

Bank of New York Mellon v 839 Prospect Ave., LLC
2011 NY Slip Op 33129(U)
November 28, 2011
Supreme Court, Nassau County
Docket Number: 17780/08
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

THE BANK OF NEW YORK MELLON,
F/K/A THE BANK OF NEW YORK,

Mortgagee-Plaintiff,

- against -

839 PROSPECT AVENUE, LLC, RANJAN BATHEJA,
NASSAU COUNTY INDUSTRIAL DEVELOPMENT
AGENCY, EAST PORT EXCAVATION & UTILITIES
CONTRACTORS, INC., NEW YORK CONTRACTING
AND CONSTRUCTION MANAGEMENT CORP.,
AFA PROTECTIVE SYSTEMS, INC., JERRY CARDULLO
IRON WORKS, INC., SAMUEL FELDMAN LUMBER CO.,
INC., D/B/A FELDMAN LUMBER,
BUTT OTRUBA-O'CONNOR, ARCHITECTS,
GALLI ENGINEERING, P.C., and "JOHN DOE #1" through
"JOHN DOE # 12," the Last Twelve Names Being Fictitious
and Unknown 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.

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NASSAU COUNTY

Index No.: 17780/08
Motion Seq. No.: 01
Motion Date: 09/07/11

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The following papers have been read on this motion:

	Papers Numbered
Order to Show Cause, Affidavit and Exhibits and Memorandum of Law	1
Affirmation in Opposition and Exhibit	2
Affirmation in Opposition and Exhibit	3
Affidavit in Further Support of Order to Show Cause and Exhibits	4
Reply Memorandum of Law in Further Support of Order to Show Cause	5
Sur-Reply in Opposition to Order to Show Cause	6

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to Real Property Actions and Proceedings Law ("RPAPL") § 1403(3), for an order extending the duration of the Amended Notice of Pendency for three years from October 1, 2011 to October 1, 2014. Defendants New York Contracting and Construction Management Corp. ("NY Contracting") and East Port Excavation & Utilities Contractors, Inc. ("East Port") oppose the motion.

In this non-judicial proceeding, plaintiff, the mortgagee, seeks to foreclose a mortgage on real property located at 839 Prospect Avenue, New Cassel, New York. The mortgage was given by defendant 839 Prospect Avenue, LLC on February 6, 2006, to secure its payment to plaintiff of a Note in the amount of \$3,000,000.00 (three million dollars). Plaintiff instituted this proceeding pursuant to Article 14 of the RPAPL via the filing of a Notice of Pendency of Non-Judicial Proceeding for Foreclosure by Power of Sale in the Nassau County Clerk's Office on September 25, 2008. An Amended Notice of Pendency was filed on October 1, 2008, on which date plaintiff served a Notice of Intention to Foreclose by Power of Sale, along with the Amended Notice of Pendency, by first class mail and certified mail, return receipt requested, pursuant to RPAPL § 1402(1). Only two defendants have appeared thus far, Jerry Cardullo Iron Works, Inc. and Samuel Feldman Lumber Co.

In support of plaintiff's application to extend the Amended Notice of Pendency of Non-Judicial Proceeding for Foreclosure by Power of Sale, Eric M. Reuben, a partner in the law firm which represents plaintiff, attests that plaintiff has not only engaged in extensive settlement negotiations with the borrower, but has taken measures to preserve the mortgaged property. More specifically, plaintiff negotiated with defendant Nassau County Industrial Development Agency ("IDA") which had entered into a lease agreement and sub-lease agreement with the borrower and obtained a waiver and release by defendant IDA of its claims to recapture tax

benefits and to file liens against the mortgaged premises. In addition, Mr. Reuben represents that he has negotiated and continues to negotiate with the Town of North Hempstead and its Community Development Agency ("CDA") to obtain relief from restrictive covenants, including owner occupancy requirements on the buildings which negatively affect the property's value and marketability. Mr. Reuben further represents that the borrower has agreed not to oppose the ultimate relief it seeks.

Defendant NY Contracting opposes plaintiff's application on several grounds: (1) because it was not served with a Summons and/or Complaint; (2) because Article 14 of the RPAPL was repealed; and (3) because plaintiff has not demonstrated good cause for an extension. In the alternative, it requests without moving (*see* CPLR § 2214) that this action be consolidated with the Nassau County Supreme Court action entitled *East Port Excavation & Utilities Contractors, Inc. v. Stoneridge Homes, Inc., et al.*, Index No. 182/08, in which it has allegedly already procured a Judgment of Foreclosure with Mechanics Lien and an order directing a sale. Defendant East Port opposes plaintiff's application on the ground that plaintiff has not accurately and completely identified the property in its Notice of Pendency or its Amended Notice of Pendency, specifically that it listed only one (lot 45) of the three lots (45, 46, 47) which comprise the property in question. Defendant East Port also maintains that the Notice of Pendency could not be amended as of right as was done here; it faults plaintiff for amending the Notice of Pendency without leave of Court.

Only defendant NY Contracting's attorney, who lacks personal knowledge, avers a lack of service. Therefore, defendant NY Contracting has not established the existence of an issue of fact regarding service. Furthermore, via a return receipt, plaintiff has conclusively established that defendant NY Contracting was served on October 6, 2008 with the Amended Notice of Pendency and the Notice of Intention to Foreclose by Power of Sale. *See Simonds v. Grobman*,

277 A.D.2d 369, 716 N.Y.S.2d 692 (2d Dept. 2000).

Plaintiff's failure to file a Summons and Complaint is of no consequence. *See* RPAPL § 1403(1). And, per the accompanying Legislative Note, the repeal of Article 14 of the RPAPL, effective July 1, 2009, does not affect cases like this one in which a Notice of Pendency had already been filed. *See also* General Construction Law §§ 93, 94.

While defendant East Port seeks vacatur of the Amended Notice of Pendency based on plaintiff's failure to fully identify the lots consisting of the property involved in its Notice of Pendency and Amended Notice of Pendency, that relief has not been approximately sought and is denied. *See* CPLR § 2214. In any event, plaintiff points out that the metes and bounds description, which is not challenged, was accurately set forth in the Amended Notice of Pendency, as was the address. Plaintiff's counsel attributes its error to the County Assessor's website because it only listed lot 45 when the property's address was searched there and counsel was unable to correlate lots 46 and 47 with the property except on the "View Area Maps" and "View Tax Maps" screens. In fact, when counsel searched for lots 46 and 47, "No Section, Block and Lot Found Matching Your Criteria" was the result. Thus, only lot 45 yields results on the Nassau County Assessor's website whereby lots 46 and 47 are discovered. Plaintiff accordingly seeks to amend its Amended Notice of Pendency *nunc pro tunc*. However, once again, that relief has not been appropriately sought and is therefore denied. *See* CPLR § 2214. In any event, the Court notes that, while a Notice of Pendency may be amended *nunc pro tunc*, it may not operate as constructive notice to parties whose rights have accrued since it was originally filed. *See* 75A NY Jur.2d §41; Carmody Wait 2d New York Practice Ch 87.

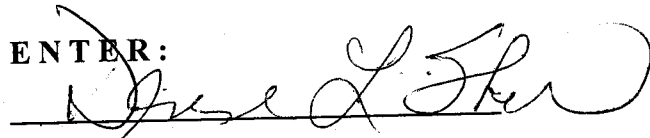
While it appears that the original Notice of Pendency was not served, the Amended Notice of Pendency was, which this Court finds to be sufficient. *See Bedford Props. v. Rhoades*, 161 A.D.2d 680, 555 N.Y.S.2d 818 (2d Dept. 1990), *app. disp.*, 76 N.Y.2d 935, 563 N.Y.S.2d 63 (1990) (amendment of complaint and notice of pendency without leave of court three days after originals filed permitted). *See also* CPLR § 3025(a).

A Notice of Pendency is valid for three years from the date of filing. *See* CPLR § 6513. However, it may be extended “for good cause shown.” *See* CPLR § 6515. Accordingly, “a party seeking to extend a notice of pendency must first make a showing of good cause.” *RKO Props., Ltd., v. Boymelgreen*, 31 A.D.3d 625, 818 N.Y.S.2d 918 (2d Dept. 2006), *citing* CPLR § 6513; *EMC Mtge. Corp. v. Stewart*, 2 A.D.3d 772, 769 N.Y.S.2d 408 (2d Dept. 2003); *Horowitz v. Griggs*, 2 A.D.3d 404, 767 N.Y.S.2d 860 (2d Dept. 2003).

Given the complexity involved here and its fervent ongoing efforts to bring this matter to a successful close, plaintiff’s motion, pursuant to RPAPL § 1403(3), for an order extending the duration of the Amended Notice of Pendency for three years from October 1, 2011 to October 1, 2014 is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
November 28, 2011

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE