

**BAC Home Loans Servicing LP v Majestic Holdings
(USA) LLC**

2010 NY Slip Op 30206(U)

January 20, 2010

Supreme Court, New York County

Docket Number: 111641/2009

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 111641/2009

BAC HOME LOANS SERVICING LP

vs

MAJESTIC HOLDINGS [USA] LLC

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 12/23/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

FILED

JAN 21 2010

NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that respondent's motion to dismiss pursuant to CPLR 3211(a)(7), for failure to state a cause of action, is denied; and it is further

ORDERED that respondent shall serve its Answer within 30 days of service of a copy of this Order with notice of entry; and it is further

ORDERED that respondent shall serve a copy of this Order with Notice of Entry upon petitioner within twenty days of entry.

Dated: 1/20/2010



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

BAC HOME LOANS SERVICING LP FKA
COUNTRYWIDE HOME LOANS SERVICING,
LP,

Petitioner,

-against-

MAJESTIC HOLDINGS (USA) LLC,
NOORUDDIN HUSSAIN, BOARD OF MANAGERS
OF CIPRIANI CLUB RESIDENCES AT 55 WALL
CONDOMINIUM and "JOHN DOE #1" through
"JOHN DOE #10," inclusive the last ten names being
fictitious and unknown to plaintiff, the persons or parties
intended being the persons, tenants, occupants, or
corporations, if any, having or claiming an
interest in or lien upon the mortgaged premises described
in the complaint,

Respondents.

EDMEAD, J.S.C.

Index No. 111641/2009

DECISION/ORDER

FILED
JAN 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this foreclosure action, respondent Majestic Holdings (USA) LLC ("Majestic") moves for an order and judgment dismissing the action pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

Background

Petitioner BAC Home Loans Servicing LP, formerly known as Countrywide Home Loans Servicing LP ("BAC") seeks to foreclose on condominium unit 825 at the Cipriani Club Residences at 55 Wall Street, New York, New York for failure to pay principal and interest and/or taxes, insurance premiums, escrows and/or other charges as required under the mortgage executed between Majestic and BAC on October 25, 2006 ("mortgage" or "mortgage

document”). According to the terms outlined in the mortgage document, the lender BAC may accelerate the mortgage and require immediate payment in full of all amounts remaining unpaid under the mortgage if the following conditions are met: (a) the Borrower Majestic fails to keep any agreement made in the mortgage document; (b) BAC sends Majestic appropriate notice that states:

- (1) the agreement Majestic failed to keep,
- (2) the action Majestic must take to correct the default,
- (3) the date by which Majestic has to correct the default, the date must be at least 30 days from the date on which notice is given,
- (4) that if default is not corrected, BAC may require immediate payment in full or may proceed with foreclosure of the property,
- (5) Majestic has the right to have enforcement of the mortgage stopped if it complies with Section 19 of the mortgage,¹
- (6) that Majestic has the right in any lawsuit for foreclosure to argue that it kept all agreements under the mortgage document and to present any other defenses;

and (c) that Majestic has not corrected the default stated in the notice by the notice date. If these conditions are not met, BAC may initiate a lawsuit to foreclose on the property.

Majestic now moves to dismiss on the grounds that BAC’s complaint does not allege that a valid Notice of Default (“Notice”) was sent to Majestic and therefore, does not comply with the terms of the mortgage as described above.

In opposition, BAC provides a copy of the Notice dated February 17, 2009. BAC contends that this Notice complies with the mortgage requirements and was sent to Majestic from Countrywide Home Loans.

In reply, Majestic argues that BAC’s failure to provide an affidavit to authenticate the Notice and establish that it had indeed been served is valid grounds for dismissal. Further, Majestic points out that the Notice is addressed to Majestic at the address of the property, 55

¹ Section 19 of the mortgage document is not fully described because it has no bearing on the pending issue before the court.

Wall Street Apartment 825, as opposed to 11 East 44th Street Suite 901, which is identified as Majestic's address in the mortgage document.

Analysis

When deciding a motion to dismiss pursuant to CPLR 3211(a)(7), the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

On a motion to dismiss for failure to state a cause of action, where the parties have submitted evidentiary material, including affidavits, or where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence" the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]; *Biondi v Beekman Hill House*

Apt. Corp., 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]).

Here, in response to Majestic's argument that BAC failed to state a cause of action by failing to plead that the required Notice of Default had been served, BAC submitted a copy of the Notice of Default addressed to Majestic H LLC, 55 Wall Street, Apartment 825. The Notice of Default, dated February 17, 2009, states that "If the default is not cured on or before March 24, 2009, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time."

That BAC submitted an attorney's affirmation containing conclusory assertions that the Notice of Default was sent to Majestic on February 17, 2009 is not fatal to BAC's submissions.² The Notice of Default contains the name and address of Majestic and the accompanying document which contains a bar code, and label of a presort, First-Class Mail postage stamp, indicates that the Notice of Default was mailed.

Further, as to Majestic's argument that the Notice of Default was improperly mailed to the Property Address, the Court will not consider such argument raised for the first time in its reply. As the First Department explained in *Dannasch v Bifulco* (184 AD2d 415, 417 [1st Dept 1992]): "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." In any event, although paragraph 15 of the mortgage indicates that the "notice address is the address of the Property unless I give notice to the Lender of a different

² This affirmation, in itself, is insufficient to establish that the requisite notice was served as expressly required in the mortgage agreement (*see Norwest Bank Minnesota N.A. v Sabloff*, 297 AD2d 722, 747 NYS2d 559 [2nd Dept 2002], *also Zuckerman v City of New York*, 49 NY2d 557 [1st Dept 1980]; *Menzel v Plotnick*, 202 AD2d 558 [2nd Dept 1994]; *Bank of New York v Cerasaro*, 98 AD2d 902 [3rd Dept 1983]).

address” it cannot be said that the address listed as Majestic’s address on the first page of the mortgage constitutes the required “notice” given by Majestic of a “different address.”

Thus, in accepting the facts as alleged in the complaint as true, and according plaintiff the benefit of every possible favorable inference (*Nonnon, supra*), it cannot be said, at this juncture, that BAC’s failure to provide an affidavit to sufficiently authenticate and establish that the Notice of Default was served warrants dismissal of the complaint for failure to state a cause of action. Therefore, Majestic’s motion to dismiss BAC’s complaint for failure to state a cause of action is denied.

Conclusion


Based on the foregoing, it is hereby

ORDERED that respondent’s motion to dismiss pursuant to CPLR 3211(a)(7), for failure to state a cause of action, is denied; and it is further

ORDERED that respondent shall serve its Answer within 30 days of service of a copy of this Order with notice of entry; and it is further

ORDERED that respondent shall serve a copy of this Order with Notice of Entry upon petitioner within twenty days of entry.

Dated: January 20, 2010


Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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