71 Clinton St. Apts. LLC v 71 Clinton Inc.
2013 NY Slip Op 32889(U)
May 13, 2013
Sup Ct, New York County
Docket Number: 850047/2011
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE HON. BARBARA R. KAPNICK Justice

PART 12

Index Number : 850047/2011
71 CLINTON STREET APARTMENTS
vs.
71 CLINTON INC.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 850047/11
MOTION DATE
MOTION SEQ. NO. 003

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 25-26
Answering Affidavits — Exhibits _____ | No(s). 30-31
Replying Affidavits _____ | No(s). 35-38

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/13/13

_____, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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71 CLINTON STREET APARTMENTS LLC, as assignee of PEOPLE'S UNITED BANK, as successor by merger to BANK OF SMITHTOWN,

Plaintiff,

-against-

71 CLINTON INC., STEVEN ROSENFELD, ILANA INDUSTRIAL LLC, PARK AVENUE FUNDING, LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, CITY OF NEW YORK DEPARTMENT OF FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, JOHN DOE No. 1 through JOHN DOE No. 25, the last twenty-five (25) names being fictitious and unknown to plaintiff, 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. 850047/2011

Subm.: 4/15/13
Motion seq. no.: 003

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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For defendants:
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By notice of motion dated November 30, 2011, plaintiff 71 Clinton Street Apartments LLC (CSA) moves pursuant to CPLR 3212 for an order granting it summary judgment and appointing a referee, pursuant to CPLR 3211(b) for an order dismissing defendants' affirmative defenses, and for an order amending the caption to eliminate references to various John Does. Defendants oppose.

I. BACKGROUND

Plaintiff seeks to foreclose a consolidated mortgage on real property located at 71 Clinton Street, New York, New York, and obtain a judgment for a deficiency against those liable for the debt secured by the mortgage. (Affirmation of Clifford Solomon, Esq., dated Nov. 30, 2011 [Solomon Aff.], Exh. 1). A note dated September 26, 2007 was executed by defendant 71 Clinton Inc. and the Bank of Smithtown whereby 71 Clinton Inc. promised to pay the principal sum of $660,691.37 with interest per the note and ensuing mortgage. On the same day, 71 Clinton Inc. executed an Amended, Restated and Consolidated Mortgage Note (Note) for the principal sum of $7,900,000.00 and delivered it to the Bank of Smithtown, secured by the Modification and Consolidation Agreement (Mortgage).

Pursuant to the Note and Mortgage, 71 Clinton Inc. was required to pay monthly principal and interest in the amount of $49,933.97 on the first of each month commencing November 1, 2007, to and including October 1, 2037. Upon a default in payment of principal or interest for 10 days, the entire unpaid balance would become payable at mortgagee's option. (Solomon Aff., Exh. 7). Defendant Rosenfeld unconditionally and irrevocably guaranteed these obligations to the extent of unpaid principal, interest or other amount due under the Mortgage and Note. (*Id.*).

Pursuant to an Agreement and Plan of Merger dated as of July 10, 2010 between People's United Financial, Inc., of which People's United Bank (People's United) is a subsidiary, and Smithtown Bancorp, Inc. of which Bank of Smithtown was a subsidiary, and a Subsidiary Plan of Merger, the Mortgage and Note were acquired by People's United. (*Id.*).

In November 2010, Bank of Smithtown commenced an action against defendants seeking to foreclose on the mortgage, and by order dated April 27, 2011, another justice of this court

granted defendants' motion for an order dismissing that action on the undisputed ground that Bank of Smithtown "is no longer the real party in interest to the underlying mortgage agreement." (*Id.*, Exh. 7).

By written assignment dated June 2, 2011, the Note was endorsed by People's United to plaintiff's order, and the Mortgage was thereby assigned to plaintiff, along with Rosenfeld's guaranty and all of the other loan documents. (*Id.*).

By letter dated June 20, 2011, addressed to 71 Clinton Inc. and referencing the loan, People's United thanked 71 Clinton Inc. for being a "valued customer of People's United." (Affirmation in Opposition of Norman Flitt, Esq., dated Jan. 4, 2012, Exh. B).

Plaintiff alleges that defendant failed to comply with the terms and conditions of the Mortgage and Note by not paying monthly installments for June 2010 through and including July 2011. On or about September 7, 2010, plaintiff served 71 Clinton, Inc and Rosenfeld with written notice of the default and demanded immediate payment of $7,874,550.91, plus interest and late fees, and provided them with 10 days to cure the default by remitting $240,223.84. (Staron Reply Affid., dated Jan. 9, 2012 [Staron Reply Affid.], Exh. 4).

On July 20, 2011, plaintiff filed a notice of pendency against defendants 71 Clinton Inc., Rosenfeld, Ilana Industrial LLC, and Park Avenue Funding, LLC. (Solomon Aff., Exh. 2). On July 27, 2011, the summons and complaint were duly served on defendants via the Secretary of State pursuant to BCL § 306. (*Id.*, Exh. 3). By stipulation dated October 3, 2011, defendants acknowledged service of the notice of pendency, summons and verified complaint, and "Commercial Property Residential Foreclosure Program Statement," and their time to answer was extended to and including November 1, 2011. (*Id.*).

By verified answer dated October 31, 2011, defendants assert the following affirmative defenses: failure to state a cause of action on which relief may be granted, *res judicata* and/or collateral estoppel, lack of standing, fraud, unconscionability, champerty, unclean hands/ inequitable conduct, right of redemption, and preclusion. (*Id.*, Exh. 4).

II. CONTENTIONS

Plaintiff maintains that it has set forth, *prima facie*, its entitlement to foreclose the subject mortgage. It appends to its motion the following documentation:

a. Consolidated Mortgage (*id.*, Exh. 6);
b. Amended, Restated and Consolidated Mortgage Note (*id.*, Exh. 7);
c. assignment of unpaid note and mortgage, endorsement of Amended, Restated and Consolidated Mortgage Note and transfer of other related loan documents (*id.*, Exh. 8); and
d. evidence of default and notice of same (*id.*, Staron Affid., Exh. 9).

In opposition to the motion, defendants deny that plaintiff has set forth a *prima facie* case for foreclosure, arguing that plaintiff has no standing, relying on the June 2011 letter from People's United and the April 2011 order by which Bank of Smithtown was denied summary judgment. Defendants also claim that plaintiff has not shown that the merger between Bank of Smithtown and People's United was completed, and consequently, People's United may not have owned the mortgage and note when it sold them to plaintiff. They observe that the Allonge to the Note reflects that the note is endorsed subject to representations and warranties set forth in a contract of sale dated March 3, 2011, and that absent any explanation, plaintiff has failed to eliminate the possibility that People's United retained rights in and to the Note and Mortgage. They also allege a deficiency in proof of default, noting that the default letter attached to the moving papers refers to a different borrower and a different property (Flitt Aff., Exh. D), and that because disclosure remains outstanding, their ability to defend themselves is stymied (Affidavit

of Steven Rosenfeld, dated Dec. 29, 2011). Defendants also maintain that plaintiff has not addressed their affirmative defenses sufficiently to warrant their dismissal. (*Id.*).

In reply, plaintiff appends six documents which it claims prove that the merger was complete and effective, that plaintiff in fact owns the Mortgage and Note, and that defendants defaulted. It also submits a new supporting affidavit from the Vice President of People's Bank, thereby asserting that it has established its *prima facie* case. (Reply Affidavit of Robert Staron, dated Jan. 9, 2012 [Staron Affid.], Exhs. 1-6). Plaintiff also maintains that defendants are judicially estopped from arguing that the merger was not effective because, in the November 2010 action, defendants argued that the merger was complete. According to plaintiff, defendants have the burden of establishing their affirmative defenses, and have failed to do so, and that the outstanding discovery demands do not preclude summary judgment. (Plaintiff's Reply Memorandum, dated Jan. 11, 2012).

III. ANALYSIS

A. Plaintiff's *prima facie* case and proof of standing

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law with evidence sufficient to negate any material issues of fact. (*Forest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant meets this burden, the opponent must rebut the *prima facie* showing with admissible evidence demonstrating the existence of factual issues that require trial. (*Zuckerman*, 49 NY2d 562; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Courts may not assess credibility on a motion for summary judgment, and the facts must be viewed in the light most favorable to the nonmoving party. (*Forest*, 3 NY3d 314; *Ferrante v Am. Lung*

Assn., 90 NY2d 623, 631 [1997]). Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable. (*Forest*, 3 NY3d 314). Moreover, the movant must submit admissible evidence proving every element for which it has the burden; any defects in the *prima facie* case cannot be cured by submitting new evidence in reply. (*627 Acquisition Co., LLC v 627 Greenwich, LLC*, 85 AD3d 645, 645-46 [1st Dept 2011]; *Cevallos v Morning Dun Realty, Corp.*, 78 AD3d 547, 549 [1st Dept 2010]; *Migdol v City of NY*, 291 AD2d 201, 201 [1st Dept 2002]).

In a foreclosure action, a plaintiff's *prima facie* entitlement to summary judgment is demonstrated with admissible evidence showing the existence of the mortgage and a default. (CPLR 3212[b]; *JP Morgan Chase Bank v Shapiro*, 104 AD3d 411, 412 [1st Dept 2013]; *1855 E. Tremont Corp. v Collado Holding LLC*, 102 AD3d 567, 568 [1st Dept 2013]; *CitiFinancial Co. v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). And, as here, if the defendant's answer asserts a lack of standing to bring the foreclosure action, the plaintiff must also prove that it has standing by demonstrating that it held or was assigned both the subject mortgage and the underlying note when the action was commenced. (*OneWest Bank FSB v Carey*, 104 AD3d 444, 445 [1st Dept 2013], *citing US Bank, NA v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]; *JP Morgan*, 104 AD3d 411, 412).

Once a plaintiff satisfies its initial burden, the party opposing the foreclosure must come forward with evidence sufficient to raise a triable fact issue as to an element of plaintiff's *prima facie* case or as to any available affirmative defense. (*Id.*; *1855 E. Tremont*, 102 AD3d 568). Summary judgment may also be denied where the nonmoving party shows that there exist material facts within the movant's exclusive control, and an insufficient opportunity to discover

them. (CPLR 3212[f]; *Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006]; *Gonzalez v Vincent James Mgmt.*, 306 AD2d 226, 226 [1st Dept 2003]).

As it is undisputed that the Mortgage and Note exist, the issue to be resolved is whether plaintiff owned them both when the suit was commenced, and whether defendants defaulted. It is also undisputed that the Mortgage and Note have changed hands several times. Consequently, plaintiff must establish each link in the chain of transactions to prove standing. (*See US Bank, NA*, 68 AD3d 752, 753; *Bank of NY v Silverberg*, 86 AD3d 274, 274 [2d Dept 2011]).

Bank of Smithtown's purported merger with People's United requires government and shareholder approval. Plaintiff, however, offered no evidence in its initial motion papers that the merger was complete and effective, doing so only with its reply brief. And, although People's United allegedly assigned plaintiff the Mortgage on June 2, 2011, it sent a letter regarding that mortgage to defendants on June 20, 2011, thereby suggesting that it in fact still owned the mortgage, a discrepancy also not addressed in plaintiff's initial moving papers. Nor did plaintiff offer proof of a default until it filed its reply brief. Plaintiff's *prima facie* case thus has fatal gaps. And even if defendants are judicially estopped from now denying that Bank of Smithtown merged into People's United, the gaps remain, precluding summary judgment given the questions of fact as to the alleged default and whether plaintiff had been transferred the Mortgage and Note by People's United before the action commenced.

Moreover, it is inappropriate to grant summary judgment without allowing at least some discovery. (*Blech v W. Park Presbyterian Church*, 97 AD3d 443, 443-44 [1st Dept 2012] ["Defendants' initial motions for summary judgment were premature, since the matter was in the

early stages of discovery, and depositions had not yet been taken."]). Here, there has been no discovery, and plaintiff now relies on documents first disclosed in its reply. These new documents introduce Cittro, a party to the mortgage transaction that was never mentioned or explained in the initial papers. (*Id.*, Exh. 3).

Given the complex transaction chain at issue, defendants must be allowed document disclosure and testimony from knowledgeable witnesses before these issues may be decided as a matter of law.

B. Defenses

Although plaintiff has failed to establish a *prima facie* case, and the burden of establishing affirmative defenses does not shift to defendants, plaintiff also moves pursuant to CPLR 3211(b), which permits a party to move for judgment dismissing one or more defenses on the ground that a defense is not stated or has no merit. To dismiss a defense, the plaintiff bears the burden of demonstrating that the defense is without merit as a matter of law. (*Deutsche Bank Natl. Trust Co. v Gordon*, 84 AD3d 443, 443-44 [1st Dept 2011]; *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559-60 [2d Dept 2006]; *Santilli v Allstate Ins. Co.*, 19 AD3d 1031, 1032 [2d Dept 2005]). In deciding a motion to dismiss a defense, the court must give the defendant the benefit of every reasonable intendment of the pleading, which is to be liberally construed. (*Id.*; *Warwick v Cruz*, 270 AD2d 255, 255 [2d Dept 2000]). A defense should not be dismissed where questions of fact exist. (*Id.*; *Atlas Feather Corp. v Pine Top Ins. Co.*, 128 AD2d 578, 578-79 [2d Dept 1987]). The standard under CPLR 3211(b) is similar to that for assessing a motion for an order dismissing a claim pursuant to CPLR 3211(a)(7). (*Matter of Ideal Mutual Ins. Co.*, 140 AD2d 62, 67 [1st Dept 1988]).

However, where affirmative defenses merely plead conclusions of law without any supporting facts, the affirmative defenses should be dismissed pursuant to CPLR 3211(b). (*Bank of Am., NA v 414 Midland Av. Assoc., LLC*, 78 AD3d 746, 750 [2d Dept 2010]; *Firemans' Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008]).

1. Champerty and Judiciary Law § 489

Champerty, codified in Judiciary Law § 489, is a medieval doctrine prohibiting "the purchase of claims with the intent and for the purpose of bringing an action." (*Trust v Love Funding, Inc.*, 13 NY3d 190, 198-99 [2009]). The prohibition against champerty developed to prevent the commercialization of or trading in litigation. (*Id.*). It is not, however, champertous to purchase an asset as an investment and then enforce payment through litigation. (*Id.* at 199-200; *Bluebird Partners LP v First Fidelity Bank, NA*, 94 NY2d 726, 736-37 [2000]).

The distinction between champerty and the legitimate enforcement of the payment of a debt requires the resolution of the factual issue of whether the asset was purchased for the purpose of bringing a lawsuit. (*Trust*, 13 NY3d at 199-200; *Bluebird*, 94 NY2d at 736-39 [allowing champerty defense where plaintiff admitted that there were multiple reasons to purchase asset, including litigation]).

Here, the mortgage was purportedly assigned to plaintiff only a few weeks before the instant action was commenced, and defendants claim that it was sold at a discount. Given every inference to which defendants are entitled on a motion pursuant to CPLR 3211(b) and the lack of discovery to date, defendants have set forth a sufficient factual basis from which it may be inferred that plaintiff may have purchased the mortgage with the intent to file this action. Thus, it is inappropriate to dismiss the champerty defense at this stage.

2. Fraud

To plead fraud, a party must allege: (a) misrepresentation or omission of a material fact, (b) made to induce a party's reliance on that fact, (c) justifiable reliance by that party, and (d) injury to that party. (*See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Shea v Hambros*, 244 AD2d 39, 46 [1st Dept 1998]). In addition, to sustain a fraud claim, there must be facts alleged to "permit a reasonable inference of the alleged misconduct." (CPLR 3016[b]; *Eurycleia*, 12 NY3d 559).

Here, defendants do not identify the fraudulent statement or omission they allege was made to them by plaintiff. Defendants' claim that an unspecified appraiser inflated the appraisal is insufficient to sustain a fraud defense absent a reason to impute to plaintiff the third-party appraiser's alleged fraudulent conduct. (*Tribeca Lending Corp. v Bartlett*, 103 AD3d 516, 516-17 [1st Dept 2013] [dismissing fraud defense where there was no reason to impute the appraiser's fraud to the mortgage lender]). It is also insufficient for defendants to claim that a third party, such as the government, was defrauded without any contention that the fraudulent conduct harmed them. (*Citidress II v 207 Second Ave. Realty Corp.*, 21 AD3d 774, 777 [1st Dept 2005] [dismissing fraud defense in foreclosure action where alleged fraudulent actions by third parties not linked to plaintiff]; *Natl. Union Fire Ins. Co. v Robert Christopher Assoc.*, 257 AD2d 1, 8 [1st Dept 1999] [dismissing fraud defense absent a nexus between misrepresentation alleged and claimed injury]). In their opposition papers and answer, defendants fail to allege facts giving rise to a reasonable inference that plaintiff had engaged in a fraudulent scheme to induce defendants to mortgage the underlying property or default on that mortgage, causing injury.

3. Unclean hands and inequitable conduct

Unclean hands bars equitable relief, such as foreclosure, only when "the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke [it] was injured by such conduct." (*Wells Fargo Bank v Hodge*, 92 AD3d 775, 776 [1st Dept 2012]; *NY Community Bank v Parade Place, LLC*, 96 AD3d 542, 543 [1st Dept 2012] [unclean hands/inequitable conduct defense dismissed in absence of evidence plaintiff acted unfairly to defendant in foreclosure action]). Here, as with the fraud defense, (*supra,* III.B.2.), defendants have not shown what specific inequitable conduct by plaintiff caused them harm. General allegations of bad behavior by or towards third parties is not enough. (*Id.*).

4. Unconscionable terms or behavior

A mortgage foreclosure may be denied when the terms of the mortgage are unconscionable or where the mortgage lender's behavior is unconscionable. (*LaSalle Bank NA v Kosarovich*, 31 AD3d 904, 906 [3d Dept 2006] [dismissing unconscionable terms defense because defendant failed to show mortgage terms shocked the conscience]; *Empbanque Cap. Corp. v Geathers*, 224 AD2d 238, 239 [1st Dept 1996] *citing European Am. Bank v Harper*, 163 AD2d 458, 460-61 [2d Dept 1990] [finding that it was unconscionable for mortgage lender to refuse to accept mortgage payments and instead proceed with default]). Mortgage lenders have no obligation to modify the terms of the mortgage and it is not unconscionable to proceed with foreclosure if there is a default. (*Bank of Smithtown v 264 West 124 LLC*, 2013 WL 1405721, April 9, 2013 [1st Dept]). A bad bargain does not excuse default. (*LaSalle*, 31 AD3d 906). Defendants do not identify a single term in the mortgage which they claim is unconscionable, and as with their defenses of fraud and unclean hands (*supra*, III.B.2, 3), they allege no conduct by plaintiffs that shocks the conscience.

5. Failure to state a cause of action

It is not necessary to plead a failure to state a cause of action as an affirmative defense. (*Tache-Haddad Enter. v Melohn*, 224 AD2d 213, 214 [1st Dept 1996]; *Raine v Allied Artists Prods., Inc.*, 63 AD2d 914, 915 [1st Dept 1978]; *Riland v Todman & Co.*, 56 AD2d 350, 352 [1st Dept 1977]). Such a pleading constitutes harmless surplusage, but dismissal is not required if it is the only remaining affirmative defense. (*Id.*).

6. *Res judicata* and collateral estoppel

As the dismissal of the November 2010 action for lack of standing was not a decision on the merits, the instant action is neither barred by *res judicata* nor collaterally estopped. (*See Springwell Navigation Corp. v Sanluis Corporacion, SA*, 81 AD3d 557, 557-58 [1st Dept 2011] [dismissal for lack of standing is not decision on merits that bars or estops future claims]; *Pullman Group, LLC v Prudential Ins. Co. of Am.*, 297 AD2d 578, 578 [1st Dept 2002] [same]).

7. Preclusion and right of redemption

Having failed to address the affirmative defenses of preclusion and right of redemption, plaintiff has not shown that these defenses, to the extent they exist, should be dismissed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment and to appoint a receiver is denied; it is further

ORDERED, that plaintiff's motion to dismiss defendants' affirmative defenses is granted as to fraud, unconscionability, unclean hands/inequitable conduct, and *res judicata* and collateral estoppel and denied as to all others; it is further

ORDERED, that the caption is amended to eliminate references to the various John Does; and it is further

ORDERED, that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein

ENTER:

Barbara Jaffe, JSC

DATED: May 13, 2013
New York, New York