

Soverign Bank v Four H Republic, LLC
2010 NY Slip Op 30904(U)
April 6, 2010
Supreme Court, New York County
Docket Number: 601219/2009
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 601219/2009
SOVEREIGN BANK
VS.
FOUR H REPUBLIC LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 11/9/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

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

PAPERS NUMBERED
1-3
4
5-6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided by the annexed memorandum Decision and order.*

FILED
APR 12 2010
NEW YORK COUNTY CLERK'S OFFICE

*NB - 5-17-10 @ [initials]
conference set in a
decentral paragraph,*

Dated: 4/6/10

[Signature]
JANE S. SOLOMON 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 55

-----x
SOVERIGN BANK, SUCCESSOR BY MERGER TO
INDEPENDENCE COMMUNITY BANK,

Plaintiff,

-against-

Index No.: 601219/2009
DECISION and ORDER

FOUR H REPUBLIC, LLC; BEHZAD NEHMADI;
BITA NEHMADI; SPRINT SPECTRUM REALTY
CO., L.P.; ANA M. BETANCES d/b/a A&C
GROCERY STORE a/k/k A&C GROCERY STORE,
INC.; ABDOU DIOUM d/b/a SUPER AFRICAN
HAIR BRAIDING; MAME MEDOUNE DIOUM d/b/a
SUPER AFRICAN HAIR BRAIDING; NEW
CINGULAR WIRELESS PCS, LLC; VISTA MEDIA
GROUP, INC.; THE CITY OF NEW YORK
(Environmental Control Board); NEW YORK
CITY TRANSIT AUTHORITY, TRANSIT
ADJUDICATION BUREAU; NEW YORK CITY
DEPT. OF TRANSPORTATION, PARKING
VIOLATIONS BUREAU; "JOHN DOES #1-10",

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Defendants.

-----x

JANE S. SOLOMON, J.:

Plaintiff, Sovereign Bank (Sovereign), brings this action to foreclose a mortgage loan against property owned by defendant Four H Republic, LLC (Four H), located at 173 West 141st Steet, New York, New York (the Property). Defendants Behzad Nehmadi (Behzad) and Bita Nehmadi (Bit) are guarantors of the mortgage. Sovereign now moves for (1) summary judgment of foreclosure pursuant to CPLR 3212; (2) dismissing the affirmative defenses raised by Four H, Behzad and Bit (hereinafter, the Answering Defendants); (3) an inquest to ascertain and compute the amount due upon the note and mortgage, and to examine and

report whether the premises can be sold in parcels; (4) amendment of the caption; and (5) attorney's fees, and any other relief the court deems just and proper. The Answering Defendants oppose the motion. No other party submits papers. Sovereign's motion is decided as follows.

FACTS

On September 13, 2006, Independence Community Bank (ICB) and Four H executed a loan consolidation mortgage in the sum of \$4.25 million. Behzad and Bitra signed personal guarantees for \$700,000 each (Motion, Ex. M). Sovereign allegedly is the successor by merger to ICB and the owner and holder of the Property's Note and Mortgage.

The loan contains a notice provision and an acceleration provision. The notice provision states:

"[T]he mortgagee shall provide mortgagor written notice of any default herein. If mortgagor is in default . . . mortgagor shall have a period of ten (10) days after mortgagee's giving of such notice within which time such Monetary Default must be cured. (Motion, Ex. G, ¶ 64).

The acceleration provision states:

"[T]he whole of said principal sum and the interest thereon shall be due, at the option of the mortgagee, after default . . . for fifteen (15) days . . ." (Motion, Ex. G, ¶ 6).

Finally, the agreement contains a clause requiring the mortgagor to pay reasonable attorney fees in any dispute over the mortgage (Id., ¶ 35).

It is undisputed that Four H failed to make payment in February and March of 2009 and was over one month late in making its January payment. On March 18, 2009, Sovereign sent a bill to Four H, seeking payment totaling \$109,150.70 (Motion, Ex. L, p. 2). The bill lists several past due charges and also included the following statement: "Default Interest A late charge of: \$1730.90 [w]ill be assessed if the total payment due is not received by: 4/1/2009." Four H did not submit any payment, and on April 22, 2009, Sovereign accelerated the debt and brought this action for foreclosure.

DISCUSSION

Sovereign moved for summary judgment on the ground that it is the holder of the note, gave notice of default, and Answering Defendants did not cure within fifteen days of such notice. In opposition, Answering Defendants argue that Sovereign has not sufficiently proven that it is the legal successor to ICB; that the default notice was invalid; that the guarantees may be unenforceable; and that attorney's fees are uncertain.

Sovereign responds that it is the holder in due course; that Answering Defendants were sent notice of default and time to cure; that the mortgage agreement does not require notice of acceleration; and that any argument about the guarantee and the right to attorney's fees are inapposite to the request for foreclosure and insufficient to prevent summary judgment.

"A plaintiff may establish a prima facie right to foreclosure by producing the mortgage documents underlying the transaction and undisputed evidence of nonpayment" (*Red Tulip, LLC v. Neiva*, 44 AD3d 204, 209 [1st Dept, 2007]). Upon such a showing, the burden shifts to the defendant to raise a triable issue regarding its affirmative defenses in opposition to the foreclosure (*Id.*, at 209).

Sovereign has submitted sufficient evidence to show that it is the successor in interest by way of merger to ICB (Reply Affidavit, Ex. P), and therefore has standing to foreclose. It also has submitted the mortgage documents and undisputed evidence of nonpayment (see, Account Summary, Motion, Ex. J).

Answering Defendants do not raise any triable issue regarding their affirmative defenses to foreclosure. They fail to point to any provision in the mortgage agreement that requires notice of acceleration. Their arguments regarding the guarantees become ripe in connection with an application for a deficiency judgment. As to attorney's fees, those may be fixed by the court at a later date. Those fees may be fixed by the court in due course as an element of the debt to be paid upon sale. Finally, Answering Defendants had notice of their default, that is, the failure of Four H to pay timely, as evidenced by the February and March bills (Motion, Ex. L). Their argument that notice was not

sufficiently explicit is unavailing; there is no specific requirement in the mortgage that the bills do not satisfy.

Answering Defendants do not address any of their remaining affirmative defenses, which may be deemed abandoned. Accordingly, the motion for summary judgment is granted.

Sovereign has also moved that John Does 1 through 10 be substituted as Laquana Watson, Mo Kende, Wendy Castillo, Kenneth Stevens, Mary Johnson, Fannie Hildalgo, Maria Martinez, James Heaslie, "Jane Doe" and "John Doe." Sovereign then requests that the action be discontinued against them and the caption be amended accordingly. There being no opposition to such an amendment, this relief is granted.

Accordingly, it hereby is

ORDERED that the motion for summary judgment as to liability is granted in favor of Plaintiff and against defendants, with the amount of the judgment as against each defendant to be calculated as set forth below; and it further is

ORDERED that the parties appear for a conference in part 55, room 432 at 60 Centre Street, on May 17, 2010 at 11 AM to schedule any discovery sought by any party with respect to the calculation of the debt due by Four H (which may be noticed and/or held prior thereto) and such other proceedings as properly precede entry of judgment, with the amount due by the guarantors to be determined after sale; and it further is

ORDERED that all affirmative defenses as against Sovereign Bank are hereby dismissed; and it further is

ORDERED that defendants Laquana Watson, Mo Kende, Wendy Castillo, Kenneth Stevens, Mary Johnson, Fannie Hildalgo, Maria Martinez, James Heaslie, are substituted for the "Doe" defendants, and the complaint is then discontinued without prejudice as against them; and it further is

ORDERED that the new caption shall read as follows:

-----x
SOVERIGN BANK, SUCCESSOR BY MERGER TO
INDEPENDENCE COMMUNITY BANK,

Plaintiff,

Index No. : 601219/2009

-against-

FOUR H REPUBLIC, LLC; BEHZAD NEHMADI;
BITA NEHMADI; SPRINT SPECTRUM REALTY
CO., L.P.; ANA M. BETANCES d/b/a A&C
GROCERY STORE a/k/k A&C GROCERY STORE,
INC.; ABDU DIOUM d/b/a SUPER AFRICAN
HAIR BRAIDING; MAME MEDOUNE DIOUM d/b/a
SUPER AFRICAN HAIR BRAIDING; NEW
CINGULAR WIRELESS PCS, LLC; VISTA MEDIA
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(Environmental Control Board); NEW YORK
CITY TRANSIT AUTHORITY, TRANSIT
ADJUDICATION BUREAU; NEW YORK CITY
DEPT. OF TRANSPORTATION, PARKING
VIOLATIONS BUREAU,

Defendants.

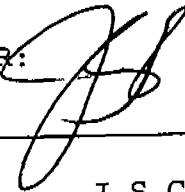
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and plaintiff shall serve a copy of this order with notice of

entry upon the proper Clerk(s) so this amendment may be entered
of record.

Dated: April 6 2010

ENTER:



J.S.C.

JANE S. SOLOMON
JANE S. SOLOMON

FILED
APR 12 2010
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