

ADHY Advisors, LLC v 50 E. 119th St., LLC
2011 NY Slip Op 34336(U)
January 7, 2011
Supreme Court, New York County
Docket Number: 112273/09
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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ADHY ADVISORS, I.L.C., as JP MORGAN CHASE Index No. 112273/09
BANK, N.A., as successor-in-interest to WASHINGTON Mot. Seq. Nos. 002 & 003
MUTUAL BANK,

Plaintiff,

DECISION and ORDER

- against -

50 EAST 119th STREET, LLC, M. HILLER & SON,
INC. RETIREMENT TRUST, NEW YORK CITY
DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, and
"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.

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Appearances: For Plaintiff: For Defendant 50 East 119th Street, LLC:
Berliner & Pilson Law Offices of Ephraim Frenkel
By: Richard J. Pilson, Esq. By: Ephraim Frenkel, Esq.
80 Cuuermill Road, Suite 411 3839 Bell Boulevard, Suite 308
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Papers considered in review of these motions:

Motion Sequence Number 002:

Papers	Document Number
Notice of motion	1
Affirmation in support and annexed exhibits	2
Dessberg Affidavit	3

Motion Sequence Number 003:

Papers	Document Number
Order to show cause	4
Affirmation in support and annexed exhibits	5
Affirmation in opposition and annexed exhibits	6

PAUL G. FEINMAN, J.:

Motions bearing sequence numbers 002 and 003 are consolidated for the purpose of this

decision and order.

By motion sequence number 002, JP Morgan Chase Bank, N.A. moves: (1) for summary judgment on the issue of liability as against defendants 50 East 119th Street, LLC, M. Hiller & Son, Inc. Retirement Trust and New York City Department of Housing Preservation and Development; (2) for entry of a default judgment as against the remaining defendants; (3) for an order of reference to compute damages; (4) to substitute Micro Ecologies Inc. as a party defendant in the place and stead of “John Doe #1”; and (5) to discontinue the action as against “John Doe #2” through “John Doe # 12” and accordingly, amend the caption.

By motion sequence number 003, defendant 50 East moves, by order to show cause: (1) to cancel the lis pendens as against the property known as 50 East 119th Street a/k/a 1829 Madison Avenue, New York County having block number 1745 and lot number 50; (2) for an order directing the receiver to return possession of the premises to 50 East; and (3) for an order directing the receiver to deliver certain items to 50 East; and (4) vacating the judgment as against 50 East. For the reasons discussed below, both motions are denied in their entirety.

Background

This is a foreclosure action. The subject premises is 50 East 119th Street a/k/a 1829 Madison Avenue, New York County having block number 1745 and lot number 50, New York County. On July 6, 2006, Washington Mutual Bank (“WaMu”) and defendant 50 East 119th Street, LLC (“50 East”) executed an amended and restated promissory note (Doc. 3, Ex. A) and a mortgage consolidation and extension agreement (Doc. 3, Ex. D). The mortgage consolidation and extension agreement was recorded with the City Register on December 14, 2006 under CRFN #2006000687712 (Doc. 3, Ex. D). JP Morgan claims that “by virtue of its acquisition

from the FDIC of the assets of Washington Mutual Bank on September 25, 2008 [JP Morgan Chase Bank, N.A.] is the current owner and holder of the Note and Mortgage” (Doc. 2 ¶ 9). According to plaintiff, 50 East defaulted by failing to pay the principal and interest installments which were due on May 1, 2009 (Doc. 2 ¶ 11).

In August 2009, JP Morgan commenced this commercial foreclosure action by filing of a summons, verified complaint, and notice of pendency (Doc. 3, Ex. A). In April 2010, JP Morgan moved for, among other things, summary judgment as to the issue of liability. In June 2010, defendant 50 East moved, among other things, to cancel the notice of pendency.

By order dated August 18, 2010, this court granted plaintiff’s motion to substitute “ADHY Advisors, LLC, as assignee of JP Morgan Chase Bank, N.A., as successor-in-interest to Washington Mutual Bank” (“ADHY”) for plaintiff. The court also adjourned motions bearing sequence number 002 and 003 “for the new plaintiff to submit papers.” Thereafter, the substituted plaintiff, ADHY, submitted an affirmation in opposition to 50 East’s motion bearing sequence number 003 (Doc. 6), but ADHY never submitted papers pertaining to JP Morgan’s motion for summary judgment, bearing sequence number 002.

Analysis

I. Motion Sequence Number 002

Former plaintiff JP Morgan moved: (1) for summary judgment on the issue of liability as against defendants 50 East 119th Street (“50 East”), LLC, M. Hiller & Son, Inc. Retirement Trust and New York City Department of Housing Preservation and Development; (2) for entry of a default judgment as against the remaining defendants; (3) for an order of reference to compute damages; (4) to substitute Micro Ecologies Inc. as a party defendant in the place and stead of

“John Doe #1”; and (5) to discontinue the action as against “John Doe #2” through “John Doe # 12” and accordingly, amend the caption.

The movant on a motion for summary judgment in a foreclosure action bears the initial burden of establishing entitlement to judgment as a matter of law by offering the mortgage instruments and evidence of default (*see Eastern Sav. Bank, FSB v Sassouni*, 68 AD3d 917, 917 [2d Dept 2009]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In support of its motion, JP Morgan submitted: (1) the pleadings including the summons, verified complaint, notice of pendency and defendants’ verified answers and notice of appearance (Doc. 3, Exs. A-B); (2) the relevant affidavits of service (Doc. 3, Ex. E); (3) the amended and restated promissory note (Doc. 3, Ex. C); the mortgage consolidation modification and extension agreement, amended and restated mortgage security agreement; and (4) the affidavit of Katrin Franz, plaintiff’s Asset Manager, who allegedly had first hand knowledge of the basis for liability, explaining the aforementioned documents (Doc. 2).

Now, ADHY claims to be the assignee of JP Morgan’s interest. However, ADHY has failed to submit papers or evidence that would demonstrate their entitlement to summary judgment as the purported assignee as per the direction of this court’s order dated August, 18, 2010. Even if this court were to consider the motion insofar as it relates to ADHY’s predecessor-in-interest, the documentary evidence—records from the New York City Department of Finance’s Automated City Register Information System (Doc. 5, Ex. 1)—submitted by defendant 50 East

tends to demonstrate that “a search of the New York City Register’s office [reveals] that Washington Mutual Bank FA is the recorded mortgagor of the premises and not the named [p]laintiff JP Morgan Chase, National Association. The records do not show an assignment of mortgage from Washington Mutual Bank FA to JP Morgan Chase National Association and therefore [it] is not the owner of said mortgage” (Doc. 5 ¶ 5). Therefore, the motion for summary judgment must be denied without prejudice to renew.

I. Motion Sequence Number 003

Defendant 50 East moves, by order to show cause to cancel the lis pendens as against the premises.¹ ADHY opposes arguing that JP Morgan is the successor-in-interest to WaMu and submits the purchase and assumption agreement and an affidavit tending to demonstrate the same (Doc. 6, Exs. A-B). CPLR 6501 permits the filing of a notice of pendency such “in any action . . . in which the judgment demanded would affect title to” the property. Plaintiff’s failure to demonstrate entitlement to summary judgment in this foreclosure action has no bearing on plaintiff’s entitlement to file a notice of pendency pending the ultimate judgment. Neither has 50 East demonstrated that the notice of pendency must be cancelled under CPLR 6514 (a) nor that this court should exercise its discretion to cancel it under CPLR 6514 (b). Therefore, the motion is denied. Accordingly it is

ORDERED that the motion for summary judgment, bearing sequence number 002, is denied in its entirety without prejudice to renew; and it is further

¹ 50 East also seeks various other relief all of which is premised upon the merit of the primary relief sought. Because 50 East has not established entitlement to the primary relief sought – cancellation of the notice of pendency, it cannot prevail on the ancillary relief sought which includes an order directing the receiver to return possession of the premises to 50 East.

ORDERED that the motion for cancellation of the notice of pendency, bearing sequence number 003, is denied in its entirety; and it is further

ORDERED that because it appears that this court's order dated August 18, 2010 was not served upon the County Clerk nor the Clerk of the Trial Support Office as was directed, plaintiff is hereby directed to serve a copy of this order and a copy of this court's order dated August 18, 2010, with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the substituted plaintiff; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the receiver, Michele Kahn, Esq., at 708 Third Avenue, 19th Floor, New York, NY 10017; and it is further

ORDERED that the parties are directed to appear for a compliance conference on February 23, 2011, at 10:00 A.M. at 60 Centre Street, Room 212; the receiver, as a non-party, need only appear if there are issues she deems necessary to bring to the Court's attention regarding her ongoing ability to discharge her duties.

This constitutes the decision and order of the Court.

Dated: January 7, 2011
New York, New York



J.S.C.

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