

Greystone Bank v 15 Hoover St., LLC

2011 NY Slip Op 31852(U)

June 22, 2011

Supreme Court, Nassau County

Docket Number: 007223-10

Judge: Timothy S. Driscoll

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Scan

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
GREYSTONE BANK,

Plaintiff,

-against-

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Index No: 007223-10

**Motion Seq. No. 3
Submission Date: 5/2/11**

**15 HOOVER STREET, LLC, a New York
Limited Liability Company, DAVID
NEUBERG, an individual MALKIE
NEUBERG, an individual, IAN S.
RUBENSTEIN, an individual, MY NEW
YORK PROPERTIES LLC, a New York
Limited Liability Company, BEST
DEVELOPMENT CONSULTING LLC, a
New York Limited Liability Company,
KARAT PLATINUM LLC, a New York
Limited Liability Company, A & B
ENTERPRISES USA, INC., a New York
corporation, UNITEX CARGO SERVICES,
INC., a New York Corporation, DESIGN FOR
LIVING, LLC, a New York Limited Liability
Company, PLATINUM GEM CORP., a New
York corporation, ZEE COURIER
CORPORATION, a New York corporation,
ATLANTIC FEATHER & FOAM, INC., a
New York corporation, and "John Doe #1" to
"John Doe #50", Both Inclusive, the Names of
the Last 50 Defendants, Being Fictitious, Said
Defendants' True Names Being Thereby
Intended to Designate Parties with Liens that
are Subject and Subordinate to the Lien of the
Mortgage Being foreclosed herein and Tenants,
Lessees, or Occupants of Portions of the
Mortgaged Premises Described in the
Complaint,**

Defendants.

-----x

The following papers having been read on these motions:

**Notice of Motion, Affirmation in Support,
Affidavits in Support and Exhibits.....X
Memorandum of Law in Support.....X
Affidavit in Opposition and Exhibits.....X
Affidavit in Opposition and Exhibit.....X
Affirmation in Opposition and Exhibits.....X
Memorandum of Law in Opposition.....X
Memorandum of Law in Opposition.....X
Reply Affidavit and Exhibit.....X
Reply Memorandum of Law.....X**

This matter is before the Court for decision on the motion filed by Plaintiff Greystone Bank (“Greystone” or “Plaintiff”) on February 24, 2011 and submitted on May 2, 2011. For the reasons set forth below, the Court grants the motion as to the first, second, third and fourth causes of action in the Amended Complaint, and Plaintiff’s application for the appointment of a referee to compute sums due upon the foreclosure sale. The Court continues its stay of prosecution of the fifth cause of action for a deficiency judgment as set forth in a prior decision of the Court dated September 28, 2010, and extends that stay to the sixth cause of action on the guaranty.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order 1) pursuant to CPLR § 3212 granting summary judgment in favor of Greystone on the Amended Complaint (“Complaint”); and 2) appointing a referee to compute sums due under the Note and Mortgage.

Defendants oppose Plaintiff’s motion.

B. The Parties’ History

The parties’ history is set forth in a prior decision of the Court dated September 28, 2010 (“Prior Decision”) (Ex. 3 to Kramer Aff. in Supp.) which addressed a motion and cross motion by Defendants a) to dismiss or stay this action on the grounds that Plaintiff is not duly licensed or authorized to do business in the State of New York; and 2) to dismiss the action on the ground that Plaintiff was required, but failed, to elect its remedy. In the Prior Decision, the Court 1) granted the motion and cross motion to the extent that the Court stayed Plaintiff’s prosecution of the deficiency judgment on the note pending resolution of the foreclosure action and further order of the court; and 2) otherwise denied the motion and cross motion, concluding that

Plaintiff, a foreign corporation that maintains a domestic representative office registered under the New York State Banking Department, is authorized to pursue this action. The Prior Decision is incorporated herein by reference.

As noted in the Prior Decision, this is an action 1) to foreclose on a first mortgage lien on certain premises located in Nassau County ("Property"), 2) to enforce a guaranty ("Guaranty"), and 3) for related relief.

Plaintiff is the owner and holder of the subject first mortgage lien on the Property. Plaintiff is a North Carolina corporation with its principal place of business in North Carolina. Defendant 15 Hoover Street, LLC ("Hoover"), a New York limited liability company, is the mortgagor of the first mortgage lien on the Property, and a maker of the note ("Note") secured by the mortgage lien. David and Malkie Neuberger ("Neuberger") are makers of the Note. Hoover and the Neuberger are referred to collectively as the "Borrowers." Rubinstein is the guarantor of the Borrowers' obligations under the Note and mortgage ("Mortgage"), pursuant to the Guaranty that he executed.

Defendants My New York Properties, LLC ("New York Properties"), Best Development Consulting, LLC ("BDC"), Karat Platinum LLC ("Karat"), A & B Enterprises USA, Inc. ("A & B"), Unitex Cargo Services, Inc. ("Unitex"), Design for Living, LLC ("Design"), Platinum Gem Corp. ("Platinum"), Zee Courier Corporation ("Zee") and Atlantic Feather & Foam, Inc. ("Atlantic") are lessees of a portion of the Property.

The Complaint alleges that Borrowers failed to make required payments pursuant to the Note and Mortgage and are thereby in default. In the Complaint, Plaintiff asserts six causes of action: (1) foreclosure and sale of the Property that secures the loan, (2) foreclosure of Greystone's security interest in personal property, (3) recovery of rental proceeds pursuant to an assignment of leases and rents, (4) possession of the Property, (5) a deficiency judgment against Borrowers for any deficiency due to Greystone following foreclosure and sale of the Property, and (6) a money judgment against Guarantor Ian Rubinstein for any deficiency due to Greystone following foreclosure and sale of the Property.

In his Affidavit in Support of the instant motion, Alix Pierre ("Pierre"), a Special Asset Officer for Greystone, affirms that his responsibilities include administering the loan at issue. All the documents regarding this matter, which are kept in the ordinary course of Plaintiff's business, are within his custody and control. He is fully familiar with the facts and circumstances of this action, including Defendants' defaults under the Mortgage documents.

The Property is situated in the County of Nassau, designated as Section 40, Block 16, Lots 1-5 and 38-40, with an address of 15 Hoover Street, Inwood, New York. For value received, the Borrowers executed and delivered to Plaintiff the Note dated September 29, 2008 (Ex. 1 to Pierre Aff. in Supp.). Pursuant to the Note, Borrowers promised to pay to the order of Greystone the principal sum of Three Million, Seven Hundred and Thirty-Seven Thousand and 00/100 Dollars (\$3,737,000.00), with interest, in installments of principal and interest.

Hoover, further, entered into a Consolidation, Extension and Modification Agreement (“Consolidation Agreement”) dated September 29, 2008 (Ex. 2 to Pierre Aff. in Supp.). The Consolidation Agreement was duly recorded and indexed, and any mortgage tax imposed was paid. At or about the same time, to secure the payment of the principal sum set forth in the Note and the interest due thereon, Hoover, as mortgagor, executed and delivered to Plaintiff, as mortgagee, a first mortgage lien on the Property in the principal amount of Three Million, Seven Hundred and Thirty-Seven Thousand and 00/100 Dollars (\$3,737,000.00), and established by the Mortgage, specifically the Amended and Restated Mortgage, Assignment of Rents and Security Agreement dated September 29, 2008 (*id.* at Ex. 3). The Mortgage was duly recorded and indexed, and any mortgage tax imposed was paid. At the time the Mortgage was executed, Hoover was the owner of the Property, and the Neubergs were the sole members of Hoover.

Pursuant to the Mortgage, Hoover granted Greystone a security interest in all personalty associated with the Property. Hoover further granted to Greystone all rights and remedies as a secured party under the Uniform Commercial Code (“UCC”), including the right to record or continue UCC financing statements for the personal property associated with the Property. Pierre provides a copy of Greystone’s duly recorded UCC-1 Financing Statement (Ex. 4 to Pierre Aff. in Supp.).

In May of 2009, Greystone agreed to allow the Neubergs to transfer a 75% ownership interest in Hoover to Defendant Rubinstein. In connection with this approval, on or about May 11, 2009, Rubinstein executed the Guaranty (Ex. 5 to Pierre Aff. in Supp.) in which he guaranteed payment and performance under the applicable loan documents, including the Note and Mortgage.

Borrowers failed to comply with the terms and conditions of the Note and Mortgage by failing to make the monthly payments due after December 1, 2009, and by failing to pay late charges. Greystone sent a default notice to Borrowers dated February 25, 2010 (Ex. 6 to Pierre Aff. in Supp.) in which Greystone declared the entire indebtedness, including unpaid principal

and interest, immediately due and payable. Pierre provides a copy of Greystone's foreclosure record (*id.* at Ex. 7) which reflects the amounts due since the default, and the total amounts due as of February 1, 2011. As of February 1, 2011, there is due and owing to Greystone the unpaid principal balance of \$3,668,002.00, together with interest and default interest, which continues to accrue, as well as late fees and other charges.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to a judgment of foreclosure by producing the Note and Mortgage and demonstrating that Borrowers have defaulted on their payment obligations. In addition, Greystone has established that it perfected its security interest in the personalty associated with the Property. Accordingly, Plaintiff submits, it is entitled to summary judgment on its claims for foreclosure on the Mortgage, foreclosure of the UCC lien, and a deficiency judgment against the Borrowers individually. Plaintiff argues that Defendants' general and conclusory denials are insufficient to defeat Plaintiffs' entitlement to summary judgment.

In addition, Greystone has demonstrated its right to recover a deficiency judgment against the Guarantor by producing the Guaranty, and establishing Guarantor's failure to pay the amounts due under the Note and Mortgage. Guarantor has failed to produce evidence defeating Greystone's right to a deficiency judgment and, therefore, Greystone is entitled to summary judgment on its claim against Guarantor, who is liable for any deficiency remaining following foreclosure of the Property.

Plaintiff submits, further, that the Court should reject Defendants' technical argument that Greystone is barred from bringing this foreclosure action. Plaintiff notes that the Court rejected this argument in reaching the Prior Decision.

Defendants Rubinstein and Hoover submit, *inter alia*, that 1) Greystone, as a North Carolina bank that was not authorized to conduct business in New York, violated Banking Law § 200 when it made the loan at issue in light of the Affidavits in Opposition which demonstrate that Greystone maintained an office in New York, and conducted business in New York, prior to obtaining authorization from the New York State Department of Banking; 2) in light of the alleged unlawfulness of the loan, the Court should declare the loan null and void; 3) the Court should deny Greystone's motion for summary judgment on the sixth cause of action, based on the Guaranty, in light of the direction in the Prior Decision that Plaintiff's prosecution of a deficiency judgment based on the Note, pending the completion of a foreclosure action and

further order of the Court, was stayed; and 4) alternatively, the Court should deny Plaintiff's motion and permit discovery to proceed.

Defendants Neubergs, New York Properties, BDC, and Karat submit, *inter alia*, that 1) the Court should deny Plaintiff's motion and permit discovery on issues including the lawfulness of the loan, particularly in light of recent information demonstrating that Greystone did not become authorized to operate a representative office in New York until almost one year after making the loan at issue; and 2) Plaintiff is not entitled, at this juncture, to pursue the fifth cause of action seeking a deficiency judgment, in light of the Prior Decision.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Foreclosure

In moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default. *Wells Fargo v. Webster*, 61 A.D.3d 856 (2d Dept. 2009), citing *Republic Natl. Bank of N.Y. v. O'Kane*, 308 A.D.2d 482, 482 (2d Dept. 2003), quoting *Village Bank v. Wild Oaks Holding*, 196 A.D.2d 812, 812 (2d Dept. 1993). In *Wells Fargo, supra*, the Second Department held that plaintiff bank sustained its initial burden of demonstrating its entitlement to judgment as a matter of law by submitting proof of the existence of the note, mortgage, and consolidation agreement, and the defendants' default in payment. *Id.* Accordingly, it was incumbent on the defendants to demonstrate, by admissible evidence, the existence of a triable issue of fact as to a *bona fide* defense. *Id.* In light of their failure to do so, the Second Department held that the trial court properly granted summary judgment to the

plaintiff. *Id.*

C. Application of these Principles to the Instant Action

Plaintiff has established a *prima facie* case on its first cause of action for foreclosure on the Property, and the fourth cause of action for possession of the Property, by producing the Mortgage and Note, and establishing proof of default. In addition, pursuant to the Mortgage, Plaintiff was assigned all rents from the Property and acquired a security interest in all personalty at the Property. Plaintiff has thus established a *prima facie* case on the second and third causes of action, for foreclosure of Greystone's security interest in personal property and recovery of rental proceeds pursuant to the assignment of leases and rents, by providing the obligation sued upon and establishing the default in fulfilling that obligation.

The Court has already determined, in the Prior Decision, that Greystone is authorized to pursue this action pursuant to Banking Law § 200. The Court reaffirms that conclusion now, as nothing in the Defendants' papers now before the Court provide a basis to refute that conclusion. Moreover, to the extent that the Prior Decision does not foreclose this inquiry, the fact that Greystone's authorization for a representative office in New York followed the funding of the loan does not warrant a different determination.

The Court concludes that Defendants have failed to raise a triable issue of fact in opposition to Plaintiff's motion for summary judgment on its first four causes of action. In addition, the affirmative defenses asserted by the Defendants are unsubstantiated by factual allegations and conclusory in nature and, therefore, insufficient to defeat Plaintiff's right to judgment. Accordingly, the Court grants Plaintiff's motion for summary judgment on its first through fourth causes of action, as well as its application for the appointment of a referee to compute sums due upon the foreclosure sale.

In the Prior Decision, the Court stayed Greystone's prosecution of a deficiency judgment based on the Note, pending the completion of this foreclosure action and further order of the court. The election of remedies rule on which the Court relied applies to actions to the Guaranty at issue. *See TBS Enterprises, Inc. v Grobe*, 114 A.D.2d 445 (2d Dept 1985), *app. den.*, 67 N.Y.2d 601 (1986). Under these circumstances, the Court denies Greystone's motion for summary judgment as to its fifth cause of action for a deficiency judgment, and its sixth cause of action based upon the Guaranty of the Note and Mortgage. The Court continues the stay

previously imposed as to the fifth cause of action, and extends that stay to the sixth cause of action.

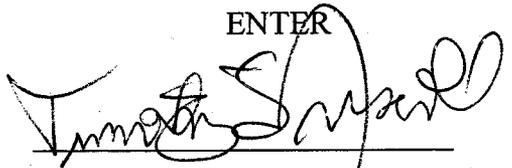
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Plaintiff's motion for summary judgment on the first, second, third and fourth causes of action in the Amended Complaint, and an Order appointing a Referee to compute, is granted.

Settle judgment and order on notice.

DATED: Mineola, NY
June 22, 2011

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JUN 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE