

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

2010 NY Slip Op 33568(U)

November 29, 2010

Sup Ct, Queens County

Docket Number: 700083/10

Judge: Orin R. Kitzes

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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF QUEENS

PART 17
 HON. ORIN R. KITZES

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 GECCMC 2007-C1 DITMARS LODGING, LLC,
 Plaintiffs,

-against-

Index No.: 700083/10

Motion Date: 11/17/10
 Motion No. 30

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.

Dated: November 29, 2010

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 Plaintiff moves for an order for Summary Judgment in favor of Plaintiff against Defendants Mohola, LLC, and P&P La Guardia L.L.C. (“P&P”) (collectively, the “Borrower Defendants”), and Defendants Rajni Patel and Edward I. Penson (collectively the “Borrower Principals,” and together with the Borrower Defendants, the “Defendants”) as to the First and Second Causes of Action alleged in the Verified Complaint; to strike the Verified Answer of Defendants and the affirmative defenses included therein; to amend the caption to excise “John Doe” Defendants 1 through 12; for the appointment of a referee to compute the amounts due and owing under the Loan Documents; for an order directing that a foreclosure sale shall be held subject to Plaintiff’s lien herein; and to determine that any lien held by any Lienor Defendant is subordinate to the mortgage herein. Defendants oppose this motion.

In moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default. Wells Fargo v. Webster, 61 A.D.3d 856, 856 (2d Dept. 2009), *citing*

Republic Natl. Bank of N. Y. v. O'Kane, 308 A.D.2d 482, 482 (2d Dept. 2003), *quoting Village Bank v. Wild Oaks Holding*, 196 A.D.2d 812, 812 (2d Dept. 1993). In *Wells Fargo, supra*, the Second Department held that plaintiff bank sustained its initial burden of demonstrating its entitlement to judgment as a matter of law by submitting proof of the existence of the note, mortgage, and consolidation agreement, and the defendants' default in payment. *Id.* Once plaintiff's burden has been met, it becomes incumbent on the defendants to demonstrate, by admissible evidence, the existence of a triable issue of fact as to a bona fide defense. *Id.*

According to the complaint and Plaintiff's evidence, this action involves a loan made by Bank of America, N.A. ("Bank of America") to the Borrower Defendants, in the principal sum of Nineteen Million Three Hundred Thousand Dollars (\$19,300,000.00) ("Loan"). As part of this loan, Borrower Defendants, as maker, executed, acknowledged and delivered a Consolidated Promissory Note in favor of Bank of America, as lender ("Note"). The Note requires Borrower Defendants to pay "the principal sum of this Note and interest on the unpaid principal sum of this Note from time to time outstanding at the rates and at the times specified in Section 2.2 of the Loan Agreement..." and further states that the outstanding balance of the principal sum and all accrued and unpaid interest thereon "shall be due and payable on the Maturity Date," which was February 1, 2010. Borrower Defendants duly executed, acknowledged and delivered a Mortgage and Agreement of Consolidation and Modification of Mortgage, Assignment of Leases and Rents, and Security Agreement ("Mortgage,") by which Bank of America, through its Nominee, Mortgage Electronic Registration, Inc. ("MERS"), was granted a security interest real property located in Queens County, known as the Clarion Hotel LaGuardia Airport, and located at the street address of 94-00 Ditmars Boulevard, East Elmhurst, New York 11369 (the "Property"). The Mortgage was duly recorded on February 9, 2007.

On or about January 26, 2007, the Promissory Note was severed into two notes, as evidenced by two replacements notes – Note A and Note B. At that time, Bank of America was the owner and holder of Note A and Note B. On or about April 26, 2007, Bank of America executed and delivered to Wells Fargo Bank, N.A. as trustee ("Trustee") for the Registered Holders of GE Commercial Mortgage Corporation, Commercial Pass-Through Certificates, Series 2007-C1 (the "Trust"), an allonge whereby Bank of America assigned Note A to Trustee. Trustee subsequently executed and delivered to U.S. Bank National Association as trustee ("Successor Trustee") for the Trust, an allonge whereby Trustee assigned Note A to Successor Trustee. On March 5, 2010, Successor Trustee delivered to Plaintiff an allonge whereby Note A was assigned to Plaintiff. On the same day, MERS, the record holder of the Mortgage prior to the assignment of Note A to Plaintiff, executed a written assignment of the Mortgage to Plaintiff pursuant to an Assignment of Mortgage and Agreement of Consolidation and Modification of Mortgage, Assignment of Leases and Rents, and Security Agreement and Other Loan

Documents. Based on the above, Plaintiff claims to be the owner and holder of Note A and the Mortgage.

Borrower Defendants failed to comply with the terms and provisions of the Loan Documents by failing to pay monthly installments of principal and interest due from February 2009 through and including the Maturity Date of the Loan, February 1, 2010, plus applicable default interest, required escrow and reserve deposits and late fees, which failure constitutes an “Event of Default” under the Loan Documents. Plaintiffs provided written notice of the default to Mohola, LLC by letter dated May 27, 2009. Borrower Defendants also failed to comply with the terms and provisions of the Loan Documents by failing to pay the entire outstanding balance due on the Loan on or before the Maturity Date of February 1, 2010, which failure constitutes an “Event of Default” under the Loan Documents. In fact, borrower Defendants have not made any payment with respect to the Loan since the January 2009 monthly payment.

Based on these failures to make payments, on March 22, 2010, Plaintiff commenced the instant action for Foreclosure of Mortgage. In connection with this action, Plaintiff filed a Motion for the Appointment of a Temporary Receiver, which was granted by this Court in an Order dated April 1, 2010. In an Order, dated June 30, 2010, this Court denied Defendants’ Motion to Remove Receiver and Defendants’ Motion to Dismiss.

The Court finds that Plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law on its claims for foreclosure of the Mortgage, and demonstrated that there are no material issues of fact in dispute with respect to these claims. More specifically, Plaintiff has submitted to the Court copies of the duly executed Note and Mortgage and Plaintiff has established that Borrower Defendants have failed to make, or cause to be made, payment in accordance with the terms of the Note and Mortgage.

Defendants oppose this motion on several grounds. The first is that there is outstanding discovery regarding Defendants seeking information relating to assignments of the Mortgage and Note, and documentation evidencing the same, and such information is necessarily only in Plaintiff’s possession. Discovery is also required regarding bank accounts and money transfers in connection with the Loan to possibly support Defendants’ defense that Plaintiff has failed to mitigate its damages. Defendants also seek discovery concerning the circumstances under which Plaintiff allegedly obtained its rights in the Mortgage. Defendants are also seeking discovery as to issues of Plaintiff’s standing, which have not been substantiated by Plaintiff, and which may permit Defendants to renew their motion to dismiss the Complaint.

Defendants also claims that Plaintiff has failed to comply with the New York court rule, which requires the attorney for a party attempting to foreclose on a mortgage to submit an affirmation showing that the attorney has made an inquiry into the validity of the mortgage documents. Plaintiff’s attorney is required to certify, among other things, that the attorney communicated with

a representative of Plaintiff who personally reviewed Plaintiff's records and has confirmed the factual accuracy of court filings and any notarizations therein, and that the Complaint and the documents filed in support of the action are complete and accurate. Defendant also claims that even if the Court finds that granting summary judgment is warranted, Plaintiff's request for attorneys' fees should be denied, since Plaintiff bases its request for attorneys' fees in the Loan Agreement, and not in the Mortgage. Finally, Defendant claims that a decision on this motion should be delayed until a determination of their Appeal now pending in the Second Department.

The Court finds that Defendants have failed to raise an issue of fact regarding Plaintiff's entitlement to summary judgment in its favor. Initially, the Court notes that Defendants do not allege that they have made the payments due under the Loan Documents and they admit that they have not made payments on the Loan since February 2009. The affidavit of Defendants' principal, Defendant Edward I. Penson, contains mostly conclusory speculation about issues that are not related to this Motion. Furthermore, Defendants' claim regarding the October 20, 2010 Administrative Order of the Chief Administrative Judge of New York is misplaced. This rule applies only to residential mortgage foreclosures and Defendants do not cite any law or reason that the rule be applied retroactively to commercial foreclosure actions. Similarly, the claim regarding the pending Appellate Division, Second Department's decision is misplaced since Defendants' previous requests to the Second Department to stay this case pending resolution of their appeal were denied. Moreover, Defendants' discovery requests are immaterial to the Court's determination of the motion for summary judgment because the information that Defendants profess to seek in their opposition to the Motion has no bearing on Defendants' uncontested failure to pay the Loan at maturity. Defendants' mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered by further discovery is an insufficient basis for denying the motion.

Furthermore, Defendants claim that the foreclosure action is purportedly improper under Judiciary Law § 489 fails to raise an issue of fact. Defendants have not included this argument in their Affirmative Defenses to the Verified Complaint, and thus such defense is deemed to have been waived pursuant to C.P.L.R. § 3018(b). In any event, the Defendants' claim is without merit because the Plaintiff purchased the Note with a legitimate business purpose. Judiciary Law § 489 prohibits a corporation from "tak[ing] an assignment of . . . any claim . . . with the intent and for the purpose of bringing an action or proceeding thereon." To fall within the statutory prohibition, "the assignment must be made for the very purpose of bringing suit and this implies an exclusion of any other purpose . . ." Hill International, Inc. v Town of Orangetown, 290 A.D.2d 416, 417 (2d Dep't 2002). In the present case, Plaintiff acquired the Note and Mortgage to "acquire, own, hold, develop, manage, lease, service, modify, enforce, foreclose, structure a workout of, sell and/or otherwise deal with the Whole Mortgage Loan and real property acquired through foreclosure, deeds in lieu of foreclosure or otherwise with respect to such Whole Mortgage Loan. . ." (*See Limited Liability Company Agreement of GECMC 2007-C1 Ditmars Lodging, LLC at ¶ 3.*

Finally, Defendants' arguments as to why Plaintiff should not be awarded attorneys' fees in enforcing the Note and Mortgage are expressly contradicted by the Loan Documents. While Defendants assert that Plaintiff relies solely on Section 20.4 of the Loan Agreement in support of its claim for attorneys' fees, the Verified Complaint cites directly to Section 8.3 of the Mortgage, which states that the cost and expense of foreclosing the Mortgage following a default, "including reasonable attorneys' fees," shall be part of the debt owed by Defendants. Mortgage, annexed to the Verified Complaint as Exhibit E, at § 8.3. Moreover, Section 4.1 of the Mortgage states that Defendants "shall comply with the covenants set forth in Article 17 of the Loan Agreement," which Article provides that Defendants expressly agree to pay "all reasonable costs and expenses (including reasonable attorneys' fees and disbursements)" incurred by the lender in, *inter alia*, any action against Defendants brought in enforcing the lender's rights with respect to the Property. Mortgage at § 4.1; Loan Agreement, annexed to the Verified Complaint as Exhibit A, at § 17. Accordingly, the Mortgage and the other Loan Documents expressly provide Plaintiff with the right to recover attorneys' fees from Defendants, and the case law does not say otherwise. Similarly, Plaintiff is entitled to costs related to this foreclosure action.

Accordingly the motion is granted, in its entirety.

Submit order

ORIN R. KITZES, J.S.C.