

Washington Mut. Bank v LKH Assets LLC
2009 NY Slip Op 31506(U)
June 25, 2009
Supreme Court, New York County
Docket Number: 604209/07
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 604209/2007
WASHINGTON MUTUAL BANK
VS.
LKH ASSETS LLC
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2

5, 6

7

3, 4

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion & cross-motion are decided in accordance with the attached memorandum decisions.

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

FILED
JUN 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 6/25/09

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

-----X
WASHINGTON MUTUAL BANK,

Plaintiff,

-against-

Index № 604209/07

LKH ASSETS LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, SANITARY PLUMBING & HEATING CORP., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, "JOHN DOE NO. I" to "JOHN DOE NO. XXX," inclusive the last thirty names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Motion Seq. No.: 003

FILED
JUN 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

-----X
DORIS LING-COHAN, J.:

Under motion sequence 003, plaintiff Washington Mutual Bank (WaMu) moves for an order, pursuant to CPLR 3212, granting summary judgment against defendants in this foreclosure action, for an order of reference to a court-appointed referee to compute and report the amount due plaintiff, and for an amendment of the caption. Defendants Elsia Vasquez, Altagracia Quesada, Mikhail Mamedov, Geronimo Santana, Cora Gordon and Tony Vega, sued herein as Jane Doe and John Doe nos. I - XXX (together, Tenants), cross-move for an order holding defendant LKH Assets, LLC (LKH) in default, and for an order, *inter alia*, creating a constructive trust for their benefit.

Defendant LKH Assets, LLC (LKH) was the owner of real property located at 225-235 West 146th Street, New York, New York (the Property). By mortgage and note documentation,

executed and dated November 7, 2005 (attached collectively as Exhibit B to Notice of Motion), LKH became the borrower/obligor and WaMu became the owner and holder of one or more notes secured by one or more mortgages on the Property which were consolidated to form a single obligation, or lien, in the amount of \$2,500,000.00 (the Mortgage). It is undisputed that LKH defaulted on its mortgage payments, including principal and interest, due October 1, 2007, November 1, 2007, and December 1, 2007. The default triggered the commencement of this action, by the serving and filing of a summons and complaint, on or about December 21, 2007, in an effort to foreclose on the Property and recoup the loan amount outstanding. On the same day, an Article 7-A administrator was appointed, by order of the New York County Civil Court, to manage the Property. On January 25, 2008, WaMu filed a notice of pendency in the office of the New York County Clerk encumbering the Property.

This is plaintiff's second motion for summary judgment and related relief. By decision and order, under motion sequence 001, dated September 23, 2008, this court denied, with leave to renew upon proper papers, WaMu's prior motion for summary judgment. The same order also denied, with leave to renew upon proper papers, the cross motion for intervention by then, non-parties, Esquire Group Estates, LLC, Vintage Ventures, LLC and the Chase Group Alliance, LLC (The Group). The Group renewed its request for intervention, under motion sequence 002. By decision and order, dated January 9, 2009, this court granted intervention based on The Group's submission of evidence tending to show that, pursuant to written deed, dated March 26, 2008, they had become the new fee owners of the Property subject to all liens filed or affecting the premises at issue. In addition, the decision and order noted the events of September 25, 2008, and directed WaMu and its counsel to resolve, to this court's satisfaction, the issue as to whether

WaMu, which had been seized by the Federal Government and (on September 25, 2008) taken over by J.P. Morgan Chase & Co. (JP Morgan Chase), maintained the legal capacity to foreclose on the Mortgage, or whether JP Morgan Chase became the successor-in-interest to the Mortgage with the capacity to pursue the instant foreclosure action.

