

GMAC Mtge. Corp. v Dominguez
2009 NY Slip Op 33386(U)
May 11, 2009
Supreme Court, New York County
Docket Number: 1000086/05
Judge: Charles H. Solomon
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

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GMAC MORTGAGE CORPORATION,

Plaintiff,

-against-

PLUYER J. DOMINGUEZ, US BANK OF
NEW YORK, JOHN DOE #1-5 and
JANE DOE #1-5,

Defendants,

Index No.: 100086/05

INTERIM DECISION,
ORDER, DECLARATION and
PARTIAL JUDGMENT

LA MATICA, INC.,

Intervenor.

-----x
US BANK OF NEW YORK TRUST, U/A
DATED 12/2/02 (EQCC HOME EQUITY
LOAN TRUST 2001-1F),

Index No.: 124215/02

Plaintiff,

-against-

PLUYER J. DOMINGUEZ, et al.,

Defendants,

LA MATICA, INC.,

Intervenor.

-----x
SOLOMON, J.

Before me are two foreclosure actions on a small building at 562 West 171st Street in Washington Heights in Upper Manhattan which was acquired on September 21, 1990 by a group of Dominican American men in the corporate name "La Matica, Inc." (La Matica) for a social club; their president was one Pluyer J. Dominguez (Dominguez), who lived across the street. GMAC

Mortgage Corporation (GMAC) and Bank of New York, as trustee (BNY) see infra, now hold the mortgages on the property which are in default.

FACTS

The Building is classified by the New York City Department of Finance as "A9 - 1 Family Dwelling". At the closing when La Matica acquired the property, Dominguez appeared for it without counsel, and the individual seller, Lawrence I. ~~Waks (Waks), took back a purchase money mortgage which was duly~~ recorded on October 5, 1990. As was the case throughout, formalities were not adhered to by the new owner, so that Dominguez apparently was given the deed which he did not see fit to record until August 20, 1999. Then, on October 15, 1999, two documents were recorded: First, a deed executed by Dominguez as President of La Matica transferring the property to himself; second, a mortgage securing a loan made by EquiCredit Corp. Of NY (EquiCredit), for \$157,500 to Dominguez. Thereafter, on March 3, 2000, a credit line mortgage in the amount of \$69,000 was recorded by plaintiff GMAC d/b/a ditech.com against Dominguez and, on October 2, 2000, another mortgage held by EquiCredit, in the amount of \$212,000, was recorded against Dominguez. On January 25, 2001, a satisfaction of the October 1999 EquiCredit mortgage was recorded.

It appears that for the first decade or so after La

Matica acquired the building, some portion of the building was rented and the members paid into a fund, all of which kept the encumbrances current. In or about the year 2002, the members became aware that Dominguez had abused their trust and a lawsuit was begun. That action settled by a stipulation of settlement dated September 23, 2003 in which, among other things, La Matica and Dominguez agreed that Dominguez would reconvey title subject to the GMAC and EquiCredit mortgages, and that the deed would be ~~held in escrow pending either La Matica's full satisfaction of~~ the amount owed, or assignment and assumption of the mortgages from Dominguez to La Matica, "guaranteed by the individual shareholders and collateralized by the Building." This document reflects an acknowledgment that La Matica and its members knew that the mortgages at issue here encumbered their interest in the property.

U.S. Bank of New York Trust, U/A Dated 12/1/01 (EQCC¹ Home Equity Loan Trust 2001-1F) (US Bank), the named plaintiff in the first filed foreclosure action, first appears of record on September 19, 2002, when an assignment to it of a mortgage was recorded. The EquiCredit mortgage recorded on October 2, 2000 was executed on August 28, 2000, nearly six months after the GMAC mortgage was recorded. According to Dustin Stephenson, a

¹ Apparently for **EquiCredit Corp.**

Foreclosure Manager for the servicer of the US Bank position,² US Bank obtained documents when it acquired the loan; his information is based on those documents, a number of which he provides. Understandably, no one with first hand knowledge of the Dominguez-EquiCredit transactions is heard from. While US Bank contends that \$160,705.55 of the August 2000 loan was used to pay off the earlier loans to Waks and EquiCredit, the documents indicate that the only mortgage paid by the August 2000 ~~transaction was EquiCredit's own prior mortgage (HUD form, Ex. J~~ to Aff. Of Dustin Stephenson In Support of US Bank Cross-Motion). In connection with making that loan, EquiCredit received an application from Dominguez that disclosed he claimed an income of \$12,000 per year, that the building was mortgaged, and that he owed \$68,300 to GMAC, which was listed as holding an installment debt (Stephenson Aff., Ex. F). On January 29, 2004, a satisfaction of the Waks mortgage was recorded and on September 13, 2006, a deed with a printed date of September 17, 2003, signed by Dominguez on December 12th, 2003 was recorded conveying the property back to La Matica from Dominguez.

THESE LAWSUITS

US Bank commenced its foreclosure action against Dominguez in November 2002, also naming Waks and others (but not

² Notably, US Bank is said to have misnamed itself as plaintiff and in the recorded documents. See *infra*.

La Matica or GMAC) as defendants. I signed a Revised Judgment of Foreclosure and Sale on January 18, 2005 (Judgment) upon the default of all defendants therein, confirming the calculations of a referee to compute of a balance due to US Bank of \$276,999.59 with interest from November 23, 2004, and directed the sale of the property as one parcel. Under governing law, execution of this sale would be subject to prior liens of record, namely that held by GMAC. Although Dominguez defaulted, he filed at least ~~two Chapter 13 consumer bankruptcy petitions, the effect of which~~ was to stay certain proceedings in both foreclosure actions: The first was filed on May 31, 2005 and dismissed on July 8; the second was filed on September 21, 2005 and dismissed on January 31, 2006.

While the US Bank action was pending, it appears that Dominguez or La Matica made payments to GMAC until July 2004, at which time a principal balance of \$64,552.72 was due. GMAC commenced its action in January 2005, naming Dominguez and US Bank as defendants. Dominguez is in default here as well. The complaint identifies US Bank's lien as a subordinate mortgage. US Bank answered, and raised equitable subrogation as an affirmative defense and counterclaim. It contends that since part of the proceeds of the loan made in 2000 paid off the EquiCredit mortgage that pre-dated GMAC's mortgage, US Bank's mortgage is equitably subrogated, and therefore senior, to the

GMAC mortgage.

La Matica moved by orders to show cause to stay the sale and for leave to intervene in both actions. Relatively concurrently, the GMAC action, originally before another judge, was transferred to me. On those motions, I permitted intervention--the formal order in the US Bank action is dated June 1, 2006 and the short form decision in GMAC's action is dated February 15, 2007, cancelled the US Bank sale until further ~~court order, and directed settlement of orders which would have~~ implemented decisions granting consolidation of the two actions. No such order was settled and so the two actions retain their separate identity. Since then, however, La Matica has participated in this litigation, and its intervention is approved nun pro tunc to February 15, 2007. Its answers assert affirmative defenses, recovery of attorney's fees, and it counterclaims for a declaration of its rights in the Building, and that the encumbrances entered into by Dominguez are voidable and unenforceable. As to both actions, I directed that discovery be had after which a note of issue was to be filed. Pending now are dispositive motions arising from the post-note of issue status of the cases.

THESE MOTIONS

GMAC moves in its action alone (1) to strike the answers, defenses and counterclaims of US Bank and La Matica and

grant it summary judgment against those parties and a default against Dominguez; (2) for confirmation of an order made on November 1, 2005 by the prior judge granting it summary judgment and appointing a referee to compute, failing which it seeks to amend the caption to replace the "Doe" defendants with named individuals and judgment against them and Dominguez on default; and (3) for the appointment of a referee to compute. La Matica moves for summary judgment dismissing both actions.

