

DLJ Mtge. Capital, Inc. v Hirsh

2008 NY Slip Op 31738(U)

June 16, 2008

Supreme Court, Nassau County

Docket Number: 0271-07/

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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DLJ Mortgage Capital, Inc.,

Plaintiff,

-against-

Yael Hirsh; Rochelle Stern; David Stern; Mortgage Electronic Registration Systems, Inc., as nominee for Fairmount Funding, LTD; Guma Construction; People of The State of New York; Freeda Inc.; New York State Department of Taxation and Finance, and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiff, the person or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

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**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.: 10271/07
Motion Seq. No.: 01, 02**

DECISION AND ORDER

Papers Read on this Motion:

- 1. Plaintiff's Motion for Summary Judgment.....01
- 2. Defendants Affirmation in Opposition.....xx
- 3. Plaintiff's Reply Affirmation.....xx
- 4. Defendants Cross-Motion.....02
- 5. Defendants Reply Affirmation.....xx

Plaintiff, DLG Mortgage Capital Inc., moves by Notice of Motion, sequence number 01, for an order directing Summary Judgment in favor of the Plaintiff on the grounds that the Defendants have not asserted a defense to the cause of action. Plaintiff also moves for an order directing the appointment of a referee to compute the amount due to the Plaintiff, that the title of this action be amended, and that costs and disbursements including reasonable attorneys fees, for this motion be awarded.

Defendants, Yael Hirsh, Rochelle Stern and David Stern, Cross-move by Notice of Cross Motion, sequence number 02, for an order granting the moving Defendants leave to serve and file a Second Amended Verified Answer to assert lack of capacity on behalf of the Plaintiff to sue, and dismissing the Complaint upon the ground that the Plaintiff at the time of the commencement of

this action had no interest in the subject matter herein.

This action to foreclose a mortgage was commenced by Summons and Verified Complaint served on Defendants Yael Hirsh and Rochelle Stern on June 13, 2007 and June 29, 2007, respectively, as owners of record. The Summons and Complaint as well as the Notice of Pendency were filed with the Office of the Clerk of the County of Nassau on June 12, 2007.

Defendants, Mortgage Electronic Registration Systems, Inc. (Subordinate mortgagee), as nominee for Fairmont Funding, LTD, the New York State Department of Taxation & Finance (Judgment creditor), the People of the State of New York (Judgment creditor), David Stern (owner of premises by a Consolidated and Modified Liens) and Danielle Hirsh (daughter of Yael Hirsh), were served with a Summons and Complaint for this foreclosure action on June 13, 2007. Defendants Freeda, Inc. (Judgment creditor), and Guma Construction (Lienor by Mechanic's Lien), were served on June 18, 2007. Issue was joined by Defendants, Yael Hirsh, Rochelle Stern and David Stern on July 24, 2007 by service of Answer. The remaining Defendants have yet to answer or move with respect to the Complaint and the time to do so has expired.

Defendants Yael Hirsh and Rochelle Stern entered into a mortgage in the sum of \$1,700,000.00, with Mortgage Electronic Registration Systems, Inc., as nominee for Fairmont Funding, LTD, on property known as 34 Lismore Road, Lawrence, NY 11559. Plaintiff is the current owner and holder of said Note and Mortgage by Assignment recorded on November 14, 2007, in 32501 of Mortgages, page 403.

I. Plaintiff's Summary Judgment Motion

In motion sequence 01, the Plaintiff alleges that Defendants Yael Hirsh and Rochelle Stern have failed to make the required mortgage payments to the Plaintiff. Plaintiff alleges that although the Defendants generally deny the allegations against them in their Answer, they fail to affirmatively assert that the payments required under the note and mortgage were made. Plaintiff also alleges that the affirmative defenses raised by the Defendants; namely, a failure to state a cause of action, a lack of personal jurisdiction and the Plaintiff's alleged failure to serve a notice of default prior to commencing the instant action, are without merit.

In opposition to the motion for Summary Judgment, Defendants allege that the Plaintiff has no authority to bring this action because at the time that the alleged acceleration notices were sent, the Plaintiff had no interest in the mortgage. Specifically, the action was commenced on or about June 12, 2007, although the Plaintiff did not have a valid Assignment until November 2, 2007, approximately five months later. In reply, Plaintiffs allege that no assignment is necessary in order to effectuate a mortgage transfer, only an effective delivery of the mortgage. Further, Plaintiffs claim that Defendants waived the Plaintiffs affirmative defense of lack of standing when they failed to raise it in their Answer.

In general, “[t]o establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and the mortgage note, *ownership of the mortgage*, and the defendant’s default in payment [*Emphasis added*].” *Campaign v Barba*, 23 AD3d 327 (2d Dept 2005). The “foreclosure of a mortgage may not be brought by one who has no title to it and absent an effective transfer of the debt, the assignment of the mortgage is a nullity.” *Kluge v Fugazy*, 145 AD2d 537 (2d Dept 1988). “Where the plaintiff is the assignee of the mortgage and the underlying note at the time the foreclosure action was commenced, the plaintiff has standing to maintain the action.” *Federal Nat. Mortg. Ass’n v Youkelsone*, 303 AD2d 546 (2d Dept 2003).

In the instant case, there is a question of fact with regards to whether the Plaintiffs had a valid interest in said mortgage at the time of the commencement of the underlying foreclosure action against the Plaintiffs in June 2007. This creates an issue of standing on the part of the Plaintiff, who failed to meet its burden to prove an entitlement to the interest claimed. Further, even assuming that delivery of a mortgage is sufficient to claim an interest, there is no affirmation from a person with knowledge as to the circumstances of the delivery of the mortgage. Thus, summary judgment is denied as there is a question of fact as to whether the Plaintiffs are entitled to the interest claimed.

Further, although it is well settled that “[w]hen a defendant answers a complaint and fails to assert lack of standing as a defense, such defense is waived pursuant to CPLR § 3211[e],” no waiver exists in cases where the Plaintiff has failed to establish proper standing. *Countrywide Home Loans, Inc. v Taylor*, 17 Misc3d 595, (NY Sup 2007). Thus, contrary to the Plaintiff’s

contention, the argument that the Plaintiffs lack of standing to bring this action has not been waived. All other issues raised by the Plaintiff are more appropriately resolved at trial, including the validity of the Defendant's affirmative defenses as raised in their Answer.

II. Defendant's Cross-Motion

In motion sequence 02, Defendants Yael Hirsh, Rochelle Stern and David Stern, cross move for an order granting leave to serve and file a Second Amended Verified Answer based on the lack of capacity of the Plaintiff to sue and dismissing the Plaintiff's Complaint upon the same ground. Plaintiffs maintain that a search of the records in the County Clerk's Office, Nassau County, have failed to show the filing of any assignment in favor of the Plaintiff. The Plaintiff previously assumed that this inability to discover the assignment as recorded was due to the lag time in the County Clerk's Office.

Generally, "defenses waived under CPLR § 3211(e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR § 3025(b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay." *Nunez v Mousouras*, 21 AD3d 355 (2d Dept 2005). As stated earlier, given that the Plaintiffs have not met their burden to prove their legal interest in the subject mortgage, the Court finds it proper to grant the Defendants leave to amend their Answer based on the Plaintiff's alleged lack of standing. Further, the Defendants' request to dismiss the Plaintiff's complaint is denied as premature.

As such, it is hereby

ORDERED, that the Plaintiff's motion for Summary Judgment, sequence number 01, against the Defendants is **DENIED**. It is further,

ORDERED, that the Defendants motion, sequence number 02, is **GRANTED** to the extent that leave to Amend their Answer is permitted. The Complaint is deemed served as of the date of this decision.

Any relief not specifically granted herein is **denied**.

This constitutes the **DECISION** and **ORDER** of this Court.

DATED: June 16, 2008
Mineola, N.Y.

ENTER:


HON. MICHAEL J. WOODARD
J.S.C.
ENTERED

JUN 18 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE