

Lasalle Bank, N.A. v Diaz
2007 NY Slip Op 33335(U)
October 10, 2007
Supreme Court, New York County
Docket Number: 0112125/2006
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EILEEN A. RAKOWER

PRESENT:

J.S.C.

PART **Part 5**

Index Number : 112125/2006

LASALLE BANK, N.A.

vs

DIAZ, MATHILDE D.D.S.

Sequence Number : 002

STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
OCT 17 2007
NEW YORK
COUNTY CLERKS OFFICE

Dated: 10/10/07



EILEEN A. RAKOWER

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X

LASALLE BANK, N.A., AS TRUSTEE FOR
CERTIFICATE HOLDERS OF BEAR STERNS
ASSET BACKED SECURITIES I LLC, ASSET
BACKED CERTIFICATES, SERIES 2005-FR1
C/Owner EMC MORTGAGE CORPORATION
909 Hidden Ridge Drive, Suite 200
Irving, TX 75038-3817,

Plaintiff,

Index No.
112125/06

- against -

Seq. No.: 002

DECISION/ORDER

MATHILDE DIAZ, D.S.S. & DIVISION OF LIENS
AND RECOVERY, EMC MORTGAGE
CORPORATION, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. AS NOMINEE
FOR FREMONT INVESTMENT AND LOAN, NEW
YORK CITY DEPARTMENT OF SOCIAL SERVICES,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY TRANSIT AUTHORITY
ADJUDICATION BUREAU, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,
THE BOARD OF MANAGERS OF LIBERTY VIEW
CONDOMINIUM, and JOHN DOE,

Defendants.

-----X

HON. EILEEN A. RAKOWER

Plaintiff, Lasalle Bank, N.A., as Trustee for Certificate Holders of Bear Stearns
Asset Backed Securities I LLC, Asset Backed Certificates, Series 2005-FR1 C/O
EMC Mortgage Corporation EMC Mortgage Corporation (“Lasalle”) brings this

action to foreclose a mortgage as against defendant Mathilde Diaz (“Diaz”), owner of condominium unit 18K which is located at 99 Battery Place New York, New York. Plaintiff now moves for an order: (1) granting summary judgment as against defendant The Board of Managers of Liberty View Condominium (“Board”) pursuant to CPLR 3212 or, in the alternative granting a dismissal pursuant to CPLR 3211; (2) Severing the Board’s cross-claims (3) treating the Board’s answer as a limited notice of appearance, entitling the Board’s attorneys to receive, without prior notice, a copy of the Notice of Sale, Notice of Discontinuance and Notice of Surplus Money Proceedings; (4) amending the caption to drop “John Doe” as a party defendant; (5) appointing a referee to determine the amount due and to ascertain whether the premises may be sold in parcels; and (6) deeming all non-appearing and non-answering parties in default. The Board opposes that portion of Lasalle’s motion that seeks severance and dismissal of its cross claims against Diaz and cross-moves for summary judgment on its cross-claims against Diaz for unpaid common charges, including interest, disbursements and reasonable attorney’s fees. Defendants Mathilde Diaz, D.S.S. & Division of Liens and Recovery (“D.S.S.”) , EMC Mortgage Corporation (“EMC”), Mortgage Electronic Registration Systems, Inc. As Nominee for Fremont Investment and Loan (“Systems”), New York City Department of Social Services (“NYCDSS”), New York City Environmental Control Board (“ECB”), New York City Transit Adjudication Bureau (“TAB”), New York State Department of Taxation and Finance (“DTF”) have not appeared.

Initially, Lasalle submits affidavits of service for Diaz, served on September 6, 2006; D.S.S., served on September 1, 2006; EMC served on September 1, 2006; Systems, served on September 5, 2006; and NYCDSS, ECB, TAB, and DTF were served on September 1, 2006. Having received no answer from these defendants, plaintiff moves this Court for an order declaring each in default. When a defendant fails to appear, the plaintiff may seek a default judgment against that defendant (CPLR §3215[a]). The time to answer for each defendant named above has expired and, thus, a default judgment shall be issued against them.

Diaz signed an Adjustable Rate Note (“Note”) dated April 22, 2005 promising to pay the principle amount of \$312,000 by monthly payments of \$1768.00 each with an annual interest rate of 6.800% for 30 years with payments beginning on June 1, 2005. Diaz has been in default on her monthly payments beginning February 1, 2006 which triggered an “acceleration clause” contained in the Note. Section (7)(C) of the Note states:

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. The date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

Lasalle brought a foreclosure action against Diaz and the other named defendants and submits an "affidavit of merit and amount due" which states that as result of Diaz's default, she owes the following amounts: (1) the principle balance of \$312,000.00; (2) 6.8% interest from January 1st, 2006 through April 30, 2007 totaling \$17,670.31; (3) 9.8% interest from May 1, 2007 through July 19, 2007, totaling \$6,701.59. The Board was made a defendant because it has a lien against Diaz for unpaid common charges and attorney's fees. Lasalle, in support of its motion, argues that the Board's cross-claim is irrelevant to the foreclosure action and should be dismissed or severed and tried separately.

Pursuant to New York Real Property Law §339-aa:

Suit to recover a money judgment for unpaid common charges shall be maintainable without foreclosing or waiving the lien securing the same, and foreclosure shall be maintainable notwithstanding the pendency of suit to recover a money judgment.

The Board acknowledges that Lasalle's mortgage is superior to the Board's lien for common charges and that it is only entitled to surplus funds realized at the foreclosure sale. An assessment of unpaid common charges and attorney's fees owed by Diaz is a simple computation which can be accomplished at the time of the foreclosure action. Thus, severing the Board's cross-claim from the foreclosure action is not required.

The Board, in support of its cross-motion for summary judgment against Diaz, submits: (1) the "Declaration of Condominium"; (2) the condominium bylaws; (3) a condominium assignment agreement between Diaz and Roger Nie; and (4) a "notice for unpaid condominium charges" directed to Diaz, dated April 7, 2006 and recorded April 12, 2006. The Board argues that, pursuant to the condominium by-laws ("by-laws"), it is entitled to collect delinquent common charges from Diaz in the amount

of \$8,801.14, including late fees and cable fees through August 1, 2007. Attorney fees incurred to date are \$5,955.60.

Section 6.4 of the by-laws states, in relevant part:

Default in Payment of Common Charges.

(A) The Board of Managers shall take prompt action to collect any Common Charges due . . . In connection therewith, the Board of Managers shall have the right and obligation to cause liens for all sums due and owing to the Board of Managers . . .

(B) In the event that any Unit Owner shall fail to make prompt payment of Common Charges, such Unit Owner shall be obligated to pay interest thereon at the highest rate chargeable . . . together with all costs and expenses paid or incurred by the Board . . . including, without limitation, reasonable attorneys' fees . . .

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

The board has produced sufficient evidence that it is entitled as a matter of law to unpaid common charges, interests, costs and attorney's fees resulting from Diaz's nonpayment. In any event, Diaz is in default as she has failed to answer or otherwise appear in this action.

Wherefore it is hereby

ORDERED that plaintiff's motion to dismiss defendant the Board of Managers of Liberty View Condominium's cross-claim is denied, and it is further

ORDERED that plaintiff's motion to sever the cross-claim of Board of Managers of Liberty View Condominium is denied, and it is further

ORDERED that plaintiff's motion to amend the caption to delete "John Doe" as a party defendant is granted, and it is further

ORDERED that defendant the Board of Managers of Liberty View Condominium cross-motion for summary judgment as against defendant Mathilde Diaz is granted, and it is further

ORDERED that this action be, and the same is hereby referred to ANN BERMAN of the LAW OFFICES OF ANN PINCISS BERMAN, PC 60 E. 42nd Street, Suite 4700 New York, New York 10165(212)867-5464, as Referee to ascertain and compute the amount due to plaintiff for principal, interest and other disbursements advanced as provided for in the note and mortgage upon which this action was brought, to examine and report, by documentary evidence submitted in lieu of a hearing, whether or not the mortgaged premises can be sold in parcels, and that the referee make his/her report to the Court with all convenient speed; and it is further

ORDERED that this action be, and the same is hereby referred to ANN BERMAN of the LAW OFFICES OF ANN PINCISS BERMAN, PC 60 E. 42nd Street, Suite 4700 New York, New York 10165(212)867-5464, as Referee to ascertain and compute the amount due to defendant the Board of Managers of Liberty View Condominium for common charges, interest, late charges, costs, disbursements and attorney's fees upon which this action was brought, and that the referee make his/her report to the Court with all convenient speed; and it is further

ORDERED that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22NYCRR Part 36), including, but not limited to, section 36.2(c) ("Disqualifications from appointment"), and section 36.2(d) (Limitations on appointments based upon compensation"), and it is further

ORDERED that a copy of this Notice of Entry shall be served upon the owner of the equity of redemption, any tenants named in this action and any other party entitled to notice, and it is further

ORDERED that the non-answering defendants, Mathilde Diaz, D.S..S. & Division of Liens and Recovery, EMC Mortgage Corporation, Mortgage Electronic Registration Systems, Inc. As Nominee for Fremont Investment and Loan, New York City Department of Social Services, New York City Environmental Control Board, New York City Transit Adjudication Bureau, New York State Department of Taxation and Finance are deemed in default.

This constitutes the decision and order of the court.

All other relief requested is denied.

DATED: October 10, 2007



EILEEN A. RAKOWER, J.S.C.

FILED
OCT 17 2007
NEW YORK
COUNTY CLERK'S OFFICE