

**GECMC 2007-C1 Ditmars Lodging, LLC v Mohola,
LLC**

2010 NY Slip Op 31790(U)

June 30, 2010

Supreme Court, Queens County

Docket Number: 700083/10

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES
Justice

PART 17

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GECMC 2007-C1 DITMARS LODGING, LLC,
Plaintiff,

Index No.: 700083/10
Motion Date: 6/23/10
Motion Cal. No.: 31 & 32

-against-

MOHOLA, LLC, P&P LA GUARDIA L.L.C.,
RAJNI PATEL, EDWARD I. PENSON, NEW
YORK CITY HOUSING AUTHORITY, STATE
BANK OF INDIA, LOS ANGELES AGENCY,
CRIMINAL COURT OF THE CITY OF NEW
YORK, STATE OF NEW YORK, DEPARTMENT
OF TAXATION AND FINANCE, CITY OF NEW
YORK, DEPARTMENT OF TAXATION, and
“JOHN DOE #1” through “JOHN DOE #12”, the
last twelve names being fictitious and unknown to
Plaintiff, the persons or parties intended being the
tenants, occupants, persons or corporations, if any,
having or claiming an interest in or lien upon the
premises, described in the Verified Complaint,
Defendants.

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The following papers numbered 1 to 23 read on this motion by Defendants **MOHOLA, LLC, P&P LA GUARDIA L.L.C., RAJNI PATEL, and EDWARD I. PENSON** (“Defendants”) pursuant to CPLR 3211 (a)(3) dismissing the complaint due to Plaintiff lacking standing to maintain this action, and Order to Show Cause by defendants, pursuant to CPLR 6405, to remove the temporary receiver, who was appointed by this Court on April 1, 2010, for the property known as Clarion Hotel LaGuardia Airport, located at 94-00 Ditmars Boulevard, East Elmhurst, New York 11269 (the “Premises”), and for a Temporary Restraining Order to restrain the temporary receiver and its retained management company, Hostmark Hospitality Group, from entering into any union contracts or collective bargaining agreements in connection with the Premises. Motion Calendar Numbers 31 and 32 are consolidated for purposes of disposition.

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Upon the foregoing papers it is ordered that this motion by Defendants pursuant to CPLR 3211 (a)(3) dismissing the complaint due to Plaintiff lacking standing to maintain this action, and Order to Show Cause by defendants, pursuant to CPLR 6405, to remove the temporary receiver, who was appointed by this Court on April 1, 2010, and for a Temporary Restraining Order to restrain the temporary receiver and its retained management company, Hostmark Hospitality Group, from entering into any union contracts or collective bargaining agreements in connection with the Premises, is decided as follows:

According to the complaint, on or about January 24, 2007, Bank of America, N.A. ("BofA") loaned the principal sum of Nineteen Million Three Hundred Thousand (\$19,300,000) Dollars (the "Loan") to the Borrower Defendants. In connection with the Loan, on or about January 24, 2007, the Borrower Defendants and BofA entered into a Loan Agreement (the "Loan Agreement"), and the Borrower Defendants delivered to BofA a promissory note (the "Note") in the principal amount of the Loan. Thereafter, BofA and the Borrower Defendants entered into an agreement by which the Note was severed into two separate portions, and accordingly, the Borrower Defendants delivered to BofA two replacements promissory notes, in the aggregate amount of the Loan.

On or about January 24, 2007, in order to secure the Loan, the Borrower Defendants, as mortgagor, executed and delivered to MERS, as nominee for BofA, the Mortgage. On or about March 5, 2010, MERS assigned the Mortgage to Plaintiff. On or about April 26, 2007, BofA assigned to Wells Fargo Bank, N.A. ("Wells Fargo") all of its rights, title and interests in and to the Loan Agreement and the other loan documents executed between BofA and the Borrower Defendants in connection with the Loan (the "Loan Documents"). BofA then executed and delivered to Wells Fargo an Allonge ("Allonge 1") whereby BofA allegedly assigned all of its rights, title and interests in and to the more valuable one of the replacement promissory notes ("Note A"), in the principal amount of seventeen million three hundred thousand (\$17,300,000) dollars, to Wells Fargo. Wells Fargo subsequently executed and delivered to U.S. Bank National Association ("U.S. Bank") an Allonge ("Allonge 2") whereby Wells Fargo assigned all of its rights, title and interests in and to Note A to U.S. Bank. On or about March 5, 2010, U.S.

Bank assigned the Loan Documents to Plaintiff. On or about March 5, 2010, U.S. Bank allegedly executed and delivered to Plaintiff an Allonge (“Allonge 3”) whereby U.S. Bank assigned all of its rights, title and interests in and to Note A to Plaintiff.

Defendants failed to make monthly mortgage payments for over a year and then failed to pay a \$19.3 million loan (the “Loan”) at maturity in February 2010. In that time, Defendants did not make any payments whatsoever to lender, even though the Clarion Hotel LaGuardia Airport (the “Hotel” or the “Property”) was generating more than adequate revenue. On or about March 22, 2010, Plaintiff filed its Summons and Complaint. Thereafter, but before Defendants were served with the Complaint, Plaintiff brought an *ex parte* application for the appointment of a temporary receiver for the Premises. On or about April 1, 2010, this Court granted Plaintiff’s motion, and, *inter alia*, ordered the appointment of a temporary receiver for the Premises. On or about April 29, 2010, Defendants moved, by Order to Show Cause, to have the temporary receiver removed. Thereafter, Defendants made a motion, pursuant to CPLR 3211 (a) (3) to dismiss the complaint. The Order to Show Cause and the CPLR 3211 motion are the subject of the instant Order.

In their Order to Show Cause to vacate the appointment of the temporary receiver, Defendants have alleged that, among other things, Plaintiff lacks standing to move for the appointment of a temporary receiver, and that the appointed temporary receiver is illegally operating the Premises. Plaintiff has opposed the Order to Show Cause and the Motion. In their motion pursuant to CPLR 3211, Defendants have alleged Plaintiff lacks standing to maintain this action. The Court shall first address the standing issue.

According to defendants, Plaintiff lacks standing to maintain this action because Plaintiff has not made a *prima facie* showing that it is the mortgagee under the Mortgage, or that it is the owner of the debt, which the Mortgage allegedly secures. Defendants argue that Plaintiff cannot show that it holds the rights of a Mortgagee under the Mortgage since it was assigned the Mortgage by a nominee, and not by the beneficial owner of the Mortgage or the Debt. As such, the purported assignment of the Mortgage to Plaintiff was invalid. Because the purported assignment of the Mortgage to Plaintiff was invalid, Plaintiff has no right to foreclose on the Mortgage. This is due to Plaintiff having its right to maintain this action provided by the assignment of the Mortgage from MERS and MERS was a mere nominee with no beneficial ownership interest in the Mortgage. Moreover, the Mortgage provided to MERS neither the right to foreclose on the mortgaged Premises nor the right to transfer any ownership interest in the Loan Documents. The Mortgage identifies MERS as the nominee of BofA, and in Section 1.6, the Mortgage explicitly states that MERS does not own any mortgaged Premises on which it could foreclose. Thus, MERS did not own the Mortgage, and had no interest in the Premises on which it could foreclose and had nothing to assign to Plaintiff.

Furthermore, Defendants argue that, because MERS had no ownership interest

whatsoever in Note A, any assignment of the Mortgage would nevertheless be insufficient to permit Plaintiff to foreclose since the security cannot be separated from the debt, and exist independently of it. This is the necessary legal conclusion. Here, Note A, representing the Debt, was allegedly owned by U.S. Bank, while the Mortgage, the security, was allegedly held by MERS. Accordingly, the debt and the security were improperly separated, making the purported transfer of the Mortgage a nullity.

Defendants also claim that Plaintiff's own documentation fails to show that it is the owner of the debt. According to Defendants, Plaintiff has annexed documentation to its Complaint that fails to establish that it is the owner of Note A. This is due to discrepancies in documents Plaintiff alleges establish the assignment of Note A, and an apparent break in the chain of title to the Loan Documents and that the several alleged assignments from BofA eventually to Plaintiff were improper.

Plaintiff claims that it has standing to foreclose on the Property because it is and was the owner of both the Note and the Mortgage following the valid assignment of the Note to Plaintiff prior to the commencement of this action. According to Plaintiff, the Successor Trustee's execution of an allonge indorsement of the Note to Plaintiff on March 5, 2010 assigned ownership of the Mortgage to Plaintiff, just as the B of A Trustee Allonge and the Trustee Successor Trustee Allonge had previously assigned ownership of the Mortgage as well. As such, no further formal assignment or transfer documentation for the Mortgage was necessary; since it passed as an inseparable incident to the Note.

Plaintiff also claims that Defendants wrongly contend that the MERS assignment of the Mortgage to Plaintiff was necessary in order for Plaintiff to have standing to foreclose on the Mortgage. Plaintiff also claims that there is no "break in the chain of title to the Loan Documents." In addition, the Note incorporates by reference all the "terms, covenants, and conditions contained in the Loan Agreement, the Mortgage and the other Loan Documents." Additionally, the assignment of the Note to Plaintiff was valid since the Allonge indorsement was written by or on behalf of the holder and on the allonge. Plaintiff also claims that these Documents were validly indorsed by attorneys who were authorized to sign these documents on their client's behalf. Additionally, contrary to Defendant's contention, the Note and Mortgage were not improperly separated under New York law. Finally, Plaintiff argues that Defendants wrongly allege that MERS cannot assign a mortgage as a lender's nominee, since here, the Note and Mortgage was assigned to Plaintiff by the prior owner, not by MERS as nominee. Based on the above, Plaintiff claims it has standing to maintain this foreclosure action as the owner and holder of the Note and the Mortgage, and the Motion should be thus denied.

The Court notes that both sides have submitted copies of all of the documents referred to above and these have been reviewed. Regarding the motion to dismiss pursuant to CPLR 3211 (a)(3), the Court initially notes that upon a motion to dismiss, the pleadings by the plaintiff

must be liberally construed, giving the benefit of every favorable inference to the plaintiff and if a valid cause of action is discernible on its face, a motion to dismiss pursuant to CPLR 3211 should be denied. Here in the instant case, a reading of the Plaintiff's complaint shows the necessary basic elements of an action to foreclose a mortgage and are sufficiently set forth to withstand the scrutiny of a CPLR 3211 challenge.

Regarding Defendants' claim that Plaintiff lacks standing, which is, of course, a threshold issue. "If standing is denied, the pathway to the courthouse is blocked. The plaintiff who has standing, however, may cross the threshold and seek judicial redress." Saratoga County Chamber of Commerce, Inc. v Pataki, 100 NY2d 801, 812 (2003.) Professor Siegel (NY Prac, § 136, at 232 [4d ed]), states that: [i]t is the law's policy to allow only an aggrieved person to bring a lawsuit . . . A want of "standing to sue," in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a "jurisdictional" dismissal: (1) the courts have jurisdiction only over controversies; (2) a plaintiff found to lack "standing" is not involved in a controversy; and (3) the courts therefore have no jurisdiction of the case when such a plaintiff purports to bring it. "Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." Caprer v Nussbaum, 36 AD3d 176, 181(2d Dept 2006.) Simply put, if a plaintiff lacks standing to sue, the plaintiff may not proceed in the action.

Regarding standing in a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced. Mortgage Elec. Registration Sys., Inc. v Coakley, 41 AD3d 674 (2d Dept 2007.) Where a mortgage is represented by a bond or other instrument, an assignment of the mortgage without assignment of the underlying note or bond is a nullity. U.S. Bank, N.A. v. Collymore, 68 A.D.3d 752 (2d Dep't 2009.) Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident.

Here, Plaintiff has shown its standing as the lawful holder or assignee of the subject note on the date it commenced this action. The Plaintiff's evidentiary submissions were sufficient to establish that the successor owner of the Note and Mortgage effectively assigned the subject Mortgage and Note prior to the commencement of this action. Accordingly, the motion to dismiss the complaint pursuant to CPLR 3211 (a) (3) is denied.

The branch of the motion seeking to dismiss the complaint as against the individual Defendants is denied. Defendants claim these individuals are neither parties to the Mortgage nor responsible for repayment of the Loan. However, the individual defendants, Mr. Penson and Mr. Patel expressly agreed in the Loan Documents that an action for foreclosure on the Property may

be maintained against them. Specifically, Section 15.1(a) of the Loan Agreement provides that nothing contained therein shall “impair the right of Lender to name Borrower or Borrower Principal as a party defendant in any action or suit for judicial foreclosure and sale under this Agreement and the Mortgage.” Moreover, pursuant to Section 15.1(b) of the Loan Agreement, these individuals are potentially liable to Plaintiff for its losses relating to the events of default resulting from Defendants’ failure to make any payments on the Loan since February 2009. In addition, under Section 15.1(b), these individual Defendants are potentially personally liable to Plaintiff for its losses arising from “misappropriation of Rents received by Borrower after the occurrence of an Event of Default” and insufficient cash flow from the operation of the property. (See Loan Agreement § 15.1(b)(ii)(v).) Accordingly, the branch of the motion seeking dismissal of the action against Mr. Penson and Mr. Patel is denied.

