

**Bayside KCNP Inc. v New Millenium United  
Methodist Church**

2012 NY Slip Op 32735(U)

November 2, 2012

Supreme Court, Queens County

Docket Number: 2904/12

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS  
Justice

IAS PART 2

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BAYSIDE KCNP INC.

Plaintiff,

-against-

NEW MILLENIUM UNITED METHODIST CHURCH ,  
MUN SANG SUK, YEUNG OK SUK, 552 W. 23TH ST.  
ASSOCIATES INC.,

JOHN DOE No.1 through JOHN DOE No. 10 the last  
ten (10) names being fictitious and unknown to the plaintiff,  
the persons or parties intended being the persons or parties,  
intended being the tenants, occupants, persons or parties, if any,  
having or claiming an interest in or lien upon the premises  
described in the Verified Complaint

Defendants.

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Index No: 2904/12

Motion Date: 8/15/12

Motion Seq. No.: 1

The following papers numbered 1 to 12 read on this motion by plaintiff Bayside KCNPB Inc. for an order consolidating this action with the action pending in this court, entitled *Woori American Bank v New Millennium United Methodist Church, NYC Environmental Control Board, NYCTL 2009-A Trust and The Bank of New York, The City of New York and "John Doe"* under Index No. 19710/2011; amending the caption to reflect said consolidation and deleting defendants John Doe No.1 through John Doe No. 10; amending the caption in order to correct the spelling of defendant New Millenium United Methodist Church to New Millennium United Methodist Church(New Millennium); granting a default judgment against defendant 552 W.24th St. Associates Inc.(552Associates);granting summary judgment against defendants New Millennium , Mun Sank Suk and Yeung Ok Suk and striking these defendants' verified answer and affirmative defenses; and appointing a referee to compute the amount due plaintiff and to determine whether the real property may be sold in a single parcel.

	Papers <u>Numbered</u>
Notice of Motion - Affirmation -Affidavit-Exhibits .....	1-5
Opposing Affirmation-Exhibits.....	6-9
Reply Affirmation-Exhibit .....	10-12
Memorandum of Law.....	

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

On February 27, 2007 New Millennium executed and delivered to Woori America Bank a note in the sum of \$2,775,000.00, secured by mortgage against real property known as 211-06 48<sup>th</sup> Avenue, Bayside, New York, 11364, and Associates executed and delivered to Woori America Bank a guaranty of payment of the debt secured by said mortgage. The mortgage was recorded on March 22, 2007.

On December 31, 2009, New Millennium executed and delivered to Woori America Bank a note in the sum of \$2,630,721.56, which replaced the February 27, 2007 note. On the same date, New Millennium executed and delivered to Woori America Bank a modification agreement, which modified the February 27, 2007 mortgage and note, and Mun Sang Suk and Yeung Ok Suk individually executed and delivered to Woori America Bank a guaranty of payment whereby they jointly and severally guaranteed payment of the debt secured by the December 31, 2009 mortgage and note modification agreement.

On August 19, 2011 Woori American Bank commenced a mortgage foreclosure action against New Millennium, NYC Environmental Control Board, NYCTL 2009-A Trust and The Bank of New York, The City of New York and “John Doe ”under Index No. 19710/2011. A notice of pendency was filed on August 19, 2011 against the subject real property. An examination of the court’s file in that action reveals that defendant New Millennium served an answer to the Woori complaint and interposed affirmative defenses; defendants NYCTL 2009-A Trust and The Bank of New York served an answer to the Woori complaint and interposed affirmative defenses, including the superiority of the tax lien; and defendant City of New York served a notice of appearance, and waived service of all papers and notice of all proceedings in said action, except amended pleadings, notices of settlement of judgments and orders, notices of entry of judgments and orders, notices of application for discontinuance of the action, referee reports and all surplus money proceedings.

On December 16, 2011, Woori American Bank assigned the mortgage to the subject real property to Bayside KCNPB Inc., and said assignment was recorded on

January 12, 2012. On December 16, 2011, the December 31, 2009 note was endorsed to Bayside KCNPB, Inc., pursuant to a separate allonge dated December 16, 2011.

Woori America Bank entered into a written assignment whereby it assigned to Bayside KCNPB Inc. its cause of action in the action commenced under Index No. 19710/2011, effective December 20, 2011. Said assignment was filed under Index No. 19710/2011 on February 9, 2012.

