

New York Community Bank v Parade Place, LLC

2010 NY Slip Op 31069(U)

April 30, 2010

Sup Ct, NY County

Docket Number: 117349/2008E

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

New York Community Bank

INDEX NO. 117349/08

- v -

MOTION DATE _____

Parade Place

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3, 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed decision and order.*

Ronald V. Zyzanski, Esq. is appointed referee to compute.

FILED

MAY 04 2010

NEW YORK COUNTY CLERK'S OFFICE

S. J. ...

Dated: 5/30/2010

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
NEW YORK COMMUNITY BANK.,
Plaintiff,

Index No. 117349/2008E
Mot. Seq. No. 001

- against -

DECISION and ORDER

PARADE PLACE, LLC, 99 ASSOCIATES, INC.,
SIDERIS ENGINEERS, P.C., THE CITY OF NEW
YORK ENVIRONMENTAL CONTROL BOARD,
and "JOHN DOE #1 through JOHN DOE #10" as
possible tenants in possession,
Defendants.

-----X
For Plaintiff:
Farber, Rosen, & Kaufman, P.C.
By: Richard C. Lunenfeld, Esq.
99-77 Queens Boulevard, Suite 1114
Rego Park, NY 11374
(718) 459-5400

For Defendant Parade Place, LLC:
Shapiro & Shapiro, LLP
By: Geoffrey K. McDonald, Esq.
1300 Flatbush Avenue
Brooklyn, NY 11210
(718) 434-8800

FILED
MAY 04 2010
NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of this motion for summary judgment:

Papers	Document Numbers
Notice of Motion	1
Digirolamo Affidavit	2
Lunenfeld Affirmation in Support and Exhibits	3
McDonald Affirmation in Opposition and Exhibits	4
Lunenfeld Reply Affirmation in Support and Exhibit	5

PAUL G. FEINMAN, J.:

Plaintiff moves for summary judgment as against Parade Place, LLC and for a default judgment as against 99 Associates, Inc., Sideris Engineers, P.C., and the City of New York Environmental Control Board ("ECB"). For the reasons set forth below, the motion is granted.

Background

In June 2005, Astoria Federal Savings and Loan Association assigned a mortgage to plaintiff for the premises located at 69 East 125th Street, New York County (Not. of Mot., Ex. A; Compl. Ex. C); Parade simultaneously executed and delivered a mortgage note and a

consolidated and restated note for the premises to plaintiff (Not. of Mot., Ex. A; Compl. Exs. D, E).

According to plaintiff, Parade executed a mortgage and note for the premises to defendant 99 Associates, Inc. in September 2005 (Not. of Mot., Ex. A; Compl., Ex. F), a gap mortgage and note in March 2006 (Compl., Ex. G). Then, Parade, failed to pay the sum due and payable on September 1, 2008, and, despite demands and written notice, defaulted (Compl. ¶ 18). Plaintiff then commenced this foreclosure action by service of a summons, complaint, and notice of pendency (Not. of Mot., Exs. A, B). Defendants Parade interposed an answer (Not. of Mot., Ex., D); the ECB submitted a notice of appearance and waiver in foreclosure (Not. of Mot., Ex. E); 99 Associates submitted a notice of appearance (Not. of Mot., Ex. F); Sideris has not appeared.

Analysis

I. Plaintiff's Motion for Summary Judgment

On a motion for summary judgment, the movant bears the initial burden of establishing entitlement to judgment as a matter of law and the absence of material issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To do so on its first cause of action for foreclosure, plaintiff must produce the mortgage instruments and evidence of default (*see Eastern Sav. Bank, FSB v Sassouni*, 68 AD3d 917 [2d Dept 2009]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]). The burden would then shift to defendants to raise a triable question of fact (*see Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 592 [1st Dept 2009]); evidence would be viewed in the light most favorable to defendants (*see Brown v Muniz*, 61 AD3d 526, 531 [1st Dept 2009]).

In support of its motion, plaintiff submits the following evidence: (1) mortgage, along with the recording and endorsement cover page, note, and a consolidated and restated note for the premises to plaintiff (Not. of Mot., Ex. A; Compl. Exs. C, D, E); (2) the summons and complaint (Not. of Mot., Ex. A); (3) the notice of pendency (Not. of Mot., Ex. B); (4) the relevant affidavits of service (Not. of Mot., Ex. C); (5) Parade's answer (Not. of Mot., Ex. D); and (6) the affidavit of Donna Digirolamo, Senior Vice President of New York Community Bank, who has first hand knowledge of the basis for liability. Thus, as to the first cause of action, plaintiff has met its burden of establishing its prima facie case.

Parade attempts to raise a triable issue of fact by arguing that: (1) plaintiff fails to allege service of the notice of default; and (2) the complaint does not sufficiently describe the property. The first contention is without merit. The complaint alleges that plaintiff performed under the terms of the mortgage and the failure to specifically allege that the notice of default was served is distinct from actually failing to serve the same (Compl. ¶ 18) (*see FFCA Acquisition Corp. v PB Victor, Inc.*, 298 AD2d 911, 911-912 [4th Dept 2002]; *Bell v Bell, Kalnick, Klee & Green*, 246 AD2d 442, 443 [1st Dept 1998]). The latter is not fatal and, notably, the former is not contested. Moreover, the documentary evidence submitted by plaintiff in support of the motion includes plaintiff's letter, dated October 29, 2008, addressed to Parade, which unambiguously gives notice of the default (Reply Aff. Ex. A). Parade has not rebutted this and, accordingly, have not met their burden of raising a triable issue of fact (*see Roosevelt Sav. Bank v Jaffee*, 227 AD2d 608, 609 [2d Dept 1996]).

Next, Parade claims that the complaint does not sufficiently describe the property. The complaint in a foreclosure action must sufficiently describe the premises to be foreclosed

upon (*see Wilshire Credit Corp. v Y.R. Bldrs.*, 262 AD2d 404, 404 [2d Dept 1999]). The complaint here specifically describes the “Mortgaged Premises” as “69 East 125th Street, New York, New York 10035 . . . as more specifically described in Exhibit ‘A’” which is a detailed legal description containing the block and lot numbers (Compl. ¶ 3, Ex. A). Clearly, “the ability of the owner, or any interested person, to identify and locate the land with reasonable certainty seems manifest” (*Goff v Shultis*, 26 NY2d 240, 245 [1970], *rearg denied* 26 NY2d 240 [1970]) and defendants have failed to meet their burden. Thus, plaintiff’s motion for summary judgment on the first cause of action for foreclosure is granted. Moreover, plaintiff is, pursuant to RPAPL § 1371, entitled to a deficiency judgment as against Parade in the event that the proceeds of the sale are insufficient.

Also, Parade contends that the premises cannot be sold as one parcel because it is now one of four contiguous properties which comprise a single tax lot for development. However meritorious, the court need not address this portion of Parade’s opposition now because this determination will be made by referee appointed below.

II. Attorneys’ Fees

Plaintiff also moves for summary judgment on the second cause of action which seeks to recover attorneys’ fees from Parade. The mortgage provides that plaintiff is entitled to recover attorneys’ fees from Parade under certain circumstances such as when it becomes necessary for plaintiff to defend or uphold the mortgage or foreclose upon it.¹ Parade’s submission entirely fails to address this. Thus, plaintiff’s motion seeking to recover attorneys’ fees from Parade is

¹ The mortgage provides that Parade shall pay “all sums paid by [plaintiff] for the expense of any litigation” to defend or uphold the mortgage, including attorney’s fees (Compl. ¶ 12, Ex. A).

granted, the sum of which shall be ascertained by the referee appointed below.

III. Plaintiff's Motion for Default Judgment

To prevail on a motion for a default judgment, the movant bears the burden of demonstrating proof of service of the summons and complaint, proof of a meritorious claim, and proof of default (*see* CPLR 306 [a]; 3215 [f]). To obtain personal jurisdiction over a corporation, CPLR 311 (a) (1) requires personal service "by delivering the summons" upon "an officer, director, managing or general agent, or cashier or assistant cashier or any other agent authorized" (CPLR 311 [a]).

Here, as to 99 Associates, plaintiff has submitted an affidavit of service which attests that an authorized agent was personally served with the summons, complaint, and notice of pendency on January 14, 2009 (Not. of Mot., Ex. C). 99 Associates filed a notice of appearance but never interposed an answer (Not. of Mot., Ex. F). Plaintiff submitted an affidavit of service which attests that this motion was mailed to 99 Associates' attorney on July 27, 2009 and this motion was filed on July 23, 2009 (Not. of Mot., Ex. F) (*see* CPLR 2103 [b] [2]). To date, 99 Associates has not submitted papers in response. Accordingly, plaintiff is entitled to a default judgment as against 99 Associates.

As to Sideris, plaintiff has submitted an affidavit of service which attests that an authorized agent was personally served with the summons, complaint, and notice of pendency on January 14, 2009 (Not. of Mot., Ex. C). Plaintiff's affirmation states that Sideris has not appeared nor interposed an answer (Lunenfeld Aff. ¶ 12). Thus, plaintiff is entitled to a default judgment as against Sideris.

As to the ECB, plaintiff has submitted an affidavit of service which attests that a general

agent was personally served with the summons, complaint, and notice of pendency on January 6, 2009 (Not. of Mot., Ex. C). The ECB executed a notice of appearance and waiver in foreclosure which waived service of motions for default or summary judgment (Not. of Mot. Ex. E). Thus, plaintiff is entitled to a default judgment as against the ECB. Accordingly, it is

ORDERED that plaintiff's motion for summary is granted as against defendant Parade Place, LLC; and it is further

ORDERED that plaintiff's motion for a default judgment is granted as against defendants 99 Associates, LLC, Sideris Engineers, P.C., and The City of New York Environmental Control Board; and it is further

ORDERED that RONALD V. ZEZIMA, ESQ., 271 NORTH AVENUE, SUITE 305, NEW ROCHELLE, NY 10801, PH: (914) 633-5600 is appointed as referee to ascertain and compute the amounts owed upon the note and mortgage being foreclosed in this action, to determine whether the property can be sold in one parcel, and to compute the amount of reasonable attorneys' fees owed to plaintiff pursuant to paragraph 12 of the mortgage; and it is further

ORDERED that, if required, said referee shall take testimony pursuant to RPAPL § 1321; and it is further

ORDERED that by accepting this appointment the referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to section 36.2 (c) ("disqualifications from appointment") and section 36.2 (d) ("limitations on appointments based on compensation"); and it is further

ORDERED that the names of defendants "John Doe #1 through John Doe #10 as possible tenants in possession" be severed and stricken from the caption and that the action be

discontinued as to them, all of the foregoing without prejudice to any of the proceedings heretofore had herein or to be had herein; and it is further

ORDERED that the amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

NEW YORK COMMUNITY BANK.,
Plaintiff,

Index No. 117349/2008

- against -

PARADE PLACE, LLC, 99 ASSOCIATES, INC., THE
CITY OF NEW YORK ENVIRONMENTAL
CONTROL BOARD, SIDERIS ENGINEERS, PC,
Defendants.

-----X;

ORDERED that plaintiff shall serve a copy of this order upon the Clerk of Court (60 Centre Street, Basement), the owner of the equity of redemption, any tenants named in this action, and any other party entitled to notice.

This constitutes the decision and order of the court.

Dated: April 30, 2010
New York, New York



J.S.C.

FILED
MAY 04 2010
COUNTY OF NEW YORK