

<b>Flushing Sav. Bank, FSB v New Canaan Realty Inc.</b>
2011 NY Slip Op 31750(U)
June 20, 2011
Sup Ct, Nassau County
Docket Number: 3856/10
Judge: Anthony L. Parga
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SHORT FORM ORDER  
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY  
PRESENT:

HON. ANTHONY L. PARGA  
JUSTICE

-----X PART 8  
FLUSHING SAVINGS BANK, FSB.,

Plaintiff,

INDEX NO. 3856/10

-against-

MOTION DATE: 4/29/11  
SEQUENCE NO. 001

NEW CANAAN REALTY INC., BNB BANK  
NATIONAL ASSOCIATION, NEW YORK  
STATE DEPARTMENT OF TAXATION AND  
FINANCE, JAMES RYU, BEST DELI, INC.,  
"JOHN DOE NO. I" to "JOHN DOE NO.XXX",  
inclusive, the last thirty 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 complaint,

Defendants.

-----X	
Notice of Motion, Affs. & Exs.....	<u>1</u>
Affirmation in Opposition.....	<u>2</u>
Reply Affirmation.....	<u>3</u>

Upon the foregoing papers, the plaintiff's motion for summary judgment, pursuant to CPLR §3212, and for an order amending the caption of this action, is granted as directed below.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action to foreclose upon a mortgage, given as security for a note, due to the alleged default in payments under the terms of the note. Plaintiff is the owner and holder of a note dated November 9, 2005, made by New Canaan Realty Inc. and Best Deli, Inc. to plaintiff in the original principal amount of \$480,000.00. The note is secured by a mortgage of the same amount, dated November 9, 2005, given by New Canaan Realty, Inc. to plaintiff, which was recorded on November 21, 2005 with the Nassau County Clerk's Office. The mortgage

encumbers the premises known as 1000 Stewart Avenue, Bethpage, New York. Defendant James Ryu guaranteed the note and mortgage to the plaintiff.

In support of its application, Movant submits the affidavit of Patrick Trombly, Vice President of Flushing Savings Bank, FSB, wherein Mr. Trombly attests that plaintiff is the owner and holder of the \$480,000 note, secured by the mortgage. Mr. Trombly attests that New Canaan Realty, Inc. and Best Deli, Inc. are the obligors on the note and that James Ryu is the guarantor on the note. Mr. Trombly attests that the mortgage is a commercial mortgage and that defendants have defaulted by failing to timely pay each and every installment of principal and interest which became due and payable on November 1, 2009 and continually thereafter. He further attests that said amounts remain unpaid.

In opposition, defendants New Canaan Realty, Inc., James Ryu and Best Deli, Inc. contend that plaintiff's motion should be denied because there is an issue of fact as to whether plaintiff is the owner of the note which is secured by the mortgage being foreclosed upon. Defendants argue that the last page of the note states that "the guaranteed portion of this note was transferred to a Registered Holder for Value." As such, defendants New Canaan Realty, Inc., James Ryu, and Best Deli, Inc. contend that plaintiff should be permitted to foreclose on the mortgage only up to that portion of the note that it owns. Defendants also contend that the Registered Holder for Value should be a plaintiff in this action, and as such, the action should be dismissed.

In reply, plaintiff submits the affidavit of Joseph Baldasare, Vice President of Flushing Savings Bank, FSB ("Flushing"). Mr. Baldasare attests that the note and guaranty at issue herein were executed in connection with a loan made under the U.S. Small Business Administrations ("SBA") 7(a) Loan Program. By the Authorization, the SBA guaranteed 75.00% of the loan. Mr. Baldasare attests that on November 30, 2005, plaintiff sold the SBA guaranteed portion of the loan to Signature Securities. As such, the Registered Holder referenced in the Transfer Notation stamped on the note by plaintiff was Signature Securities. Mr. Baldasare further attests that on February 16, 2010, the SBA repurchased the guaranteed portion of the note that was sold to Signature Securities, therefore Signature Securities is no longer a registered holder for value.

Mr. Baldasare further attests that the repurchase by SBA of the guaranteed portion was pursuant to the Guaranty Agreement (Deferred Participation) for Short Term Loans dated October 30, 1997 between Flushing Savings Bank and the SBA. Paragraph 7 of said participation agreement provides that Flushing may demand that the SBA purchase the guaranteed percentage of the outstanding balance of the loan if the borrower defaults. It also states that with consent by the SBA, Flushing may continue to administer the loan after the SBA

purchases the guaranteed portion. Furthermore, Mr. Baldasare attests that the participation agreement states that Flushing has a right to recover on any guaranteed loan, and any monies recovered shall be repaid to both Flushing and the SBA in the same proportion respectively to the unpaid balance of the loan. Additionally, the guaranty, signed by James Ryu, states the SBA is not a coguarantor and the guarantor's liability will continue even if the SBA pays Flushing.

Finally, Mr. Baldasare attests that the note has not been transferred to the SBA and has not been assigned, in whole or in part, to any other entity. He attests that Flushing was, and is, the holder of the note and mortgage which is the subject of this action.

Since the participation agreement between Flushing and the SBA provided that the administration of the loan may continue with Flushing (paragraph 7), and since, pursuant to the participation agreement (paragraph 9), any monies recovered would be paid to both the lender and the SBA proportionately, Flushing has demonstrated that it is the proper party to pursue the action seeking recovery on the note. (*See, Marine Midland Bank v. CMR Industries, Inc.*, 159 A.D.2d 94, 559 N.Y.S.2d 892 (2d Dept. 1990)). The evidence submitted before this Court demonstrates that Flushing was, and is, the holder of the note and mortgage. Further, the guaranty states that the SBA is not a co-guarantor and that the guarantor's liability will continue even if the SBA pays Flushing. As such, the defendant's contentions in opposition are without merit, and defendants have failed to raise a triable issue of material fact sufficient to defeat plaintiff's prima facie showing of entitlement to summary judgment. (*Id.*).

In addition, defendants' answer contains allegations and defenses which have not been substantiated by any evidence submitted before this Court. A "shadowy semblance of an issue is not enough to defeat a motion [for summary judgment]." (*Ben Strauss Indus., Inc. v. City of New York*, 90 A.D.2d 751, 456 N.Y.S.2d 5 (1<sup>st</sup> Dept. 1982); *See also, Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 22 N.Y.2d 255, 257 N.E.2d 890 (1970) (bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment); *See also, S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 313 N.E.2d 776 (1974)(some evidentiary facts are required to be put forward to create a factual issue sufficient to defeat a prima facie showing of entitlement to summary judgment).

A mortgagee establishes a prima facie right to foreclose by producing the mortgage, the unpaid note and evidence of default. (*See, EMC Mortgage Corp. v. Riverdale Assoc.*, 291 A.D.2d 370, 737 N.Y.S.2d 114 (2d Dept. 2002)). Further, where a guarantee is clear and unambiguous on its face and, "by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." (*Citibank v. Plapinger*, 55 N.Y.2d 90 (1985); *See also, Gilman v. Chase*

*Manhattan Bank*, 73 N.Y.2d 1, 534 N.E.2d 824 (1988)).

Accordingly, summary judgment is granted to plaintiff. Movant shall submit an order of reference, on notice, within fifteen (15) days, so that this Court may appoint a Referee to compute and report the amount due to plaintiff.

In addition, the plaintiff's request to amend the caption as directed below is granted without opposition. The caption of this action shall be amended to substitute J & R Deli, in the place and stead of John Doe No. I, J & R Deli having been identified as John Doe No. I (Tenant) and having been served with the Summons Mortgage Foreclosure and Mortgage Foreclosure Action and Verified Complaint on May 4, 2010. Additionally, the caption of this action is hereby amended by deleting therefrom as party defendants, "John Doe No. II" to "John Doe No. XXX," and discontinuing the action as against said defendants. Accordingly, the amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
FLUSHING SAVINGS BANK, FSB,

Plaintiff,

Index No.: 3856/10

-against-

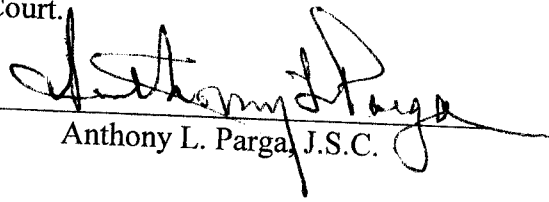
NEW CANAAN REALTY INC., BNB BANK NATIONAL  
ASSOCIATION, NEW YORK STATE DEPARTMENT  
OF TAXATION AND FINANCE, JAMES RYU,  
BEST DELI, INC., and J & R DELI,

Defendants,  
-----X

Movant shall serve a copy of this Order upon the Nassau County Clerk within fifteen (15) days. Upon receipt of same, the Clerk is directed to amend the caption of this action as directed above.

This constitutes the decision and order of this Court.

Dated: June 20, 2011

  
Anthony L. Parga, J.S.C.

**ENTERED**

JUN 22 2011

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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