

Velocity Commercial Capital, LLC v Nam
2013 NY Slip Op 33006(U)
November 19, 2013
Sup Ct, Queens County
Docket Number: 702680/12
Judge: Howard G. Lane
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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
IA PART 6

VELOCITY COMMERCIAL CAPITAL, LLC,
Plaintiff,

BY: **LANE, J.**

DATED: November 19, 2013

INDEX NO.: 702680/12

-against-

MOTION DATES: May 1, 2013
and July 31, 2013

HYUNG JOO NAM, et al.,
Defendants.

MOTION CAL. NOS.: 139 and
147

MOTION SEQ. NOS.: 1 and 2

Plaintiff Velocity Commercial Capital, LLC (Velocity) moves for summary judgment against answering defendants Hyung Joo Nam and Myung Nam a/k/a Meyung Hii Nam a/k/a Meyunghii Nam a/k/a Meyung H. Nam (Meyunghii Nam); for a default judgment against defendants International Beauty School, Inc. (International), BNB Bank National Association (BNB), JPMorgan Chase Bank, N.A. (Chase), The Board of Managers of Main Street Tower Condominium (Board), and Beauty Salon, Inc. s/h/a "John Doe No. 1" (Beauty); to sever the action against defendant Amore Beauty & Spa, Inc. (Amore), which is the subject of a Chapter 7 bankruptcy proceeding; to appoint a referee to compute the amount due to Velocity; and to amend the caption of this action to delete from the caption defendants sued herein as "John Doe No. 1" to "Jane

Doe No. 10" and replace them with the actual tenant, defendant Beauty.

Plaintiff Velocity commenced this action by filing the Summons and Complaint and a Notice of Pendency on November 1, 2012. Plaintiff Velocity seeks to foreclose on a commercial mortgage on the subject real property known as 36-09 Main Street, Unit 6A, Flushing, New York (Premises), to secure repayment of a note, evidencing a loan in the original principal amount of \$250,000.00 plus interest, extended to defendant Hyung Joo Nam by defendant BNB. Pursuant to written guarantees, all dated January 8, 2008, defendants Meyunghii Nam, International and Amore, jointly and severally guaranteed all obligations under the Note and Mortgage. On that same date of January 8, 2008, defendant Hyung Joo Nam assigned all rents, revenues, income, issue and profits from leases and the use and occupancy of the Premises to defendant BNB in an Assignment of Leases and Rents, which was recorded on March 21, 2008.

Defendant BNB assigned its interest in the mortgage to plaintiff Velocity via an Assignment of Mortgage, dated April 18, 2012, and its interest in the note via an Allonge to Mortgage Note, dated April 18, 2012, and recorded on June 12, 2012. Defendant BNB also assigned the Assignment of Leases and Rents to plaintiff Velocity by an Assignment of Assignment of Leases and Rents, dated April 18, 2012 and recorded on June 12, 2012.

Plaintiff Velocity alleges that it is the owner of the Note, Mortgage and Guarantees; that it had physical possession of the original Note at the time of commencement of this action and still has such possession; that defendant Hyung Joo Nam defaulted under the terms of the Mortgage and Note by failing to make the monthly principal and interest payments due on December 1, 2010, and each and every month thereafter, and also by transferring title to the Premises to the individual guarantor, defendant Meyunghii Nam, by a deed recorded on April 2, 2009, in violation of Section 28 of the Mortgage. As a result of the failure of the mortgagor, defendant Hyung Joo Nam, to make the required payments, plaintiff Velocity, by letter dated September 7, 2012, notified defendant Hyung Joo Nam that the loan was in default and that if the default was not cured during the allotted cure period, plaintiff Velocity would declare all amounts due under the Note immediately due and payable without further notice to him. Defendant Hyung Joo Nam failed to pay the arrears under the Note and Mortgage. As a consequence, plaintiff Velocity elected to accelerate all amounts due under the Note and Mortgage, and thereafter commenced the instant action.

That branch of plaintiff Velocity's motion to sever the causes of action against defendant Amore, one of the corporate guarantors, is granted.

Defendant Amore filed a Chapter 7 petition in

bankruptcy on October 13, 2009, thereby invoking an automatic stay of all non-bankruptcy actions and proceedings (see 11 USC § 362[a]).

Inasmuch as the automatic stay under Section 362(a) of the United States Bankruptcy Code ordinarily applies only to the debtor and not to the non-bankrupt co-defendants (see *Matthews v Castro*, 35 AD3d 403 [2006]; see also *Matter of State of New York v DeFranco Ford, Inc.*, 202 AD2d 593 [1994]), the remaining branches of plaintiff Velocity's motion will be addressed herein.