The branch of the motion to remove the temporary receiver and revoke all authority granted to him is denied. Defendants argue that the Court should immediately vacate its appointment of a temporary receiver because Plaintiff has no legal interest in the Premises or standing to maintain this action and is illegally operating the Hotel. Defendants also claim that Plaintiff has no automatic right, as it claimed in its *ex parte* motion papers, to a temporary receiver. Moreover, Plaintiff’s allegations that Defendants misappropriated income from the hotel is demonstrably false. Furthermore, Defendants point out that, this Court, upon review of the prior appointment of a receiver pursuant to a mortgage clause, may decide that equity considerations require the Receiver to be removed. Furthermore, Defendants claim unless the Receiver is removed, the Defendants’ business will be jeopardized.

According to Mr. Patel, the managing agent hired by the Receiver to manage the Hotel, Hostmark, is unjustly enriching itself at the expense of the business by collecting far higher management fees than Defendants did, and the appointment has threatened certain third parties, including Defendants’ employees, who have had their health insurance interrupted since the appointment of the temporary receiver. Moreover, Hostmark’s mismanagement has also led to a potential disruption in employee payroll, and its inexperience in dealing with New York hotel unions may lead it to bind Defendants to a collective bargaining agreement that the larger hotel association is currently considering, but that is unsuitable for a New York City airport hotel. Finally, Defendants argue that the Court should vacate the appointment of the Temporary Receiver because Plaintiff brought both its foreclosure action and the motion for a Temporary Receiver in bad faith and with unclean hands. According to Defendants Plaintiff did not inform the Court that at the time Plaintiff brought the foreclosure action, Plaintiff and Defendants were engaged in good faith negotiations to restructure or otherwise seek to satisfy the underlying debt allegedly owed by Defendants to Plaintiff, and were holding amounts in reserve totaling \$787,155.68.

Plaintiff opposes the removal of the Temporary Receiver by arguing, and submitting evidence that establishes the Court-appointed Temporary Receiver, Allan S. Botter, Esq., has done an exemplary job with the Hotel. He has acted quickly, shown excellent judgment, and has stabilized the Hotel. Mr. Botter retained a nationally-recognized hotel management company (Hostmark Hospitality Group) within a week later, and took over management of the Hotel the next day. Within two days, Hostmark's transition team was on site and was undertaking a comprehensive evaluation of the Hotel, including physical appearance, finances, business generation, guest relations, food and beverage, staffing issues, sales and marketing, and technology issues.

The Hotel had serious issues, and the Temporary Receiver and Hostmark took swift action in response, including: (a) cleaning and landscaping a filthy hotel, (b) repairing most of the restaurant equipment, (c) updating the guest reservation system, (d) paying outstanding franchise fees, union dues, and employee health insurance, (e) meeting payroll and insurance obligations for employees, (f) working to stave off the loss of the Hotel's franchise license, and (g) repricing rooms under a flexible system to increase revenue. The Temporary Receiver also handled a crisis situation in which Defendants closed and emptied employee payroll accounts just prior to the Temporary Receiver taking control of the Hotel, which caused a snafu with the payroll company ADF. The Temporary Receiver responded quickly to resolve the matter to meet employee payroll.

As such, according to Plaintiff, the Hotel is now cleaner, the restaurant is fully operational, the Hotel license is no longer in jeopardy, and sound business practices are being employed to operate the Hotel. As a result, since the Temporary Receiver took over management, revenue per available room has increased 71%. That is a dramatic increase in just a little more than 6 weeks.

Plaintiff also argues that Defendants' argument that Plaintiff acted in bad faith by bringing the foreclosure action and moving for a temporary receiver is immaterial and cannot form the basis for removal of the Temporary Receiver because (1) Plaintiff was under no obligation to negotiate with Defendants after they defaulted on their Loan payments; and (2) Defendants own actions hindered the effectiveness of the negotiations.

The court finds that the Defendants have failed to establish sufficient grounds for the removal of the temporary receiver. (CPLR 6405; *see Crossland Fed. Sav. Bank v Pekofsky*, 164 Misc 2d 152, 154 [1995].) The allegations made by the movants are refuted by Plaintiff and in some instances completely disproved. Moreover, this Court finds that the loan documents clearly provide Plaintiff with the right to seek a Temporary Receiver if Defendants defaulted on the Mortgage and Note. Defendants have not denied their default in making payments and thus cannot argue Plaintiff did not have a right to seek a Temporary Receiver. As such, Defendants

have not shown a sufficient basis to warrant the removal of the Temporary receiver. Furthermore, as discussed above, this Court finds Plaintiff has standing to bring the instant action.

Accordingly, the branch of the motion seeking the removal of the Temporary Receiver is denied. The Court does find that in any negotiations with the union representing workers at the Hotel, the Temporary Receiver and Hostmark should consult with Defendants prior to entering any agreement.

Dated: June 30, 2010

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ORIN R. KITZES, J.S.C.