Accordingly, in support of its renewed motion for summary judgment, under motion sequence 003, plaintiff has submitted a copy of an affidavit from the Federal Deposit Insurance Corporation (FDIC) by its' duly sworn "Receiver In Charge for FDIC as Receiver of Washington Mutual Bank," Robert C. Schoppe (Schoppe), together with proof of its recording in the Washington State Recorder's Office on October 3, 2008 (Exhibit A to Notice of Motion). In his affidavit, Schoppe states, in relevant part:

1. I am an authorized representative of the Federal Deposit Insurance Corporation, an agency of the United States government (the "FDIC").
2. On September 25, 2008, Washington Mutual Bank, formerly known as Washington Mutual Bank, FA ("Washington Mutual"), was closed by the Office of Thrift Supervision and the FCID was named receiver.
3. As authorized by Section 11(d)(2)(G)(i)(II) of the federal Deposit Insurance Act, 12 U.S.C. § 1821(d)(2)(G)(i)(II), the FDIC, as receiver of Washington Mutual, may transfer any asset or liability of Washington Mutual without any approval, assignment, or consent with respect to such transfer.
4. Pursuant to the terms and conditions of a Purchase and Assumption Agreement between the FDIC as receiver of Washington Mutual and JP Morgan Chase Bank, National Association ("JPMorgan Chase"), dated September 25, 2008 (the "Purchase and Assumption Agreement"), JP Morgan Chase acquired certain of the assets, including all loans and all loan commitments, of Washington Mutual.
5. As a result, on September 25, 2008, JPMorgan Chase became the owner of the loans and loan commitments of Washington Mutual by operation of law.

Having sufficiently demonstrated that JP Morgan Chase has the capacity to proceed with the foreclosure, plaintiff claims entitlement to judgment through its submission of various mortgage and note documents executed by LKH, together with a sworn affidavit from a person

with knowledge, JP Morgan Chase vice president Robert D. George (George), confirming the default. Plaintiff points out that, under the express terms of the Amended and Restated Mortgage, Security Agreement, Assignment of Leases and Rents, and Fixture Filing (Notice of Motion, Exhibit B), LKH's failure to pay any regular monthly payment within fifteen days after the date due, constitutes an "Event of Default," as defined under Section 5.1(a). Plaintiff further points out that Section 5.3 states that "[u]pon the occurrence of any Event of Default all sums secured hereby shall become immediately due and payable, without notice or demand. . . ." And finally, that Section 7 provides, in relevant part:

[u]pon the occurrence of any Event of Default, Lender shall have the option, without notice or demand, to declare all sums secured hereby immediately due and payable and to proceed to foreclose on this Security instrument as now or then provided by law . . . or by advertisement in accordance with Article 14 of RPAPL.

Plaintiff argues that, despite the fact that it was not required, it sent an acceleration letter, dated November 27, 2007, notifying LKH that, as a result of its failure to make monthly payments due as of October 1, 2007, WaMu was exercising its right to accelerate the loan amount and to declare "the entire principal amount of the Loan currently outstanding, together with all accrued and unpaid interest and additional interest thereon and all other sums and indebtedness due and payable . . . to be immediately due and payable" (Notice of Motion, Exhibit C). The instant foreclosure action was commenced less than a month later.

Execution of the Mortgage documents and default in payment is established by movant and not denied by either LKH or The Group. Consequently, it is incumbent upon The Group, as the only party submitting opposition to the instant motion for summary judgment, to come forward with competent proof, rather than conjecture, of a triable issue of fact with respect to a

bona fide defense (*See LPP Mtge., Ltd. v Card Corp.*, 17 AD3d 103, 104 [1st Dept], *lv denied* 6 NY3d 702 [2005]; *Gateway State Bank v Shangri-La Private Club for Women*, 113 AD2d 791, 791 - 172 [2nd Dept 1985] *affd* 67 NY2d 627 [1986]).

Among the arguments asserted in opposition to the motion, is The Group's contention that George's affidavit does not satisfy CPLR 3212 (b). The statute provides, provides, in relevant part:

[a] motion for summary judgment shall be supported by affidavit. . . . The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause or action or that the cause of action or defense has no merit

(CPLR 3212 [b]). Defendant asserts that George is not a person with knowledge of the relevant facts because he did not become involved with the Mortgage until after the September 25, 2008-takeover.

This objection triggered the submission of George's (sworn) reply affidavit in which he denies being new to the transaction. He explains that, prior to holding his current position as a vice president at JP Morgan Chase, he held the position of vice president at WaMu in its Special Assets Management Department for the Eastern Region. He confirms that JP Morgan Chase purchased, among other of WaMu's assets, the subject note and mortgage, through the FDIC as receiver, and that his affidavit is based upon the records maintained in the ordinary course of business. George further asserts that LKH defaulted by failing: (1) to make the requisite installment due on October 1, 2007; and (2) to comply with the terms of the Account Security Agreement which was executed at the November 7, 2005 mortgage closing, and establish a pledge account with WaMu for the purpose of satisfying certain Department of Housing

Preservation and Development (HPD) violations encumbering the Property, and to provide written releases for such violations. Through the submission of George's affidavits, JP Morgan Chase has demonstrated that it has the capacity, as the new owner of the combined notes and mortgages, to pursue this action, and that in conjunction with LKH's default in payment on the combined notes, it is entitled to foreclosure (*see Katz v East-Ville Realty Co.*, 249 AD2d 243 [1st Dept 1998]; *Federal Natl. Mtge. Assn. v Youkelsone*, 303 AD2d 546 [2nd Dept 2003]). In further opposition to the motion, The Group raises the affirmative defenses of unclean hands, waiver, estoppel and/or laches based on the mortgagee's oppressive and bad faith conduct, and the mortgagee's failure to properly accelerate the note and/or mortgage. Moreover, now that it has been granted intervenor status, The Group demands an opportunity to pursue its own discovery.

As an intervening defendant, The Group obtained the same rights as the previously named defendants to challenge the foreclosure; no more, no less. Their right to defend, however, does not alter the fact that plaintiff's establishment of a prima facie right to foreclosure, shifts the burden to The Group to produce evidentiary proof in admissible form sufficient to establish the existence of a material question of fact precluding summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

As stated previously, when The Group became the new fee owners of the Property on March 26, 2008, they did so subject to all liens filed or affecting the premises at issue. The competent evidence is that, approximately, one month after plaintiff commenced this action by filing, plaintiff filed a notice of pendency, on January 25, 2008, in the office of the County Clerk, New York County. By encumbering the Property in this manner, plaintiff put "the world on

notice of the plaintiff's potential rights in the action and thereby warning all comers that if they then buy the realty or lend on the strength of it or otherwise rely on the defendant's right, they do so subject to whatever the action may establish as the plaintiff's right" (Seigel, NY Prac § 334, at 534 [4th ed]). "A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party" (CPLR 6501). As a result, when The Group became the "new" fee owners of the Property, pursuant to the March 26, 2008 deed, they did so with knowledge of both the foreclosure action and the notice of pendency.

Where, as here, the undisputed facts are that LKH defaulted on the Mortgage, and the Group became the new fee owners with knowledge of the default, the foreclosure action, and the notice of pendency, then affirmative defenses of unclean hands, waiver, estoppel and/or laches based on the mortgagee's oppressive and bad faith conduct, are unavailing.

With respect to the charge of unclean hands, this affirmative defense requires an offer of competent evidence tending to show that plaintiff was "guilty of immoral or unconscionable conduct directly related to the subject matter" of the litigation which it has not (*Citibank, N.A. v American Banana Co.*, 50 AD3d 593, 594 [1st Dept 2008] [internal quotation marks and citation omitted]). The mortgagee's refusal to agree to The Group's request regarding an undertaking and a takeover of the Mortgage, does not constitute immoral or unconscionable conduct. Nor does the mortgagee's decision to aggressively pursue foreclosure support the affirmative defenses of waiver, estoppel and/or laches based on allegations of oppressive conduct and bad faith (*see, e.g., Ultramar Energy v Chase Manhattan Bank*, 179 AD2d 592, 592 - 593 [1st Dept 1992] [bank's aggressive measures to protect its interests not wrongful]).

With respect to its demand for discovery, as stated above, The Group's status as an intervening defendant does not automatically entitle it to pursue discovery regarding the acknowledged default or the reason it has chosen its course of action. "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant information. . . . The mere hope that discovery will lead to evidence sufficient to defeat the motion is insufficient (*Spatola v. Gelco Corp.*, 5 AD3d 469 [2nd Dept 2004]; see also *Bailey v. New York City Transit Authority*, 270 AD2d 156 [1st Dept 2000]). The Mortgage, executed notes, and affidavit, "establish the right of the parties and prevail over conclusory allegations" (*805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]), and plaintiff's establishment of a prima facie right to foreclosure is not precluded by the affirmative defenses, nor by The Group's demand for discovery.

In light of the events of September 25, 2008 resulting in the seizure of WaMu by the Federal Government and then the take-over by JP Morgan Chase, the caption needs to be amended to accurately reflect the status of WaMu, JP Morgan Chase, and The Group, with respect to this foreclosure action (CPLR 1001, 1018).

By notice of cross motion, defendants Elsia Vasquez, Altagracia Quesada, Mikhail Mamedov, Geronimo Santana, Cora Gordon and Tony Vega, sued herein as Jane Doe and John Doe nos. I - XXX (together, Tenants), seek an order: (1) holding defendant LKH Assets, LLC (LKH) in default as to cross claims asserted by Tenants; and (2) directing that the excess of the proceeds of any sale or other disposition of the property securing the Mortgage, be held in a trust for the benefit of Tenants.

Tenants in essence seek relief in the form of a court-imposed constructive trust on the

Property or on the proceeds of a possible foreclosure sale of the Property. The explanation proffered is that there are loans, liens, and judgements pertaining to the Property which have not been satisfied, which the Tenants argue, mandate the requested relief. For the following reasons, the cross motion is denied.

The Property is currently being managed by a 7A Administrator, who was appointed pursuant to Real Property Actions and Proceedings Law (RPAPL) § 778, and who applied for, and received, loans from HPD for the rehabilitation of the Property. RPAPL § 778 also provides, in relevant part, that:

Any administrator is authorized and empowered . . . to make disbursements in payment [for the rehabilitation] . . . and to institute all necessary legal proceedings. . . . [T]o accept and repay such moneys as may be received from the department charged with enforcement of the housing maintenance code of the city of New York for the purpose of replacing or substantially rehabilitating systems or making other repairs or capital improvements authorized by the court. All moneys expended by the department pursuant to the foregoing shall constitute a debt recoverable from the owner and a lien upon the building and lot, and upon the rents and other income thereof. Such lien shall be enforced in accordance with the provision of article eight of subchapter five of the housing maintenance code of the city of New York . . . Such administrator shall dispose of the rents and other monies deposited with him according to the following order of priority

Many of the issues before the court were addressed in a proceeding brought in Civil Court of the City of New York, Housing Part B, before the Hon. David B. Cohen. By decision and orders, dated December 17, 2008 and February 6, 2009, Judge Cohen directed that LKH pay an undertaking in the sum of \$95,000.00, to cover a February 26, 2008 judgment against it in the amount of \$50,000.00 (proof of payment annexed as Exhibit C to Aff. in Opp. to Cross-Motion), and he denied the Tenants' request for an order directing the administrator to pay certain obligations in an order dictated by the Tenants. Not only did the Housing Court decline a request

to prioritize payment, but RPAPL provides a statutory scheme addressing the Tenants' concerns, including empowering the 7A Administrator "to institute all necessary legal proceedings" to accomplish the goals of the court and the HPD (RPAPL §778).

The balance of the arguments contained in the motion and cross motion have been reviewed and are found to be without merit.

Based upon the above, it is

ORDERED that plaintiff's motion for summary judgment and the appointment of a Referee to compute and report the amount due under the loan agreement is granted; plaintiff shall settle order on notice in accordance with the above decision and 22 NYCRR 202.48, returnable to room 119A, 60 Centre Street; such order shall include an amendment of the caption to reflect: (1) intervention by The Group as a party in interest; and (2) that JP Morgan Chase by operation of law, became a real party in interest with the capacity to maintain the instant foreclosure action (CPLR 1001, 1018); it is further

ORDERED that the cross-motion is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

This constitutes the decision of the court.

Dated: June 25, 2009

FILED
JUN 30 2009
COUNTY CLERK'S OFFICE
NEW YORK
Hon. Doris Ling-Cohan, J.S.C.