

HSBC Bank USA v 127 Fulton LLC
2013 NY Slip Op 31959(U)
August 16, 2013
Supreme Court, New York County
Docket Number: 810083/2010
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. _____
Justice

PART 8

Index Number : 810083/2010
HSBC BANK USA
vs.
127 FULTON LLC
SEQUENCE NUMBER : 003
OTHER RELIEFS

INDEX NO. 810083/10
MOTION DATE _____
MOTION SEQ. NO. 003

The following papers, numbered 1 to 34, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED

AUG 21 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/16/13

Joan M. Kenney, J.S.C.
JOAN M. KENNEY

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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 8

-----X
HSBC BANK USA, NATIONAL ASSOCIATION,

Index # 810083/10

Plaintiff,

DECISION & ORDER

-against-

127 FULTON LLC, LAURE-ANNE BROWN, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY TRANSIT AUTHORITY TRANSIT ADJUDICATION BUREAU, RED HOOK CONSTRUCTION GROUP-I, LLC and "JOHN DOE #1" THROUGH "JOHN DOE #100" the names of the last 100 defendants being known to HSBC, it being intended to designate fee owners, tenants or occupants of the lien premises, if the aforesaid individual defendants are living, and if any or all of said individual defendants be dead, their heirs at law, next of kin, distributees, executors, administrators trustees, committees, devisees, legatees and the assignees, lienors, creditors and successors in interest of them, and generally all persons having or claiming under, by, through or against the said defendants named as a class, of any right, title or interest in or lien upon the premises described in the complaint herein,

Defendants.

-----X
KENNEY, Joan, M., J .

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Papers considered in review of these motions:

Papers:

Notice of Motion, Affirmation,
Affidavits, Exhibits & Memorandum of Law
Notice of Cross Motion, Affirmation in Support & Opposition,

Numbered:

1-25

FILED

AUG 21 2013

**COUNTY CLERK'S OFFICE
NEW YORK**

Motion sequences 003 and 004 are consolidated for decision in this foreclosure action.

Plaintiff, HSBC Bank USA, N.A. (HSBC), moves for an Order seeking (1) substitution of 140 Wendover II, LLC, as assignee for HSBC, (2) a judgment of foreclosure, pursuant to CPLR 3212, and dismissal of 127 Fulton LLC's (the borrower) and Laure-Anne Brown's (the guarantor) counterclaims, (3) severance of the remaining causes of action in the complaint, (4) appointment of a referee to compute, (5) amendment the caption to eliminate the fictitious defendants.

Defendant, Red Hook Construction Group-I, LLC (Red Hook) cross-moves for an Order, pursuant to CPLR 601, consolidating this action with a related action.

Plaintiff's motion consists of five branches. Red Hook only opposes three of the five parts of the motion. The first and fifth branches of plaintiff's motion are granted. The balance of the application and the cross motion will be addressed *seratim*.

140 Wendover II LLC (Wendover) as assignee for HSBC, is substituted in the caption and the fictitious defendants are hereby eliminated from the action. Consequently, the caption of the action shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK PART 8
 -----X
 140 WENDOVER II LLC, as assignee for
 HSBC BANK USA, NATIONAL ASSOCIATION,

Plaintiff,

-against-

127 FULTON LLC, LAURE-ANNE BROWN, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, NEW YORK CITY DEPARTMENT
OF TAXATION AND FINANCE, NEW YORK CITY
TRANSIT AUTHORITY TRANSIT ADJUDICATION
BUREAU, RED HOOK CONSTRUCTION GROUP-I,
LLC,

Defendants.

-----X

FACTUAL AND PROCEDURAL BACKGROUND

HSBC, Wendover's predecessor-in-interest, as owner of the notes and mortgages, commenced this foreclosure action on November 8, 2010.¹ The mortgages at issue secured a building loan in the amount of \$13,338,574.55, and a project loan in the amount of \$1,661,425.46 (the loans). When HSBC served its pleadings, the borrower, and the guarantor, were already in default under the terms of the notes, mortgages, as well as, not one, but three separate forbearance agreements, dated October 10, 2008, March 17, 2009 and January 22, 2010.

The loans were made to the borrower, on or about November 27, 2007. On or about March 2, 2011, HSBC assigned all of the documents attendant to the loans and mortgages, including any and all of its right, title and interest in this litigation, to

¹HSBC filed its pleadings simultaneously with a notice of pendency.

Wendover. In reply, Wendover's principal, Mark Weissman (Weissman) avers that the consideration for the assignment of the loans and the litigation was \$10,000,000.00. The moving papers do not annex any documents supporting this allegation, even though Weissman says "Wendover is me."

The parties do not contest that the debt, in excess of \$15,000,000, was secured by the building known as, 127 Fulton Street, New York, New York (the building). The building is located with the City, County and State of New York. The original scope of the project was to convert the building from what was presumably commercial property, to a mixed use residential condominium premises.

Construction was not completed timely, resulting in the borrower and the guarantor's default in both payment and performance. After the assignment was completed, Wendover, the borrower and the guarantor, executed yet another written modification of the loans; wherein the borrower and guarantor, *inter alia*, consented to entry of an Order of foreclosure, and waived any defenses, counterclaims or set-offs they may have had against Wendover or HSBC.

Notwithstanding the foregoing, issue was joined on or about January 11, 2011, with the service of the borrower and guarantor's joint answer, which included counterclaims. Notably, the borrower and the guarantor both have counterclaims alleging that HSBC,

"consistently delayed requisitions [to pay Red Hook as the general contractor], causing a delay in completing the construction by the deadline required by the Building Loan Agreement." Now, at this point in the litigation, neither the borrower nor the guarantor have served an amended answer to plaintiff's amended complaint dated, January 14, 2011. However, Red Hook did serve and file a responsive pleading to the amended complaint pursuant to a stipulation. Red Hook served its amended verified answer on or about March 29, 2012. Curiously, neither the borrower nor the guarantor are opposing either the motion-in-chief or the cross motion.

Red Hook is a mechanic's lienor, who performed work, labor and services for the borrower and was not paid. Red Hook interposed the affirmative defense that [Wendover] "is subject to equitable estoppel." Said defense is predicated upon the fact that the [original] mortgages "lack[ed] appropriate trust fund covenant language... ." In the action to foreclose Red Hook's lien, the allegations include, *inter alia*, that Red Hook, "performed work, labor and services in the amount of (sic) and fair and reasonable value Seven Hundred Twenty-Three Thousand Eight Hundred and Fifty 00/100 (\$723,850.00) Dollars."²

²Red Hook's cross motion seeks to consolidated the instant action with *Red Hook Construction Group-I, LLC v. 127 Fulton, LLC and 140 Wendover II LLC*, Index # 107110/11, which seeks, *inter alia*, to foreclose upon Red Hook's mechanic's lien.

Red Hook's opposition vociferously alleges that the sole motivation for Wendover to foreclose at this stage, is to render Red Hook's lien "worthless." Red Hook claims that Wendover has made surreptitious agreements with the borrower and the guarantor, and these allegations can only be refuted or confirmed through the discovery process. It is undisputed that the motion-in-chief was served and filed prior to the commencement of any meaningful discovery.³

A principal of Red Hook, Christopher Lynch (Lynch), avers that "in or about 2010" he had several conversations with HSBC's attorneys regarding payment to Red Hook for the amounts they were owed. Lynch alleges at some point he was informed by Richard Beers, Esq. that HSBC was not going to continue funding the project; and that it sold the loans to an entity called Debt Acquisition Group (DAG).

Richard Beers, Esq. (Beers) also allegedly told Lynch that DAG "was buying the building and the Note." According to Lynch, when he pressed Beers for the identity of the purchaser of the HSBC debt, he was allegedly told that it was a "friendly party" to DAG.

DAG's principal, Mark Esrig (Esrig), apparently met with Lynch in April 2011, at 127 Fulton Street, and Lynch was informed by Esrig that if Lynch did not discount the amount owed to Red Hook,

³Notwithstanding the rules for Part 8, which instruct counsel that service of a premature CPLR 3212 motion, will not stay discovery.

Esrig would "foreclose on himself" and render Red Hook's lien "worthless."

In July 2011, Lynch states that he had a meeting with Wendover's counsel, Edward J. Bullard, Esq. (Bullard), Ari Loren and Esrig. Bullard informed Lynch that he was also representing DAG. Lynch was further informed by Bullard that he wanted to "mediate" the dispute, so the project could be finished. Lynch rejected the amount offered to settle the lien because the offer was "insulting." Finally, Lynch states that the movant has deliberately withheld a purchase agreement that may exist, which may shed light on the relationship, if any, between Wendover and the borrower. Additionally, counsel for Red Hook avers that on April 4, 2011, he had a conversation with Beers, who yet again advised that the mortgages were sold to a "familiar borrower to the purchaser of 127 Fulton Street," and that a "confidential agreement" was attendant to the transaction.

In reply, Weissman denies having any connection with either the borrower or the guarantor and dismisses the allegations made by Lynch.

ARGUMENTS

Wendover argues that it is entitled to the relief sought because it has produced the necessary evidence showing that it is the holder and/or owner of the mortgages and underlying debt and the borrower is in default.

Red Hook contends very simply that the scheme between Wendover and [the borrower and/or the guarantor] and the concealment thereof, was an effort to avoid a merger of the mortgage with the debt. Red Hook argues further that the sole motivation for the transaction was to discharge Red Hook's mechanic's lien, and that such an effort should be prevented by the doctrine of equitable estoppel. In other words, Wendover could have simply purchased the property and satisfied HSBC's debt, and Red Hook's lien would have remained intact.

DISCUSSION

"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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). In the event the movant has satisfied its prima facie burden of proof, the burden then shifts to Red Hook to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). 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).

Wendover has failed to address or refute the negative

implications raised by the Lynch affidavit, thereby raising factual issues with respect to the veracity or accuracy of the statements made by Weissman.

Further, meaningful discovery has not been conducted by the parties prior to the filing of this summary judgment motion. Because discovery may assist the parties (and this Court) in narrowing or resolving disputed issues of fact, the summary judgment motion is denied without prejudice. *Magee v County of Suffolk*, 14 AD3d 664 (2d Dept 2005); *Perroto Dev. Corp. v Sear-Brown Group*, 269 AD2d 749 (4th Dept 2000) (denying summary judgment motion without prejudice to renew, after completion of discovery).

The Court has considered all of the additional arguments raised in the motion-in-chief and the cross motion and find them to be unpersuasive. Consequently, the motions are denied.

Accordingly, it is

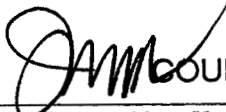
ORDERED that the motion-in-chief and cross motion are denied without prejudice.

Dated: August 16, 2013

E N T E R:

FILED

AUG 21 2013


COUNTY CLERK'S OFFICE
NEW YORK
Hon. Joan M. Kenney
J.S.C.