

GRP Loan, LLC v Karmoeddien

2009 NY Slip Op 30131(U)

January 14, 2009

Supreme Court, Queens County

Docket Number: 647/2008

Judge: David Elliot

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Upon the foregoing papers it is ordered that the motion # 16 on the motion calendar for April 29, 2008 and the motion # 27 on the motion calendar for August 19, 2008 are determined together as follows:

Plaintiff commenced this foreclosure action by filing a summons and complaint on January 9, 2008. Plaintiff alleges that it is the holder of the mortgage, dated May 17, 2006, given by defendant Shazaman Karmoeddien in favor of Mortgage Electronic Registration Systems, Inc. (MERS), acting solely as nominee for Fremont Investment and Loan (Fremont), with respect to the premises known as 117-47 133rd Street, South Ozone Park, New York as security for a note evidencing a loan in the principal amount of \$540,000.00, plus interest. Plaintiff alleges that defendant Karmoeddien defaulted under the terms of the mortgage and note by failing to pay the monthly mortgage payment which became due and payable on October 1, 2007, and subsequent installments, and by conveying title to the property on or about August 15, 2007, to defendant Savitri D. Singh without its prior written consent. Plaintiff named defendant SMI as a party defendant insofar as defendant SMI claims to hold an unrecorded mortgage lien against the property. Plaintiff further alleges that it provided a notice of default to defendant Karmoeddien, and that defendant Karmoeddien failed to remit the sums due in accordance with the notice and, as a consequence, it elected to accelerate the entire mortgage debt and declare all sums secured thereby to be due and payable.

Defendant SMI served an answer denying certain allegations of the complaint and asserting various affirmative defenses. The remaining defendants are in default in appearing or answering the complaint. Plaintiff has determined that defendants "John Doe #4" through "John Doe #10" are unnecessary party defendants.

With respect to that branch of the motion by plaintiff for summary judgment against defendant SMI and that branch of the motion by defendant SMI for summary judgment dismissing the complaint asserted against it, it is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

Plaintiff asserts that defendant Karmoeddien is in default under the terms of the mortgage and note and no valid defense to

the foreclosure action exists. Plaintiff also asserts that, pursuant to Real Property Law § 291, its recorded mortgage has priority over the unrecorded mortgage of defendant SMI and, therefore, it is entitled to foreclosure of the unrecorded mortgage lien of defendant SMI. In support of the motion, plaintiff offers its attorney's affirmation, an affidavit of Kristen Tess, a secretary of plaintiff attesting to the existence of the mortgage and note executed by defendant Karmoeddien and defendant Karmoeddien's defaults thereunder, a copy of the pleadings, the mortgage, note and assignments. In addition, plaintiff offers documentary evidence to show that the subject mortgage was recorded on June 16, 2006, and the SMI mortgage is unrecorded.

Defendant SMI does not dispute that plaintiff's mortgage has record priority over its mortgage dated August 15, 2007. Instead, defendant SMI asserts that plaintiff's mortgage has been fully satisfied in accordance with the terms of a payoff letter, dated August 13, 2007, issued by plaintiff. Defendant SMI further asserts that plaintiff has wrongfully refused to issue a satisfaction. Defendant SMI argues, therefore, that plaintiff should be precluded from obtaining foreclosure based upon the doctrines of estoppel and accord and satisfaction. Defendant SMI submits, among other things, the affirmation of its counsel, an affidavit of Valerie R. Clark, a vice-president of Saxon, a copy of the payoff letter, various correspondence and the HUD-1 settlement statement from the Singh closing, and a cover letter dated August 16, 2007 from Regent Abstract Services, Ltd. advising of the enclosure of a check in the amount of \$505,195.00 and requesting the issuance of a satisfaction for the Karmoeddien loan.

Plaintiff's predecessor in interest previously commenced a foreclosure action against Karmoeddien originally entitled Freemont Investment & Loan v Karmoeddien, (Supreme Court, Queens County, Index No. 21372/2006).¹ During the pendency of such action, defendant Karmoeddien sought plaintiff's consent to a "short sale"² of the subject property. Plaintiff received a copy of a "HUD-1"

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Equity One was subsequently substituted as the party plaintiff in the action under Index No. 21372/2006 by order dated May 16, 2007.

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A "[s]hort sale" is a term used to describe a situation in which the foreclosing secured creditor allows its loan to be paid off either by the debtor or by a third party (such as through a sale or refinance) for less than is actually owed on the secured debt" (In re Mi La Sul, 380 BR 546, 548 n 1 [Bkrtcy CD Cal, 2007]).

statement (a statement of settlement costs) and a contract of sale entered into between defendant Karmoeddien and an entity named "Mary Ann Smith, LLC," as the prospective purchaser, from Rudy Adams, a representative of Reliable Foreclosure Corporation (Reliable), a mortgage broker. The contract of sale recited the purchase price as \$540,000.00. GRP Financial Services Corp., the servicing agent for plaintiff, stated in a letter dated August 13, 2007 addressed to "Rudy" that it would accept a discounted payoff in the amount of \$505,195.00 with respect to its mortgage, and upon receipt of the payoff funds, it would advise its counsel to cancel the notice of pendency, "cancel" the foreclosure action, issue a satisfaction of mortgage and close the file.

Defendant Karmoeddien did not consummate the sale with Mary Ann Smith, LLC, but rather sold the property for the purchase price of \$750,000.00 to defendant Singh. Defendant Singh financed his purchase, in part, with a mortgage loan from defendant SMI in the principal amount of \$675,000.00, plus interest. According to defendant SMI, it relied upon the August 13, 2007 letter when making its mortgage loan to defendant Singh. Defendant SMI asserts that plaintiff accepted the payment of the amount of \$505,195.00, and that such payment constitutes full satisfaction of the subject mortgage. Defendant SMI also asserts that it would not have made the mortgage loan to defendant Singh, if it had known the property would remain encumbered by plaintiff's mortgage following the payment of the amount of \$505,195.00.

Plaintiff does not dispute that GRP Financial Services, Corp. had the authority to issue the August 13, 200 letter on its behalf or to consent to a discount of approximately \$107,000.00 from the amount defendant Karmoeddien actually owed. Rather, it asserts that the consent was granted in reliance upon the representations of defendant Karmoeddien and Reliable that the sale of the premises would be to Mary Ann Smith, LLC for a purchase price of \$540,000.00. In addition, plaintiff admits that it accepted the tendered amount of \$505,195.00.³ Plaintiff contends, however, that it would not have agreed to the short sale if it had known the true circumstances, i.e. the sale to defendant Singh for a purchase price of \$750,000.00, and defendant Karmoeddien's receipt of the sum of \$176,819.30 following payment of closing costs, etc. Plaintiff also asserts that defendant SMI was on actual notice and inquiry notice of the fraudulent misrepresentations made by defendant Karmoeddien and Reliable to it and thus, defendant SMI is

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Plaintiff also discontinued the foreclosure action under Index No. 21372/2006 after commencement of this action.

not entitled to rely upon affirmative defenses of estoppel and accord and satisfaction.

The August 13, 2007 letter indicated consent to the short sale was contingent upon several factors, but did not indicate it was exclusive to the sale to Mary Ann Smith, LLC at a purchase price of \$540,000.00. To the extent plaintiff argues defendant SMI should have made inquiries of plaintiff once it became obvious that Karmoeddien would receive a large amount of cash at the closing, plaintiff has failed to cite to any statute or case law which imposes such a duty upon a purchaser's lender.

To the extent plaintiff asserts that the knowledge of Reliable regarding the contemplated sale to defendant Singh, should be imputed to defendant SMI, plaintiff has failed to offer any evidence that Reliable was an agent for defendant SMI in connection with the Singh transaction. With respect to the issue of whether defendant SMI had actual knowledge of the purported fraudulent misrepresentation by defendant Karmoeddien or Reliable, Ms. Clark avers that "Saxon was never advised and had no knowledge of the conditions allegedly imposed on KARMOEDDIEN and did not know of or in any way participated (sic) in [Karmoeddien's] scheme." Plaintiff makes no showing to rebut such statement. Defendant SMI, therefore, has established a meritorious defense and entitlement to summary judgment dismissing the complaint asserted against it. The motion by defendant SMI is granted to the extent of dismissing the complaint asserted against it. That branch of the motion by plaintiff for summary judgment in its favor and as against defendant SMI is denied.

With respect to that branch of the motion which seeks leave to enter a default judgment against defendants Karmoeddien, Equity One as Servicer for Nomura Home Equity Loan, Inc., Home Equity Loan Trust, Series 2006-FM1, Asset back Pass-Through Certificates, Series 2006-FM1, Singh, New York City Environmental Control Board, New York City Parking Violations Bureau, and New York City Transit Adjudication Bureau, such defendants were named as parties herein to foreclose their respective interests in the property. It is clear that plaintiff's consent to the short sale and acceptance of the sum of \$505,195.00, mooted plaintiff's mortgage and therefore, the mortgage foreclosure cause of action is no longer viable, and plaintiff may not foreclose against the property. Thus, that branch of the motion which seeks leave to enter a default judgment against defendants Karmoeddien, Equity One as Servicer for Nomura Home Equity Loan, Inc., Home Equity Loan Trust, Series 2006-FM1, Asset back Pass-Through Certificates, Series 2006-FM1, Singh, New York City Environmental Control Board, New York City Parking

Violations Bureau, and New York City Transit Adjudication Bureau is denied.

Accordingly, the complaint is dismissed without prejudice to plaintiff's seeking other relief in a separate action McSorely v. Separ, 13 AD3d 495.

Dated: January 14, 2009

J.S.C.