

New York Community Bank v Woodhaven Assocs., LLC
2011 NY Slip Op 33314(U)
August 5, 2011
Supreme Court, Queens County
Docket Number: 30712/2010
Judge: Augustus C. Agate
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE
Justice

IA Part 24

NEW YORK COMMUNITY BANK, x

Plaintiff,

-against-

WOODHAVEN ASSOCIATES, LLC, ET AL.,

Index
Number 30712/ 2010

Motion
Date May 3, 2011

Motion
Cal. Number 21

Motion Seq. No. 1

The following papers numbered 1 to 13 read on this motion by defendant Woodhaven Associates, LLC (Woodhaven) pursuant to CPLR 3211(a)(7) and RPAPL 1301 to dismiss the complaint, or in the alternative, to stay the instant action pursuant to CPLR 2201 pending a resolution of the issues in the action entitled *Fine v New York Community Bank* (Supreme Court, Queens County, Index No. 1780/2011), and for an award of costs, disbursements and reasonable attorneys' fees in relation to this motion.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits.....1-4
Answering Affidavits - Exhibits.....5-7
Reply Affidavits.....8-10
Stipulations dated March 3, 2011 and
March 25, 2011.....11-13

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

Plaintiff New York Community Bank (Bank) agreed to extend a revolving line of credit to defendant Ari Chtrik a/k/a Aaron Chtrik Purec in an amount up to \$6.5 million to finance the development of real property located on Crescent Street in Long Island City, New York, and that as evidence thereof, defendant Chtrik executed a promissory note in the plaintiff Bank's favor (the Chtrik note). The Chtrik note was partially secured by a second mortgage dated

November 13, 2006, in the principal amount of \$2 million given by defendant Woodhaven, a limited liability company, against the real property known as 93-22 Jamaica Avenue, Woodhaven, New York (the subject property), and fully secured by a guaranty, dated the same date, also given by defendant Woodhaven to plaintiff Bank, guaranteeing defendant Woodhaven's payment of the loan pursuant to the Chtrik note and subject mortgage (the Woodhaven guaranty). Defendant Woodhaven is the fee owner of the subject property. Defendant Chtrik, in his capacity as the managing member of defendant Woodhaven, executed, and delivered to Woodhaven, both the subject mortgage and guaranty. A nonparty herein, Shaya Boymelgreen, provided plaintiff Bank with a limited guaranty, guaranteeing repayment of \$2 million of the subject loan to defendant Chtrik (the Boymelgreen guaranty). In 2008, the Chtrik note was modified by defendant Chtrik and plaintiff Bank pursuant to two agreements dated May 25, 2008 and August 4, 2008, respectively. Under the May 25, 2008 modification agreement, the maturity date of the Chtrik note was extended to November 13, 2008. (The August 4, 2008 modification agreement modified the interest rate, but did not affect the extended maturity date).

Following November 13, 2008, defendant Chtrik made certain payments of interest, which were accepted by plaintiff Bank, and credited to the contract interest due under the loan documents, including a payment of \$36,859.31 on January 1, 2010. When defendant Chtrik thereafter failed to make any additional payments under the amended Chtrik note, plaintiff Bank commenced this action seeking foreclosure of the subject mortgage. Plaintiff Bank alleges that as a result of defendant Chtrik's failure to pay all amounts due and owing under the amended Chtrik note, it notified defendant Woodhaven of defendant Chtrik's payment default and declared all amounts due under the subject mortgage and Woodhaven guaranty to be immediately due and payable. Plaintiff Bank also alleges that defendant Woodhaven is in default under the subject mortgage and Woodhaven guaranty by failing to pay the amount due thereunder by November 13, 2008, the extended maturity date.

Prior to the commencement of the instant foreclosure action on December 10, 2010, the Bank brought an action entitled *New York Community Bank v Chtrik*, in Supreme Court, Nassau County (Index No. 18180/2010) (the Nassau County action), seeking, among other things, to recover against Chtrik under the Chtrik note in the principal amount of \$6,114,930.00, plus interest, and against

Boymelgreen under the Boymelgreen guaranty in the amount of \$2,000,000.00.¹

Following the institution of this action, Stephen Fine, as an alleged member of Woodhaven, brought a derivative suit on behalf of defendant Woodhaven against New York Community Bank (the Bank) entitled *Fine v New York Community Bank* (Supreme Court, Queens County, Index No. 1780/2011) (the derivative suit), seeking a judgment cancelling and rescinding the Woodhaven guaranty and subject mortgage, permanently enjoining the Bank from enforcing the Woodhaven guaranty and subject mortgage, and awarding damages against the Bank. In the derivative suit, Fine alleges that he learned of the existence of the subject mortgage and Woodhaven guaranty in late 2010. He also alleges that Chtrik lacked the requisite authority to execute the subject mortgage and Woodhaven guaranty on behalf of Woodhaven, and therefore, the subject mortgage and Woodhaven guaranty are void, and of no effect. Fine further alleges that at the time of the making of the mortgage loan, the Bank was aware of the terms of Woodhaven's operating agreement dated March 1999, including the limitations therein concerning the authority of a manager to mortgage the subject property, and that the subject mortgage and Woodhaven guaranty were not "necessary, convenient or incidental" to the accomplishment of the limited liability company's purposes or business. Fine additionally alleges the execution and delivery of the subject mortgage and Woodhaven guaranty were not authorized by himself or any member of Woodhaven other than Chtrik.

In this case, defendant Woodhaven moves to dismiss the complaint pursuant to CPLR 3211(a)(7) and RPAPL 1301, or in the alternative, for a stay. Defendant Woodhaven asserts that plaintiff Bank was obligated pursuant to RPAPL 1301(2) to include in the complaint a statement regarding whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part has been collected. Defendant Woodhaven argues that plaintiff Bank merely alleges "[n]o prior action seeking the same relief sought herein has been commenced," and makes no mention of the pendency of the Nassau County action. Defendant Woodhaven asserts the complaint thus fails to comply with the statutory requirement found in RPAPL 1301(2), and thus, argues it fails to state a cause of action. In addition, defendant Woodhaven argues that because plaintiff Bank instituted the Nassau County action to

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By order dated July 11, 2011, a motion by the Bank for leave to enter a default judgment against Chtrik pursuant to CPLR 3215 was denied, and a preliminary conference was directed to be held on September 7, 2011.

recover under the Chtrik note, plaintiff Bank was obligated pursuant to RPAPL 1301(1) and (3) to obtain to obtain leave of court before bringing this foreclosure action. Defendant Woodhaven asserts that since plaintiff Bank failed to do so, the instant action should be dismissed, or alternatively, stayed pending an outcome in the Nassau County action. Defendant Woodhaven alternatively seeks a stay of the instant action, pending a determination as to the validity of the Woodhaven guaranty and subject mortgage in the derivative action.

Plaintiff Bank opposes the motion asserting, among other things, that Fine is, at most, a minority member of defendant Woodhaven and lacks "standing" to bring this motion on behalf of defendant Woodhaven. Such assertion is one based upon plaintiff Bank's claim, in essence, that Bartfield and Knopfler, PLLC, the law firm appearing on behalf of defendant Woodhaven, was retained by Fine, and that Fine lacks authority to do engage counsel on behalf of the limited liability company under either the operating agreement dated "___ day of March, 1999" or the operating agreement dated March 25, 1999. Plaintiff Bank also asserts that defendant Chtrik has the sole and exclusive authority to litigate on behalf of defendant Woodhaven under these operating agreements. Plaintiff Bank argues, in essence, therefore, that Bartfield and Knopfler, PLLC lacks authority to represent defendant Woodhaven herein (see e.g. *Gaston & Co., Inc. v All Russian Zemsky Union*, 221 App Div 732 [1927]).

The right to appear as attorney for a party depends on a grant of authority to that effect from the party (see *O.G. Orr & Co. v Fireman's Fund Ins. Co.*, 235 App Div 1 [1932]). In general, the authority of an attorney to appear is presumed from his or her appearance (see *Hamilton v Wright*, 37 NY 502 [1868]), and an adverse party having no contrary notice or ground for suspicion may act on that presumption (see *Carpenter v New York Trust Co.*, 174 App Div 378 [1916], *affd* 221 NY 614 [1917]). However, once the authority of an attorney appearing for a party is questioned by the plaintiff or the court, the attorney must establish his or her authority to act on behalf of the defendant (see *Gaston & Co. v All Russian Zemsky Union*, 221 App Div 732, 734 [1927]; *NRK Management Corp. v Donahue*, 109 Misc 2d 601 [1981]; *Weinstock v Long*, 29 Misc 2d 795 [1961]; 1 NY Jur 2d, Actions § 82).

In this instance, Joseph Bartfield, Esq., in his reply affirmation dated April 29, 2011, indicates that Bartfield and Knopfler, PLLC, is counsel for defendant Woodhaven, without identifying the individual who engaged the law firm, or the basis for the person's authority to do so. No affidavit of any member of defendant Woodhaven has been submitted in support of the motion,

and defendant Chtrik has not appeared in relation to the motion in his individual or representative capacity.² It is notable that Fine is not a named defendant herein, and has made no motion for leave to intervene in his individual capacity, and yet, Mr. Bartfield executed stipulations dated March 3, 2011 and March 25, 2011, agreeing to adjourn the instant motion to dismiss as "Attorneys for *Stephen Fine*, Member of Defendant Woodhaven Associates, LLC" (emphasis supplied). It is also notable that Bartfield and Knopfler, PLLC also represents Fine in the derivative action. Under these circumstances, enough is in the record to raise a question as to the authority of counsel appearing for defendant Woodhaven. Accordingly, the motion is denied without prejudice to renewal based upon proper papers and a showing answering the question of who retained counsel on behalf of defendant Woodhaven, and the claimed basis for his or her authority.

Dated: August 5, 2011

Augustus C. Agate, J.S.C.

²It is unclear from the submissions whether defendant Chtrik has been joined as a party defendant.