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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

LIC ASSETS, LLC.
.
Plaintiff,

-against-

CHRIKER REALTY, LLC, MICHAEL MAZZEO a/k/a MICHAEL MAZZEO, JR., MICHAEL MAZZEO ELECTRIC CORP., SIGNATURE BANK, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, NEW YORK CITY DEPT. OF FINANCE,

"JOHN DOE #1" THROUGH "JOHN DOE #12", the last twelve 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 Index Number 11706/ 2011

Motion Date September 7, 2011

Motion Cal. Number 28

Motion Seq. No. 2

The following papers numbered 1 to 20 read on this motion by plaintiff pursuant to CPLR 3212 for summary judgment against defendants Michael Mazzeo a/k/a Michael Mazzeo, Jr. (Mazzeo), Chriker Realty LLC (Chriker Realty) and Michael Mazzeo Electric Corp. (Mazzeo Electric), to strike the answers of Mazzeo, Chriker Realty and Mazzeo Electric, for leave to appoint a referee to compute the sums due and owing plaintiff, for leave to amend the caption striking defendants "John Doe #1" through "John Doe #12" inclusive, without prejudice; and this cross motion by defendants Mazzeo and Chriker Realty pursuant to CPLR 3211(a)(7) and (10) to dismiss the complaint asserted against them, for summary judgment pursuant to CPLR 3212 dismissing the complaint asserted against them, to remove the temporary receiver, and to cancel the notice of pendency.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits 1-6
Notice of Cross Motion - Affidavits - Exhibits 7-11
Answering Affidavits - Exhibits 12-16
Reply Affidavits 17-19

Defendant Mazzeo Electric's Memorandum of Law.....20

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action by filing a copy of the summons and complaint on May 13, 2011. It seeks to foreclose a consolidated mortgage dated June 22, 2004, and recorded on September 29, 2004 (the consolidated mortgage), and another mortgage dated June 27, 2006 and recorded on August 14, 2006 (the June 27, 2006 mortgage), on the real property commonly known as 41-24 24th Street, Long Island City, New York, a/k/a 41-30 24th Street, Long Island City, New York (the subject property) given by defendant Chriker Realty to secure repayment of notes evidencing loans in the respective principal amounts of $1,000,000.00 and $2,000,000.00. Plaintiff also seeks to adjudicate defendants Mazzeo, a managing member of Michael Mazzeo Electric Corp. (Mazzeo Electric), and Mazzeo Electric to be liable pursuant to commercial guaranties in the event any deficiency remains after a foreclosure sale of the mortgaged premises, and to foreclose upon a security interest in the fixtures and personalty at the mortgage premises. In its complaint, plaintiff alleges it is the holder, pursuant to assignments, of the two mortgages, and the respective notes, and alleges that a UCC-1 financing statement was filed to protect its security interest in the fixtures and personalty located at the subject property. Plaintiff further alleges that defendants Mazzeo and Mazzeo Electric executed and delivered unlimited, continuing guaranties dated June 22, 2004 to State Bank of Long Island (SBLI), guaranteeing payment of all indebtedness of defendant Chriker Realty. Plaintiff additionally alleges that on September 18, 2009, defendants Mazzeo and Mazzeo Electric executed and delivered to SBLI a certificate, whereby they reaffirmed and acknowledged the validity and effectiveness of the guaranties. It is alleged that defendant Chriker Realty defaulted under the terms of the consolidated mortgage, by failing to pay all the sums due and owing thereunder on May 31, 2010, the extended maturity date, and defaulted under the terms of the June 27, 2006 mortgage by failing to pay all the sums due and owing thereunder on October 31, 2010, the extended maturity date.

Defendants Mazzeo and Chriker Realty served a joint answer, denying certain allegations of the complaint, and asserting various affirmative defenses including lack of personal jurisdiction, failure to state a cause of action, and lack of standing. Defendant Mazzeo Electric served a separate answer, likewise denying certain allegations of the complaint and asserting various affirmative defenses. Defendant Signature Bank filed a notice of appearance. Defendants New York State Department of Taxation and Finance and New York City Department of Finance are in default in the action. Plaintiff has determined that defendants "John Doe #1" through "John Doe #12" are not necessary party defendants.

Plaintiff moves for summary judgment against defendants Mazzeo, Chriker Realty and Mazzeo Electric, to strike the answers of defendants Mazzeo, Chriker Realty and Mazzeo Electric for leave to appoint a referee to compute the sums due and owing plaintiff, for leave to amend the caption striking defendants "John Doe #1" through "John Doe #12" inclusive, without prejudice.

Defendants Mazzeo and Chriker Realty oppose the motion by plaintiff and cross move to dismiss the complaint, and for summary judgment dismissing the complaint asserted against them, contending that plaintiff lacked standing to bring the action, and that to the extent it did have standing, the complaint fails to state a cause of action and plaintiff has failed to join itself as a necessary party defendant. They claim that plaintiff improperly seeks to foreclose two distinct mortgages against the subject property and has failed to allege that one mortgage is subordinate to the other, or that the alleged extension agreements were recorded. Defendants Mazzeo and Chriker Realty assert the branch of the motion by plaintiff for summary judgment is premature because plaintiff failed to respond to their discovery demands, and in any event, they are not in default in payment under the loans because the loans' maturity dates were extended beyond October 31, 2010.

Defendant Mazzeo Electric opposes the motion by plaintiff, claiming it is premature and that triable issues of fact exist.

Defendants Mazzeo and Chriker Realty asserted the lack of personal jurisdiction as an affirmative defense in their answer. To the extent the defense is based upon a claim of improper service, defendants Mazzeo and Chriker Realty failed to move to dismiss the complaint upon improper service within 60 days of service of a copy of the answer, and as a consequence, the defense based upon improper service is deemed waived (CPLR 3211[e]; *DeSena v HIP Hosp., Inc.*, 258 AD2d 555 [1999]; *Wade v Byung Yang Kim*, 250 AD2d 323 [1998]; *Fleet Bank, N.A. v Riese*, 247 AD2d 276 [1998]). In any event, the affidavit of service dated May 26, 2011 of the licensed process server presented by plaintiff constitutes prima facie evidence of proper service of process upon defendant Mazzeo pursuant to CPLR 308(2) (*see Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135, 139 [1986]), and the affidavit of service of the licensed process server dated June 24, 2011 offered by

plaintiff constitutes prima facie evidence of proper service upon defendant Chriker Realty in accordance with Limited Liability Company Law §§ 303, 304 (see CPLR 311-a(a); *Trini Realty Corp. v Fulton Center LLC*, 53 AD3d 479 [2008]).

That branch of the motion for leave to amend the caption to delete reference to defendants "John Doe #1" through "John Doe #12" is granted.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

In support of its motion for summary judgment as against defendants Mazzeo and Chriker Realty, plaintiff offers, among other things, a copy of the pleadings, the note, subject mortgage, loan agreement and guaranty, a copy of a notice of default, an affirmation of regularity of its counsel, and the affidavit of Fred Grand, a member of plaintiff limited liability company.

Plaintiff claims in its complaint that defendant Chriker Realty defaulted under the consolidated mortgage by failing to pay the mortgage debt on May 31, 2010, as the extended maturity date. In his affidavit, Mr. Grand indicates that SBLI and defendant Chriker Realty entered into an extension agreement extending the maturity date of the consolidated mortgage and that defendant Chriker Realty defaulted under the consolidated mortgage, notes and the extension agreement, by failing to pay the mortgage debt upon maturity on May 31, 2010. Nevertheless, Mr. Grand also indicates in his affidavit that the extension agreement extended the maturity date of the consolidated mortgage until October 31, 2010. Insofar as the claimed default under the consolidated mortgage is premised upon defendant Chriker Realty's alleged failure to pay at maturity on May 31, 2010, Mr. Grand's affidavit is insufficient evidence to demonstrate the absence of any material issues of fact relative to the claim for foreclosure of the consolidated mortgage (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], *supra*). Thus, it is not necessary to consider the sufficiency of the opposition papers of defendants Mazzeo and Chriker Realty relative to the branch of the motion by plaintiff for summary judgment with respect to the first cause of action (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *supra*; *Levitin v Boardwalk Capital, LLC*,

78 AD3d 1019 [2010]). That branch of the motion by plaintiff for partial summary judgment against defendant Chriker Realty on the first cause of action is denied.

