

MB Fin. Bank, N.A. v 22 Renwick St. Assoc. LLC

2011 NY Slip Op 34120(U)

October 12, 2011

Supreme Court, New York County

Docket Number: 650048/11

Judge: Melvin L. Schweitzer

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

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

MB FINANCIAL BANK, N.A.

INDEX NO. 650048/11
~~10561129~~

- v -

22 RENWICK STREET ASSOCIATES LLC,
et al

MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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 plaintiff for*
summary judgment is GRANTED
per the attached Decision and
Order.
Defendant's motion for
discovery is DENIED.
Settle order.

Dated: October 12, 2011

Melvin L. Schweitzer
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 COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X
 MB FINANCIAL BANK, N.A. :
 :
 Plaintiff, :
 :
 -against- :
 :
 22 RENWICK STREET ASSOCIATES LLC, et al. :
 :
 Defendants. :
 -----X

650048/11
 Index No. ~~10561900~~
 DECISION AND ORDER
 Sequence No. 001

MELVIN L. SCHWEITZER, J.:

This is a commercial real estate foreclosure action. Plaintiff, the lender, seeks summary judgment against defendant, the borrower, on, *inter alia*, its foreclosure action and its claim for a deficiency judgment.

Facts

Lender, MB Financial Bank, N.A. (Lender or plaintiff), accelerated a \$19,000,000 loan (Loan) as a result of a default in the payment of interest by borrower (Borrower or defendants). Lender commenced this foreclosure action in January 2011 as a result of the acceleration and Borrower's consequent default on the Loan according to its terms. The Loan had been made to fund the acquisition of land for, and the construction of, a condominium building in New York City.

Broadway Bank, predecessor-in-interest to Lender, made the Loan to Borrower in 2007. On April 23, 2010, Broadway Bank was closed by the Illinois banking regulators and the Federal Deposit Insurance Corporation (FDIC) was appointed receiver of the bank. Lender purchased the assets of the bank. By virtue of the purchase, the notes, mortgages and other agreements relating to the Loan were assigned to the Lender.

Lender also seeks foreclosure against certain parties asserting mechanic's liens and against certain government entities named as defendants. These defendants have not responded to the complaint or this motion. Borrower answered in February 2011, denying every substantive allegation of the complaint and asserting affirmative defenses of lack of standing of the Lender and failure to state a cause of action. Borrower also contends Lender failed to comply with discovery requests.

Borrower asserts that Lender's motion for summary judgment is based solely on an affirmation of regularity of counsel for Lender who has no personal knowledge of the facts and, instead, relies upon verification of the complaint by a bank officer. Borrower says the verification was signed in Illinois and was not accompanied by a certificate of conformity required by CPLR 2309 (c) and RPL 299 (a). Accordingly, Borrower claims both the affirmation and verification are inadmissible and of no probative value.

Borrower also contends Lender's motion is based on out-of-state assignment documents pursuant to out-of-state powers of attorney. It says that neither the assignments nor powers of attorney contain certificates of conformity and, therefore, the Lender lacks standing because the mortgages were not effectively assigned.

Discussion

Lender argues that "A mortgagee establishes a prima facie case for foreclosure by production of the mortgage documents and proof of default." *Bank Leumi Trust Co. of New York v Lightning Park, Inc.*, 215 AD2d 246, 247 (1st Dept 1995); *see also Chem. Bank v Broadway 55-56th St. Assocs.*, 220 AD2d 308, 309 (1st Dept 1995). Once a plaintiff has established a prima facie case for foreclosure, the burden shifts to the defendant to come forward with

admissible evidence of the existence of a question of fact. See *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 (1st Dept 2007), *leave denied*, 10 NY3d 741 (2008); *Chem. Bank*, 220 AD2d at 309. Mere conclusions of fact or law are insufficient to defeat a summary judgment motion. See *Banco Popular N. America v Victory Tax Mgmt., Inc.*, 1 NY3d 381, 383 (2004). Thus, evidence presented by a defendant in an attempt to avoid summary judgment in a foreclosure action must meet a threshold of believability. See e.g. *New York State Urban Dev. Corp. v Marcus Garvey Brownstone Houses, Inc.*, 98 AD2d 767, 770 (2d Dept 1983); *Freisch-Groningsche Hypotheekbank Realty Credit Corp. v Ward Equities*, 188 AD2d 397, 398 (1st Dept 1992). To meet this burden, the defendant must provide “proof in admissible form sufficient to create a material issue of fact necessitating a trial.” *Franchini v Palmieri*, 1 NY3d 536, 537 (2003).

Here, Lender, as plaintiff, asserts it has established a prima facie case for a judgment of foreclosure and for a deficiency judgment to the extent that any deficiency remains in the amounts owing on the Loans after the completion of the related foreclosure auction. In addition, it says Borrower’s affirmative defenses, as defendants, are baseless and raise no question of fact.

Plaintiff has demonstrated the existence of the loan and mortgage documentation and has provided undisputed proof of the defaults. In this regard, it notes defendants’ answer denies breach but does not plead payment and the failure to do so constitutes a waiver of the defense of payment and an admission of nonpayment.

Plaintiff also argues that defendants’ affirmative defenses are stated as bare legal conclusions, unsupported by facts. As such, plaintiff states they have no effect. The court agrees with plaintiff on this point.

As to the omission of a certificate of conformity attesting to the verification of the complaint, plaintiff characterizes this as a mere irregularity, and further cures this omission *nunc pro tunc* by the submission of a certificate of conformity.

As to the assignments of the mortgages, plaintiff points out they complied with RPL 309 (b) and that no certificate of conformity is required under RPL 299 (a). Plaintiff also points out that CPLR 2309 (c) only applies to oaths and affirmations, not acknowledgments, and thus the provision has no relevance to the assignment of the mortgages. Finally, it points out the assignments were made, and plaintiff as Lender, had physical possession of the notes and mortgages prior to commencement of the action. Plaintiff thus asserts that the lack of standing defense is groundless.

The court agrees with plaintiff's arguments. The irregularity has been rectified *nunc pro tunc*. Furthermore, the acknowledgments of the assignments of the mortgages and the power of attorney given by the FDIC complied substantially with RPL 309-b and thus no certificate of conformity was required by RPL 299 (a). Additionally, CPLR 2309 (c) does not require a certificate of conformity as it relates only to oaths and affirmations. Finally, plaintiff, Lender, had possession of the mortgages before initiating this action. Consequently, the standing to sue defense is baseless.

Also, the court, in the circumstances, sees no need for discovery and does not view defendants' claim as an impediment to the granting of summary judgment.

For these reasons, plaintiff's motion for summary judgment is granted and defendants' motion for discovery is denied.

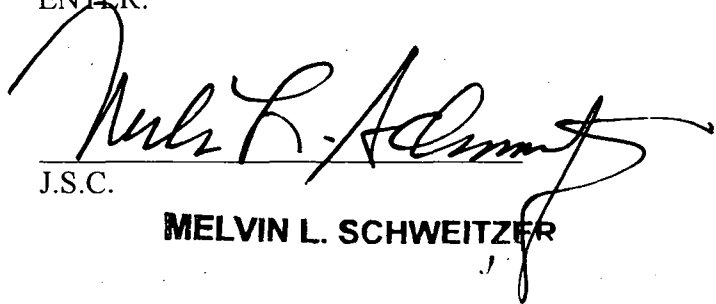
Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted and plaintiff is directed to settle an order and judgment and submit it to the court; and it is further

ORDERED that defendants' motion for discovery is denied.

Dated: October 12, 2011

ENTER:



J.S.C.
MELVIN L. SCHWEITZER