

General Elec. Capital Corp. v Ocean Mar. Inc.

2011 NY Slip Op 33154(U)

November 28, 2011

Supreme Court, Nassau County

Docket Number: 002278-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
GENERAL ELECTRIC CAPITAL CORPORATION,

Plaintiff,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

-against-

**Index No: 002278-11
Motion Seq. No: 1
Submission Date: 10/4/11**

**OCEAN MARINE INC., OCEAN OUTBOARD INC.,
ANTHONY J. CALIGURE, NYS CORPORATION
TAX PROCESSING UNIT and JOHN DOE
DEFENDANT NOS. 1-25, the Names of "John Doe"
Defendants Being Fictitious and Unknown to Plaintiff,
the Persons and Entities Intended Being Those Who May
be in Possession of, or May Have Possessory Liens or
Other Interests in the Premises Herein Described,**

Defendants.

-----X

Papers Read on this Motion:

- Notice of Motion, Affirmation in Further Support,**
- Affidavit in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affidavit in Opposition and Exhibit.....X**
- Affirmation in Opposition and Exhibits.....X**
- Plaintiff's Reply Memorandum of Law.....X**
- Affirmation in Further Support.....X**

This matter is before the court on the motion by Plaintiff General Electric Capital Corporation ("Plaintiff"), filed on July 7, 2011 and submitted on October 4, 2011, following oral argument before the Court. For the reasons set forth below, the Court grants Plaintiff's motion for a judgment of foreclosure and sale, the amendment of the caption and an order of reference.

In addition, the Court directs the Nassau County Clerk, immediately upon receipt of a

copy of this Order, to amend its records to re-index the mortgage described herein so as to cover the three lots (Section 62, Block 44, Lots 388, 387 and 389) that were intended to be covered by the mortgage, and not only the one lot (Lot 388) that was indexed against the property described herein, *nunc pro tunc* to December 9, 2005.

BACKGROUND

A. Relief Sought

Plaintiff Capital moves for an Order 1) pursuant to CPLR § 3212, granting summary judgment in favor of Plaintiff and against Defendants Ocean Marine Inc., Ocean Outboard Inc., Anthony J. Caligure, and NYS Corporation Tax Processing Unit and striking the affirmative defenses asserted by the Defendants Ocean Marine Inc., Ocean Outboard Inc., Anthony J. Caligure in their Answer, and granting Plaintiff the relief requested in the Complaint, including a judgment of foreclosure and sale; 2) pursuant to New York Real Property Actions and Proceedings Law (“RPAPL”) § 1321, granting Plaintiff judgment against Defendant NYS Corporation Tax Processing Unit (“NYS”) for the relief requested in the Complaint, including a judgment of foreclosure and sale, in light of NYS’ failure to answer the Complaint in a timely manner; 3) referring this action to a referee to a) ascertain and compute the amount due to Plaintiff for principal, interest, advances to protect the lien of the subject mortgage and other costs, fees and expenses, including attorney’s fees, and any other charges due on or secured by the mortgages mentioned in the Complaint and the amount due to such of the Defendants as are prior encumbrances of the mortgaged premises; and b) examine and report as to whether the mortgaged premises can be sold in parcels and, if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due, and directing that upon presentation and coming in of the Referee’s Report, the Plaintiff have the usual judgment of foreclosure and sale; and 4) amending the caption of this proceeding by directing that the names of the “John Doe” defendants be deleted from the caption.

Defendants do not contest that 1) they signed the promissory note and mortgage to which Plaintiff’s motion makes reference; 2) the mortgage was intended to attach to Section 62, Block 44, lots 388, 387 and 389; and 3) it was their intention to mortgage those three (3) lots. Defendants do assert an affirmative defense that the mortgage, as recorded, was defective because, as a result of its improper indexing in the Office of the Nassau County Clerk (“County

Clerk”), it attaches only to lot 388. As discussed, *infra*, Plaintiff has demonstrated its right to the requested relief, and the Court’s Order includes a direction to the Clerk to amend its records to reflect that the mortgage is indexed against the three lots at issue.

B. The Parties’ History

The Verified Complaint for Foreclosure of Mortgage (“Complaint”) (Ex. 1 to Allen Aff. in Supp.) alleges as follows:

This is an action for foreclosure of a mortgage held by Plaintiff as security for a loan (“Loan”) made to Defendant Ocean Marine Inc. (“Borrower”) in the principal amount of \$1,000,000.00. Plaintiff advanced \$1,000,000.00, the entire Loan amount, to Borrower on or about November 14, 2005. The purpose of the loan was to fund Borrower’s refinancing of an existing debt on property located at 351 South Main Street, Freeport, New York (“Property”). The Property, located in the marina district of Freeport, has consisted of a building containing a showroom for the sale of powerboats, a parking lot and a marina.

On or about November 14, 2005, Borrower executed a promissory note (“Note”) in the amount of \$1,000,000.00 payable to the order of Plaintiff, as evidence of the Loan. The Note was amended pursuant to a First Amendment to Note dated as of November 14, 2005 (“Note Amendment”). The Note is secured by a mortgage (“Mortgage”) dated November 14, 2005, granted by Borrower to Plaintiff, in the amount of \$1,000,000.00. On or about December 9, 2005, Plaintiff recorded the Mortgage in the Clerk’s Office at Liber 29811, Page 951. All applicable taxes were paid at the time the Mortgage was recorded.

Pursuant to the Note, amendments thereto and other relevant documents and instruments (collectively “Loan Documents”), Borrower was required to pay taxes associated with the Property, including town and village real estate and school taxes. Borrower failed to pay town real estate taxes, village real estate taxes and school taxes in 2009 and 2010. By letter dated September 8, 2010, Plaintiff provided Borrower with written notice of its failure to pay the required taxes and demanded evidence of Borrower’s payment of those obligations within fifteen (15) days, pursuant to the terms of the Loan Documents. Borrower failed to pay the outstanding tax obligations within the required time frame, which constituted an Event of Default under the Loan Documents and entitled Plaintiff to accelerate all amounts due under the Loan and demand that all obligations due under the Loan Documents be paid immediately to Plaintiff.

By letter dated October 25, 2010, Plaintiff notified Borrower of the acceleration under the Loan Documents and demanded immediate payment in full of all obligations due pursuant to the Loan Documents ("Demand for Payment"). As of the date of the Demand for Payment, Borrower was required to pay Plaintiff the amount of \$988,736.02, which included outstanding principal, accrued interest and other required fees and costs. Borrower has not repaid its obligation and the Loan remains in default.

The Note also provides that if a payment is more than 10 days late, Borrower will be charged 5.000% of the unpaid portion of the regularly scheduled payment ("Late Charges"). In addition, pursuant to the Note and in light of Borrower's default, Plaintiff may increase the variable interest rate by 4.000 percentage points ("Default Interest Rate"). Thus, in light of Borrower's failure to make the required tax payments since January 1, 2009, additional interest at the Default Interest Rate and Late Charges have accrued and will continue to accrue until full payment is made under the Note.

In addition, on or about November 14, 2005, in connection with the Loan, Defendants Ocean Outboard Inc. ("Outboard") and Anthony J. Caligure ("Caligure") (collectively "Guarantors") executed and delivered to Plaintiff a Commercial Guaranty ("Guaranties"). Pursuant to the Guaranties, the Guarantors guaranteed Borrower's payment of the Loan and Borrower's performance under the Loan Documents. By letters dated January 2, 2011, sent to each of the Guarantors, Plaintiff informed the Guarantors of Borrower's default and demanded payment of all obligations owed by Borrower under the Loan Documents ("Guarantor Demands"). Guarantors have failed to pay the amounts due under the Guaranties.

Plaintiff seeks to foreclose the mortgage ("Mortgage") securing the Loan and obtain the appointment of a receiver ("Receiver") for the Property, pursuant to the terms of the Loan Documents and the RPAPL. These proceedings are not subject to the provisions of the Foreclosure Prevention and Responsible Lending Act of 2008 as the Loan is neither a subprime home loan nor high-cost home loan as those terms are defined in the RPAPL and Banking Law.

The Complaint contains three (3) causes of action. In the first, asserted against all Defendants, Plaintiff seeks foreclosure of the Mortgage. In the second, asserted against the Borrower, Plaintiff seeks a deficiency judgment under the loan documents. And in the third, asserted against the Guarantors, Plaintiff seeks a deficiency judgment. The Complaint requests

the following relief: 1) a judgment of foreclosure, 2) an Order that the Property be sold in one or more parcels according to law, in "as is" condition, along with the fixtures and articles of personalty, and that the monies arising from such sale be brought into Court, 3) an Order that Plaintiff be paid the amounts due on the Note and Mortgage, with interest at the Default Rate and Late Charges, together with the expenses of the sale, the costs, allowances and disbursements of this action, attorney's fees and other designated charges, 4) the appointment of a Receiver for the Property, 5) a direction that the Referee making the sale be directed to pay from the proceeds thereof all taxes, assessments and water and sewer charges that are liens on the Property sold, 6) a deficiency judgment against Borrower of the debt remaining unsatisfied after a sale of the Property, and 7) a deficiency judgment against Guarantors. The Complaint also includes copies of the Loan Documents and other documentation to which it refers.

In his Affidavit in Support dated July 1, 2011, Jerry Allen ("Allen"), a Senior Portfolio Analyst of Plaintiff, affirms that he has personal knowledge of the matters asserted in his affidavit, and that his affidavit is also based on Plaintiff's books and records kept in the ordinary course of business. Allen affirms the truth of the allegations in the Complaint regarding the 1) Loan, Note, Mortgage and other Loan Documents, 2) Borrower's default under the Note, 3) the Guaranties, and 4) Guarantors' default under the Guaranties. Allen affirms that, to date, neither the Borrower nor the Guarantors have paid Plaintiff the sum of \$976,311.00 that was due on acceleration of the Loan, and have not fully paid the interest, fees, charges or costs that have accrued since then and which continue to accrue. Allen affirms that \$843,430.35 in outstanding principal alone remains unpaid.

Counsel for Plaintiff affirms that Plaintiff filed the Complaint, and Notice of Pendency which contains relevant information regarding the Mortgage and Property, on or about February 15, 2011. He avers that the Defendants captioned as "John Doe Defendant Nos. 1-25" are not necessary party defendants, and Plaintiff requests that they be excised from the caption of the action.

Plaintiff's counsel affirms further that Plaintiff served Borrower, Guarantors and NYS with the Complaint and Notice of Pendency, as reflected by the Affidavits of Service provided (Ex. 2 to Isser Aff. in Supp.). Defendant NYS served a Notice of Appearance dated March 3, 2011 but has not answered the Complaint. On or about March 9, 2011, the Borrower

and Guarantors served their Verified Answer (“Answer”) (*id.* at Ex. 3). In their Answer, Borrower and Guarantors deny many of the allegations in the Complaint and assert two (2) affirmative defenses. In the first affirmative defense, the Borrower and Guarantors assert that payments of the monthly mortgage were paid to the Plaintiff after the foreclosure action was instituted and accepted by the Plaintiff. In the second affirmative defense (“Second Affirmative Defense”), the Borrower and Guarantors affirm that: 1) the Mortgage was elected by Plaintiff to be recorded Sec. 0062; Block: 00004400, Lot: 00.388; 2) upon information and belief, the tax map designation is the official recording device in Nassau County and forms paid of the mortgage; 3) there are at least two (2) other lots that the instant mortgage does not cover by its terms as cited by the County Clerk; and 4) this proceeding is defective by its terms and should be dismissed because it does not describe the property subject to the mortgage in proper terms.

In his Affirmation in Opposition, counsel for the Borrower and Guarantors (“Answering Defendants”) affirms that the Answering Defendants do not contest that 1) they signed the Note and Mortgage; 2) the Mortgage was intended to attach to Section 62, Block 44, lots 388, 387 and 389; and 3) it was their intention to mortgage those three (3) lots. Counsel makes reference to the Second Affirmative Defense and the County Clerk Endorsement Cover Page (Ex. 3 to Allen Aff. in Supp.) which lists only one lot, specifically Lot 00388. Counsel affirms that, “[u]pon information and belief[,] the Nassau County Clerk’s office cannot change the recorded document to conform to plaintiff’s wishes” (Thorpe Aff. in Opp. at ¶ 5).

Counsel for the Answering Defendants also makes reference to a related action (“Related Action”) titled *General Electric Capital Corporation v. County Clerk of Nassau County, Maureen O’Connell, Ocean Marine Inc., NYS Corporation Tax Processing Unit, John Does 1-10*, Nassau County Index Number 8934-2011, which plaintiff filed on June 17, 2011. In the notice of pendency filed in the Related Action (Ex. A to Thorpe Aff. in Supp.), plaintiff asserts that the notice of pendency affects land having the following land and tax map designation: SECTION: 62, BLOCK: 44, LOTS: 388, 387, and 389. In the complaint in the Related Action (*id.*), plaintiff seeks an order from the Court directing the County Clerk to re-index the Mortgage so as to cover the three lots (Section 62, Block 44, Lots 388, 387 and 389) that were intended to be covered by the Mortgage, and not only the one lot (Lot 388) that was indexed against the Property. The complaint in the Related Action further alleges that 1) by mistake, the County

Clerk's handwritten notation on the left-hand side margin of the Mortgage, which notation the County Clerk uses to index mortgages against property, only lists Lot 388; and 2) as a result of this clerical error, the County Clerk incorrectly indexed the Mortgage to cover only Lot 388, not all three lots, as intended by the parties.

In his Reply, Plaintiff's counsel submits that the filing of the Related Action is irrelevant to the motion before the Court. Plaintiff argues that, in light of the concession of the Answering Defendants that Borrower intended to grant Plaintiff a Mortgage on all three lots as collateral, any indexing error by the County Clerk would not defeat Plaintiff's entitlement to summary judgment.

At oral argument before the Court regarding the instant motion on September 14, 2011, counsel for Answering Defendants reiterated his position that the Mortgage was recorded, but was indexed improperly. The Court provided counsel for Plaintiff and the Answering Defendant with the opportunity to provide the Court with additional submissions on this issue.

In his Affidavit in Opposition dated September 20, 2011, counsel for Answering Defendants affirms that it is the position of the County Clerk that, "[i]n order to foreclose all 3 lots...a new mortgage would have to be prepared and filed and a new 255 Affidavit would have to be prepared and filed concerning the payment of the mortgage recording tax" (Thorpe Aff. in Opp. at p. 2). Counsel for Answering Defendants affirms, further, that "[a]n alternative procedure suggested by the County Clerk's Office would involve a court order ordering the prior mortgage recording be amended to include all 3 lots" (*id.*), and suggests that the Court adopt this alternative procedure. In his Affirmation in Further Support, Plaintiff's counsel reaffirms his position that any indexing error by the County Clerk cannot defeat Plaintiff's entitlement to summary judgment, and concurs with counsel for Answering Defendants that the Court issue an Order directing the County Clerk to re-index the Mortgage against all three lots, *nunc pro tunc*.

C. The Parties' Positions

Plaintiff submits that it has established its right to the requested relief by 1) establishing the Loan, and providing copies of relevant documentation including the Note and Mortgage; and 2) conclusively demonstrating Borrower's default of its obligations to pay taxes associated with the Property, and Borrower's non-payment upon acceleration of the Loan.

Plaintiff also submits that the Answer fails to raise a triable issue of fact. Plaintiff notes, first, that Borrower does not deny the materials allegations in the Complaint. With respect to the first affirmative defense, Plaintiff submits that Defendants have failed to explain the relevance of this alleged defense, have not asserted that they made required payments, and cannot identify any provision in the Loan Documents that provides that Plaintiff's acceptance of a partial payment from Borrower results in a waiver of Plaintiff's rights or remedies. Moreover, the Loan Documents do not support this defense, as they expressly provide that payments made by the Borrower after an Event of Default, other than payment in full, does not constitute a waiver. As to the Second Affirmative Defense, Plaintiff submits that the County Clerk's erroneous indexing is irrelevant, given that the property described in the Mortgage is identical to the property for which foreclosure is sought.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Right to Foreclosure

A plaintiff in a mortgage foreclosure action establishes a *prima facie* case for summary judgment by submission of the mortgage, the mortgage note and evidence of default. *Countrywide Home Loans, Inc. v. Delphonse*, 64 A.D.3d 624 (2d Dept. 2009); *Washington Mut. Bank FA v. O'Connor*, 63 A.D.3d 832 (2d Dept. 2009); *Yildiz v. Vural Management Corp.*, 61

A.D.3d 970 (2d Dept. 2009); *Wells Fargo Bank Minnesota, Nat. Assn., v. Mastropaolo*, 42 A.D.3d 239 (2d Dept. 2007); *Daniel Perla Associates, LP v. 101 Kent Associates, Inc.*, 40 A.D.3d 677 (2d Dept. 2007).

The failure to record the mortgage does not make it void, although it would affect the priority of a subsequent mortgage or the obligation of a good faith purchaser without knowledge. *In re Borriello*, 329 B.R. 367, 380-381 (Bankr. E.D.N.Y. 2005), citing *Hopper v. Lockey*, 17 A.D.3d 912 (3d Dept. 2005).

C. Application of these Principles to the Instant Action

Plaintiff has established a *prima facie* case of its entitlement to a judgment of foreclosure and sale through the affidavit of Jerry Allen, the copies presented of the Note, Amended Note, Mortgage, other Loan Documents and Guaranties, and Allen's affirmations as to the default by the Borrower and Guarantors.

The Answering Defendants have failed to provide support for their first affirmative defense. The Court also concludes that the indexing error by the County Clerk does not affect Plaintiff's right to judgment and, accordingly, the second affirmative defense also fails to raise a triable issue defeating Plaintiff's right to judgment. Thus, Answering Defendants have failed to defeat Plaintiff's right to judgment.

The Court also grants Plaintiff's motion to amend the caption to delete the John Doe Defendants, and for an order of reference.


The Court also concludes that the indexing error of the County Clerk does not affect Plaintiff's right to the requested relief, and directs that the records of the County Clerk be amended to reflect that the Mortgage is indexed against the appropriate lots. **Accordingly, the Court directs the Nassau County Clerk, immediately upon receipt of a copy of this Order, to amend its records to re-index the Mortgage described herein so as to cover the three lots (Section 62, Block 44, Lots 388, 387 and 389) that were intended to be covered by the Mortgage, and not only the one lot (Lot 388) that was indexed against the Property, *nunc pro tunc* to December 9, 2005.**

It is further ordered that Plaintiff shall submit the appropriate Orders, on ten (10) days notice, to effectuate the foreclosure and sale of the Property, including an Order directing the appointment of a Referee.

All matters not decided herein are hereby denied.
This constitutes the decision and order of the Court.

DATED: Mineola, NY
November 28, 2011

ENTER


HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
DEC 05 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE