

**Aurora Bank FSB v ERA Intl., LLC**

2011 NY Slip Op 31351(U)

May 16, 2011

Supreme Court, Queens County

Docket Number: 78/10

Judge: David Elliot

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## MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART: 14

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AURORA BANK FSB as Attorney-In-Fact for  
U.S. BANK NATIONAL ASSOCIATION, etc.,

Plaintiff,

- against -

ERA INTERNATIONAL, LLC, et al.,

Defendants.

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X

INDEX NO. 78/10

MOTION  
SEQ. NO. 3

BY: Elliot, J.

DATED: May 16, 2011

MOTION

DATE: March 1, 2011

X

Plaintiff moves for summary judgment dismissing the defendants' affirmative defenses and counterclaims, for leave to appoint a referee to compute the sums due and owing plaintiff, and to amend the caption to include actual tenants by substituting Unique Sheet Metal, Inc. and Maisonel in place of "John Doe No. 1" though "John Doe No. 20."

Plaintiff commenced this action by filing a copy of the summons and complaint and a Notice of Pendency on January 4, 2010. Plaintiff seeks to foreclose on a commercial mortgage on the subject real property known as 66-26 Myrtle Avenue, Glendale, New York, to secure repayment of a note, evidencing a loan in the original principal amount of \$495,000, plus interest, extended to ERA International LLC by GreenPoint Mortgage Funding, Inc. (GreenPoint). Pursuant to written guaranties, both dated January 24, 2007,

defendants Erika Montesdeoca and Richard Montesdeoca jointly and severally guaranteed all obligations under the Note and Mortgage.

By assignment dated February 16, 2007, GreenPoint assigned its interest in the note, mortgage and guaranties to Aurora Bank FSB f/k/a Lehman Brothers Bank, FSB. This assignment was recorded on November 6, 2009. On July 23, 2009, Aurora Bank FSB f/k/a Lehman Brothers Bank, FSB, assigned the note, mortgage and guaranties to U.S. Bank National Association, as Trustee of the Lehman Brothers Small Balance Commercial Mortgage Pass-Through Certificates, 2007-2 (Trustee). This assignment was recorded on November 6, 2009. Plaintiff alleges that it is the attorney-in-fact for Trustee, and that the defendant ERA International LLC defaulted under the terms of the mortgage and note by failing to make the monthly installment payment due on February 1, 2009, and as a consequence, it elected to accelerate the entire mortgage debt.

That branch of the motion by plaintiff for leave to amend the caption as proposed, is granted.

On a motion for summary judgment in a foreclosure action, a plaintiff must make a prima facie showing by producing the mortgage, the unpaid note, bond or obligation and the evidence of default and the assignment of the mortgage documents to it (*see EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002]; *IMC Mtge. Co. v Griggs*, 289 AD2d 294 [2001]; *Paterson v Rodney*, 285 AD2d 453 [2001]; *see also Bercy Investors, Inc. v Sun*, 239 AD2d 161 [1997]).

In support of the motion for summary judgment against defendants, the plaintiff offers a copy of the pleadings, affidavits of service, a copy of the subject mortgage, underlying note, the guaranties, assignments and power of attorney, and the affidavit of John Kullerstrand, vice president of the plaintiff.

The submissions establish plaintiff's prima facie entitlement to summary judgment as against the defendants (*see EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002], *supra*; *IMC Mtge. Co. v Griggs*, 289 AD2d 294 [2001], *supra*; *Paterson v Rodney*, 285 AD2d 453 [2001], *supra*; *see also Bercy Investors, Inc. v Sun*, 239 AD2d 161 [1997], *supra*). The burden shifts to the defendants to raise a triable issue of fact regarding their defenses (*see Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282 [2005]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002], *supra*; *First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2000]).

The affirmative defenses pled by the defendants must be dismissed. A defense that merely pleads conclusions of law without supporting facts is insufficient and fatally deficient (*see Becher v Feller*, 64 AD3d 672 [2009]). The first affirmative defense, failure to state a cause of action, is without merit as the plaintiff has established that it is the holder of the mortgage and underlying note and that there has been a default in payment. The defendants, by stipulation, withdrew the second affirmative defense, which raised the issue of jurisdiction. The third affirmative defense is that the plaintiff is not a proper party. This must be dismissed as the plaintiff's authority has been established by the submission of the

assignments, properly leading to plaintiff, and power of attorney. The fourth affirmative defense, that plaintiff is not a holder in due course, is unsupported by the facts presented. In the fifth affirmative defense, the defendants allege that the plaintiff failed to satisfy conditions precedent for this action. However, the defendants waived any conditions precedent as per the note. In any event, the plaintiff has established that it took all necessary steps before commencing this action. In their sixth affirmative defense, the defendants alleged that the plaintiff waived the mortgagor's default. There is no evidence that the plaintiff knowingly and intentionally waived the mortgagor's obligations to pay the note. The seventh affirmative defense is that plaintiff failed to comply with the notice requirements of RPAPL 1303 and 1304. The notice requirements of RPAPL 1303 and 1304, however, do not apply in this case, as the mortgaged premises are non-owner occupied and commercial. The eighth affirmative defense is that the plaintiff is barred from foreclosing the subject loan based on the equitable defenses of estoppel, laches and unclean hands. Again, these are legal conclusions without accompanying proof in admissible form. In the ninth affirmative defense, the defendants claim prior payment of the loan (which is also tied to defendants' waiver defense). However, the plaintiff provided a payment history which shows that there was no prior payment. The evidence establishes that the defendants' payment in February 2009 (the month of default) was applied to the January 2009 payment obligation and not to the February 2009 payment obligation, and that no further payment was made. This establishes that the defendants' default began with the February 2009 payment

obligation. In any event, even if the last payment was applied to the February 2009 payment obligation, this would not prevent the mortgagee from filing a foreclosure action in January 2010.

The defendants' argue that the affidavit of John Kullerstrand, Vice President of Special Assets for plaintiff, lacks probative value because it is an out-of-state affidavit and did not contain a certificate of conformity. However, the plaintiff corrected this irregularity in its reply papers by submitting an affidavit with a certificate of conformity (*see Moccia v Carrier Car Rental, Inc.*, 40 AD3d 504 [2007]; *Nandy v Albany Med. Ctr. Hosp.*, 155 AD2d 833 [1989]). The affidavit submitted in reply was from Mariah Dobransky, the plaintiff's Special Assets Officer. Inasmuch as Mr. Kullerstrand is no longer employed by the plaintiff, and the affidavit of Ms. Dobransky re-alleges the facts in Mr. Kullerstrand's affidavit, the lack of a certificate of conformity attached to the original affidavit is insufficient to warrant the denial of the summary judgment motion.

The defendants next argue that the plaintiff lacked the authority to bring this action. Though the power of attorney attached to the affidavit of Mr. Kullerstrand was dated after the commencement of this action, there was a power of attorney attached to the complaint which established that the plaintiff gained its authority from the Trustee prior to the commencement of the action. Additionally, contrary to the argument of the defendants, the power of attorney does give the plaintiff the authority to bring this foreclosure action and to pursue a collection against the guarantor defendants.

The defendants' argument that the acceleration of the debt is invalid because the demand letter was sent to the wrong address is without merit. The affidavit of Ms. Dobransky establishes that the notice was sent to the defendants. Furthermore, while the defendants state they do not recall receiving the demand letter, they do not actually deny that they received the letter. In any event, the filing of the notice of pendency and foreclosure complaint acts as due acceleration of the mortgage debt obviating the requirement for an acceleration letter (*see Clayton Natl. v Guldi*, 307 AD2d 982 [2003]).

Plaintiff, therefore, is entitled to summary judgment in its favor against the defendants (*see Fed. Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558 [1997]; *DiNardo v Patcam Serv. Station*, 228 AD2d 543 [1996]). Those branches of the motion by plaintiff for summary judgment in its favor against the defendants and dismissing the defendants' affirmative defenses and counterclaims are granted.

That branch of the motion by plaintiff for leave to appoint a referee is granted.

Settle order.

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J.S.C.