With respect to the branch of the motion by plaintiff for summary judgment on its cause of action for foreclosure of the mortgage dated June 27, 2006, plaintiff has established its prima facie entitlement to summary judgment as against defendant Chriker Realty (*see EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002]; *IMC Mtge. Co. v Griggs*, 289 AD2d 294 [2001]; *Paterson v Rodney*, 285 AD2d 453 [2001]; *see also Bercy Investors, Inc. v Sun*, 239 AD2d 161 [1997]). The burden shifts to defendant Chriker Realty to raise a triable issue of fact regarding its defenses (*see Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282 [2005]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002], *supra*; *First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2000]).

To the extent defendant Chriker Realty places standing in issue, a plaintiff must have a legal or equitable interest in the mortgage at the time it commences a foreclosure action (*see Wells Fargo Bank, N.A. v. Marchione*, 69 AD3d 204, 207 [2009]). A plaintiff has standing where it is both (1) the holder or assignee of the subject mortgage and (2) the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint (*see Deutsche Bank Nat. Trust Co. v Barnett*, 88 AD3d 636 [2011]; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d at 207–209; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2009]).

Defendants Mazzeo and Chriker Realty contend the notes were not made payable to plaintiff, validly endorsed over to it or in blank, or in plaintiff's physical possession at the time of the institution of the action. Plaintiff, however, has offered evidence that the respective subject mortgages and underlying notes were assigned to it pursuant to written assignments dated March 30, 2011. The respective assignments provide for the assignment of the mortgages forming the consolidated mortgage lien "together with the bond(s) or note(s) or obligation(s) described in said Mortgage(s)" from SBLI to plaintiff, and for the assignment of the other subject mortgage "together with the bond(s) or note(s) or obligation(s) described in said Mortgage(s)" from SBLI to plaintiff, without recourse. Such quoted language was sufficient to assign the notes underlying the subject mortgages along with the subject mortgages to plaintiff (*see Matter of Stralem*, 303 AD2d 120 [2003]; *TPZ Corp. v Dabbs*, 25 AD3d 787 [2006]).

In general, the date of an assignment's execution is controlling as to the effective date of the assignment (*see LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911 [2009]). The respective assignments were recorded on April 20, 2011, thereby evidencing their existence before the bringing of this action. Plaintiff, therefore, has made a prima facie showing that at the time of the commencement of this action, it was the assignee of both subject mortgages

and the respective underlying notes pursuant to written assignments (see *Citimortgage, Inc. v Stosel*, __ AD3d ___, 2011 WL 5588720, 2011 NY App Div LEXIS 8158).

To the extent defendants Mazzeo and Chriker Realty assert the signature of Stephen B. Mischo, vice-president of SBLI, on the assignment of the mortgages dated June 27, 2006 is "suspicious" and may not be authentic, the assignment is properly subscribed and bears a certificate of acknowledgment by a notary public. The certificate of acknowledgment constitutes prima facie proof of the authenticity of the signature of Stephen B. Mischo (*see* CPLR 4538; *Hoffman v Kraus*, 260 AD2d 435 [1999]). The reply affirmation of counsel for defendants Mazzeo and Chriker Realty is insufficient to rebut the presumption of due execution of that instrument (*see Osborne v Zornberg*, 16 AD3d 643 [2005]; *Albin v First Nationwide Network Mtge. Co.*, 248 AD2d 417 [1998]; *Son Fong Lum v Antonelli*, 102 AD2d 258 [1984], *affd* 64 NY2d 1158 [1985]).

Defendants Mazzeo and Chriker Realty have failed to raise any triable issue of fact as to the validity of the assignment of the subject mortgages and underlying notes, or the effective dates of the assignments. Under such circumstances, their assertion that plaintiff lacks standing to enforce the subject mortgages is without merit.

Defendant Mazzeo asserts that plaintiff lacks standing to enforce his guaranty since plaintiff is not a party to it, and there is no express assignment of the guaranty to plaintiff.

Pursuant to General Obligations Law § 13-101, any "claim or demand" can be transferred with limited specified exceptions. A "transfer" is defined as including an "assignment" (*see* General Obligations Law § 13-109). Under section 13-107 of the General Obligations Law, a transfer of a "bond," unless expressly reserved in writing, vests in the transferee all claims or demands of the transferrer for damages against any guarantor of the obligation of such obligor (*see* General Obligations Law § 13-107[1]). A bond is defined in the section as including "notes" and "other evidences of indebtedness."

In this instance, defendant Mazzeo's guaranty was made in favor of SBLI, as the "Lender" and the Lender's "successors and assigns." The guaranty authorizes the Lender to assign or transfer the guaranty in whole or part and provide that "[s]ubject to any limitations stated in [the] Guaranty on transfer of Guarantor's interest, this Guaranty shall be binding upon and inure to the benefit of the parties, their successors and assigns." Plaintiff has demonstrated that the transfer of the interests of Mazzeo was not limited under the circumstances, and thus, has made a prima facie showing that upon the assignment of the mortgage notes, it became vested with the right to pursue the claims pursuant to the guaranty (*see Targa Intl. Corp. v Gross*, 112 Misc 2d 688 [1982]). Defendant Mazzeo has failed to prove the guaranty is not a general guaranty, or to raise any triable issue of fact related to the defense of lack of standing to recover under his guaranty.

To the extent defendants Mazzeo and Chriker Realty also assert that plaintiff lacks standing to enforce the UCC-1 financing statement because plaintiff is not the secured party of record, plaintiff has failed to offer a copy of the UCC-1 financing statement, and makes no claim it is the secured party of record or that an amendment was filed to show SBLI had assigned to plaintiff its rights under any security agreement to the fixtures and personalty (*see* UCC 9-514). Rather, plaintiff acknowledges that the third cause of action is "superfluous." Under such circumstances, that branch of the motion by plaintiff to strike the affirmative defense asserted by defendants Mazzeo and Chriker Realty based upon lack of standing is granted only to the extent it is raised in relation to the causes of action for foreclosure and to recover under Mazzeo's guaranty.

Contrary to the argument of defendants Mazzeo and Chriker Realty, a plaintiff may seek the foreclosure of two separate mortgages held by it within the confines of one action, where both mortgages are against the same property and are claimed to be in default, and no intervening liens are filed as against the property (*see* CPLR 3211[a][7]; 1-2 Bergman on New York Mortgage Foreclosures § 2.07 [2011]; *see e.g. Swedbank, AB v Hale Ave. Borrower, LLC*, ___ AD3d ___, 2011 WL 5579046, 2011 NY App Div LEXIS 8182; *Key Bank of N. N.Y. v Lake Placid Co.*, 102 AD2d 911 [1984]). Although defendants Mazzeo and Chriker Realty assert the Real Property Actions and Proceedings Law makes no allowance for the prosecution, in a single action, of separate causes of action for foreclosure based upon distinct mortgages on the same real property, they have failed to point to any provision therein, or in any other statute, barring such prosecution. Here, plaintiff alleges in its complaint the dates of the recording of the subject mortgages and thus, has given notice of the claimed priority of the subject mortgages (CPLR 3013).

To the extent defendants Mazzeo and Chriker Realty assert plaintiff has failed to join itself as a necessary party defendant, such assertion is without merit since plaintiff seeks to foreclose both the subject mortgages without regard to their priority (*see* CPLR 3211[a][10]; RPAPL 1311; *see also Polish National Alliance v White Eagle Hall Co.*, 98 AD2d 400 [1983]; *C. G. Swackhamer, Inc. v P. F. L. Constr. Corp.*, 285 App Div 841 [1955]; *see generally* 1-2 Bergman on New York Mortgage Foreclosures § 2.07 [2011]).

That branch of the cross motion by defendants Mazzeo and Chriker Realty to dismiss the complaint asserted against them is granted only to the extent of dismissing the third cause of action asserted against defendant Chriker Realty (CPLR 3211[a][7]).

With respect to the affirmative defenses asserted by defendants Mazzeo and Chriker Realty based upon laches, equitable estoppel, waiver, unjust enrichment, unconscionability, usury, violation of General Business Law § 349, violation of state and federal disclosure laws, misrepresentation, and fraud, they have failed to allege or prove any facts supporting

these defenses (*see Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [1971], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145 [2008], *supra*; *MacIver v George Braziller, Inc.*, 32 Misc 2d 477 [1961]; CPLR 3016, 3018[b]). Defendants Mazzeo and Chriker Realty also have failed to show that facts essential to justify opposition to the motion may emerge upon discovery. In addition, defendant Mazzeo's affirmative defenses are precluded by his guaranty, which waived all defenses except actual payment and performance of the indebtedness. That branch of the motion by plaintiff to strike the affirmative defenses asserted by defendants Mazzeo and Chriker Realty based upon laches, equitable estoppel, waiver, unjust enrichment, unconscionability, usury, violation of General Business Law § 349, violation of state and federal disclosure laws, misrepresentation, and fraud is granted.

Defendants Mazzeo and Chriker Realty contend they have reason to believe the mortgage loans were extended by SBLI beyond October 31, 2010 based upon their prior dealings with SBLI, and therefore, a triable issue of fact exists as to whether they are in default under either mortgage. Defendants Mazzeo and Chriker Realty assert that in relation to the earlier extensions of the mortgage loans, they received or entered into the extension agreements after the earlier operative maturity dates passed. Defendant Mazzeo asserts that "[n]ear the end of 2010," "Steven[1]" Mischo, a vice-president of SBLI, "assured" him that the subject mortgage loans "would be" extended beyond the October 31, 2010 maturity date, and requested Mazzeo to provide SBLI with various financial statements so SBLI could " 'paper its file' ." Defendants Mazzeo and Chriker Realty also assert they promptly forwarded the requested financial documentation. They seek discovery on the issue of whether the loans were in fact extended beyond October 31, 2010 by SBLI.

Defendants Mazzeo and Chriker Realty make no claim that Mr. Mischo, or any other representative of SBLI actually orally agreed to an extension of the mortgage loans' maturity dates beyond October 31, 2010 (*cf. Pellicane v Norstar Bank*, 213 AD2d 610 [1995]; *see generally Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 NY2d 175 [1982]). In fact, they fail to allege any specific date as to when the mortgage loans were purportedly extended by SBLI. The loan documents, by their terms, make clear any changes had to be in writing, and defendants Mazzeo and Chriker Realty have failed to demonstrate any agreement, extending the respective maturity dates of the subject mortgage loans beyond October 31, 2010, was executed and delivered to them by SBLI or plaintiff. Under such circumstances, defendants Mazzeo and Chriker Realty have failed to demonstrate the need for discovery on the issue of whether the mortgages were extended beyond October 31, 2010 (*see Auerbach v Bennett*, 47 NY2d 619, 636 [1979]; *Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614, 615 [1999], *lv dismissed* 93 NY2d 956 [1999]; *Bailey v New York City Tr. Auth.*, 270 AD2d 156 [2000]).

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[1] The assignments dated March 30, 2011 are executed by one "Stephen" B. Mischo.

That branch of the motion by plaintiff seeking partial summary judgment as against defendant Chriker Realty on the second cause of action for foreclosure of the June 26, 2007 mortgage is granted. Entry of judgment as against defendant Chriker Realty shall await resolution of the remaining claims asserted by plaintiff.

That branch of the motion by plaintiff seeking partial summary judgment as against defendants Mazzeo and Mazzeo Electric on the fourth cause of action to recover under the guaranties is denied. Insofar as plaintiff has failed to demonstrate its prima facie showing on the first cause of action for foreclosure under the consolidated mortgage and note, plaintiff also has failed to show the triggering of the liability of defendants Mazzeo and Mazzeo Electric under the guaranties predicated upon the consolidated mortgage and underlying notes (*see Panish v Rudolph*, 298 AD2d 237 [2002]). A question of fact also exists as to the extent defendants Mazzeo and Mazzeo Electric are liable under their guaranties based upon the June 27, 2006 mortgage (*cf. Signature Bank v Galit Props., Inc.*, 80 AD3d 689 [2011]).

That branch of the motion by plaintiff for leave to appoint a referee is denied at this juncture.

That branch of the cross motion by defendants Mazzeo and Chriker Realty to remove the temporary Receiver and to cancel the notice of pendency is denied.

Dated: November 23, 2011

J.S.C.