

Bank of New York v 125-127 Allen St. Assoc.
2007 NY Slip Op 32124(U)
July 9, 2007
Supreme Court, New York County
Docket Number: 0101549/2004
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 52

Index Number : 101549/2004
BANK OF NEW YORK
vs
125-127 ALLEN STREET ASSOC.
Sequence Number : 001

INDEX NO. 101549/2004
MOTION DATE 5-20-07
MOTION SEQ. NO. 001
MOTION CAL. NO. 2

is motion to/for Extend US pendens

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...
Answering Affidavits - Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1, 3, 4
2

Notice of Cross Motion
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION/ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/9/07 sf

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
THE BANK OF NEW YORK, AS COLLATERAL
AGENT AND CUSTODIAN f/b/o,
NYCTL 1998-2 TRUST,
Plaintiff,
against

Index Number 101349/2004
Submission Date May 2, 2007
Mot. Seq. No. 001
Cal. No. 2

DECISION AND ORDER

125-127 ALLEN STREET ASSOCIATES, THE
FEDERAL INSURANCE CORPORATION, AS
RECEIVER FOR CAPITAL NATIONAL BANK,
ROBERT GANS, JULIAN RODRIGUEZ, THE CITY
OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF FINANCE, THE STATE OF
NEW YORK, THE NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE
and "JOHN DOE" and "JANE DOE," numbers 1
through 10, the names of the last 10 defendants
being fictitious, the true names of said defendants
being unknown to this plaintiff it being intended to
designate fee owners, tenants or occupants of the liened
premises and/or persons or parties having or claiming
an interest in or a lien upon the liened premises
described in the compliant, if the aforesaid individual
defendants are living, an if any or all of said individual
defendants be dead, their heirs at law, next of kin,
distributees, executors, administrators, trustees,
committees, devisees, legatees, and the assignees,
lienors, creditors and successors in interest of them,
and generally all persons having or claiming under,
by, through, or against the said defendants,
Defendants.

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JUL 16 2007
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-----X

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For Defendants Allen St. Assoc. & Julian Rodriguez:
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Papers considered in review of this motion to extend and cross-motion to dismiss :

Papers **Numbered**
Notice of Motion and Affidavits Annexed..... 1

Notice of Cross-Motion.....	<u>2</u>
Plaintiff's Memo of Law & Affidavit	<u>3,4</u>

PAUL G. FEINMAN, J.:

The motion and cross-motion are consolidated for purposes of decision.

Pursuant to CPLR 6513, plaintiff seeks an order extending the Notice of Pendency as concerns a tax lien recorded against the property located at 125 Allen Street for a three-year period. Defendants 125-127 Allen Street Associates and Rodriguez cross-move to dismiss the action for failure to state a cause of action (CPLR 3211[a][7]). Defendants City of New York and New York City Department of Finance served a notice of appearance and waiver as concerns this motion (Not. of Mot. Ex. C). For the reasons which follow, the motion is granted and the cross-motion is denied.

Plaintiff commenced its proceeding by filing a summons and complaint and Notice of Pendency on January 30, 2004, seeking to foreclose on a real estate tax lien for the balance due as of June 1, 2000, as the owners had failed to pay the taxes owed to the City (Not. of Mot. Ex. A, Compl. ¶¶ 13-15). Plaintiff had previously commenced a similar proceeding in 2002 which was dismissed after its counsel failed to appear at a preliminary conference in April 2002 (Not. of Mot., Krapf Aff. ¶ 9).

Defendants Allen Street Associates and Rodriguez cross-move on the ground that the lien, which arose from a real estate tax bill due on July 1, 1997, was in fact paid by them on the date due, and they did not owe the City any money at the time it sold the lien to plaintiff (Not. of Cross-Mot. Huang Aff. at unnumbered p. 1). As proof, they offer a photocopy of the front of Rodriguez's check dated July 1, 1997, made to the order of the City of New York Department of

Finance, in the amount which was owed at the time according to the payment coupon (Not. of Cross-Mot. Ex. 1-2). They also attach copies of "FairTax" records from the Department of Finance to show that the City recorded the amount paid (Not. of Cross-Mot. Ex. 3). They therefore seek dismissal of the action for failure to state a cause of action.

In response, plaintiff submits a copy of defendants' check, dated December 4, 1997, that explicitly "replaces" the July 1, 1997 check, but does not include the interest that would have accrued from July 1, 1997 through December 4, 1997 (Mangini Aff. Ex. A). According to the affidavit of the New York City Tax Lien ombudsman whose company acts as servicing agent to plaintiff bank, the outstanding interest totaled \$1,258.86 and it was this balance that was sold at the tax lien sale on June 1, 2000 (Mangini Aff. ¶¶ 1, 5-8). In addition, as of July 1, 1999, defendants also owed real estate taxes for the period of January 1, 2000-June 30, 2000 in the amount of \$10,752.42 (Mangini Aff. ¶ 9). Defendants only made their payment in December 1999, and again failed to include the accrued interest in the amount of \$241.59, and this balance was also sold at the tax lien sale of June 1, 2000 (Mangini Aff. ¶¶ 10-11). Plaintiff attaches a copy of the account history maintained by the Department of Finance showing the payments and interest accrual from 1993-2007 (Mangini Aff. Ex. B).

The rules concerning the filing of a notice of pendency are contained in Article 65 of the CPLR. A notice of pendency is effective for a period of three years from the date of filing and may be extended if, *prior to its expiration*, plaintiff moves for an extension and establishes good cause (CPLR 6513). Although under the statute, the extension is to be filed, recorded and indexed before expiration of the prior period, it has been held that where a plaintiff has started the extension process prior to the expiration of the notice of pendency, he or she will be allowed

an order *nunc pro tunc* to continue its effect (*H.M. Hughes Co. v Carmania Corp., N.V.*, 187 AD2d 287 [1st Dept. 1992]). Here, the Notice of Pendency was filed on January 30, 2004 and was due to expire on January 30, 2007. According to plaintiff's counsel, he is preparing a motion for summary judgment but it would not be decided with judgment entered prior to the expiration of the Notice. Thus, plaintiff filed the instant motion on January 2, 2007, in effect tolling the expiration of the Notice. The motion was adjourned numerous times and finally marked submitted after oral argument on May 2, 2007.

In assessing a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the facts alleged in the complaint must be assumed to be true. Furthermore the court must accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998]). Submissions of a party in opposition to a motion to dismiss are to be "given their most favorable intendment" (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 [1998]). In order for a defendant to prevail in a motion to dismiss, he or she must convince the court that nothing the plaintiff can reasonably be expected to prove would establish a valid claim (Siegel, New York Practice, § 265 [3d ed.]). Factual claims if contradicted by documentary evidence, are not entitled to such consideration (*Maas v Cornell University*, 94 NY2d 87, 91 [1999]). However, the documentary evidence must resolve all factual issues as a matter of law (*Ozdemir v Caithness Corp.*, 285 AD2d 961 [3d Dept. 2001], *lv. denied* 97 NY2d 605 [2001]; see CPLR 3211 [a] [1]).

Here, the documentary evidence refutes defendants' claims that they paid all the real estate taxes and interest due and do not owe any taxes from the 1997 period as well as the 2000

period. Accordingly, their cross-motion to dismiss the complaint must be denied, and plaintiff's motion to extend the Notice of Pendency another three years is granted. It is

ORDERED that the motion to extend the Notice of Pendency originally filed on January 30, 2004 against the property located at 125 Allen Street, New York, New York (Block 415; Lot 33), is extended *nunc pro tunc* to January 2, 2007, the date this motion was filed, for an additional three year period through and including January 30, 2010; and it is further

ORDERED that the cross-motion to dismiss the complaint is denied.

This constitutes the decision and order of the court.

Dated: July 9, 2007
New York, New York



J.S.C.

FILED
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