

Capital One Bank, N.A. v Nickeidan Realty Corp.

2009 NY Slip Op 32813(U)

November 17, 2009

Supreme Court, Nassau County

Docket Number: 007747-09

Judge: Timothy S. Driscoll

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**CAPITAL ONE BANK, N.A.,
as successor-by-merger
to North Fork Bank,**

Plaintiff,

-against-

**NICKEIDAN REALTY CORP., DENNIS SMIGIEL,
LINDENHURST BOAT COMPANY, INC., KYDD'S
MARINE CENTER INC., NEW YORK STATE
DEPARTMENT OF TAXATION & FINANCE, and
JOHN DOE No. 1 through JOHN DOE No. 100, etc.,**

Defendants.

-----X

**TRIAL/IAS PART: 25
NASSAU COUNTY**

**Index No: 007747-09
Motion Seq. No: 1
Submission Date: 9/11/09**

Papers Read on this Motion:

- Notice of Motion, Affidavit in Support,**
- Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Opposition.....X**
- Supplemental Affidavit in Further Support and Attachment.....X**
- Reply Affirmation in Further Support.....X**

This matter is before the court on the motion by Plaintiff Capital One Bank, N.A., as successor-by-merger to North Fork Bank, for summary judgment and other relief, filed on August 7, 2009 and submitted on September 11, 2009. For the reasons set forth below, the Court grants Plaintiff's motion for summary judgment, and directs Plaintiff to submit an Order on Notice for the appointment of a Referee to examine and report whether the mortgaged premises should be sold in one parcel or in multiple parcels.

BACKGROUND

A. Relief Sought

Plaintiff Capital One Bank, N.A., as successor-by-merger to North Fork Bank (“Plaintiff” or “Bank”) moves for an Order 1) pursuant to CPLR § 3212, granting summary judgment in favor of Plaintiff and against Defendants Nickeidan Realty Corp., Dennis Smigiel, Lindenhurst Boat Company, Inc. and Kydd’s Marine Center, Inc. (collectively “Nickeidan Defendants”), and striking the answer of the Nickeidan Defendants on the grounds that a) neither the Nickeidan Defendants, or any other defendants, have raised a triable issue of fact in this proceeding; b) the lone affirmative defense that the Nickeidan Defendants asserted lacks merit and fails to state a valid defense to foreclosure; and c) Plaintiff is entitled to all relief it requested in the verified complaint (“Complaint”), including a judgment of foreclosure and sale against Defendant Nickeidan and a judgment against Defendants Dennis Smigiel, Lindenhurst Boat Company, Inc. and Kydd’s Marine Center, Inc.; 2) pursuant to New York Real Property Actions and Proceedings Law (“RPAPL”) § 1321, granting Plaintiff judgment against the New York State Department of Taxation and Finance for all the relief requested in the Complaint, including judgment of foreclosure and sale, on the ground that the New York State Department of Taxation and Finance has appeared in this action but has not served an Answer to the Complaint; 3) referring this action to a Referee to a) ascertain and compute the amount due and owing to Plaintiff, pursuant to the mortgage, in principal, interest and other costs including counsel fees; and b) examine and report whether the mortgaged premises should be sold in one parcel or in multiple parcels; 4) directing that, upon presentation and acceptance of the Referee’s Report, Plaintiff have judgment of foreclosure and sale; 5) awarding counsel fees, costs and disbursements; and 6) amending the caption of this proceeding by a) directing that the names of the “John Doe” defendants be deleted from the caption; and b) amending the name of Plaintiff from “Capital One Bank, N.A.” to “Capital One, N.A.”

B. The Parties' History

This lawsuit concerns the foreclosure of real property located at 25 Alhambra Road, Massapequa, New York ("Subject Property"). At all relevant times, Defendant Nickeidan Realty Corp. ("Nickeidan") was and still is the owner of the Subject Property.

Nickeidan acknowledged and delivered to the Bank a Promissory Note ("Note") dated June 9, 2004 for valuable consideration. Pursuant to that Note, Nickeidan agreed to pay to the Bank the sum of Eight Hundred Fifty Thousand (\$850,000) and 00/100 with interest at an annual fixed rate of 6.5%.

To secure payment of the \$850,000 represented by the Note, Nickeidan delivered to the Bank a Mortgage and Security Agreement dated June 9, 2004 ("Mortgage") related to the Subject Property. The Mortgage was recorded in the Office of the Clerk of Nassau County on July 7, 2004.

Defendant Dennis Smigiel ("Smigiel"), pursuant to a Personal Guaranty of All Liability Agreement dated June 9, 2004 ("Smigiel Guaranty"), personally guaranteed the obligations of Nickeidan to the Bank. Defendant Lindenhurst Boat Company, pursuant to a Corporate Guaranty of All Liability Agreement dated June 9, 2004 ("Lindenhurst Boat Guaranty"), also guaranteed the obligations of Nickeidan to the Bank. Defendant Kydd's Marine Center, Inc., pursuant to another Corporate Guaranty of All Liability Agreement dated June 9, 2004 ("Kydd's Marine Guaranty"), also guaranteed the obligations of Nickeidan to the Bank.

Prior to the commencement of this action, Nickeidan and its Guarantors defaulted under the Mortgage by failing to make required payments of principal, interest and late charges. The Bank gave the Nickeidan Defendants notice of their collective default. In addition, the Nickeidan Defendants have made no payments to the Bank since the Bank notified them of their default.

C. The Parties' Positions

Plaintiff submits that it has established its right to the requested relief through the Affidavit of Frederick Knodel ("Knodel"), a Vice President of the Bank, who has provided copies of the Note, Mortgage and Guaranties, as well as specific details regarding the default by the Nickeidan Defendants on December 15, 2008.

Plaintiff affirms that the New York State Department of Taxation and Finance has appeared in this matter through counsel, but has not filed an Answer. Plaintiff provides a copy of that Notice of Appearance.

With respect to its request that the caption be amended, Plaintiff affirms that 1) upon completion of service of process, Plaintiff determined that the Defendants captioned “JOHN DOE No. 1 through JOHN DOE No. 100 inclusive,” are not necessary party defendants, and asks that the caption be amended to excise those defendants; and 2) Plaintiff incorrectly listed the Plaintiff as “Capital One Bank, N.A.,” although Plaintiff’s correct name is “Capital One, N.A.” as reflected on the certificate of merger that Plaintiff provides, and requests that the caption be amended to reflect Plaintiff’s correct name.

The Nickeidan Defendants oppose Plaintiff’s motion. Preliminarily, the Nickeidan Defendants object to Knodel’s failure to state expressly that he has personal knowledge of the facts set forth in his affidavit; instead Mr. Knodel avers that he “is fully aware of the facts and circumstances herein” (Knodel affidavit, par. 1). In his supplemental affidavit, Mr. Knodel explains that he “made each and every allegation in my capacity as plaintiff’s officer with full personal knowledge,” that “in making all of the allegations contained in my moving affidavit, I did so after reviewing the Bank’s underlying documents,” and that “I have complete control over the documents in question” (Knodel supplemental affidavit, ¶¶ 3-5).

In their Answer, the Nickeidan Defendants submit an affirmative defense that Plaintiff’s request for the equitable relief of foreclosing the Mortgage is barred by its “inequitable conduct” (Exhibit C to Plaintiff’s Motion). The Nickeidan Defendants, however, present no evidence to support this defense.

Finally, the Nickeidan Defendants object to Plaintiff’s failure to produce the original Note.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The

Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Plaintiff has Established its Right to Foreclosure

A plaintiff in a mortgage foreclosure action establishes a *prima facie* case for summary judgment by submission of the mortgage, the mortgage note and evidence of default. *Countrywide Home Loans, Inc. v. Delphonse*, 64 A.D.3d 624 (2d Dept. 2009); *Washington Mut. Bank FA v. O'Connor*, 63 A.D.3d 832 (2d Dept. 2009); *Yildiz v. Vural Management Corp.*, 61 A.D.3d 970 (2d Dept. 2009); *Wells Fargo Bank Minnesota, Nat. Assn., v. Mastropaolo*, 42 A.D.3d 239 (2d Dept. 2007); *Daniel Perla Associates, LP v. 101 Kent Associates, Inc.*, 40 A.D.3d 677 (2d Dept. 2007).

A party establishes a *prima facie* case of entitlement to summary judgment on a guaranty by proving: (1) the underlying obligation, (2) the guaranty executed by the defendant, and (3) a failure to make payments according to the terms of the underlying obligation and the guaranty. *Provident Bank v. Giannasca*, 55 A.D.3d 812 (2d Dept. 2008); *Verela v. Citrus Lake Development, Inc.*, 53 A.D.3d 574 (2d Dept. 2008); *Northport Car Wash Inc. v. Northport Car Care, LLC*, 52 AD3d 794 (2d Dept. 2008); *JP Morgan Chase Bank v. Gamut-Mitchell, Inc.*, 27 A.D.3d 622 (2d Dept. 622).

The Court concludes that Plaintiff has established a *prima facie* case through the affidavit of Frederick Knodel, the Vice President of its bank, the copies presented of the mortgage note executed by Nickeidan, the mortgage and security agreement executed by Nickeidan, the personal guaranty by Dennis Smigiel, the corporate guaranties of Lindenhurst and Kydd's, and testimony as to the default on December 15, 2008.

Knodel properly provided additional information in his Supplemental Affidavit to address the objections of the Nickeidan Defendants to the sufficiency of Knodel's initial

affidavit. The function of reply papers is to address arguments made in opposition to the position of the movant, not to permit the movant to introduce new arguments or new grounds for the requested relief. *Matter of Allstate Ins. Co. v. Dawkins*, 52 A.D.3d 826 (2d Dept. 2008); *Kennelly v. Mobius Realty Holdings LLC*, 33 A.D.3d 380 (1st Dept. 2006). The Knodel supplemental affidavit complies with this rule, as it specifically addresses the argument raised in the Nickeidan Defendants' opposition papers.

The sole affirmative defense that the Nickeidan Defendants allege in their Answer is a defense of inequitable conduct by Plaintiff. As the Nickeidan Defendants have produced no evidence to support this defense, this affirmative defense, as well as the general denials in the Answer, must be stricken. In addition, the Nickeidan Defendants' objection to Plaintiff's failure to produce the original Note does not raise a triable issue of fact, as the Nickeidan Defendants do not dispute the contents of the original Note. *Thomson v. Rubenstein*, 31 A.D.3d 434 (2d Dept. 2006).

Finally, the Court directs that a Referee shall be appointed to examine and report whether the mortgaged premises should be sold in one parcel or in multiple parcels.

C. Counsel Fees

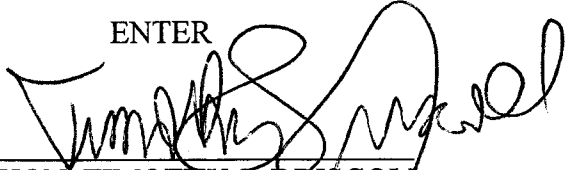
Attorneys fees are considered an incident of litigation and, unless authorized by statute, court rule or written agreement of the parties, are not recoverable. *Hooper Assoc., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491(1989). In the matter *sub judice*, the Note (page 4), Mortgage (§ 2.03(a)) and Guaranties (¶¶ titled "Miscellaneous"), expressly authorize recovery of reasonable counsel fees incurred with respect to enforcement of these documents. Accordingly, the Court grants Plaintiff's application for an award of counsel fees, which are to be determined upon the Court's signing the judgment of foreclosure.

Accordingly, it is hereby

ORDERED, that Plaintiff shall submit the appropriate Orders, on notice, to effectuate the foreclosure and sale of the Subject Property, including an Order directing the appointment of a Referee to examine and report whether the mortgaged premises should be sold in one parcel or in multiple parcels.

All matters not decided herein are hereby denied.
This constitutes the decision and order of the Court.

DATED: Mineola, NY
November 17, 2009

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
NOV 23 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE