

2013 Funding LLC v Park 91 LLC

2013 NY Slip Op 32941(U)

November 6, 2013

Sup Ct, New York County

Docket Number: 85006/13

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART _____

Index Number : 850063/2013
2013 NY FUNDING I LLC
vs
PARK 91 LLC
Sequence Number : 002
SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, 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

is decided in accordance with the annexed decision.

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

Dated: 11/6/13

CYNTHIA S. KERN, J.S.C.

1. CHECK ONE: CASE DISPOSED
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

CYNTHIA S. KERN
NON-FINAL DISPOSITION

NSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
2013 FUNDING LLC,

Plaintiff,

Index No. 85006/13

-against-

DECISION/ORDER

PARK 91 LLC, et al.,

Defendants.
-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	3
Answering Affidavits to Cross-Motion.....	4
Replying Affidavits.....	5
Exhibits.....	6

Plaintiff commenced the present action for foreclosure of a mortgage. Plaintiff now moves for an order pursuant to CPLR § 3212 granting it summary judgment against defendants Park 91 LLC and Michael Gardner and for an order pursuant to CPLR § 3215 granting default judgment against defendants Lynda Gardner and New York State Department of Taxation and Finance. Additionally, plaintiff seeks an order directing that the caption be amended to remove John Doe as a defendant. Defendants Park 91 LLC, Michael Gardner and Lynda Gardner (collectively referred to herein as “moving defendants”) cross-move for an order dismissing the complaint and vacating any notice of pendency. As will be explained more fully below,

plaintiff's motion is granted and moving defendants' motion is denied.

The relevant facts are as follows. In February, 2009, defendant Park 91 LLC ("Park 91") borrowed \$7 million from Signature Bank ("Signature"). In connection with the loan, it executed a \$7 million note in favor of Signature Bank (the "Note") and a supplemental mortgage and consolidation agreement securing the payment of the Note (the "Mortgage"). Additionally, defendant Michael Gardner guaranteed repayment of the loan by executing a guaranty in favor of Signature Bank (the "Guaranty"). Moreover, Mr. Gardner, on behalf of Park 91, executed and delivered to Signature a "Statement of Business Purpose," which stated:

The proceeds of the loan are to be used for the refinancing of existing debt on the premises owned by the Borrower located at 1145 Park Avenue, New York, NY and by the Borrower for business or commercial purposes. The loan proceedings will not be used for personal, family, household or agricultural purposes.

Starting May 1, 2012, and thereafter, Park 91 defaulted under the Note by failing to make payment when it became due. On or about March 15, 2013, Signature Bank sold the loan, including the Note, Guaranty and Mortgage to plaintiff.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

It is well settled that a plaintiff who seeks summary judgment in a foreclosure action establishes a *prima facie* case for such relief by producing copies of the mortgage, the unpaid note and evidence of a default under the terms thereof. *E.g., Red Tulip, LLC v. Neiva*, 44 A.D.3d 204 (1st Dept 2007). Once plaintiff establishes its *prima facie* right to foreclosure, the burden shifts to defendant “to raise a triable issue regarding [its] affirmative defenses and counterclaims in opposition to foreclosure.” *Id.*; *see also Mahopac Natl. Bank v. Baisley*, 244 A.D.2d 466 (2nd Dept 1997).

In the instant action, plaintiff has established its *prima facie* right to judgment as a matter of law by producing a copy of the executed Note, Mortgage and Guaranty and the affidavits of James Forie, Senior Vice President of Signature Bank and James Guarino, Manager of plaintiff, attesting to Park 91 and Mr. Gardner’s non-payment under the Note and Guaranty.

In opposition, moving defendants have failed to raise a triable issue of fact. Moving defendants do not dispute their nonpayment and default under the Note and Guaranty. Instead, moving defendants argue that the instant action must be dismissed as plaintiff has failed to comply with the requirements of RPAPL §§ 1302, 1303, 1304, 1320 and 3408. Moreover, moving defendants contend that plaintiff may not proceed with foreclosure as Signature, the original holder of the Note, did not properly accelerate the Note, nor has plaintiff demonstrated proper service of the notice of default. However, all of these arguments are without merit.

As an initial matter, RPAPL §§ 1302, 1304 and 3408 are inapplicable to the instant action as plaintiff seeks to foreclose on a commercial mortgage, not on a home loan. Section 1302 explicitly states that it only applies to “[f]oreclosure of high-cost home loans and subprime home loans.” Similarly, the notice required under Section 1304 is only required when foreclosing on a

“high-cost home loan . . . a subprime home loan or a non-traditional home loan.” Additionally, a mandatory settlement conference under Section 3408 is only required in a “residential foreclosure action involving a home loan.” Pursuant to Banking Law § 6-1, in order for a loan to qualify as a “home loan” the borrower must be a “natural person” and the debt must be incurred “by the borrower primarily for personal, family, or household purposes.” McKinney’s Banking Law § 6-1(e)(ii) and (iii). Here, it is undisputed that the Borrower is Park 91, a limited liability company, which is not a natural person. Moreover, in the Statement of Business Purposes provided by Park 91 at the time it took out the loan it explicitly stated that the loan was to be used for “business or commercial purposes” and “the loan proceeds [would] not be used for personal, family, household or agricultural purposes.” Accordingly, the loan at issue herein is not a home loan as a matter of law and any assertion by moving defendants to the contrary is unavailing.

Additionally, moving defendants’ contention that plaintiff failed to comport with the requirements of RPAPL §§ 1320 and 1303, which do apply to the instant action, is without merit as plaintiff’s summons, annexed to its moving papers, contains the exact language, word for word, in bold face type that is required under Section 1320 and is accompanied by the separate notice required under Section 1303.

Finally, moving defendants’ contention that summary judgment should be denied and this action dismissed on the ground that Signature’s default notice was insufficient and an improper acceleration of the Note is unavailing as the Mortgage did not require prior notice of acceleration or prior demand for payment as a precondition to commencing this foreclosure action. Pursuant to Section 2.1.1.(a) of the Mortgage, nonpayment of any installment of principal or interest

