[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10

Index Number : 115505/2009

ONGLINGSWAN, ALASTAIR

VS

CHASE HOME FINANCE, LLC

Sequence Number : 002

RENEWAL

INDEX NO. 115505/09

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

OCT 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

and the case is scheduled for a preliminary conference on December 1, 2011 at 9:30am in Part 19 60 Centre St.

Dated: 10/3/11

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

Alastair Onglingswan,

Plaintiff,

-against-

Chase Home Finance, LLC, Century Operating Corporation, Armory Owners, Inc., Adam Plotch and Linda Solomon,

Defendants.

----------x

Decision/Order
Index No.: 115505/2009
Seq. No.: 002

Present:
Hon. Judith J. Gische
JSC

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
AO n/m (RR) w/FS affirm, AO affid, exhs	1
CHF opp w/LPM affirm, exhs	2
AD and LS opp w/PAM affirm, exhs	3
AO reply w/ FS affirm	4

Upon the foregoing papers, the decision and order of the court is as follows

This action was brought by plaintiff to set aside and vacate the sale of shares and lease allocated to apartment 1A ("apartment") in the building known as 532 West 43rd Street, New York, NY 10035 ("building"). Defendant Chase Home Finance, LLC ("Chase Home") had the security interest in the stock and proprietary lease that was sold. Defendants Adam Plotch and Linda Solomon were the successful bidders at the auction sale which was held on September 16, 2009 ("auction") and defendant Armory Owners Corp is the owner of the building. Defendant Century Operating Corporation ("Century") is the owner's managing agent.

By order of this court dated February 24, 2010 ("prior order"), the court denied plaintiff's motion for an order vacating the sale to Plotch and Solomon. Chase Home's cross motion for summary judgment dismissing the complaint was granted and the complaint against defendants Century Operating, Armory, Plotch and Linda Solomon was dismissed.

Plaintiff now seeks to reargue and/or renew the prior motions and, upon reargument/renewal, an order granting summary judgment in his favor, thereby reversing the court's prior order granting summary judgment in favor of Chase Home and related relief. Plaintiff's motion is opposed by Chase Home, Plotch and Solomon.

A motion for leave to reargue may be granted on a showing that the court overlooked or misapprehended the facts or the law (CPLR 2221; Williams P. Pahl Equip. Corp. v. Kassis, 182 A.D.2d 22 [1st Dept. 1992]). A party is charged, however, with the duty to exercise due diligence in making their factual presentation clear in the original motion. A motion to reargue is not another opportunity for a party who has not done so to try again (*see* Prime Income Asset Management, Inc. v. American Real Estate Holdings L.P., 82 A.D.3d 550 [1st Dept 2011]; Leone Properties, LLC v. Board of Assessors for Town of Cornwall, 81 A.D.3d 649 [2nd Dept 2011]).

A motion for renewal, on the other hand, "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e][2]).

Although CPLR 2221 [d][3] requires that a motion to renew be made within thirty (30) days after service of a copy of the order determining the prior motion and written

notice of its entry, this rule specifically states that it "shall not apply to motions to reargue a decision made by the appellate division or the court of appeals" CPLR 2221 [d][3]; Lucente v. Riverbay Corp., 58 A.D.3d 451 [1st Dept. 2009]). For reasons that will become clear, the court permits reargument and renewal of the prior motions. It will reconsider whether any party is entitled to summary judgment at this time.

Facts and Arguments.

In connection with the underlying motion, plaintiff did not dispute that he had received Chase Home's Notice of Sale or that he had actual notice of the time and place of the sale. His arguments at that time were that: 1) Chase Home did not have standing to foreclose the lien once held by JP Morgan Chase and, 2) the Notice of Sale was defective because it failed to include a statement of the estimated value of the personal property, in violation of Lien Law § 201.3. The court rejected both arguments, holding that the sale of the stock and lease were governed by the requirements of the UCC (UCC § 9-613), not Lien Law § 201 which would have required the bank to include a statement of the estimated value of the property, and that Chase Home had standing to maintain this action.

Plaintiff now, however, states that he did not receive any mail from Chase Home during the period August 2 - August 29, 2009 because he was out of the country and did not return to the U.S. until September 10, 2009. The Notice of Sale was sent by Chase Home on August 12, 2009. According to plaintiff, he received a telephone call that his mortgage was in default and, once he was so notified, he immediately contacted Chase Home and asked for information on what he had to pay and what he had to do to reinstate the loan. The information never came, or so plaintiff alleges, and the sale went forward on

September 16th.

Plaintiff also attacks the Notice of Sale on the basis that: 1) it did not notify him he had the right to an accounting of the unpaid indebtedness and 2) it was sent to the wrong address. According to plaintiff, his correct address is "529 West 42nd Street, Apt. 1A, New York, New York" but the Notice of Sale was addressed to "536 West 43rd Street, Apt. 1A, New York, New York," the wrong address. Plaintiff denies he ever received the Notice of Sale at either of these addresses. Plaintiff explains that he travels out of the country very frequently (providing a copy of his passport showing that he was out of the country when the notices were sent) and that he notified Chase Home when he took the loan that he preferred to have notices sent to him at a "P.O. Box" he established. Plaintiff provides proof that the Notice of Sale, sent via certified mail to the 536 West 42nd Street address, was never delivered.

Plaintiff cites the case of O'Brien v. Chase Home Finance and Adam Plotch, 42 A.D.3d 344 [1st Dept 2007]), for the proposition that the sale by Chase Home was not conducted in a reasonable manner and that there is the possibility defendants colluded to deprive him of valuable rights. O'Brien involved two of the same defendants in this action (Chase Home and Plotch) and, like this case, the non-judicial sale of an apartment. The apartment, valued at $350,000, was sold at auction for only $99,000. In reversing the motion court, the Appellate Court stated that whether the sale was conducted in a commercially reasonable manner pursuant to UCC § 9-610 was an issue of fact for trial. Plaintiff provides a copy of the underlying motion court decision that was reversed on appeal, highlighting that the Notice contained a defect (no indication whether the sale was 8:30 a.m. or p.m.), and that he, like the plaintiff in O'Brien had the financial wherewithal to

reinstate the loan, but was prevented from doing so by the defendants' actions.

Plaintiff provides a copy of his September 10, 2009 fax correspondence to Chase Home requesting the reinstatement amount through October 2009, asking how to address the check, and requesting that the foreclosure sale on September 16th be delayed until the end of the month. He also states in the letter that he will shortly be traveling out of the country. In his sworn affidavit, plaintiff states he called Chase Home more than once to follow up and was promised the information had been sent to him. The reinstatement letter, has the address of "536 West 43rd Street" on it. The amount that had to be paid was $22,741.44. Although plaintiff, in connection with the underlying motion, claimed he had the money to reinstate the loan, plaintiff now provides a screen shot of his bank account showing the sum of $33,140.54 on deposit, as of the date of his sworn affidavit.

According to plaintiff, the failure to contain a statement that "the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting..." renders the Notice of Sale defective, as a matter of law.

In opposition, Chase Home argues that UCC § 9-613 does not require the inclusion of any particular language in a notice to the defaulting party. Chase Home argues further that even if the August 12, 2009 notice to plaintiff was incomplete, UCC § 9-610, which applies to disposition of collateral after default, only requires that such sale have been done in a "commercially reasonable manner." Thus, according to Chase Home, the August 12, 2009 default letter substantially complied with the requirements of UCC § 9-613.

Next, Chase Home states that the building where plaintiff lives is also known as "532 West 42nd Street" and that a search of public records shows that the building is

situated on tax block 1071, lot 10 which encompasses addresses 529-549 on West 42nd Street as well as 532-538 on West 43rd Street. Thus, according to Chase Home, the Notice of Default was not improperly addressed but even if one of the copies was, the other was sent to the correct address, negating claims by plaintiff that either or both of these mailings were improperly addressed. Although the reinstatement quote bears the address of "536 West 42nd Street," it was sent via facsimile to the number provided by plaintiff. Chase Home provides confirmation that the facsimile was, in fact, transmitted.

Law Applicable to a Motion for Summary Judgment

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " [Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must submit evidentiary facts to controvert the allegations set forth in the movant's papers to demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing (Hindes v. Weisz, 303 AD2d 459 [2d Dept 2003]).

Discussion

In connection with the underlying motion, the court decided that the sale was governed by the requirements of UCC article 9, and that Chase Home had met its burden of proof that the sale was done in accordance with the requirements of the UCC, sections 9-610 et seq. The court did not, however, examine the Notice of Sale to see whether each of the notice requirements were satisfied.

In relevant part, UCC § 9-613 (emphasis added) provides as follows:

> § 9-613. Contents and Form of Notification Before Disposition of Collateral: General.
> Except in a consumer-goods transaction, the following rules apply:
>
> (1) The contents of a notification of disposition are sufficient if the notification:
> (A) describes the debtor and the secured party;
> (B) describes the collateral that is the subject of the intended disposition;
> (C) states the method of intended disposition;
> **(D) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and**
> (E) states the time and place of a public disposition or the time after which any other disposition is to be made.
>
> (2) Whether the contents of a notification that lacks any of the information specified in paragraph (1) are nevertheless sufficient is a question of fact.
>
> (3) The contents of a notification providing substantially the information specified in paragraph (1) are sufficient, even if the notification includes:
> (A) information not specified by that paragraph; or
> (B) minor errors that are not seriously misleading.
>
> (4) A particular phrasing of the notification is not required.

