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Sasidharan v Piverger
2014 NY Slip Op 50890(U)
Decided on June 3, 2014
Supreme Court, Kings County
Demarest, J.
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Decided on June 3, 2014

Supreme Court, Kings County

Sarala Sasidharan, Sumit Sasidharan, and Seva Management Corporation, Plaintiffs,

against

Jacques-Philippe Piverger, Schelton Assoumou, Ask Capital, Inc., Ravi J. Mallik, Jaswant S. Mallik, O'keke & Associates, P.C., Adanna Ugwonali, Esq., and Patrick O'keke, Esq., , Defendants.

002039/2013

Attorneys for Plaintiffs:

Douglas Moyal, Esq.

Mavrides, Moyal & Associates, LLP

276 Fifth Ave., Suite 404

New York, NY 10001

Attorney for Defendant Piverger:

Brem Moldovsky, Esq.

411 Lafayette Street, 6th Floor

New York, NY 10003

Attorney for Patrick O'Keke and O'Keke & Associates:

John Iwuh, Esq.

801 Franklin Ave,

Brooklyn, NY 11238

Attorney for Ravi Mallik and Jaswant Mallik:

Mark J. Caruso, Esq.

Caruso, Caruso & Branda, P.C. 7301 13th Avenue

Brooklyn, NY 11228

Attorney for Ask Capital, Inc.:

Laurence J. Leibowitz, Esq.

Ballon, Stoll, Bader & Nadler, P.C.

729 7th Avenue, 17th Floor

New York, NY 10013

Carolyn E. Demarest, J.

In this action by plaintiffs Sarala Sasidharan, Sumit Sasidharan, and Seva Management Corporation (Seva) (collectively, plaintiffs) against defendants Jacques-Philippe Piverger (Piverger), Schelton Assoumou (Assoumou), Ask Capital, Inc. (ACI), Ravi J. Mallik (Ravi), Jaswant S. Mallik (Jaswant), O'keke & Associates, P.C. (O'keke & Associates), Adanna Ugwonali, Esq. (Ugwonali), and Patrick O'keke, Esq. (Mr. O'keke), Ravi and Jaswant (collectively, the Malliks) move, under motion sequence number 1, for an order, pursuant to CPLR 3211, dismissing plaintiffs' complaint as against them. Mr. O'keke and O'keke & Associates (collectively, the O'keke defendants) cross-

move, under motion sequence number 4, for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing plaintiffs' complaint as against them based upon a defense founded on documentary evidence and for failure to state a cause of action. Piverger moves, under motion sequence number 6, for an order dismissing with prejudice plaintiffs' complaint and any and all cross claims as against him. **BACKGROUND**

ACI is in the business of locating, developing, renovating, and buying or finding a buyer for distressed apartment buildings and single family homes, which are either in foreclosure or delinquent in their mortgages. Assoumou is the sole shareholder and principal of ACI. In or about 2010, ACI sought to purchase property located at 18 Hancock Street, in Brooklyn, New York, (the premises), which is a multi-family [*2]apartment building, with the intent of renovating it and reselling it at a profit. ACI approached the owner of the premises, Giampolo Rivera (Rivera) (who is not a party to this action), who agreed to sell the premises, which were in foreclosure and which he was allegedly desperate to sell. ACI sought to borrow funds from plaintiffs to assist in the renovation of the premises and to buy out the existing tenants.

On January 18, 2011, plaintiffs agreed to make a loan to ACI in the amount of $150,000, and ACI executed a promissory note dated January 18, 2011 (the note), in favor of plaintiffs, which was secured by certain collateral. The note provided that ACI promised to pay plaintiffs, as lenders, the amount of $150,000 in principal plus any outstanding fees and accrued interest. Section 1 of the note set forth that plaintiffs agreed to lend ACI this sum in order for it to engage in a real estate transaction in connection with the premises, and that ACI was to allocate management expertise and the principal in order to facilitate the acquisition, rehabilitation, and disposition of the premises to Piverger, who was to be the buyer to whom the premises were to be sold. ACI was to engage in and responsibly allocate the principal for various operational activities in order to prepare the premises for acquisition by Piverger. These activities included the buy-out of existing tenants, the arrangement and management of architectural work product, existing deed-lenders payoff, procurement of construction materials, and the application for, receipt of, and management of requisite building permits. ACI also agreed to act as the general contractor of record in order to coordinate and supervise the rehabilitation of the premises on behalf of the buyer.

Section 3 of the note stated that the amount owed on the note was to be due and payable on October 18, 2011, which was the maturity date of the note, and that it could be extended for an additional three months beyond the maturity date to January 18, 2012. Under section 4 of the note, ACI agreed to pay $32,000 in interest to plaintiffs, and under section 5 of the note, ACI agreed to

pay a $3,000 origination fee to plaintiffs. Section 6 of the note set forth that if ACI exercised its rights to the three-month extension option, ACI agreed to pay $7,500 to plaintiffs. Section 7 of the note provided that Assoumo, as a principal of ACI, and Piverger, as the buyer of the premises, each agreed to personally guarantee and be jointly and severally liable for the principal, fees, accrued interest, and expenses due in connection with the loan transaction, pursuant to a Personal Guaranty Agreement.

Section 8 of the note stated that ACI was thereby granting plaintiffs a security interest in the collateral described in Exhibit A to the note. Section 9 of the note provided, under "Representations and Warranties Regarding Collateral," that on and as of the date of the note, ACI represented and warranted to plaintiffs that it was the true and lawful owner of the collateral, having good and marketable title to it, free and clear of any and all liens. Section 10 of the note set forth that ACI agreed to take all actions requested by plaintiffs and reasonably necessary to perfect the lien granted to it under the note. Section 16 of the note defined an "Event of Default" as ACI s breach of the obligation to [*3]pay any amount payable under the note, and the creation of any lien upon any of the collateral. The collateral listed on Exhibit A to the note included a quitclaim deed to the premises, executed to plaintiffs by Rivera, which was to be held in trust with the law office of O'keke & Associates, who represented ACI in this transaction. Exhibit A to the note specified that the deed was to be released to plaintiffs subject to an Escrow Agreement dated January 18, 2011 (the Escrow Agreement). The Personal Guarantees of Piverger and Assoumou were also listed as collateral.

A Personal Guaranty was executed by Piverger, as guarantor, and a Personal Guaranty, was executed by Assoumou, individually, as guarantor, on January 19, 2011 (the Guarantees). The Guarantees provided that Piverger, as the purchaser of the premises, and Assoumou, as the principal of ACI, for good consideration and as an inducement for plaintiffs to lend capital in the amount of $150,000 for the purposes of a real estate transaction pertaining to the premises, guaranteed to plaintiffs the prompt, punctual, and full payment of all monies due to plaintiffs from ACI.

The Escrow Agreement, dated January 18, 2011, was entered into by ACI, Piverger, Assoumou, and plaintiffs, and O'keke & Associates (by Ugwonali),[FN1] with O'keke & Associates as the escrow agent, who was to hold the collateral of a deed, as security for plaintiffs' $150,000 loan to ACI, along with $63,000 in funds, until such time as plaintiffs were repaid, and to release this collateral to plaintiffs in the event of a default. Exhibit A to the Escrow Agreement stated that the escrowed documents and funds consisted of an original quitclaim deed to the premises executed

by the deed holder (Rivera) and a cash sum in the amount of $63,000. The quitclaim deed was dated December 7, 2010 and was between Rivera, as the seller, and plaintiffs, as the purchasers, and was executed by Rivera. The $63,000 in funds were paid by a check in the amount of $23,000 from Sumit, a check in the amount of $21,000 from Seva, and a check in the amount of $19,000 from Seva.

Section 2 of the Escrow Agreement stated that O'keke & Associates, as the escrow agent, acknowledged receipt of the escrowed documents and funds and agreed to hold them in escrow pursuant to the provisions of that agreement. Section 3 of the Escrow Agreement provided that if an Event of Default occurred under the note, O'keke & Associates, as the escrow agent, upon notice, would deliver to plaintiffs the quitclaim deed and plaintiffs would cause the deed to be publicly recorded, and O'keke & Associates would also deliver to plaintiffs the cash sum of $63,000 for the purpose of funding closing costs in connection with this transaction.

In addition, ACI entered into a Consulting Agreement, dated January 18, 2011 (the Consulting Agreement) with Seva, which was in the real estate finance and management [*4]business, whereby ACI agreed to retain Seva as a consultant to assist it in the acquisition, rehabilitation, and disposition of the premises, and to pay it a $35,000 consulting fee and a $45,000 fee if the consulting term were extended. Section 7 of the Consulting Agreement provided that on the occurrence of an Event of Default pursuant to section 16 of the note, ACI was required to immediately pay Seva any unpaid consulting fee. The Consulting Agreement was executed by Seva, ACI (by Assoumou), and Piverger.

Piverger was unable to raise and/or borrow sufficient funds to purchase the premises. Assoumou, therefore, contacted Ravi, with whom he had prior transactions and who, according to Assoumou, still owed him money as a result of prior dealings, including the sale of other property located at 83 Vanderveer Street, in Brooklyn. Assoumou offered Ravi the opportunity to purchase the premises at the price of $395,000, and to purchase and retire the note that ACI had with plaintiffs. Ravi agreed to this transaction, and entered into a Residential Contract of Sale with Rivera for the purchase of the premises on July 1, 2011. The Contract of Sale listed O'keke & Associates, by Mr. O'keke, as the attorney for Rivera.

According to plaintiffs, in the summer of 2011, Assoumou communicated to them that Piverger was facing problems, but that he had found replacement buyers for the premises, namely, the Malliks, who would satisfy the note in place of himself and Piverger for a negotiated settlement of $140,000 of the approximately $220,000 due and owing at the full maturity of the note. Ravi and

Aaron Boyajian, Esq. (Boyajian), the attorney who represented the Malliks in the purchase of the premises, both acknowledge that they were advised of the existence of the note given by ACI in favor of plaintiffs, and that Assoumou and plaintiffs represented to them that the loan held by plaintiffs was a lien on the premises to secure the loan pursuant to the note.

Since plaintiffs believed that the Malliks would be purchasing the premises and satisfying the note, by letters dated September 27, 2011, plaintiffs requested the release of the $63,000 from O'keke & Associates, which was being held to cover closing costs if plaintiffs closed on the premises due to an Event of Default under the note. By checks in the amount of $23,000 to Sumit, in the amount of $21,000 to Seva, and in the amount of $19,000 to Seva, each dated October 31, 2011, drawn on O'keke & Associates' IOLA account, O'keke returned to plaintiffs the $63,000, which it had been holding in escrow.

Subsequently, by an e-mail dated December 23, 2011 to Ugwonali, Anik Mukheja (Anik) (who is the principal of Seva and acted as plaintiffs' representative) acknowledged O'keke & Associates' previous release of the cash sum of $63,000 to plaintiffs in accordance with plaintiffs' instructions, but stated that plaintiffs would like to remind her that the original quitclaim deed was being held in escrow by O'keke & Associates and that the quitclaim deed was only to be released upon the receipt of their written instructions. In response, in an e-mail dated December 26, 2011 to Anik, Mr. O'keke specifically stated that O'keke & Associates still had the escrowed deed on file, and would not release it without a written authorization, in compliance with the Escrow [*5]Agreement or pursuant to a court order. In this e-mail, Mr. O'keke pointed out that New York is a "race/record" state, and as such, the Escrow Agreement would not prevent the seller/owner from legally transferring the premises to another party unless plaintiffs' deed was recorded with the City Register's office first.

As reflected in an e-mail dated March 22, 2012 to Anik from Boyajian, Ravi negotiated a $10,000 discount on the amount owed by ACI under the note and agreed to purchase the note for $140,000, with Ravi paying $132,000 and Assoumou paying the remaining $8,000. In addition, Ravi had his attorney, Boyajian, prepare a Note Purchase Agreement. The proposed Note Purchase Agreement, prepared in March 2012, was between plaintiffs and Ravi, and stated that Ravi desired to purchase and plaintiffs desired to sell, all of their right, title, and interest in and to the loan, and that Ravi would pay plaintiffs $132,000 in immediately available funds to purchase the note, the loan documents consisting of the Personal Guaranty of Piverger, the Personal Guaranty of Assoumou, the note agreement, the Escrow Agreement, and an enforceability opinion, and all of plaintiffs' liens against the real and personal property encumbered by any loan document, by paying

$100,000 on the date of the agreement or such other date as may be agreed upon in writing by Ravi and plaintiffs (the closing date), and paying the remaining $32,000 on or before the 45th day following the closing date.

By an e-mail dated April 17, 2012 to Ugwonali, Sumit stated that plaintiffs had still not been repaid and would like to confirm that the deed to the premises being held in escrow would not be released without plaintiffs' written authorization and that they would like to meet prior to any closing scheduled with the Malliks. By letter dated April 18, 2012, plaintiffs informed Assoumou and Piverger, along with O'keke & Associates, that they were declaring an Event of Default in accordance with section 16 of the note due to ACI's breach of the obligation to pay the amount due on the maturity date, which had been extended to January 18, 2012.

By a letter addressed to Ugwonali of O'keke & Associates, also dated April 18, 2012, from Anik, as an officer of Seva, plaintiffs demanded that O'keke & Associates, pursuant to section 3 of the Escrow Agreement, release the quitclaim deed and deliver it to them due to the default. By an e-mail dated April 20, 2012, Mr. O'keke took the position that the reimbursement of the $63,000 in escrowed funds terminated any and all agreements between plaintiffs and O'keke & Associates, as the escrow agent. By an e-mail dated April 20, 2012, Anik responded that he was still hoping that Ravi's closing on the premises and the note agreement would take place, but that if it did not, plaintiffs still had an interest in the premises, and that they were seeking to protect their interests in the most mutually beneficial way possible. In an e-mail also dated April 20, 2012, Anik stated that while plaintiffs had acknowledged that the funds had been previously returned, there were multiple components to the Escrow Agreement and that their April 18, 2012 direction letter to release the deed did not concern the funds.

An e-mail by Sumit to Assoumou dated April 20, 2012 reflects that Ravi wanted [*6]plaintiffs to wait until the Wednesday after the closing on the sale of the premises to close on the purchase of their note and that plaintiffs had to "take it on faith" that he would close. The closing of the sale of the premises to Ravi, and his father, Jaswant, at which they were represented by Boyajian, as their attorney, took place on April 23, 2012. By a deed dated April 23, 2012, the Malliks purchased the premises, as tenants in common (each with a 50% interest) from Rivera, who was represented by O'keke & Associates, for the sum of $395,000. The Malliks recorded their deed with the City Register of the City of New York on May 7, 2012.

The Malliks, however, upon purchasing the premises, did not satisfy the amount due on plaintiffs' note. According to Ravi and Boyajian, after conducting customary due diligence in

connection with the Contract of Sale and receiving a title report on the premises, they became aware that ACI's loan transaction with plaintiffs was not recorded as a lien against the premises. Boyajian asserts that he contacted Mr. O'keke regarding the validity of the quitclaim deed being held by his law firm to collateralize and secure the note, and that Mr. O'keke responded that the deed had been destroyed and that the transaction declared null and void.

By an "Undertaking" dated April 23, 2012 (the Undertaking), executed by Ugwonali on behalf of O'keke & Associates, O'keke & Associates affirmed, certified, and warranted to the Malliks that it represented ACI in the loan transaction which was evidenced by the note and secured by collateral, that pursuant to the terms of the Escrow Agreement, ACI deposited with it the deed to the premises and $63,000 to be held in escrow as security for the loan in the event of default, and that as of the date of this undertaking, it had returned the $63,000 held in escrow to plaintiffs and had destroyed the quitclaim deed, and that the loan transaction had been deemed null and void. O'keke & Associates attached to the Undertaking a copy of the checks deposited in escrow and the reimbursement checks for $63,000 paid to plaintiffs from its escrow account. The Undertaking recited that O'keke & Associates acknowledged that the Malliks were relying upon this affirmation in closing the purchase of the premises.

At the closing, the representative of the title abstract company, Ridge Abstract Corp., as agent for Commonwealth Land Title Insurance Company, confirmed that the information contained in the title report, i.e., that plaintiffs did not have a lien against or a recorded ownership interest in the premises, was confirmed. Commonwealth Land Title Insurance Company issued a 2006 ALTA Owner's policy for title insurance to the Malliks at the closing.

Subsequent to the closing, by an e-mail dated April 27, 2012, Boyajian informed Sumit and Anik that Ravi had no obligation to pay anything to them for the terminated loan transaction because O'keke & Associates had refunded the $63,000 and terminated the Escrow Agreement and because ACI did not own the premises at the time of the loan, and, therefore, could not pledge it as collateral or use it as security for the loan. He stated that nevertheless Ravi was prepared to offer them $83,800 to close out the loan, which [*7]was arrived at by subtracting the returned $63,000 from the $150,000 loan, and then subtracting $3,200 which Assoumou owed to Ravi from costs associated with the closing. Plaintiffs claim that they accepted this offer, but, thereafter, the Malliks were unwilling to pay anything.

On February 1, 2013, plaintiffs filed this action against Piverger, Assoumou, ACI, the Malliks, the O'keke defendants, and Ugwonali. Plaintiffs' complaint seeks to recover a total of $203,639.22

alleged to be due to them as of January 18, 2013, which consists of the amount due and owing under the note of unpaid principal in the amount of $150,000, minus the $63,000 received by plaintiffs, plus interest of $39,500 until the maturity date of January 18, 2012, plus default interest totaling $32,139.22 as of January 18, 2013, plus $45,000 due and payable under the Consulting Agreement. Plaintiffs' first cause of action for recovery on the note and Guarantees alleges that Piverger, Assoumou, and ACI have defaulted on the note and owe the sum of $203,639.22 plus interest from the date of default. Plaintiffs' second cause of action for breach of the Escrow Agreement and breach of fiduciary duty also seeks to recover the sum of $203,639.22, alleging that the O'keke defendants and Ugwonali have failed to protect their interests by not delivering to them the quitclaim deed held in escrow, that they have violated the fiduciary duty owed by them and the terms of the Escrow Agreement, and that they have acted to sell the premises to a third party. Plaintiffs' third cause of action for fraud alleges that Piverger, Assoumou, ACI, the Malliks, the O'keke defendants, and Ugwonali acted in concert to defraud them and convert the sum of $203,639.22 for their benefit, that the Malliks were aware, either by actual or constructive notice, that plaintiffs had loaned the sum of $150,000 to ACI, and that the premises were sold to the Malliks with the knowledge that they were to be paid in full on the note.

On June 3, 2013, the Malliks e-filed their instant motion to dismiss plaintiffs' complaint as against them. On August 6, 2013, in response to the Malliks' motion, plaintiffs cross-moved, under motion sequence number 2, pursuant to CPLR 3025 (b), to add a fourth cause of action for intentional interference with contractual relations. On September 10, 2013, plaintiffs moved, under motion sequence number 3, for a default judgment against Piverger. On September 30, 2013, the O'keke defendants, under motion sequence number 4, e-filed their instant cross motion to dismiss plaintiffs' complaint as against them. On December 6, 2013, Piverger e-filed a cross motion, under motion sequence number 5, to dismiss plaintiffs' complaint and all cross claims as against him and to deny plaintiffs' motion for a default judgment against him.

The motions were orally argued on December 18, 2013. By an order dated December 18, 2013, the court granted plaintiffs' cross motion (under motion sequence number 2) to amend their complaint and directed plaintiffs to serve and file an amended complaint, verified by them, within 10 days. This order provided that motion sequence numbers one and four would be reconsidered based upon plaintiffs' amended complaint and gave all defendants leave to supplement their prior submissions related to these [*8]motions.

In accordance with the court's December 18, 2013 order, plaintiffs amended their complaint,

and the Malliks and the O'keke defendants supplemented their prior submissions. Plaintiffs' amended complaint adds a fourth cause of action for intentional interference with contractual relations, alleging that Piverger, Assoumou, ACI, the Malliks, the O'keke defendants, and Ugwonali acted in concert to intentionally interfere with plaintiffs' contractual relations and converted the sum of $203,639.22 for their benefit. Specifically, it alleges that the Malliks were aware, by either actual or constructive notice, that plaintiffs had loaned the sum of $150,000 to ACI, that the Malliks told plaintiffs, Piverger, and Assoumou (as the principal of ACI) that they would purchase the premises and satisfy the note in place of Assoumou and Piverger for a negotiated settlement, and that the premises were sold on April 23, 2012 to the Malliks with the knowledge that plaintiffs were to be paid in full on the note.

At oral argument on December 18, 2013, plaintiffs' motion, under motion sequence number 3, for a default judgment was denied as moot based on Piverger's response. Assoumou and ACI interposed an answer, dated January 3, 2014, to the amended complaint, which raises, among other things, the defense of criminal usury. The O'keke defendants interposed an answer, dated January 13, 2014, to the amended complaint. On January 15, 2014, Piverger, under motion sequence number 6, e-filed his instant motion to dismiss plaintiffs' complaint and all cross claims as against him, and withdrew his prior motion, under motion sequence number 5, as it duplicated his motion under motion sequence number 6. At the December 18, 2013 oral argument, plaintiffs consented to dismissal of their second, third, and fourth causes of action as against Piverger, leaving only their first cause of action based upon his Personal Guaranty.

DISCUSSION*The Malliks' Motion*

With respect to the Malliks' motion, it is initially observed that "[i]n the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Furthermore, affidavits and other documentary evidence submitted in opposition to the motion "may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). To the extent that extrinsic evidence, including affidavits and documentary evidence, is considered, "the standard of review under a CPLR 3211 motion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one'" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000],

quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

It is noted that plaintiffs' first cause of action, which seeks recovery against [*9]Piverger, Assoumou, and ACI based on the note and the Guarantees,[FN2] and plaintiffs' second cause of action, which seeks recovery against the O'keke defendants and Ugwonali based on the Escrow Agreement, are not asserted against the Malliks, who were not parties to the original transaction. As to plaintiffs' third cause of action for fraud and plaintiffs' fourth cause of action for tortious interference with contractual relations, which have been pleaded as against the Malliks, the Malliks argue that plaintiffs did not have a recorded lien on or any ownership interest in the premises at any time, that plaintiffs' rights under the note were not affected by their purchase of the premises, and that the note was unrelated to their Contract of Sale. They rely upon the title report, which does not show any recorded lien, and the Undertaking executed by Ugwonali of [*10]O'keke & Associates, which stated that the loan transaction was null and void and that the quitclaim deed had been destroyed.

It is well settled that "the holding of a deed in escrow is not sufficient, in and of itself, to demonstrate that the deed will operate as an actual conveyance" (*Vitvitsky v Heim*, 52 AD3d 1103, 1104-1105 [3d Dept 2008]). Real Property Law § 320 provides as follows:

"A deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time."

Thus, pursuant to Real Property Law § 320, a deed conveying real property, which, by a note, shows that it was intended only as a security in the nature of a mortgage, must be considered a mortgage, and the recording of the deed with the note would merely give it the effect of a mortgage (*see People v Gass*, 206 NY 609, 616 [1912] *Bouffard v Befese, LLC*, 111 AD3d 866, 868 [2d Dept 2013] *DeMaio v Capozello*, 74 AD3d 864, 865 [2d Dept 2010] *Henley v Foreclosure Sales, Inc.*, 39 AD3d 470, 470 [2d Dept 2007] *Leonia Bank v Kouri*, 3 AD3d 213, 217 [1st Dept 2004] *Basile v Erhal Holding Corp.*, 148 AD2d 484, 485 [2d Dept 1989], *appeal denied* 75 NY2d 701 [1989] *Lee v Beagell*, 174 Misc 6, 6 [Sup Ct, Broome County 1940]). In determining whether a deed was intended as security, the court may consider the deed, any written agreement executed at the same

time, the parties' testimony bearing on their intent, and the surrounding circumstances and acts of the parties (*see Henley*, 39 AD3d at 470; *Corcillo v Martut, Inc.*, 58 AD2d 617, 618 [2d Dept 1977], *affd* 45 NY2d 878 [1979]). Thus, " a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as a security for a loan of money'" (*Basile*, 148 AD2d at 485, quoting *Peugh v Davis*, 96 US 332, 336 [1877]). Indeed, "the giving of a deed to secure a debt, in whatever form and however structured, creates . . . a mortgage" (*Leonia Bank*, 3 AD3d at 216-217).

Here, plaintiffs never entered into a contract of sale with Rivera. Furthermore, section 8 of the note expressly provided that ACI was granting plaintiffs a security interest in the collateral, which consisted of the deed, and section 3 of the Escrow Agreement provided that the escrowed documents and funds would be released in the event of an Event of Default under the note. Thus, notwithstanding its form, the quitclaim deed was, in substance, a mortgage intended as security for ACI's debt to plaintiffs.

Although Rivera was not a party to the note and did not receive the proceeds of the [*11]loan, "[t]he fact that the recipient of the loan and the mortgagor are not the same person [does not] impair[] the validity of an otherwise valid mortgage"; "it is neither illegal nor improper to give such a mortgage" (*Amherst Factors v Kochenburger*, 4 NY2d 203 [1958] *see also* 77 NY Jur 2d, Mortgages and Deeds of Trust § 45). Thus, the mortgage represented by the deed was not invalid simply because the proceeds of the loan secured thereby did not go to the benefit of Rivera, as the owner of the mortgaged property, "since a mortgage may be given to secure the debt of a third party" (*Parr v Reiner*, 133 Misc 2d 914, 916 [Sup Ct, Suffolk County 1986], *affd* 143 AD2d 427 [2d Dept 1988] *see also Amherst Factors*, 4 NY2d at 207-208; 77 NY Jur 2d, Mortgages and Deeds of Trust § 57).Pursuant to Real Property Law § 291, an unrecorded mortgage is valid as between the mortgagor and mortgagee, but is otherwise void as against a bona fide good faith purchaser for value who first records its interest, and such a bona fide good faith purchaser for value of the real property will, upon the recording of its conveyance, take title to property free of any such unrecorded interest. Here, there is no dispute that the Malliks obtained their interest in the premises after plaintiffs obtained their purported interest in such premises by the quitclaim deed, but recorded it first. Indeed (as previously discussed), the Malliks rely upon the title report which shows the absence of any recording by plaintiffs of their interest in the premises. Thus, the Malliks would be entitled to priority as titleholder free of encumbrances if they were bona fide good faith purchasers for value (*see* Real Property Law § 291; *Foster v Piasecki*, 259 AD2d 804, 805-806 [3d Dept 1999]).

"It has long been the rule [, however,] that a purchaser with prepurchase notice, actual or constructive, of an unrecorded instrument or encumbrance is not a good faith purchaser for value and cannot avail himself or herself of the benefits of the recording statutes" (*7 Vestry LLC v Department of Fin. of City of NY*, 22 AD3d 174, 184 [1st Dept 2005] *see also* Real Property Law § 291). "Where there are conflicting claims between a prior unrecorded [mortgage on the real property] and a subsequent purchaser [of the property], if the [subsequent] purchaser has knowledge of any fact, sufficient to put him [or her] on inquiry as to the existence of some right or title in conflict with that he [or she] is about to purchase, he [or she] is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his [or her] claim, to be considered as a bona fide purchaser'" (*Miles v De Sapio*, 96 AD2d 970, 970 [3d Dept 1983], quoting *Williamson v Brown*, 15 NY 354, 362 [1857] *see also 487 Elmwood v Hassett*, 83 AD2d 409, 412 [4th Dept 1981], *appeal dismissed* 55 NY2d 1037 [1982]).Here, the proof in the record establishes that the Malliks had notice of plaintiffs' note and the quitclaim deed. Indeed, as discussed above, the Malliks negotiated with plaintiffs to purchase the note and led them to believe that they were going to pay off the note. Additionally, the O'keke defendants, who were the escrow agents with respect to the quitclaim deed and represented ACI in connection with [*12]the note, also represented Rivera in connection with the sale of the premises to the Malliks. While the Malliks argue that the title report did not reveal any recorded interest against the premises, this would be of no moment since they were well aware of the unrecorded deed. The Malliks also rely upon the Undertaking executed by Ugwonali on behalf of O'keke & Associates, which stated that the quitclaim deed was destroyed and the loan transaction was deemed null and void. This simply raises an issue of fact as to whether the Malliks' reliance upon this Undertaking was reasonable in view of their e-mail communications with plaintiffs, who continued to assert that they had an interest in the premises. Thus, the Malliks have failed to demonstrate that they were good faith purchasers for value of the premises.

With respect to plaintiffs' third cause of action, it is noted that "[i]n an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996] *see also Salazar v Sacco & Fillas, LLP*, 114 AD3d 745, 746 [2d Dept 2014]).

Plaintiffs contend that they have alleged each of these required elements to sustain their cause of action. While inartfully pleaded in their amended complaint, plaintiffs, by their moving papers

and exhibits, have asserted that the Malliks falsely stated to them, at various times during negotiations, that they agreed to purchase the note in order to induce them to rely upon these representations, knowing that they had not recorded their lien on the premises, that the Malliks intended to deprive them of their legal right to secure their interest in the premises by making these statements, and that they reasonably relied upon these statements made by the Malliks by refraining from securing their interest in the premises as collateral for the note, causing them to sustain damages of the loss of the collateral. Thus, plaintiffs have alleged a cognizable claim for fraud, warranting the denial of dismissal of their third cause of action against the Malliks (*see Salazar*, 114 AD3d at 746-747).

As to plaintiffs' fourth cause of action, "[t]he elements of tortious interference with contractual relations are (1) the existence of a contract between the plaintiff and a third party, (2) the defendant's knowledge of the contract, (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and (4) damages to the plaintiff'" (*Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 476 [2d Dept 2009], quoting *Bayside Carting v Chic Cleaners*, 240 AD2d 687, 688 [2d Dept 1997] *see also Lama Holding Co.*, 88 NY2d at 424 [1996] *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]).

Plaintiffs maintain that they have satisfied these elements of a cause of action for intentional interference with contractual relations by alleging that there was a loan agreement as evidenced by the note between them and ACI which was secured by the [*13]quitclaim deed, that the Mallik defendants had knowledge of the loan agreement, note, and quitclaim deed, and the Malliks intentionally procured the breach of the loan agreement by purchasing the premises without acquiring the note, causing them to sustain damages by the loss of their collateral.The Malliks do not dispute the existence of the agreement under the note and that they had knowledge of this agreement. The Malliks contend that they did not cause the breach of the agreement under the note or render performance impossible because the note had matured on January 18, 2012 and was already declared in default on April 18, 2012, which was prior to their purchase of the premises on April 23, 2012. However, it is undisputed that the Malliks entered into negotiations to purchase the note and even had Boyajian review plaintiffs' loan documents and agreed on a purchase price for the note. Plaintiffs argue that had the Malliks not negotiated in bad faith, leading them into believing that they would purchase the note, they would have declared a default against Assoumou and Piverger, demanding full payment of the indebtedness, and the quitclaim deed would have been released to them, allowing them to secure their interest in the collateral by recording it.[FN3]

It is noted that plaintiffs did, in fact, declare the note in default and seek the release of the quitclaim deed prior to the Malliks' purchase of the premises in order to record their interest in the property, and the O'keke defendants refused to release the quitclaim deed, contending that the Escrow Agreement had already been terminated. When, based upon their negotiations with the Malliks, plaintiffs believed that the Malliks would satisfy the note, they removed the $63,000 from escrow but did not immediately seek the return of the deed from O'keke & Associates for recording in order to secure their interest in the premises, as collateral under the note. Thus, plaintiffs have sufficiently alleged that the Malliks intentionally procured the breach of the agreement to provide the quitclaim deed as collateral under the note or rendered performance impossible by causing the loss of the collateral as security under the note.

The Malliks further argue that they did not cause any damages to plaintiffs because their remedy for the default by ACI under the note is to seek payment under the Guarantees from Piverger and Assoumou, as guarantors. The Malliks, however, do not address the fact that they circumvented plaintiffs' interest in the collateral in their [*14]purchase of the premises. Plaintiffs have, therefore, adequately alleged that they have sustained damages by their loss of their collateral securing the note. Thus, plaintiffs' fourth cause of action alleges a viable claim against the Malliks, and dismissal of this claim must be denied.

The

O'keke defendants' Cross Motion

In support of the O'keke defendants' cross motion, Mr. O'keke, in his affidavit,

asserts that plaintiffs indicated that they were willing to purchase the premises from Rivera, and that the Escrow Agreement, in which his law firm, O'keke & Associates, agreed to become the escrow agent for this transaction, consisted of plaintiffs' depositing the sum of $63,000 with O'keke & Associates to be used for closing costs and Rivera's depositing an executed quitclaim deed. He asserts that Rivera repeatedly inquired as to when plaintiffs would be closing on the premises since he was facing foreclosure, and that, several months later, plaintiffs informed Ugwonali that the deal was off and that they were no longer interested in buying the premises and requested a return of their money in escrow. He claims that in late October 2011, Assoumou came in, as a representative of plaintiffs, to pick up the checks from O'keke & Associates that were issued from its escrow account, and that Ugwonali informed Assoumou that the release of the checks terminated the Escrow Agreement and that Rivera was free to shop for a new buyer. He further claims that Rivera then went into contract with the Malliks for the sale of the premises.

Mr. O'keke, in his affidavit, contends that a copy of the note was never provided or delivered to him, O'keke & Associates, or Ugwonali, and was never recorded or secured against the premises and that it was not part of the consideration for the Escrow Agreement. He admits that the quitclaim deed remained in the possession of O'keke & Associates and that he was aware that plaintiffs, in April 2012, had contacted Ugwonali and that plaintiffs had demanded that O'keke & Associates furnish the deed to them. He claims that since plaintiffs were not stating that they wanted to close on a purchase of the premises from Rivera and had already received and cashed the reimbursement of the $63,000 funds, he was bewildered by their request for the deed, and that, on April 20, 2012, he e-mailed Anik and told him to retain a lawyer since he considered the escrow terminated, and that Anik should then have his lawyer send a formal claim in writing. He states that he adjourned the closing to April 23, 2012, giving plaintiffs ample opportunity to have their attorneys clarify their position, but they did not do so.

The O'keke defendants rely upon section 6 (c) of the Escrow Agreement, which provides that the "Escrow Agent shall not be liable to the other parties hereto . . . for any action taken or omitted by it, or any action suffered by it to be taken or omitted, in good faith and in the exercise of reasonable judgment, except for acts of willful misconduct or negligence." They argue that they acted in good faith, believing the Escrow Agreement had been terminated by plaintiffs at the time they requested the release of the deed.

The O'keke defendants' argument is rejected. Mr. O'keke's denial of his [*15]knowledge of the note and the fact that it was related to the Escrow Agreement is belied by the express terms of the Escrow Agreement, which specifically referred to the note which was entered into between ACI and plaintiffs. His characterization of the Escrow Agreement as related to a purchase of the premises by plaintiffs, as opposed to holding the deed as security for the note, is also belied by the Escrow Agreement, which provided that the deed was to released from escrow if an Event of Default occurred under the note.

The O'keke defendants have not shown that plaintiffs abandoned the escrow or vitiated the Escrow Agreement by obtaining the release of the $63,000, since the O'keke defendants confirmed that they were still holding the deed as collateral subsequent to the release of these funds. As discussed above, following the release of the $63,000, Anik, in an e-mail to Ugwonali dated December 23, 2011, reminded her that the original quitclaim deed was being held in escrow by O'keke & Associates and that the quitclaim deed was only to be released upon the receipt of their written instructions. In response to this letter, Mr. O'keke, in an e-mail dated December 26, 2011,

assured Anik that his law firm would not release the deed without a written authorization, in compliance with the Escrow Agreement. Furthermore, while Mr. O'keke claims that he requested that plaintiffs state their position with respect to the premises, plaintiffs, by its letter dated April 18, 2012, in fact, formally notified O'keke & Associates that they were demanding the release and return to them of the deed from escrow due to an Event of Default.

The O'keke defendants assisted in the sale of the premises to the Malliks without acknowledging plaintiffs' quitclaim deed in their possession and disregarded plaintiffs' written instructions for the return of the escrowed quitclaim deed as per the terms of the Escrow Agreement, thereby preventing plaintiffs from securing their interest in the premises by recording the quitclaim deed prior to sale to the Malliks. Indeed, O'keke & Associates provided the Undertaking to the Malliks, stating that the quitclaim deed had been destroyed and the loan transaction was deemed null and void.

Mr. O'keke argues that plaintiffs' complaint against him, individually, should be dismissed because he was not, as an individual, a party to the Escrow Agreement. This argument must be rejected since the e-mail communications evidence that Mr. O'keke was individually involved in the holding of the quitclaim deed in escrow, that he personally assured plaintiffs that the deed was still retained in escrow by his e-mail of December 26, 2011, and that he personally refused to release it to plaintiffs in his e-mail dated April 20, 2012.

"An escrow agent owes the parties to the transaction a fiduciary duty" (*Greenapple v Capital One, N.A.*, 92 AD3d 548, 549 [1st Dept 2012] *see also Talansky v Schulman*, 2 AD3d 355, 359 [1st Dept 2003]). "[T]herefore the agent, as a fiduciary, has a strict obligation to protect the rights of [the] parties' for whom he or she acts as escrowee" (*Greenapple*, 92 AD3d at 549; quoting *Grinblat v Taubenblat*, 107 AD2d 735, 736 [2d Dept 1985]). Moreover, an escrow agent has a duty not to deliver or destroy collateral held in escrow except upon strict compliance with the conditions imposed by the [*16]controlling escrow agreement (*see Farago v Burke*, 262 NY 229, 233 [1933] *Greenapple*, 92 AD3d at 549). Since plaintiffs' complaint alleges that the O'keke defendants intentionally participated in the scheme to prevent them from recording their interest in the premises, so as to create a lien in order to secure their loan, by failing to deliver the quitclaim deed to plaintiffs on demand, and by representing to the Malliks that the deed was destroyed, it sufficiently alleges a breach of fiduciary duty by the O'keke defendants which they owed to plaintiffs as their fiduciary (*Bardach v Chain Bakers, Inc.*, 265 App Div 24, 27 [1st Dept 1942], *affd* 290 NY 813 [1943] [as a trustee, an escrow agent owes his or her fiduciary "the highest kind of

loyalty"]). Hence, plaintiffs' complaint states a viable cause of action for breach of fiduciary duty and breach of the Escrow Agreement as against the O'keke defendants. In addition, plaintiffs' third and fourth cause of action, which allege Mr. O'keke's involvement, along with O'keke & Associates and Ugwonali, in a fraudulent scheme to deprive them of their security in the premises and tortious interference with contractual relations, also state viable claims. Therefore, dismissal of plaintiffs' complaint as against the O'keke defendants must be denied. *Piverger's Motion*

With respect to Piverger's motion, as noted above, plaintiffs have consented to the dismissal of all but their first cause of action as against him, which seeks recovery pursuant to the Personal Guaranty executed by him. In seeking dismissal of this claim, Piverger contends that the underlying loan was usurious, and, therefore, void.

Under New York law, usurious contracts are unenforceable (*see* General Obligations Law §§ 5-521, 5-511; Penal Law § 190.40; *Lloyd Capital Corp. v Pat Henchar, Inc.*, 80 NY2d 124, 127 [1992] *Seidel v 18 E. 17th St. Owners*, 79 NY2d 735, 740-741 [1992]). A usurious contract is void and relieves the obligor thereunder of the obligation to repay principal and interest thereon (*see* General Obligations Law § 5-511; *Seidel*, 79 NY2d at 740; *Blue Wolf Capital Fund II, L.P. v American Stevedoring, Inc.*, 105 AD3d 178, 182 [1st Dept 2013] *Venables v Sagona*, 85 AD3d 904, 905 [2d Dept 2011] *Abir v Malky, Inc.*, 59 AD3d 646, 649 [2d Dept 2009] *Stanley Weisz, P.C. Retirement Plan v NCHD Assoc.*, 237 AD2d 276, 277 [2d Dept 1997] *Fareri v Rain's Intl.*,187 AD2d 481, 482 [2d Dept 1992]).

A transaction is usurious under civil law when it imposes an interest rate exceeding 16% per annum (*see* General Obligations Law § 5-501 [1] Banking Law § 14-a [1]), and it is criminally usurious when it imposes an interest rate exceeding 25% per annum (*see* Penal Law §§ 190.40, 190.42). While the defense of civil usury is unavailable to a corporation or an individual guarantor of a corporate obligation (*see* General Obligations Law § 5-521 [1] *Schneider v Phelps*, 41 NY2d 238, 242 [1977] *Pepin v Jani*, 101 AD3d 694, 695 [2d Dept 2012] *Arbuzova v Skalet*, 92 AD3d 816, 816 [2d Dept 2012] *Tower Funding v Berry Realty*, 302 AD2d 513, 514 [2d Dept 2003]), a corporation or a guarantor of a corporation's debt may assert a defense of criminal usury [*17](*see* General Obligations Law § 5-521 [3] Penal Law § 190.40; *Nikezic v Balaz*, 184 AD2d 684, 685 [2d Dept 1992] *Transmedia Rest. Co. v 33 E. 61st St. Rest. Corp.*,184 Misc 2d 706, 710 [Sup Ct, NY County 2000], *appeal withdrawn* 273 AD2d 950 [1st Dept 2000]). Thus, Piverger, as a guarantor of ACI's obligation, who was not involved in the drafting of the note, and did not obtain any direct benefit from the loan transaction,[FN4] may raise the defense of criminal usury.

Here, since the note was extended to January 18, 2012, it was a one-year loan of $150,000 with interest of $32,000 (plus the $7,500 extension fee) resulting in interest of $39,500 for one year, which is in excess of 25% annual interest (which would be $37,500), rendering it criminally usurious (*see* Penal Law § 190.40). In addition, the sums retained by a lender are included as interest (*see* General Obligations Law § 5-501 [2] Banking Law § 14-a [2] *Band Realty Co. v North Brewster, Inc.*, 37 NY2d 460, 462 [1975], *rearg denied* 37 NY2d 937 [1975] *Oliveto Holdings, Inc. v Rattenni*, 110 AD3d 969, 972 [2d Dept 2013] *Hope v Contemporary Funding Group*, 128 AD2d 673, 673-674 [2d Dept 1987]). Thus, since ACI never received the amount of $63,000 of the $150,000 loaned which was held in escrow and later released to plaintiffs, this effectively resulted in an annual interest of $39,500 on disbursed funds of $87,000, rendering it further in excess of the rate of 25% established for criminal usury.

Since the loan was criminally usurious, Piverger's Personal Guaranty is void and plaintiffs are precluded from recovering the unpaid principal of $150,000 and all outstanding interest and fees from him, as a guarantor of the loan (*see* General Obligations Law §5-511 [2] *Seidel*, 79 NY2d at 740; *Szerdahelyi v Harris*, 67 NY2d 42, 47-48 [1986] *Oliveto Holdings, Inc.*, 110 AD3d at 972; *Blue Wolf Capital Fund II, L.P.*, 105 AD3d at 184). Thus, dismissal of plaintiffs' complaint as against Piverger must be granted (*see* CPLR 3211 [a] [1], [7]).

CONCLUSION

Accordingly, the Malliks' motion to dismiss plaintiffs' complaint as against them and the O'keke defendants' cross motion to dismiss plaintiffs' complaint as against them are both denied, and Piverger's motion to dismiss plaintiffs' complaint and any and all cross claims as against him is granted.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Footnotes

Footnote 1: Ugwonali was working with O'keke & Associates at that time, and has since relocated to Texas and no longer resides or works in New York or for O'keke & Associates. Ugwonali has not been served in this action.

Footnote 2: While a note that is usurious is void, and, as discussed below with respect to Piverger, the interest effectively charged on the face of the note exceeds the criminal usury rate (*see* Penal Law § 190.40) and would be usurious without regard to the lender's intent (*see Freitas v Geddes Sav. & Loan Assn.*, 63 NY2d 254, 262 [1984] *Fareri v Rain's Intl.*, 187 AD2d 481, 482 [2d Dept 1992]), usury is an affirmative defense, and, here, there is a triable issue of fact as to whether Assoumou (who admits that he has been criminally charged with mortgage fraud with respect to other transactions) should be estopped from raising usury as a defense in view of the fact that the note may have been drafted on behalf of Assoumou, who was represented by O'keke & Associates, and who also may have induced reliance on the legality of the transaction (*see Seidel*, 79 NY2d at 743; *DeSantis v General Advisory & Funding Corp.*, 21 AD3d 1051, 1051 [2d Dept 2005] *Russo v Carey*, 271 AD2d 889, 890 [3d Dept 2000] *Greenfield v Skydell*, 186 AD2d 391, 391-392 [1st Dept 1992] *Abramovitz v Kew Realties Equities*,180 AD2d 568, 568 [1st Dept 1992], *lv denied* 80 NY2d 753 [1992] *Angelo v Brenner*, 90 AD2d 131, 133 [3d Dept 1982] *Hammond v Marrano*, 88 AD2d 758, 760 [4th Dept 1982], *appeal discontinued* 58 NY2d 1115 [1983] *Schaaf v Borsher*, 82 AD2d 880, 880 [2d Dept 1981]). Indeed, plaintiffs were not represented by counsel in the loan transaction, and it appears that O'keke & Associates was involved, as counsel, in the loan transaction and in the drafting of the documents. Furthermore, "the law is well settled that the right to claim protection of the laws against usury is confined to the debtor and those in legal privity [with the debtor]," and if the borrower is estopped from asserting it, the transaction will not be void as against non-signatories to the note, such as the Malliks and the O'keke defendants (*Barrett v Conley*, 35 Misc 2d 47, 48 [Sup Ct, Erie County 1962]). In this regard, however, it is noted that although a party may be "estopped from claiming usury, the illegal transaction is not entirely purged of its taint" (*Seidel*, 79 NY2d at 742; *see also Keezing v Rodriguez*,196 Misc 2d 408, 411 [Sup Ct, Kings County 2003]), but, rather, "[b]alancing the competing interests of law and equity, 'the innocent [party] is permitted to recover only the amount advanced with interest, rather than to enforce the [loan] for its face amount'" (*Seidel*, 79 NY2d at 742, quoting *Hammelburger v Foursome Inn Corp.*, 54 NY2d 580, 588 [1981]). Thus, it has been held that where there is, in fact, a usurious loan which would ordinarily be unlawful, void, and unenforceable, if the "transaction was the brainchild of the defendant, equity dictates that the plaintiff is entitled to recovery of the outstanding balance of the amount advanced, with legal interest" (*Keezing*, 196 Misc 2d at 411).

Footnote 3: While plaintiffs, in their opposition papers to the Malliks' motion, also refer to the filing of a UCC-1 financing statement with respect to the quitclaim deed, such a filing could not constitute a lien upon the premises because a UCC-1 financing statement creates a security interest in personal property only and does not affect " the creation or transfer of an interest in or lien on

real property'" (*Matter of Manufacturers & Traders Trust Co. v Myers*, 38 AD3d 965, 966 [3d Dept 2007], *appeal dismissed* 8 NY2d 1019 [2007], quoting UCC 9-109 [d] [11] *see also* UCC 9-104 [j] *Badillo v Tower Ins. Co. of NY*, 92 NY2d 790, 794 [1999] *In re Nittolo Land Dev. Assn., Inc.*, 333 BR 237, 240 [SD NY 2005]).

Footnote 4: Although Assoumou claims that the loan was for Piverger, as the buyer, he admits that the proceeds of the loan were used to get the premises ready for renovation and to buy out the tenants living at the premises. Thus, Piverger, who did not buy the premises, did not obtain any benefit from this.

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