

<b>Wells Fargo Bank, N.A. v 576 Fifth Ave. LLC</b>
2010 NY Slip Op 31858(U)
June 23, 2010
Supreme Court, New York County
Docket Number: 110956/09
Judge: Marylin G. Diamond
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: HON. MARYLIN G. DIAMOND**

**PART 48**

*Justice*

WELLS FARGO BANK, N.A., Successor by Merger to  
Wells Fargo Bank Minnesota, N.A. et al,

Plaintiff,

-against-

576 FIFTH AVENUE LLC et al.,

Defendants.

INDEX NO. 110956/09

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

**RECEIVED**

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MOTION SUPPORT OFFICE  
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Cross-Motion:  Yes  No

**Upon the foregoing papers, it is ordered that:** Motion sequence numbers 002 and 003 are consolidated herein for decision. This is an action to foreclose on a commercial mortgage held by the plaintiff on leasehold interests for real property located at 576-578 Fifth Avenue in Manhattan (the "Premises"). In addition to foreclosure, the plaintiff also seeks a deficiency judgment against the defendants pursuant to section 1371 of the Real Property Actions and Proceedings Law (RPAPL), as well as costs, disbursements and attorney's fees.

**Background**

On May 13, 1999, defendant 576 Fifth Avenue LLC ("Fifth Ave LLC"), as the tenant on a master lease for the Premises, and defendant Fifth Avenue Jewelry Associates LLC ("Jewelry LLC")(collectively the "Borrowers"), as the holder of a partial sublease, obtained a loan in the amount of \$7,400,000 from GMAC Commercial Mortgage Corporation ("GMAC"). The mortgage was security for the loan, which was evidenced by a promissory note issued that same day. In consideration of GMAC's loan to the Borrowers, the defendant Western Heritable Investment Company (US) LTD ("Western") executed a Guaranty of Recourse Obligations of Borrower (the "Guaranty") in which it unconditionally guaranteed payment of all the Borrowers' "Guaranteed Recourse Obligations," as that term is defined in the Guaranty. The plaintiff in this action, Wells Fargo Bank, N.A., claims to be the holder of the underlying note, mortgage and Guaranty pursuant to an assignment from GMAC.

The plaintiff claims that the Borrowers defaulted under the terms of the note and the mortgage by failing to repay the loan by its maturity date, June 10, 2009. By letter dated July 16, 2009, Capmark Finance Inc. ("Capmark"), as plaintiff's special server, gave notice of the default to the Borrowers and Western. It thereafter commenced this action on July 31, 2009. By order dated October 27, 2009, this court, upon plaintiff's application, appointed a receiver.

The loan is a non-recourse loan, as set forth in article 15 of the mortgage agreement, the accompanying promissory note and the Guaranty. Subject to certain exceptions discussed below, the plaintiff's only recourse in the event of a default under the loan is to foreclose against the Borrowers' interest in the Premises and, accordingly, the lender may not otherwise sue for or demand any monetary or deficiency judgment against the Borrowers or Western, as the guarantor. Specifically, section 15.1 of the mortgage provides as follows:

[\* 2]

Notwithstanding anything to the contrary contained in this security instrument or in any other Security Document (but subject to the provisions of Sections 15.2, 15.3, 15.4 and 15.5), Lender shall not enforce the liability and obligation of Borrower to perform and observe the obligations contained in this Note or this Security Instrument by any action or proceeding to collect damages or wherein a money judgment or any deficiency judgment or order or any judgment establishing any personal obligation or liability shall be sought against Borrower or any principal director, officer, employee, beneficiary, shareholder, partner, member, trustee, agent or affiliate of Borrower or any person owning, directly or indirectly, any legal or beneficial interest in Borrower, or any successors or assigns of any of the forgoing (collectively, the "Exculpated Parties"). Lender, may bring a foreclosure action, action for specific performance or other appropriate action or proceeding to enable Lender to enforce and realize upon this Security instrument, the other Security Documents, and the Interest in the Property, the Rents and any other collateral given to Lender created by this Security Instrument and the Other Security Documents; provided however subject to the provisions of Sections 15.2, 15.3, 15.4 and 15.5, that any judgment on any action or proceeding shall be enforceable against Borrower only to the extent of Borrower's interest in the Property, in the Rents and in any other collateral given to Lender in connection with the Note. Lender, by accepting the Note and this Security Instrument, agrees that it shall not, except as otherwise provided below, sue for or demand any deficiency judgment against Borrower or any of the Exculpated Parties in any action or proceeding, under or by reason of or under or in connection with the Note, the other Security Documents or this Security Instrument.

As already noted, the Guaranty only obligates Western to reimburse the lender for the "Recourse Obligations of the Borrower." These recourse obligations consist of certain losses known as "carve-outs," which are described in sections 15.3 and 15.4 of the mortgage agreement. Section 15.3 provides that the Borrowers and Western shall be personally liable to the lender, jointly and severally, for the losses the lender incurs due to: (1) fraud or intentional misrepresentation by the Borrowers or any other person or entity in connection with the execution and the delivery of the promissory note, mortgage or other documents, (2) Borrowers' misapplication or misappropriation of rents received after the occurrence of a default, (3) Borrowers' misapplication or misappropriation of tenant security deposits or rents collected in advance, (4) misapplication or misappropriation of insurance proceeds or condemnation awards after the occurrence of a default, (5) fees or commissions paid by the Borrowers after the occurrence of a default to any principal, affiliate or general partner of the Borrowers or Western, (6) gross negligence or criminal acts perpetrated by the Borrowers resulting in forfeiture, seizure or loss of any portion of the property, (7) any failure of the Borrowers to comply with sections 4.3 and 13.2 of the mortgage, (8) all fees and expenses of the lender pursuant to section 19.2 of the mortgage or (9) any sale, conveyance, mortgage, grant, bargain, encumbrance, pledge, assignment or transfer of the property or any part thereof without the written consent of the lender. Section 15.4 of the mortgage provides that the agreement of the lender not to pursue recourse liability shall become null and void in the event that the mortgaged property becomes an asset in a bankruptcy proceeding or if there is a violation under section 3.11 of the mortgage, which concerns the obligation of the Borrowers to provide certain financial information.

In motion sequence number 002, Western moves to dismiss the complaint, pursuant to CPLR §§3211 (a)(1) and (7), on the ground that documentary evidence establishes a defense and the complaint fails to state a cause of action against Western. In motion sequence number 003, the plaintiff moves for summary judgment and the appointment of a referee to compute. The plaintiff also moves to dismiss the

defendants' affirmative defenses, sever the claim against Western and amend the caption to delete the City of New York and Jane and John Doe as defendants.

**Discussion**

**A. Western's Motion to Dismiss** - - In moving to dismiss, Western argues that the complaint fails to state a cause of action against it since, under the terms of the mortgage and Guaranty, the plaintiff is not entitled to recover any deficiency judgment against it after the foreclosure sale. As set forth above, under the terms of the mortgage and the Guaranty, the mortgagee may assert claims for specific damages or losses, but not for the amount due under the promissory note secured by the mortgage. Western argues that this language precludes and/or eliminates the issuance of a deficiency judgment against it or, indeed, any of the defendants. According to Western, none of the specific carve-out events specified in section 15.3 of the mortgage are alleged to have occurred in the complaint. Moreover, although liability for the full payment of the note itself against both Western and the Borrowers may be sought pursuant to the terms set forth under section 15.4 of the mortgage, the two events which would trigger that liability, bankruptcy or failure to provide requisite financial statements, are not alleged to have occurred.

In opposition to the motion to dismiss, the plaintiff argues that it is entitled to join a guarantor as a defendant in a mortgage foreclosure proceeding in order to preserve the lender's right to seek a potential deficiency judgment against the guarantor following a foreclosure sale. The plaintiff claims that it properly named Western as a party to the foreclosure action in order to avoid any possible argument that it waived its right to seek a deficiency judgment against the guarantor following a foreclosure sale. The plaintiff further argues that although the triggering events for Western's liability may not yet have occurred, it would be premature and prejudicial to dismiss the complaint against Western since grounds for seeking a deficiency may still occur. For example, the plaintiff argues that it has recourse rights against the Borrowers and the Guarantor for losses as a result of the Borrower's misapplication and/or misappropriation of rents or security deposits and that such misappropriation may not be evident until after the receiver collects all of the rents and security deposits and submits a full accounting. Similarly, Western's full recourse obligation for the entire debt secured by the mortgage would be triggered by a bankruptcy filing and the plaintiff suggests such a filing is possible up until the moment that the hammer falls at a foreclosure sale.

The problem with the plaintiff's argument is that it ignores the fact that by bringing an action for a deficiency judgment against Western before any grounds for seeking a deficiency have occurred, the plaintiff has violated the clear terms of the mortgage and Guaranty, under which it is specifically prohibited from seeking a deficiency judgment against any of the defendants in the absence of a triggering event, as outlined in section 15.4 of the mortgage. Under the unambiguous terms of the mortgage agreement, the plaintiff may not bring a premature action against the guarantor on the chance that an event might occur in the future which would change the non-recourse nature of the loan and enable it to recover a deficiency judgment. Precluding the plaintiff from seeking a deficiency judgment in the absence of a triggering event is thus precisely what was bargained for when the original loan transaction was consummated by the plaintiff's assignor, a sophisticated financial institution that was represented by counsel. *See Bronxville Knolls, Inc., v. Webster Town Center Partnership*, 221 AD2d 248 (1<sup>st</sup> Dept 1995). In the event that such an event should occur prior to the issuance of a judgment of sale and foreclosure, the plaintiff may at that time seek leave to amend its complaint so as to assert a claim for a deficiency judgment. Nevertheless, since the complaint fails to allege that there has been such an occurrence, that portion of the complaint which seeks a deficiency judgment against Western and the Borrowers must be dismissed.

Nevertheless, Western has properly been named as a defendant herein since, pursuant to the terms of the Guaranty and the mortgage, the plaintiff is entitled to recover reasonable attorney's fees and expenses against Western and the Borrowers. Section 15.3 of the mortgage expressly provides that notwithstanding

the exculpation provisions in section 15.1, the Borrowers and the guarantor shall be personally liable to the lender for "all fees and expenses of Lender pursuant to Section 19.2 of the Mortgage." Section 19.2(b) of the Mortgage provides, *inter alia*, that the Borrowers shall pay to Lender on demand any and all expenses, including legal expenses and attorney's fees, incurred or paid by Lender in enforcing its rights under the mortgage and/or in protecting its interest in the property or the collateral.

There is no merit to Western's argument that a claim for legal fees incurred as a result of the foreclosure is not properly raised in the foreclosure proceeding itself. The mortgage specifies as a trigger event the demand of "all fees and expenses" the lender incurs in enforcing its rights under the Note and Mortgage, including the commencement of a foreclosure proceeding. Thus, it is clear that the contracting parties intended to hold the Borrowers and Western personally liable for those fees and the complaint properly specifies, in its *ad damnum* clause, that the plaintiff seeks an award against Western for any outstanding legal fees and/or expenses. Under the circumstances, Western is not entitled to an order dismissing the complaint as against it.

**B. Plaintiff's Motion for Summary Judgment and Other Relief** - - In motion sequence number 003, the plaintiff argues that it is entitled to summary judgment on its foreclosure claim because it has conclusively demonstrated that it is the holder of a note and mortgage pursuant to an assignment from GMAC and that the Borrowers defaulted under the terms of the loan by failing to pay it back by June 10, 2009, the maturity date of the note. In opposing the summary judgment motion, the Borrowers do not contest that they received \$7,400,000 from GMAC or that they defaulted under the terms of the note and mortgage by failing to repay the loan when it matured. Rather, the defendants question the validity of the assignment of the loan to the plaintiff and also question the fact that the plaintiff is bringing this action through its special server Capmark. They also suggest that this action must be dismissed because Capmark filed for bankruptcy and subsequently sold its business to Berkadia Commercial Mortgage LLC ("Berkadia").

These arguments are without merit. First, the documents submitted in support of the plaintiff's motion demonstrate that in 1999, GMAC assigned the mortgage and note to Northwest Bank, Minnesota, N.A., which then changed its name to Wells Fargo Bank Minnesota, N.A., an entity which subsequently merged with the plaintiff. Although the defendants question the date of the assignment because the recorded assignment of mortgage identifies the effective date as January 30, 2002 rather than September 14, 1999, the date claimed by the plaintiff, this variance is immaterial since the defendants do not otherwise dispute the validity of the assignment. Thus, the plaintiff has sufficiently demonstrated that it was the lawful owner of the note and mortgage at the time this foreclosure proceeding was commenced. *See Mortgage Electronic Registration Systems, Inc. v. Coakley*, 41 AD3d 674 (2<sup>nd</sup> Dept 2007); *Federal Nat'l Mortgage Assoc.*, 303 AD2d 546, 547 (2<sup>nd</sup> Dept 2003).

Second, the documents submitted by the plaintiff also establish that the plaintiff, acting as the current holder of the note and mortgage, executed a limited power of attorney pursuant to which it appointed Capmark to act as its special server and agent and take all actions incident to the administration of the loan, including the commencement of this foreclosure action.

Third, although Capmark filed for bankruptcy on October 25, 2009, it was nevertheless entitled, under sections 1107 and 1108 of the United States Bankruptcy Code, to continue to operate its business and manage its assets during the pendency of the bankruptcy proceeding. On November 24, 2009, Capmark received approval from the Bankruptcy Court to complete the sale of its business to Berkadia. After the plaintiff filed its motion for summary judgment on December 11, 2009, Berkadia completed its acquisition of Capmark's business. The plaintiff attests to the fact that it granted Berkadia the authority to continue to service the loan and that this authority included the right to continue to act on behalf of the plaintiff in this action. Thus, there is no basis for this court to conclude that either the plaintiff or Capmark has acted

improperly in bringing and maintaining this foreclosure action.

Accordingly, in motion sequence number 002, Western's motion to dismiss is granted to the extent that the portion of the complaint which seeks a deficiency judgment against Western and the Borrowers is hereby dismissed. The motion is otherwise denied. In motion sequence number 003, the plaintiff's motion for summary judgment on its foreclosure claim and for an order appointing a referee to compute is hereby granted. The defendants' affirmative defenses are hereby dismissed. The plaintiff's request for leave to amend the caption so as to delete the City of New York and Jane and John Doe as defendants is granted without opposition. The motion to sever the plaintiff's request for attorney's fees and costs is, however, denied since the court can determine the amount of such an award at the time of sale.

Settle order and judgment on notice to all interested parties. .

ENTER ORDER

**Dated:** 6/23/10

**Check one:**  **FINAL DISPOSITION**

*MGD*

**MARYLIN G. DIAMOND, J.S.C.**

**NON-FINAL DISPOSITION**

**MARYLIN G. DIAMOND**