Section 9-613 [5] goes on to state that "the form appearing in Section 9-614 [3], when completed . . .provides sufficient information..." to the defaulting party. The form recommends a statement in the following form: "You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell [or lease or license, as applicable] [for a charge of $]. You may request an accounting by calling us at [telephone number]." "An accounting," as used in this provision is, by definition, "a record: (A) authenticated by a secured party; (B) indicating the aggregate unpaid secured obligations as of a date not more than 35 days earlier or 35 days later than the date of the record; (C)

identifying the components of the obligations in reasonable detail" (UCC 9-102).

It is unrefuted that the Notice of Sale lacks this language, either specifically or in sum and substance. Chase Home, however, contends that the sale was otherwise conducted in a commercially reasonable manner and, therefore the sale must be upheld.

"Commercially reasonableness" refers to more than just the price at which the collateral was sold for. "Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." (Revised UCC § 9-610[b]; Coxall v. Clover Commercial Corp., 4 Misc.3d 654 [N.Y.City Civ.Ct.,2004]). Furthermore, whether a sale was commercially reasonable under the UCC presents a triable issue of fact (see, Coxall v. Clover Commercial Corp., supra). Thus, where as here, the Notice of Sale did not provide all the information that the secured was required to provide under the UCC (i.e that plaintiff was entitled to an accounting of unpaid indebtedness or stated the charge, if any, for an accounting), the reasonableness of the sale presents a factual dispute for the trier of fact to decide.

Arguments by Chase Home, that the right of redemption expires once a secured party has disposed of the collateral or entered into a contract under UCC 9-610, are a legal leapfrog over the requirements of commercial reasonableness.

The argument advanced by Plotch and Solomon, that plaintiff could have asked for an accounting if wanted one impermissibly seeks to shift the burden of UCC compliance from Chase Home, the secured creditor, to plaintiff, the debtor. The obligation is not upon the debtor to "ask" for an accounting, but upon the creditor to "notify" the debtor of its rights.

Although Chase Home, Plotch and Solomon argue that the requirements of CPLR

2221 have not been met, and they urge the court to adhere to its original decision because, based upon the totality of the circumstances, the sale was commercially reasonable, this argument more strongly weights in favor of plaintiff. Even where the requirements for reargument/ renewal are not met, such relief may still be properly granted so as not to "defeat substantive fairness" (Metcalfe v City of New York, 223 AD2d 410, 411 [1st Dept. 1996]). The claims made by plaintiff in this motion are more sophisticated, succinct, complete and persuasive than those made by plaintiff's prior counsel. Though some of the arguments plaintiff presents are the same, they are more succinctly presented and not merely restated. Importantly, the defect in the Notice of Sale and issues about whether it was improperly served, greatly impact on whether, as plaintiff claims, he was deprived of the meaningful opportunity to try to save the collateral from being sold.

For all of the foregoing reasons, the court, in its discretion and in the interest of justice, grants plaintiff's motion to reargue/renew. Upon such reargument/renewal, the court modifies its prior order granting Chase Home's cross motion for summary judgment. Since there are triable issues of fact, Chase Home has not proved its entitlement to summary judgment. The court also reinstates the complaint against the other named defendants as they are necessary parties. To the extent the court previously denied plaintiff's motion for summary judgment, that decision is modified only to the extent that the reason plaintiff is not entitled to summary judgment is because, as set forth in this decision, there are triable issues of fact.

This case is scheduled for a preliminary conference on December 1, 2011 at 9:30 a.m. in Part 10, 60 Centre Street.

Conclusion

In accordance wherewith, it is hereby:

ORDERED that plaintiff's motion for reargument/renewal is granted and that upon such reargument/renewal, the court modifies its prior order of February 24, 2010 to deny Chase Home's cross motion for summary judgment as there are triable issues of fact; and it is further

ORDERED that the complaint against defendants Century Operating Corporation, Armory Owner Corp., Adam Plotch and Linda Solomon is reinstated, and it is further

ORDERED that to the extent the court previously denied plaintiff's motion for summary judgment, that decision is modified only to the extent that the reason plaintiff is not entitled to summary judgment is because, as set forth in this decision, there are triable issues of fact; and it is further

ORDERED that **this case is scheduled for a preliminary conference on December 1, 2011 at 9:30 a.m. in Part 10, 60 Centre Street**; and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
October 3, 2011

So Ordered:

Hon. Judith J. Gische, JSC