Bayside KCNPB Inc. commenced the within mortgage foreclosure action on February 9, 2012 against Millennium Bank (incorrectly sued herein as Millenium Bank), Mun Sang Suk, Yeung Ok Suk, 552 Associates and John Doe No 1 through No. 10, in order to effectuate service on the guarantors and obtain jurisdiction over them, and to assert a claim for a deficiency judgment against said guarantors.

That branch of plaintiff's motion for consolidation of this action with the action commenced under Index No. 19710/2011, and is denied, with leave to renew. Plaintiff has not served a copy of the within motion on all of the defendants who appeared in the action commenced under Index No. 19710/2011; has failed to request leave to be substituted as the plaintiff in the action commenced under Index No. 19710/2011 so as to properly effectuate a consolidation of these actions; and proposes deleting the NYC Environmental Control Board, NYCTL 2009-A Trust and The Bank of New York, The City of New York and "John Doe," named defendants in the action commenced under Index No. 19710/2011, from the caption of the consolidated action, without seeking leave of the court or submitting evidence that said action has been discontinued as to said defendants.

That branch of plaintiff's motion which seeks to amend the caption in this action in order to correct the spelling of the name of defendant New Millennium, is granted.

Turning now to that branch of plaintiffs' motion which seeks to dismiss the affirmative defenses and striking the answer, when moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (see, CPLR 3211 [b]; *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2006]). In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (see, *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (see, *id.*). "A defense not properly stated or one that has no merit, however, is subject to dismissal pursuant to CPLR 3211(b). It, thus, may be the target of a motion for summary judgment by the plaintiff

seeking dismissal of any affirmative defense after the joinder of issue" (*Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., NY, Inc.*, 35 Misc3d 1228A [2012]).

The defendants', New Millennium, Mun Sang Suk, and Yeung Ok Suk's, first three affirmative defenses each allege lack of standing, albeit on different grounds.

That branch of the plaintiff's motion which seeks to dismiss the defendants' first affirmative defense of lack standing, is granted.

Plaintiffs allege that the December 31, 2009 promissory note is not negotiable and not transferable, and therefore plaintiff failed to become the holder of the note and mortgage. The December 31, 2009 promissory note, executed by the borrower states on its face that the holder could enter into "sales, repurchases or participations of this Note to any person in any amount" and the borrower waived notice of such transactions. The note, thus, was clearly assignable, and was assigned to the plaintiff pursuant to the Allonge dated December 31, 2009. Said promissory note sets forth the amount loaned, the rate of interest, the term of the note, and the date and amount of monthly payments. The fact that the note also makes reference to the commercial loan agreement for "terms and conditions of this Note, including the terms and conditions under which maturity of this Note may be accelerated" does not destroy the note's negotiability (see *Broward Title Co. v Matrix Capital Bank [In re AppOnline.com, Inc.]*, 321 BR 614 [2003]). Therefore, as plaintiff's standing to commence this action is not dependent on the negotiability of said note, the first affirmative defense is dismissed.

That branch of plaintiff's motion which seeks to strike the defendants' second and third affirmative defenses of lack of standing, is denied.

In order to commence a foreclosure action, a plaintiff must have a legal or equitable interest in the mortgage. A plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced (see *Bank of N.Y. v Silverberg*, 86 AD3d 274 [2011]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2011]; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 207 [2009]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2009]; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709 [2009]). An assignment of a mortgage without assignment of the underlying note or bond is a nullity, and no interest is acquired by it (see *Merritt v Bartholick*, 36 NY 44, 45 [1867]; *Bank of N.Y. v Silverberg*, 86 AD3d 274 [2011]; *LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911, 912 [2009]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" (U.S.

Bank, N.A. v Collymore, 68 AD3d at 754; see Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 108; see also Deutsche Bank Trust Co. Ams. v Codio, 94 AD3d 1040 [ 2012]).

Plaintiff has produced a separate paper entitled "allonge to promissory note" dated December 16, 2011, which contains the following footnote : " By Modification Agreement dated May 1, 2010, Bank and Borrower inadvertently modified the Promissory Note dated February 27, 2007 which should have been dated December 31, 2009." The allonge also states that it is " Page 22 of 31". Plaintiff has failed to establish that the allonge to the promissory note is "so firmly affixed" to the note "as to become part thereof" (UCC 3-202[2]; Slutsky v Blooming Grove Inn, 147 AD2d 208 [1989]; Cit Group/Consumer Fin., Inc. v Platt, 33 Misc. 3d 1231A [2011]). In addition, plaintiff has failed to establish that the promissory note was physically delivered to it prior to the commencement of this action. The affidavit by plaintiff's president and the affirmation of its counsel stating that the plaintiff is the owner loan documents pursuant to the allonge, and that the documents were received from the bank, do not set forth any factual details as to when the plaintiff received physical possession of the note and, thus, failed to establish that the plaintiff had physical possession of the note prior to commencing this action (see Aurora Loan Servs., LLC v Weisblum, 85 AD3d at 108; U.S. Bank, N.A. v Collymore, 68 AD3d at 754). Plaintiff has also failed to submit a copy of the May 2010 modification agreement, and it is noted that the assignment of the mortgage makes no mention of any modification of the note and mortgage.

The court further finds that the documentary evidence submitted herein is insufficient to establish that the subject mortgage is valid. There is no evidence that the New Millennium, a religious corporation, obtained leave of the court prior to executing the subject mortgage in accordance with Religious Corporation Law §12 (see Bernstein v Friedlander, 58 Misc 2d 492, 495 [1968]; see also Brighton Way, LLC v Queen Esther's Temple, Inc., 19 Misc 3d 1137 [A] [2008]). Plaintiff asserts that the subject loan is a purchase money mortgage , and therefore is exempt from the provisions of said statute. However, neither the mortgage, nor the mortgage and note modification agreement submitted herein make any reference to a purchase money mortgage. To the extent that the preprinted promissory note states that: "7. PURCHASE MONEY LOAN. You may include the name of the seller on the check or draft for this Note", said instruction is insufficient to establish that the subject mortgage is a purchase money mortgage.

That branch of plaintiff's motion which seeks to dismiss the fourth affirmative defense of failure to properly accelerate the payment of the mortgage, prior to the commencement of this action, is denied as to the mortgagor. The plaintiff's moving papers fail to establish that it gave the mortgagor notice of default and acceleration of the debt prior to the commencement of the action. With respect to the defendant guarantors,

Mun San Suk and Yeung Ok Suk, this affirmative defense is dismissed as the guaranties provide that they each waived “ protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

That branch of plaintiff’s motion which seeks to dismiss defendants’ fifth, eleventh and twelfth affirmative defenses is granted as defendants merely plead conclusions of law without any supporting facts (*see* CPLR 3012, 3018[b]; *Morgenstern v Cohon*, 2 NY2d 302 [1957]; *Moran Enters., Inc. v Hurst*, 96 AD3d 914, 917 [2012]; *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2008 ]; *170 W. Vil. Assoc. v G & E Realty, Inc.*, 56 AD3d 372, 372-373 [2008 ]; *Petracca v Petracca*, 305 AD2d 566, 567 [2003]; *Glenesk v Guidance Realty Corp.*, 36 AD2d 852, 853 [1971]), without prejudice to replead those affirmative defenses in proper form.

That branch of plaintiff’s motion which seeks to dismiss the sixth affirmative defense of failure to comply with the Truth In Lending Act (TILA) (15 USC § 1601 et seq.), is granted. TILA applies only to consumer credit transactions, and it does not apply to “[c]redit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, or to government or governmental agencies or instrumentalities, or to organizations” (15 USC § 1603 [1]; *see also Mauro v Countrywide Home Loans, Inc.*, 727 F Supp 2d 145, 153 [ 2010]; *Meyerson Capital X LLC v Kats*, 33 Misc 3d 1017, 1020 [2011]; *Patriot Natl. Bank v Amadeus B, LLC*, 29 Misc 3d 1217[A], [ 2010];). The term “organization,” as defined by 15 USC § 1602 (d), includes a corporation, such as New Millennium. TILA’s implementing regulation, Federal Reserve Board Regulation Z, follows this statutory exemption (12 CFR 226.3 [a]), explicitly stating that this regulation does not apply to “[a]n extension of credit primarily for a business, commercial or agricultural purpose” or “[a]n extension of credit to other than a natural person, including credit to government agencies or instrumentalities” (12 CFR 226.3 [a] [1], [2]; *see also Capital One, N.A. v Margiotta*, 36 Misc 3d 1227A [2012]; *Patriot Natl. Bank v Amadeus B, LLC, supra*).

New Millennium is a corporation, and defendants do not allege that the underlying loan constituted a consumer credit transaction. Rather, the documentation submitted by the parties reveals that the loan was for commercial purposes. In addition, the guarantors’ principal dwelling is not involved and defendants did not sign the promissory note in their individual capacity. TILA, thus, does not apply to the subject loan, and no disclosures pursuant to its provisions were required to be delivered to defendants (*see Capital One, N.A. v Margiotta*, 36 Misc 3d 1227A [2012]; *Patriot Natl. Bank v Amadeus B, LLC, supra* ).

That branch of plaintiffs’ motion which seeks to dismiss the seventh affirmative

defense which alleges a violation of the Real Estate Settlement Procedures Act (RESPA) (12 USC § 2601, et seq.), is granted. RESPA applies to settlement procedures for residential real estate and specifically exempts extensions of credit primarily for business and commercial purposes (12 USC § 2601, 2602). Defendants do not assert that this is a residential real estate transaction, and the documentary evidence establishes that the subject loan is a commercial loan, involving non-residential real property.

That branch of plaintiff's motion which seeks to dismiss the eighth affirmative defense of lack of personal service, is granted. The affidavits of service submitted herein establish that New Millennium, Mun Sang Suk, and Yeung Ok Suk were served with process, and as defendants have not moved to dismiss the complaint on this ground, within 60 days of service of the answer, they have waived their objection to service of process (CPLR 3211[e]).

That branch of plaintiff's motion which seeks to dismiss defendants' ninth affirmative defense is granted, as the documentary evidence establishes the existence of written guaranties executed by these defendants.

That branch of the plaintiff's motion which seeks to dismiss the tenth affirmative defense of a prior action pending is denied, as it is undisputed that there is a prior pending action to foreclose the subject mortgage, and that action has neither been consolidated with the within action, nor discontinued.

That branch of plaintiff's motion which seeks to dismiss the thirteenth affirmative defense is granted, as the documentary evidence submitted establishes that plaintiff is a domestic corporation, formed prior to the commencement of this action.

That branch of plaintiff's motion which seeks to dismiss the fourteenth affirmative defense, is granted. The December 31, 2009 sets forth the rate of interest, as well as the formula for the variable rate of interest and its application, and therefore is not void for vagueness.

That branch of plaintiff's motion which seeks to strike the defendants' answer and for an order granting summary judgment and appointing a referee to determine the amount due and whether the property can be sold in a single parcel, is denied, as such relief is not warranted at this time for the reasons stated above.

That branch of plaintiff's motion which seeks a default judgment against 522 Associates, is denied. Plaintiff has failed to submit an affidavit of service as to this defendant and thus has not established that the court has jurisdiction over this defendant.

Plaintiff has failed to establish that the 522 Associate’s guaranty of the February 27, 2007 promissory note survived the cancellation, termination and replacement of that note with the December 31, 2009 promissory note.

Finally, it is noted that counsel for plaintiff failed to sign the notice of motion submitted the court, as required by 22 NYCRR §130-1.1-a.

In view of the foregoing, that branch of plaintiff’s motion which seeks an order granting consolidation of the within action with the action commenced under Index No.19710/2011 is denied. That branch of plaintiff’s motion which seeks to strike defendants’ affirmative defenses is granted solely as to the first, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth and fourteenth affirmative defenses. The fourth affirmative defense is dismissed only as to defendants Mung Sang Suk and Yeong Ok Suk, and is denied as to New Millennium. That branch of plaintiff’s motion which seeks to dismiss the second, third and tenth affirmative defenses, is denied. That branch of plaintiff’s motion which seeks to strike the answer and grant summary judgment against New Millennium, and the Suk defendants, and appoint a referee, is denied. That branch of the motion which seeks a default judgment against 522 Associates, is denied. That branch of the motion which seeks to amend the caption in order to correct the spelling of New Millennium, is granted.

Dated: November 2, 2012

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J.S.C.