

Minin v 2494 Amsterdam Ave. LLC

2011 NY Slip Op 32879(U)

October 27, 2011

Supreme Court, New York County

Docket Number: 111122/10

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Omri Minin and Emil Mizarachi

INDEX NO. 111122/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

2494 Amsterdam Ave, et al

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by defendants
Boris and Aaron Ustayev is denied to
the extent that it seeks the dismissal
of the claims against them but is
granted to the extent that it seeks
have to file an Amended Answer.

FILED

OCT 31 2011

NEW YORK
COUNTY CLERK'S OFFICE

OCT 27 2011

Dated: October 27, 2011

Alice Schlesinger
ALICE SCHLESINGER 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 COUNTY OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 16

-----X
OMRI MININ and EMIL MIZARACHI,

Plaintiffs,

-against-

2494 AMSTERDAM AVENUE LLC, ISAAC LEVY,
KEREN BINYAMINOV, SULEYMAN ARONOV, BORIS
USTAYEV, AARON USTAYEV, and "John Doe 1-10",
such names being fictitious and unknown to plaintiff,

Defendants.
-----X

SCHLESINGER, J.

Index No. 111122/10
Motion Seq. No. 001

FILED

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This foreclosure proceeding involves two commercial mortgages relating to the premises located at 2494 Amsterdam Avenue in Manhattan. Defendants Boris Ustayev and Aaron Ustayev (the Ustayevs), having recently obtained new counsel, have moved for leave to serve an Amended Answer with additional affirmative defenses and cross-claims. Plaintiffs have opposed the motion, but the co-defendants did not submit any papers or appear at oral argument, although noticed.

Background Facts

This case involves two separate loans. The first loan, made on March 20, 2008, was for \$3,600,000.00 loaned by Carnegie Capital Corp. to defendant 2494 Amsterdam Avenue, LLC (Amsterdam). The Mortgage and the Note were signed by defendants Isaac Levy and Keren Binyaminov as members of Amsterdam. The debt was secured by the property at 2494 Amsterdam Avenue owned by Amsterdam. Carnegie purportedly assigned the Mortgage to Webster Business Credit Corporation on May 21, 2008, Webster assigned it back to Carnegie on March 24, 2010, and then Carnegie assigned it to the plaintiffs Omri Minin and Emil Mizarachi on March 25, 2010. (See Exh B to Aff in Opp).¹

¹ Although the last assignment refers to the assignments involving Webster, plaintiff has not provided copies of those assignments so as to establish the chain of title.

The second loan at issue, an interest reserve loan note also made on March 20, 2008, was for \$400,000.00 loaned by Carnegie Capital to Amsterdam. The Note and the Mortgage were again signed by defendants Isaac Levy and Keren Binyaminov as members of Amsterdam. As with the first loan, Carnegie purportedly assigned the Mortgage to Webster Business Credit Corporation on May 21, 2008, Webster assigned it back to Carnegie on March 24, 2010, and then Carnegie assigned it to the plaintiffs Omri Minin and Emil Mizarachi on March 25, 2010. (See Exh C to Aff in Opp). Neither this assignment, nor the assignment relating to the earlier Mortgage, specifically refers to the Note.

Simultaneous with the making of the loans on March 20, 2008, Carnegie Capital prepared a Guaranty of Payment for each of the loans in which each Guarantor "unconditionally, absolutely and irrevocably guarantees to Lender the punctual, prompt and complete payment" of the loans. The five Guarantors who executed each Guaranty individually were the five individual defendants named in this action; that is, Isaac Levy, Keren Binyaminov, Suleyman Aronov, and the two movants herein Boris Ustayev and Aaron Ustayev. (See Exh D to Aff in Opp).

Amsterdam purportedly defaulted in making payments due on the loans on or about April 15, 2010, and this action was commenced thereafter. The first cause of action in the complaint relates to the first loan, the second cause of action relates to the second loan, and the third cause of action relates to the Guarantees. In the *ad damnum* clause, the plaintiffs seek a judgment of foreclosure and sale and further demand that "the obligors on said notes may be adjudged to pay any deficiency remaining after the application of the moneys as aforesaid." (Exh A to Motion).

In their Verified Answer dated November 12, 2010, the moving defendants the Ustayevs asserted four affirmative defenses: failure to serve the notices of default required

for foreclosure; unclean hands; lack of standing to collect on the guaranty until a deficiency judgment has been obtained following foreclosure; and failure to properly credit the loan proceeds. (Exh 2 to Motion).

A Substitution of Counsel was executed on March 1, 2011 on behalf of the Ustayevs. Shortly thereafter, new counsel made this motion to amend the Answer and to dismiss the third cause of action. The proposed Amended Answer, attached as Exhibit 4 to the moving papers, contains an "Introduction to the Affirmative Defenses" which essentially states (at ¶36) that defendants do not necessarily bear the burden of proof on the affirmative defenses. The next section, entitled "Affirmative Defenses," consists of a list of single sentences denominated as paragraphs 37 through 68; it appears that each paragraph is intended to state a separate affirmative defense, with four of the defenses being the same as those originally asserted and the remaining 27 being additional. As particularly relevant here, paragraph 38 states that "Plaintiffs may not maintain the action against the guarantors, as it has instead elected to foreclose on the subject property."

The proposed Amended Answer also contains three cross-claims against the co-defendants 2494 Amsterdam Avenue, Inc., Isaac Levy, and Keren Binyaminov; no reference is made to the last co-defendant Suleyman Aronov. The first cross-claim is for common law indemnification, the second is for common law contribution, and the third is for indemnification pursuant to Article 14 of the CPLR.

In this motion seeking leave to amend, counsel offers no discussion on the merits of the various proposed affirmative defenses or cross-claims. Instead, he cites CPLR §3025(b) and various cases for the proposition that leave to amend is freely granted, absent prejudice. As no discovery has been completed, counsel urges that the parties will not be prejudiced by the amendment as they will have ample opportunity to investigate the claims.

Counsel then turns in his motion (albeit equally briefly) to his request for dismissal of the third affirmative defense against the Ustayevs based on the Guaranty. He argues that, pursuant to RPAPL §1301(3), a lender cannot simultaneously maintain a foreclosure action and an action to recover on the mortgage debt without leave of court. As the plaintiffs here are seeking a judgment of foreclosure pursuant to the first two causes of action, the third cause of action to collect on the debt pursuant to the Guaranty is barred, the Ustayevs argue.

Plaintiffs oppose both aspects of the motion. Regarding leave to amend, they claim that the proposed Amended Answer is nothing but “a terse summary of every available defenses known to practitioners — most all of which are unsupported and unexplained — and therefore are arguably meritless” and intended primarily to cause delay. Regarding the request for dismissal, plaintiffs argue that while the cited section of the RPAPL bars two separate actions, it does not bar a single action with separate causes of action relating separately to foreclosure and to the Guaranty.

At oral argument, the discussion turned to RPAPL §1371, which governs deficiency judgments recoverable in connection with foreclosures. As neither party had briefed the issue, the Court directed additional papers. In those papers, plaintiffs argue that RPAPL §1371 in fact requires them to include in the foreclosure action a demand for a deficiency judgment and a claim against the Guarantors if plaintiffs intend to hold the Guarantors liable for any deficiency judgment. The Ustayevs maintain their position that the claims against them must be dismissed, arguing that the plaintiffs must first obtain a deficiency judgment before commencing any action against the Guarantors.

Discussion

The analysis of the issues necessarily begins with a review of the statutory language

and the cases interpreting it. CPLR §1301, entitled "Separate action for mortgage debt," states in relevant part that:

1. Where final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff ... and has been returned wholly or partly unsatisfied. ...

3. While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.

More simply stated, whether the party has elected to commence an action to collect on the debt (subd.1) or an action seeking foreclosure related to the subject real property (subd. 3), that party plaintiff must pursue that elected remedy to its end before commencing a second action to pursue the alternative remedy. If electing to sue on the debt, the plaintiff cannot commence a foreclosure action unless execution on the money judgment does not yield the entire sum due. If electing to sue in foreclosure, the plaintiff cannot commence an action to recover any part of the mortgage debt without leave of the court where the foreclosure is pending. "The purpose of these provisions was to curb perceived abuses with respect to double litigation on the note or bond and on the mortgage, except following stated conditions." McKinney's Practice Commentaries RPAPL §1301, de Winter, Rudolph and Loeb, Larry M. (West Pub. 2009).

RPAPL §1301 must be read in conjunction with RPAPL §1371(1) which, as relevant here, indicates that an individual must be named as a defendant in the foreclosure action if the plaintiff intends to hold that individual liable for any deficiency judgment obtained after the foreclosure judgment and sale. That section, entitled "Deficiency judgment," states:

If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained in such judgment, the amount thereof to be determined by the court as herein provided.

The significance of RPAPL §1371(1) and its history were explained in detail by the Court of Appeals in *Sanders v Palmer*, 68 NY2d 180, 183 (1986). Noting that RPAPL §1371(1) was enacted in 1829 with the specific purpose of changing the existing practice and procedures governing foreclosure so as to avoid multiple suits and insure the accurate calculation of any deficiency judgment, the court explained as follows:

The 1829 enactment [of RPAPL §1371] changed the prior common-law rule, an exception to the general rule that equity does justice completely and not by halves, that a deficiency judgment could not be obtained in a foreclosure action and had to be obtained in a separate action at law ... Its purpose "was to relieve parties from the expense and vexation of two suits, one equitable and the other legal, where the whole controversy could be adjusted in the one suit" ... Under its provisions "[t]he deficiency was to be ascertained by a sale of the mortgaged premises, and not by the estimates of witnesses or other less satisfactory evidence" ... (citations omitted).

Subsequent amendments in 1938 further insured a fair calculation of any deficiency judgment by mandating that, as to a mortgagee who fails to move for a deficiency judgment in a foreclosure action following the sale, "the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist." *Sanders*, 68 NY2d at 185, citing RPAPL §1371(3). The Court of Appeals firmly enforced the rule, declaring that leave to bring a separate action would not be granted as to "a party who could have been made a defendant

in the foreclosure action unless special circumstances were shown which manifestly required that course." *Id.*, quoting *National City Bank v Gelfert*, 284 NY 13, 22, *rev'd on other grounds* 313 US 221.

Thus, the rule is effectively the opposite of that claimed by the moving defendants here. While RPAPL §1301 bars two separate actions (one in equity seeking foreclosure and one at law seeking a money judgment on the debt), it does not bar the inclusion in one action of a cause of action for foreclosure and a cause of action for a deficiency judgment following the sale. On the contrary, the request for a deficiency judgment is an "incidental remedy" that should be included in the foreclosure action. *Jamaica Sav. Bank v M.S. Inv. Co.*, 274 NY 215, 219 (1937). Similarly, a guaranty is not distinct from the mortgage debt and is appropriately enforced in the foreclosure action when the deficiency judgment is sought following the sale. *Federal Home Loan Mtge. Corp v Sierra*, 226 AD2d 283 (1st Dep't 1996)(plaintiff barred from enforcing guarantees because it neither sought leave pursuant to RPAPL §1301(3) to commence a separate action, nor moved for a deficiency judgment following the foreclosure sale pursuant to RPAPL §1371(3).) To the extent the plaintiff wishes to preserve its right to enter a deficiency judgment against the guarantor, the guarantor is not only a proper party to the foreclosure action, but he is entitled to notice of the foreclosure sale so he can attend and protect his interests. *Federal Deposit Insurance Corporation v Robin Construction Corp.*, 2 AD3d 395 (2nd Dept' 2003); *see also. Morrison v Slater*, 128 AD 467 (1st Dep't 1908); *Robert v Kidansky*, 111 AD 475 (1st Dep't 1906).

When examined carefully, the cases cited by the moving defendants here do not provide otherwise and in fact support the plaintiff's position. For example, in *TBS Enters. v Grobe*, 114 AD2d 445 (2nd Dep't 1985), *app denied* 67 NY2d 607 (1986), the plaintiff pursued

his remedies in a foreclosure action through the sale without having included a request for a deficiency judgment. Thereafter, plaintiff commenced a separate action to recover on the defendant's signed personal guaranty, to the extent of the deficiency. The trial court dismissed the separate action and the Appellate Division affirmed, finding that the personal guaranty "represented part of a debt secured by the mortgage which was the subject of the foreclosure action, and that [the separate] action was barred by operation of RPAPL 1301, 1371." 114 AD2d at 445-46. The stated rationale was to insure the proper calculation of the amount due and owing on the note and guaranty, which amount is "subject to reduction by an amount representing the fair market value of the mortgaged premises" as established by the sale. *Id.* at 448.

Defendants' reliance on cases such as *Bank Leumi Trust Co. of New York v Sibthorp*, 135 AD2d 476 (1st Dep't 1987) and *P.T. Bank Central Asia v Wide Motion Corp*, 233 AD2d 151 (1st Dep't 1996) is wholly misplaced. Those cases allowed a separate action to enforce the guaranty because the guaranty represented a debt separate and apart from that secured by the mortgage. Here, the Guaranty clearly relates to the mortgage at issue. Thus, as defendants have failed to establish a basis for dismissing this action against them, that request for relief must be denied.

Such is not the case, however, with respect to defendants's request for leave to amend their answer. Although the various defenses have not been explained in any detail, defendants correctly note that leave to amend is freely granted pursuant to CPLR §3025, particularly where, as here, the action was fairly recently commenced and plaintiff cannot establish prejudice. Nevertheless, defendants may not include in their Amended Answer any of the defenses barred by this decision. In addition, in their papers they agree to withdraw the

defenses asserted in paragraphs 42, 50, 56 and 64. Therefore, the Amended Answer to be served and filed must conform to these limitations.

Accordingly, it is hereby

ORDERED that the motion by defendants Boris Ustayev and Aaron Ustayev to dismiss all claims against them in this action is denied and plaintiff may proceed to enforce the Guaranty to the extent of any deficiency judgment following the foreclosure sale; and it is further

ORDERED that the motion by defendants Boris Ustayev and Aaron Ustayev for leave to serve and file an Amended Answer with affirmative defenses and cross-claims is granted to the extent provided herein.

This constitutes the decision and order of this Court.

Dated: October 27, 2011

OCT 27 2011


J.S.C.
ALICE SCHLESINGER

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