~~US Bank cross-moves as to each motion for summary judgment for (1) formal consolidation of the actions; (2) correction of its name to "The Bank of New York, as trustee for holders of the EQCC Asset Backed Certificates 2001-1F" (BNY); (3) dismissal of the La Matica intervenor complaint and judgment against it; (4) lifting the stay of enforcement of the Judgment; and (5) an amendment of the Judgment giving effect to the doctrine of equitable subordination so that BNY is paid the first proceeds of sale up to the amount of the first EquiCredit loan.~~

DISCUSSION

GMAC has established its prima facie entitlement to foreclosure, which must be granted unless US Bank or La Matica can show that their affirmative defenses or counterclaims have merit.

Equitable Subrogation

The doctrine of equitable subrogation applies "where

the funds of a mortgagee are used to satisfy the lien of an existing, known encumbrance when, *unbeknown to the mortgagee*, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, *unknown lienor*, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance" (King v Pelkofski, 20 NY2d 326, 333-334 [1967] [citations omitted and emphasis added]). The beneficiary ~~of equitable subrogation obtains a lien superior to that of an~~ undisclosed mortgage (12 Warren's Weed NY Real Property, §128.16). The doctrine does not apply where the mortgagee had knowledge of the intervening lienor (R.C.P.S. Assoc. v Karam Developers, 238 AD2d 492, 493 [2d Dept. 1997]; and see Roth v Porush, 281 A.D.2d 612, 614 [2d Dept 2001]).

US Bank presents no evidence that EquiCredit paid the senior encumbrance without knowledge of GMAC's intervening mortgage. The EquiCredit loan was made nearly six months after GMAC recorded its mortgage. Moreover, Dominguez disclosed in his application to EquiCredit that the property was mortgaged, and he specifically disclosed a debt to GMAC of more than five times his reported annual income. In short, EquiCredit was on notice not only of the loan ahead of it, but, indeed, that a loan to Dominguez carried risk. Even if US Bank could allege lack of actual knowledge in EquiCredit, GMAC could show that by recording

its mortgage, it took steps "as would put a prudent man on guard, and from which actual notice may be inferred and found" (Holland v Brown, 140 NY 344, 347-348 [1893]). Moreover, the satisfaction of the 1999 EquiCredit mortgage was recorded before US Bank recorded its interest.

There is no equitable basis to reward US Bank's lack of due diligence when it became trustee or to imply some equitable entitlement in EquiCredit. Indeed, as GMAC points out, US Bank ~~acceded to GMAC's prior position by not naming it when it~~ commenced its action here. Accordingly, the portion of the GMAC motion seeking to strike the answer, affirmative defense and counterclaim of US Bank is granted.

La Matica's Motion

La Matica contends that it is a "Type B" corporation formed under the New York Not-For-Profit Corporation Law (NPCL). A "Type B" not-for-profit corporation is a corporation formed under NPCL § 201 (b) for certain charitable, religious or cultural non-business purposes. Before a Type B not-for-profit corporation sells, leases, exchanges or otherwise disposes of all or substantially all of its assets, it must give notice to its members and get their approval and approval of the corporation's board, and obtain court approval of the transaction (NPCL § 510). La Matica contends that the transfer of the Building to Dominguez, and each of the transactions encumbering it, are void

because they were not made in accordance with the NCPL.

This argument is without merit. Regardless of the requirements of the NPCL, La Matica does not appear to be governed by it. In opposing this motion GMAC provided the only current evidence of a corporation registered in New York with "La Matica" in it, namely, "La Matica Dominicana, Inc., a "domestic business corporation" with Mr. Urbaez, the person who represents to the court that it is a not-for-profit corporation, identified ~~as its Chairman. Notably, this certificate shows an initial~~ department of state filing date of June 17, 2002. Because La Matica did not proffer any contrary evidence, in an excess of caution, I had my staff verify this perplexing item: I am advised that no "La Matica, Inc." is of record, and that in addition to the entity disclosed by GMAC there is another, inactive, "domestic business corporation", also called "La Matica Dominicana, Inc.", which was registered on August 30, 1990 at Dominguez's home address.

As to the merits of the claim that it is not bound by Dominguez transactions, the Stipulation of Settlement demonstrates that La Matica did not consider his transfer of title as void, but as something to be recaptured in the negotiated settlement. In other words, the building was taken back with knowledge of, and subject to the encumbrances and the obligation to make good on them. Finally, Dominguez is a

defendant here, but La Matica has not asserted a cross-claim against him.

La Matica also argues that GMAC had constructive notice that something was amiss, and should not benefit from a failure to conduct due diligence. La Matica asserts that GMAC was charged with knowing that it was a not-for-profit corporation, and therefore should have demanded proof that the board of directors acquiesced, court approval was obtained, etc. In light ~~of the foregoing discussion, this argument is not convincing.~~

Accordingly, the motions of GMAC and US Bank are granted and the answers, defenses and counterclaims of La Matica are dismissed, except to the extent that, no one objecting, La Matica, Inc., registered as a New York Business Corporation as La Matica Dominicana, Inc., is entitled to a declaration that it is the owner of the property subject to the mortgage liens of GMAC and US Bank.

Because US Bank and La Matica sought relief in the US Bank action as well as the GMAC one, a copy of this decision and order is filed under both captions.

The Remaining Issues

GMAC's earlier motion for summary judgment and to appoint a referee to compute to which it refers was granted by an order made on October 14, 2005 when the automatic bankruptcy stay as to the owner defendant was in effect and will not be honored.

Indeed, GMAC filed a new motion seeking the identical relief in August 2006, and has sought it again in these motions.

It is clear that there needs to be a calculation of the amount due to GMAC in its priority position, and that such award is to be paid before the sum fixed in the Judgment as due to US Bank is paid, whether or not the cases are formally consolidated. The US Bank judgment amount need not be reset, nor is there a need to examine again whether the property can be sold as one parcel or whether Dominguez is in default.

While the court does not claim foreclosure expertise, it would seem that one sale under the Judgment would serve the interests of the parties, but that, upon any consolidation, the Judgment should properly be vacated. As a result, the Court is asking the parties to appear again for further argument on these remaining issues.

Accordingly, it hereby is

ORDERED that GMAC's motion to strike US Bank's affirmative defense and counterclaim for equitable subrogation is granted; and it further is

ORDERED that La Matica's motion for summary judgment is granted to the extent that it is ADJUDGED and DECLARED that La Matica is the true owner of record of the Building subject to the encumbrances of record of plaintiffs GMAC and US Bank, and otherwise is denied; and it further is

ORDERED that GMAC's motion to substitute the names of the individual defendants for John Does #1-6 and Jane Does #1-3, and striking the names Jane Doe #4-5 from the caption, is granted; and it further is

ORDERED that GMAC's motion for a default judgment against Dominguez and the added individually named defendants is granted; and it further is

ORDERED that GMAC's motion for summary judgment ~~dismissing La Matica's answer and counterclaim is granted; and it~~ further is

ORDERED that US Bank's cross-motion is granted to the extent that (1) the caption is amended to reflect that its current name is "The Bank of New York, as trustee for the holders of the EQCC Asset Backed Certificates 2001-1F", (2) the answer and counterclaim of La Matica is dismissed, and it is entitled to summary judgment of foreclosure as against La Matica as calculated and set forth in the Judgment which is ratified to the extent not inconsistent with this decision, and otherwise is denied; and it further is

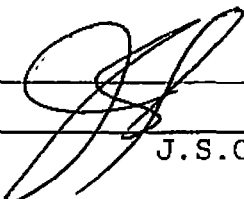
ORDERED that decision is reserved on consolidation of the actions under Index Numbers 124215/2002 and 100086/2005 until further argument is had over the wisdom of same rather than holding a sale under the Judgment with a provision that the money due to GMAC be paid first, over the mechanics of a sale intended

to satisfy more than one mortgagee, and other open issues; and it further is

ORDERED that the parties appear for a Pre-Trial conference and further argument on the motions in Part 55 on June 1, 2009 at 10 AM.

Dated: May 11, 2009

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