits of the application.

A party seeking summary judgment must establish a *prima facie* entitlement to judgment as a matter of law. Winegrad v. New York Univ Med. Ctr., 64 N.Y.2d 851 (1985); and Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Widmaier v. Master Products Mfg., 9 A.D.3d 362 (2nd Dept. 2004); and Ron v. New York City Housing Auth., 262 A.D.2d 76 (1st Dept. 1999).

A party establishes a *prima facie* entitlement to judgment as a matter of law by submitting sufficient evidence to establish the absence of triable issues of fact. Anwar v. Hellman Management, 14 A.D.3d 470 (2nd Dept. 2005). An attorney's affirmation has no probative value unless it is accompanied by documentary evidence constituting admissible proof. Adam v. Cutner & Rathkopf, 238 A.D.2d 234 (1st Dept. 1997). See, Zuckerman v. City of New York, 49 N.Y. 2d 557 (1980).

In this case, the documentary "evidence" accompanying the attorney's affidavit consists of the Option, portions of a title report, a copy of the deed from Lelchuk to TJB, a letter from Marshall Lelchuk to TJB and a copy of a tax search. These items are not

documentary evidence sufficient to establish that IPE is entitled to judgment as a matter of law.

Since IPE has failed to make a *prima facie* showing of entitlement to judgment as a matter of law, its motion for summary judgment must be denied.

B. IPE's Cross-Motion to Dismiss Pursuant to CPLR 3211(a)(1)

CPLR 3211(a)(1) permits the court to dismiss an action based upon documentary evidence. In order to dismiss pursuant to CPLR 3211(a)(1), the court must find that the documentary evidence totally refutes plaintiff's claim and conclusively establishes a defense as a matter of law. Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 (2002); and Leon v. Martinez, 84 N.Y.2d 83 (1994); and 730 J & J LLC v. Fillmore Agency, Inc., 303 A.D.2d 486 (2nd Dept. 2003); and Berger v. Temple Beth-el of Great Neck, 303 A.D.2d 346 (2nd Dept. 2003).

The documents submitted do not establish a defense to the cross-claim as a matter of law. Thus, IPE's cross-motion to dismiss pursuant to CPLR 3211(a)(1) must be denied.

C. Crawford, TJB and IPE's Cross-Motion to Dismiss Pursuant to CPLR 3211(a)(7)

While Crawford and TJB do not specifically state, in their notice of motion, that they are moving to dismiss on the grounds that the complaint and cross-claim fail to state a claim upon which relief can be granted (CPLR 3211[a][7]), a reading of the motion papers indicates that this is the basis asserted for dismissal of the complaint and cross-claim.

The Court will consider IPE's motion as one made pursuant to CPLR 3211(a)(7) even though this is not a basis it stated for dismissal. The Court believes that it would exalt form over substance to permit Lelchuk to proceed on cross-claims against IPE on which it can never obtain relief.

The original caption to this action was Richard Kurtz, Plaintiff against Marshall Lelchuk and Joan Lelchuk, and TJB Equities Inc. and HSBC (USA) a New York Corporation, Defendants. Lelchuk answered Kurtz' complaint by denying the relevant allegation of the complaint. Lelchuk's answer contained affirmative defenses but did not assert any cross-claims against the co-defendants.

Lelchuk served a third-party summons and complaint captioned Richard Kurtz, Plaintiff against Marshall Lelchuk and Joan Lelchuk, TJB Equities, Inc., Steven Crawford and IPE Asset Management LLC, Defendants. The third-party complaint alleges Lelchuk's actions against TJB, Crawford and IPE.

After the filing and service of the third party summons and complaint, the action brought by Kurtz against Lelchuk was settled. Lelchuk then served a summons and cross-claims upon TJB, Crawford and IPE. The summons and the cross-claims are captioned Richard Kurtz, Plaintiff against Marshall Lelchuk and Joan Lelchuk, TJB Equities, Inc., Steven Crawford and IPE Asset Management LLC, Defendants. The cross-claims seek the same relief against the same parties as was sought in the third-party complaint.

Lelchuk's third party summons and complaint and their subsequent complaint and cross-claims have several procedural problems. See generally Siegel, *New York*

Civil Practice 4th §§ 155, 156 (regarding the procedures for commencing a third-party action and the claims that may be asserted in a third-party complaint). See generally, Siegel, *New York Civil Practice 4th* §227 and 1 *New York Civil Practice* ¶ 3019.31 (regarding the proper procedures for interposing a cross-claim, the procedures for interposing a cross-claim against a non-party and the types of claims that may be asserted in counterclaims).

The court will overlook these procedural defects. The court will treat the third-party action as having been withdrawn and will address the merits of the cross-claims asserted by Lelchuk against TJB, Crawford and IPE.

1. *First Cross-Claim*

The Court cannot quite determine the relief requested in the first cause of action alleged in the "Cross-Claim." The "First Cause of Action" is designated as an action "In Fraudulent Conveyance."

It is not a fraudulent conveyance action within the meaning of Debtor and Creditor Law Article 10. Debtor and Creditor Law Article 10 permits a creditor to set aside transfers made by a debtor if the transfer is made without fair consideration and renders the debtor insolvent.

TJB did not make a conveyance within meaning of Debtor and Creditor Law §270. Debtor and Creditor Law § 270 defines a conveyance as "...payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance." The conveyance in this

case was made by Lelchuk when they transferred title to the Property to TJB by the August 28, 2001 deed.

Additionally, Lelchuk does not allege that the transfer of The Property from TJB to IPE was made without fair consideration or rendered TJB insolvent; both of which are essential elements of an action to set aside a fraudulent transfer. See, Sklaroff v. Rosenberg, 125 F.Supp.2d 125 (S.D.N.Y. 2000), *aff'd.,* 18 Fed. Appx. 28 (2nd Cir. 2001); and Debtor and Creditor Law §§ 272, 273.

Lelchuk has not plead any of the essential elements of a cause of action to set aside a fraudulent conveyance under Debtor and Creditor Law Article 10. To the extent that the first cross-claim purports to allege such a cause of action, it fails to state a claim upon which relief can be granted and must be dismissed.

As best as the Court can determine, the first cause of action of the cross-claim seeks to void the deed and set aside the transfer of the Property from Lelchuk to TJB on the grounds of fraud, mistake, undue influence or duress.

a. *Fraud*

The elements of common law fraud are "representation of a material existing fact, falsity, scienter, deception and injury." Channel Master Corp. v. Aluminum Limited Sales Inc., 4 N.Y.2d 403, 407 (1958). See also, Dalessio v. Kressler, 6 A.D.2 57 (2nd Dept. 2004).

On or about August 28, 2001, Crawford appeared unannounced at Lelchuk's home. At that time, the Property was scheduled to be sold at a foreclosure sale that

was to be held on August 30, 2001. Lelchuk allege that they did not want to sell their home.

Lelchuk assert that Crawford offered a plan under which Lelchuk would convey title to the Property to TJB and reinstate the outstanding mortgages thereby preventing the foreclosure. This plan would permit Lelchuk to continue to reside in the premises. Lelchuk further allege that TJB would hold title "in name only." (Cross-Claim ¶13.) Lelchuk further allege that TJB agreed to convey title back to Lelchuk on demand.

Lelchuk allege that Crawford misrepresented the nature of the documents they signed and the nature of the transaction. Lelchuk further alleges that Crawford misrepresented that they would lose their home and their equity in the home if they did not enter into the aforementioned arrangement.

As a result of these purported misrepresentations, Lelchuk executed the deed and the Option.

The documentary evidence belies these allegations. The deed conveying the property from Lelchuk to TJB is a statutory bargain and sale with covenant against grantors acts deed. See, Real Property Law §258. On the top of the deed contains the following warning in bold, capital letters, **"CONSULT YOUR LAWYER BEFORE SIGNING THIS INSTRUMENT-THIS INSTRUMENT SHOULD BE USED BY LAWYERS ONLY."** Despite this warning, Lelchuk signed the deed without consulting their attorney.

The deed clearly and unequivocally indicates that Lelchuk are conveying their ownership interest in the property to TJB. The Option also indicates that Lelchuk would

be able to repurchase the property from TJB provided they comply with the terms of the Option.

Lelchuk cannot claim to have been defrauded by the deed and the Option. These documents are clear and unambiguous and establish the nature of transaction and the relationship between Lelchuk and TJB.

A party is under an obligation to read a document before signing it and cannot avoid the effect of the document by asserting that he or she did not read or understand the contents of the document. Pimpinello v. Swift & Co., 253 N.Y. 159 (1930); and Saxony Ice Co., Division of Springdale Ice Co., Inc v. Little Mary's American Bistro, 243 A.D.2d 700 (2nd Dept. 1997); and Martino v. Kaschak, 208 A.D.2d 698 (2nd Dept. 1994). A party who signs a document without having a valid excuse for failing to read it is conclusively bound by its terms in the absence of a valid excuse for having failed to read it. Guerra v. Astoria Generating Co., LLP, 8 A.D. 3d 617 (2nd Dept. 2004); Morby v. De Siena Assocs., LPA, 291 A.D.2d 604 (3rd Dept. 2002); and Shklovskiy v. Khan, 273 A.D.2d 371 (2nd Dept. 2000). See also, Da Silva v. Musso, 53 N.Y. 2d 543 (1981).

Lelchuk do not allege that they were suffering from any mental or physical disability which prevented them from reading or understanding these documents. Marshall Lelchuk and Joan Lelchuk are of legal age. They do not assert that they are unable to read or understand English.

A party cannot claim to have been mislead where the misrepresentation could have been discovered through the exercise of due diligence. Danann Realty Corp. v. Harris, 5 N.Y.2d 317 (1959); and Cohen v. Cerier, 243 A.D.2d 670 (2nd Dept., 1997).

Lelchuk could and should have discovered the nature of the transaction by reading the deed and Option. The warning on the top of the deed clearly establishes that it is an important document which should be used only by a lawyer and which a party should not sign before consulting with a lawyer. Despite these warnings, Lelchuk chose to sign the deed. Lelchuk cannot be excused from their failure to read and abide by this conspicuous warning. See, Pimpinello v. Swift & Co., *supra;* and Arrathoon v. East New York Savings Bank, 169 A.D.2d 804 (2nd Dept. 1991).

Lelchuks' allegations that Crawford mislead them as to the effect of the foreclosure is without merit. Lelchuk allege that Crawford advised them that if the property were sold at foreclosure they would lose the house and any equity they had in it. These allegations are true. Unless Lelchuk paid the mortgage or found some other method to forestall the foreclosure, the property would have been sold at foreclosure on August 30, 2001. Lelchuk apparently did not have the financial means to bring the Chase mortgage current prior to August 30, 2001 nor have they alleged that they did. Had the Property been sold at foreclosure on August 30, 2001, Lelchuk would have lost their interest in the property. See, Real Property Actions and Proceedings Law §1353(1) which directs the officer conducting the sale to execute a deed to the purchase at the sale. Had the property been sold at foreclosure, Lelchuk would have been entitled to any amount of money received on the sale over and above the amount required to satisfy the existing liens on the property. See, Chase Manhattan Mortgage Corp. v. Hall, 18 A.D.3d 413 (2nd Dept. 2005); and Real Property Actions and Proceedings Law § 1361. In addition, after foreclosure, Lelchuk would have been

subject to being evicted by the successful bidder at the foreclosure sale. See, Real Property Actions and Proceedings Law § 713(5).

Lelchuk have previous experience with foreclosures. A review of the Court records reveal that Lelchuk have been defendants in several foreclosure proceedings prior to the one involved in this litigation.

Lelchuk's assertion that Crawford and TJB failed to advise them to retain or consult with an attorney before executing the Deed or the Option is also unavailing. Crawford and TJB were not under a duty to provide any advice or information to Lelchuk.

b. *Duress*

"A contract is voidable on the grounds of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will (citations omitted)." Austin Instruments, Inc. v. Loral Corp., 29 N.Y.2d 124, 130 (1971). See, Stewart A. Muller Construction Co., Inc. v. New York Telephone Co., 40 N.Y.2d 955 (1976); and Baratta v. Kozlowski, 94 A.D.2d 454 (2nd Dept. 1983).

A contract may be void because of duress where one contracting party has threatened to breach an existing contract by withholding performance unless the other party accedes to additional demands and the breach would result in irreparable harm. Friends Lumber Inc. v. Cornell Development Corp., 243 A.D.2d 886 (3rd Dept. 1997); and Sosnoff v. Carter, 165 A.D.2d 486 (1st Dept. 1991). In this case, there was no existing contract between Lelchuk and TJB. While TJB and Crawford were undoubtedly

aware of Lelchuk's precarious financial situation, Lelchuk does not allege that TJB engaged in any activities which deprived Lelchuk of its free will with regard to those transactions. Lelchuk freely executed the deed and the Option to avoid the impending foreclosure.

c. *Mistake*

"A unilateral mistake can be the basis for rescission if failing to rescind would result in unjust enrichment of one party at the expense of the other (see, *Weissman v. Bondy & Schloss*, 230 A.D.2d 465, 469 [1997], and the parties can be returned to the status quo ante without prejudice (see, *Broadway-111th St. Assoc. v. Morris*, 160 A.D.2d 182, 184-185)[1990])." Cox v. Lehman Brothers, Inc., 15 A.D.3d 239 (1st Dept. 2005). One cannot obtain rescission based upon unilateral mistake unless enforcement of the contract would be unconscionable, the mistake was material and the mistake was made despite the exercise of due care. Morey v. Sings, 174 A.D.2d 870 (3rd Dept. 1991); and 22 NY Jur 2d *Contracts* §126. See also, G & G Investments, Inc. v. Revlon Consumer Products Corp., 283 A.D.2d 201 (1st Dept. 2001).

The party asserting the unilateral mistake must have had no knowledge of the error. Broadway-111th Street Assocs. v. Morris, *supra;* and 22 *NY Jur 2d* Contracts § 126.

Lelchuks' claim must be for unilateral mistake since TJB and Crawford clearly understood the nature of the transaction. Lelchuk allege that they misunderstood the nature of the transaction in that they did not realize they were conveying title to the

property to TJB and further misunderstood when and under what conditions title would be reconveyed to them.

Lelchuk has failed to allege that the parties can be restored to there *status quo ante* position. The documentary evidence establishes that TJB paid Chase the sum of $96,819.47 to bring current the mortgage that was subject to the foreclosure sale of August 30, 2001. TJB also paid the sum of $41, 901.10 to HSBC to bring its mortgage current. These sums were paid in accordance with the terms of the Option. Had these sums not been paid by TJB, Chase and/or HSBC would have had the Property sold at foreclosure. Lelchuk does not allege that they were ready, willing or able to repay these sums to TJB. Therefore, Lelchuk cannot return TJB to the *status quo ante*.

Lelchuk clearly had full knowledge of the transaction and the documents they were signing. Lelchuk were provided with copies of the deed and the Option. They could have read and determined the contents of these documents and their legal import by reading the documents. They clearly were aware or should have been aware of the warning on the deed and chose to execute it without consulting an attorney.
Given these circumstances, Lelchuk cannot void either the deed or Option on the basis of unilateral mistake.

d. *Undue Influence*

Undue influence involves coercion. Adams v. Irving National Bank, 116 N.Y. 606 (1889). See also, Ressis v. Mactye,108 A.D.2d 960 (3rd Dept. 1985); and 22 *NY Jur 2d* Contracts § 142 and 43A *NY Jur 2d* Deeds § 200. Advice, even high pressure advice, does not constitute undue influence since undue influence is a form of cheating.

Kazaras v. Manufacturers Hanover Trust Co., 4 A.D.2d 227 (1st Dept. 1957), *aff'd.*, 4 N.Y.2d 930 (1958).

Lelchuk do not allege that they were coerced into signing the deed or the Option. Lelchuk had a few options to prevent foreclosure. While they chose an option which may result in their losing their home, they have not alleged any facts which would establish the existence of undue influence.

The claim against TJB is identical to the claims against Crawford. Crawford is the party who engaged in the acts which give rise to the allegations against TJB. Since the first cause of action fails to state a claim against TJB, it also fails to state a claim against Crawford.

Lelchuk does not allege that IPE engaged in any of the activities that give rise to the claims alleged in the first cause of action. Lelchuk allege that IPE, Crawford and TJB were involved in a common scheme to "cleanse" title, or that IPE was aware that Lelchuk remained as the equitable owners of the property since TJB had not paid any consideration for the Property.

While factual allegations contained in the complaint are deemed true, legal conclusions and facts contradicted on the record are not entitled to a presumption of truth. In re Loukoumi, Inc., 285 A.D.2d 595 (2nd Dept. 2001); and Doria v. Masucci, 230 A.D.2d 764 (2nd Dept. 1996). Conclusory allegations not supported by facts are insufficient as a matter of law to raise issues of fraud, duress or undue influence. See, Korngold v. Korngold, 26 A.D.3d 358 (2nd Dept. 2006). Lelchuk does not allege any

facts which would support the claim that IPE and TJB were involved in a common scheme.

The deed conveying the Property from TJB to IPE is dated May 13, 2005 and provides that the Property was being conveyed subject to outstanding mortgages of approximately $279,000 and outstanding judgments of approximately $335,000. Thus, IPE did not acquire clear title to the property. IPE acquired title subject to Lelchuks' liens. The transfers did not have the effect of cleansing title of the liens arising from the mortgages placed on the property by Lelchuk or judgments entered against Lelchuk.

Therefore, the first cross-claim must be dismissed.

2. *Second Cross-Claim*

The precise legal theory underlying the second cross-claim is not clear from a reading of the pleading.

The second cross-claim seeks to recover damages resulting from the transfer of title from Lelchuk to TJB on the grounds that the transfer was without consideration. Lelchuk allege that they have been deprived the value of the Property and seek to recover the value of the Property.

Consideration is an element of a cause of action for breach of contract. See, 22 NY Jur2d *Contracts* §67; and 2 NY PJI 2d 4:1.1, at p. 599-601. The Court must infer that this action is one for breach of contract. To the extent that the second cross-claim sets forth a claim against IPE for breach of contract, it fails to state a claim upon which relief can be granted.

One may not maintain an action for breach of contract against a party with whom he/she is not in privity. La Barte v. Seneca Resources Corp., 285 A.D.2d 974 (4th Dept. 2001); and M. Paladino, Inc. v. J. Lucchese & Sons Contracting Corp., 247 A.D.2d 515 (2nd Dept. 1998). Lelchuk did not have a contract with IPE. The lack of privity would bar any recovery for breach of contract.

Consideration is "...either a benefit to the promisor or a detriment to the promisee." Holt v. Feigenbaum, 52 N.Y.2d 291, 299 (1981). See also, Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458 (1982). A transaction is supported by consideration when something of real value to the parties is exchanged. Apfel v. Prudential-Bache Securities, Inc., 81 N.Y.2d 470 (1993).

The adequacy of consideration is not the proper subject of judicial scrutiny when some benefit was received. Laham v. Chambi, 299 A.D.2d 151 (1st Dept. 2002). The slightest consideration is sufficient to support the most onerous obligations. Rooney v. Tyson, 91 N.Y.2d 685 (1998); and Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458 (1982).

The adequacy of the consideration paid for the transfer of title to real property is irrelevant to the validity of the deed. Adamkiewicz v. Lansing, 288 A.D.2d 531 (3rd Dept. 2001).

In this case, the transaction was undeniably supported by consideration. TJB paid the arrearage on Lelchuks' HSBC and Chase mortgages. In return, Lelchuk avoided foreclosure and was given the opportunity to reside in and repurchase the property. The documentary evidence undeniably establishes that TJB paid $96,819.47 to Chase and $41,901.10 to HSBC to bring the Lelchuk's mortgages current.

The prudence or fairness of this deal is not the subject of judicial scrutiny in the absence of fraud or unconscionability. Janian v. Barnes, 294 A.D.2d 787 (3rd Dept. 2002); and Dafnos v. Hayes, 264 A.D.2d 305 (3rd Dept. 1999). The transfer of the Property from Lelchuk to TJB is not voidable for fraud. Lelchuk has not alleged that the transaction was unconscionable.

The second cross-claim does not set forth a claim upon which relief can be granted and must be dismissed.

3. *Third Cross-Claim*

New York does not recognize a separate cause of action for punitive damages. Rocanova v. Equitable Life, 83 N.Y.2d 603 (1994); and Wo v. Chan, 17 A.D.3d 356 (2nd Dept. 2005).

Since the third cross-claim alleges a separate cause of action for punitive or exemplary damages, it does not state a separate cause of action and must be dismissed.

4. *Fourth Cross-Claim*

The four elements of a constructive trust are (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment. Sharp v. Kosmalski, 40 N.Y.2d 119 (1976); and Church of God Pentecostal Fountain of Love, MI v. Iglesia De Dios Pentecostal, MI, 27 A.D. 3d 685 (2nd Dept. 2006); and Nastasi v. Nastasi, 26 A.D.3d 32 (2nd Dept. 2005).

Any claim to impose a constructive trust on the Property must fail because the relationship between the parties is not confidential or fiduciary.

A fiduciary relationship exists when one party "...reposes confidence in another and relies on the other's superior expertise or knowledge (citations omitted)." WIT Holding Corp. v. Klein, 282 A.D.2d 527, 529 (2nd Dept. 2001). See, Doe v. Holy See, (State of Vatican City), 17 A.D.3d 793 (3rd Dept. 2005). Arm's length business transactions do not give rise to fiduciary relationships. *Id.* at 529. See also, Cuomo v. Mahopac National Bank, 5 A.D.3d 621 (2nd Dept. 2003); and Wiener v. Lazard Freres & Co., 241 A.D.2d 114 (1st Dept. 1998).

The transaction between TJB and Lelchuk was an arm's length business transaction. Neither TJB nor Crawford had a fiduciary relationship with Lelchuk. Lelchuk specifically alleges that Crawford showed up at their door unannounced. Lelchuk and Crawford then had a conversation regarding Lelchuk's precarious financial situation and the impending foreclosure. Crawford offered Lelchuk a means to avoid foreclosure. In classic contractual terms, Crawford made an offer which Lelchuk accepted. This action is an outgrowth of Lelchuks' dissatisfaction with the deal they made.

While Lelchuks' decision to accept the deal offered by Crawford may, in retrospect have proven to be a bad deal, the sagacity of Lelchuk's decision is not an issue for the Court.

Even assuming that there was a fiduciary relationship between Lelchuk and TJB, the action would have to be dismissed. Lelchuk's right to have title to the Property reconveyed to them was governed by the terms of the Option. The Option required TJB to reconvey the property during the nine month period ending on May 31, 2002.

An option must be exercised within the time and in the manner established by the option. The holder of the option must strictly adhere to the terms and conditions of the option. Raanan v. Tom's Triangle, Inc., 303 A.D.2d 668 (2nd Dept. 2003); Mohring Enterprises, Inc. v. HSBC Bank USA, 291 A.D.2d 385 (2nd Dept. 2002); and D.A.D. Restaurant, Ltd. v. Anthony Operating Corp., 139 A.D.2d 485 (2nd Dept.), *app. den.*, 72 N.Y. 2d 806 (1988). In exercising an option relating to real property, the holder of an option must strictly comply with the terms of the option by timely notifying the grantor of the option of its intent to exercise the option in the manner prescribed by the option. D.A.D. Restaurant Corp. v. Anthony Operating Corp., *supra*. The holder of the option must also strictly comply with the substantive terms of the option. O'Rourke v. Carlton, 286 A.D.2d 427 (2nd Dept. 2001); and Bresnan v. Bresnan, 156 A.D.2d 532 (2nd Dept. 1989).

There is no question that Lelchuk did not comply with the terms of the Option. Lelchuk never sent the notice required by the Option nor did they tender the payment required as a deposit due on the Option's exercise within the prescribed term.

Likewise, a fiduciary relationship does not exist between Lelchuk and IPE. IPE acquired title to the Property by deed dated May 13, 2005. IPE paid TJB the sum of $200,000 to acquire title to the Property.

The only relationship between Lelchuk and IPE is that IPE currently holds title to the Property. This may give rise to a landlord-tenant relationship.

In sum, Lelchuk does not have a fiduciary relationship with any of the Defendants, a constructive trust cannot be imposed upon the property. Therefore, the

fourth cross-claim fails to state a claim upon which relief can be granted and must be dismissed.

e. *Lelchuk's Motion to Preclude*

Since this action is being dismissed, Lelchuk's motion to preclude must be denied as academic.

Accordingly, it is,

ORDERED, that the Defendants' cross-motions to dismiss the cross-claims is **granted** and the cross-claims are hereby dismissed; and it is further,

ORDERED, that Lelchuks' motion to preclude is **denied** as academic.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
July 10, 2006

Hon. LEONARD B. AUSTIN, J.S.C.

XXX ENTERED

JUL 13 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE