

Citigroup Global Mkts. Realty Corp. v Urbina

2007 NY Slip Op 32711(U)

August 15, 2007

Supreme Court, New York County

Docket Number: 0104647/2007

Judge: Kibbie F. Payne

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

CITIGROUP GLOBAL MARKETS REALTY CORP.,

INDEX NO. 104647/07

Plaintiff,

MOTION DATE 7/06/07

-against-

MOTION SEQ. NO. 001

ALEJANDRO URBINA, BERENFELD, SPRITZER,
SCHECHTER & SHEER, BOARD OF MANAGERS
OF THE CORINTHIAN CONDOMINIUM, et al.,

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, plaintiff's motion in this mortgage foreclosure action is granted in part and denied in part as indicated in the attached memorandum.

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NEW YORK
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Dated: August 15, 2007

[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 : IAS PART 4

CITIGROUP GLOBAL MARKETS REALTY CORP.,

Index No. 104647/07

Plaintiff,

Motion Seq. 001

- against -

ORDER

ALEJANDRO URBINA, BERENFELD, SPRITZER,
SCHECHTER & SHEER, BOARD OF MANAGERS OF
THE CORINTHIAN CONDOMINIUM, "JOHN DOE
1-5" and "JANE DOE # 1-5" said names
being fictitious, it being the intention
of Plaintiff to designate any and all
occupants, tenants, persons or
corporations, if any, having or claiming
an interest in or lien upon the premises
being foreclosed herein,

Defendants.

KIBBIE F. PAYNE, J.:

This is a mortgage foreclosure action, involving property known as 330 East 38th Street, Unit 47A, New York, New York 10016. The complaint alleges that, on March 23, 2006, defendant Alejandro Urbina executed a \$1,000,000.00 mortgage agreement and note with non-party Long Beach Mortgage Company. A few days later, Long Beach Mortgage Company made an assignment of the mortgage and note to plaintiff Citigroup Global Market Realty Corp. On September 1, 2006, Alejandro Urbina defaulted on the mortgage. Plaintiff invoked the acceleration clause of the mortgage and commenced this action for a judgment of foreclosure. No defendants made an appearance or answered, except for

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defendant Berenfeld, Spritzer, Schechter & Sheer (Berenfeld). In its answer, Berenfeld set forth a cross-claim and counterclaim for "judgment against the plaintiff and all defendants adjudging that Berenfeld has a mortgage on the Property and that said property be sold . . . and that Berenfeld be paid the amount of said mortgage . . . from the proceeds of sale" Plaintiff replied to the answer without making a motion.

Plaintiff now moves for an order striking Berenfeld's answer, defenses and counterclaim pursuant to CPLR 3211 (a) and (b), granting plaintiff summary judgment pursuant to CPLR 3212, substituting certain names for John and Jane Does and referring this matter to a referee pursuant to RPAPL § 1321. In its papers, Berenfeld, which admits it holds a mortgage subordinate to the one between plaintiff and Alejandro Urbina, states that it "does not dispute the validity of [plaintiff's] mortgage, [plaintiff's] right to foreclose on its mortgage or [plaintiff's] priority to the proceeds of any foreclosure sale" Berenfeld opposes only "the portion of plaintiff['s] motion which seeks to extinguish [its] right" to surplus funds.

Berenfeld appears to misunderstand plaintiff's position in regards to it. Plaintiff acknowledges that Berenfeld may be entitled to surplus monies, and argues only that its purported "right" to such funds due to a subsequent mortgage is not a defense, cross claim or counter claim to this foreclosure action.

The entitlement to surplus funds is a matter for the referee in the foreclosure. Berenfeld is empowered to pursue the surplus, if any, in accordance with RPAPL §§ 1354, 1355 and 1361. Given that Berenfeld does not otherwise oppose plaintiff's motion to dismiss its cross-claim and counterclaim, the court will grant that branch of plaintiff's motion.

The court will not grant plaintiff summary judgment. To establish a prima facie case showing of entitlement to summary judgment in a mortgage foreclosure action, the movant must prove "the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment" (Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept 2007], citing Campaign v Barba, 23 AD3d 327 [2nd Dept 2005]; see also CPLR 3212 [b]). "A summary judgment motion should not be granted merely because the party against whom judgment is sought failed to submit papers in opposition to the motion" (Liberty Taxi Management, Inc. v Vladimir Gincheran, 32 AD3d 276, 278 n 1 [1st Dept 2006] [citation omitted]). The movant will be held to its burden, regardless of the sufficiency of the opposition (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Here, plaintiff has failed to establish a prima facie case as it has not produced the unpaid note and its terms. Plaintiff's submission of the mortgage and assignment agreement between it and Long Beach Mortgage Company is insufficient for purposes of

summary judgment. The affidavit of plaintiff's foreclosure specialist, which refers generally to the note cannot substitute for the production of the note.

The court, however, is compelled to grant plaintiff's motion for an order on default pursuant to RPAPL § 1321. Section 1321 provides: "If the defendant fails to answer within the time allowed or the right of the plaintiff is admitted by the answer, upon motion of the plaintiff, the court shall . . . direct a referee to [among other things] compute the amount due" All defendants failed to answer, except Berenfeld. Berenfeld "does not dispute . . . [plaintiff's] right to foreclose on its mortgage or [plaintiff's] priority to the proceeds of any foreclosure sale" Accordingly, it is

ORDERED that the motion to strike defendant Berenfeld, Spritzer, Schechter and Sheer defenses, cross-claim and counterclaim is granted; it is further

ORDERED that the motion for summary judgment is denied; it is further

ORDERED that the motion for an order of the appointment of a referee to compute and to amend the title to this action be, and the same hereby is, in all respects granted, and it is further

ORDERED, that this matter be, and the same hereby is, referred to Leslie Jennings, Esq., an attorney at law, with an office for the practice of law located at 615 40th Street, Rm. 1736

City of New York, State of New York be, and she hereby is appointed referee in this action to ascertain and compute the amount due to the plaintiff on the promissory note and mortgage more fully described in the complaint herein, and to examine and report whether the mortgaged premises may be sold in parcels, and if the whole amount of the mortgage has not become due and that the said referee report to this court with all convenient speed; and it is further,

ORDERED, that the caption of this action be amended by deleting therefrom the names of JOHN DOE and JANE DOE, and substituting therefore, the names of Alejandro Servinas, William Landhauser, Yong Lee and Jihyun Lee, as though said parties were originally named as defendant parties from the commencement of this action, and without prejudice to any of the proceedings heretofore had herein; it is further

ORDERED that the action shall bear the following caption:
 CITIGROUP GLOBAL MARKETS REALTY, CORP.,

Plaintiff,

-against-

ALEJANDRO URBINA, BERENFELD, SPRITZER,
 SHECHTER & SHEER, BOARD OD MANAGERS OF
 THE CORINTHIAN CONDOMINIUM, ALEJANDRO
 SERVINAS, WILLIAM LANDHAUSER, YONG
 LEE and JIHYUN LEE,

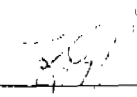
Defendants.

And, it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of this Court, who is thereby directed to mark the court's record to reflect the changes.

The foregoing constitutes the decision and order of the court.

DATE: August 15, 2007



KIBBIE F. PAYNE, J.S.C.

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