A court may grant summary judgment where there is no genuine issue of material fact and the moving party is therefore entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The burden on the party moving for summary judgment is to demonstrate the absence of any material issue of fact (see *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (see, *Alvarez v Prospect Hosp.*, *supra*). Once this initial burden has been met, however, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form to create material issues of fact requiring a trial (*Id.*) Mere conclusions and unsubstantiated allegations or assertions are insufficient. (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

A plaintiff in a mortgage foreclosure action

establishes a prima facie case for summary judgment by submission of the mortgage, note, and guaranty executed by defendants, and evidence of default (see *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624 [2009]; see also *Washington Mutual Bank, F.A. v O'Connor*, 63 AD3d 832 [2009]; *EMC Mortgage Corp. v Riverdale Associates*, 291 AD2d 370 [2002]). "Where standing is put into issue by a defendant's answer, a plaintiff must also prove its standing if it is to be entitled to relief" (*Wells Fargo Bank Minnesota, N. A. v Mastropaolo*, 42 AD3d 239, 242 [2007]). Once the plaintiff's initial burden is met, the burden then shifts to the defendant to present evidentiary proof of a defense which raises a triable issue of fact (see *Shore Park Estates Homeowners Association, Inc. v Seibert*, 277 AD2d 304 [2000]; see also *Mahopac National Bank v Baisley*, 244 AD2d 466 [1997]; *Marton Associates v Vitale*, 172 AD2d 501 [1991]).

Plaintiff Velocity seeks summary judgment against the borrower, defendant Hyung Joo Nam, and the individual guarantor, defendant Meyunghii Nam. In support of its motion for summary judgment against said defendants, plaintiff Velocity offers the pleadings, affidavits of service, the subject mortgage, the underlying note, the guarantees, the assignments and the affidavit of Dana McQuade, asset manager of plaintiff Velocity. Plaintiff Velocity made a prima facie showing of its entitlement to summary judgment as a matter of law by submitting proof of the

existence of the subject mortgage, the underlying note and nonpayment pursuant to the terms of the note and guarantees. (see *Argent Mortgage Co., LLC v Montesana*, 79 AD3d 1079 [2010]; see also *EMC Mortgage Corp. v Riverdale Associates, supra*). In addition, plaintiff Velocity's submissions sufficiently demonstrate its interest in the note and the mortgage, which is the subject of the within foreclosure action. Thus, plaintiff Velocity has established its standing to bring this action, and as such, the ninth affirmative defense of defendants Hyung Joo Nam and Meyunghii Nam, alleging lack of standing is without merit. Plaintiff Velocity further met its burden of showing that the remainder of the affirmative defenses of defendants Hyung Joo Nam and Meyunghii Nam are without merit.

Since plaintiff Velocity met its initial burden of demonstrating its entitlement to summary judgment, the burden shifts to defendants Hyung Joo Nam and Meyunghii Nam to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact (see *EMC Mortgage Corp. v Riverdale Associates, supra*).

Defendants Hyung Joo Nam and Meyunghii Nam have failed to meet this burden. Initially, defendants Hyung Joo Nam and Meyunghii Nam contend that the summary judgment motion should be denied because the affidavit of Dana McQuade is defective on its face since it indicates that it was made in New York, when it was

executed and notarized in California.

CPLR 2001 provides that: "At any stage of an action, the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded." CPLR 2101 (f) provides as follows: "A defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given."

Since the mistake here implicates no substantial rights of the defendants, nor results in any prejudice thereto, it shall be disregarded by the Court.

Defendants Hyung Joo Nam and Meyunghii Nam next contend that triable issues of fact exist concerning whether there was a proper notice of default, which is a necessary prerequisite. Specifically, in the fourth affirmative defense, defendants Hyung Joo Nam and Meyunghii Nam allege that plaintiff Velocity failed to satisfy conditions precedent for this action, and in their fifth affirmative defense, defendants Hyung Joo Nam and Meyunghii Nam allege that plaintiff Velocity failed to serve the requisite notice.

Plaintiff Velocity, however, has established that it took all necessary steps before commencing this action. In her

affidavit, Dana McQuade, asset manager of plaintiff Velocity, avers that the requisite notice of default was sent on September 7, 2012, and annexed to the motion papers is a copy of such notice of default and demand for payment signed by Dana McQuade. In addition, contrary to the assertion of defendants Hyung Joo Nam and Meyunghii Nam, plaintiff Velocity gave said defendants a 10-day period to cure the default, when the terms of the note required only five (5) days to cure. Defendants Hyung Joo Nam and Meyunghii Nam also claim that the notice of default is deficient since it does not contain the amount of money due to date, and instead contains a provision that defendants may contact Dana McQuade of Velocity, at (818) 532-3704, to obtain the exact amount necessary to satisfy the obligations as of the payment date. There, however, is no provision in the subject mortgage or note requiring plaintiff Velocity to provide the defendants the specific amount required to be paid in a notice of default.

Finally, defendants Hyung Joo Nam and Meyunghii Nam contend that, as asserted in their third affirmative defense, the amounts claimed due are incorrect. This is not a valid affirmative defense. A dispute as to the exact amount owed by the defendants does not warrant the denial of summary judgment inasmuch as any discrepancy may be resolved after a reference pursuant to RPAPL 1321 (see *Crest/Good Mfg. Co. v Baumann*, 160

AD2d 831[1990]).

In light of the foregoing, that branch of plaintiff Velocity's motion seeking summary judgment in its favor and against defendants Hyung Joo Nam and Meyunghii Nam is granted.

That branch of plaintiff Velocity's motion for a default judgment against defendants International, BNB, Chase, Board and Beauty is granted.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing" (*Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2011]; see CPLR 3215[f]).

In this case, plaintiff Velocity demonstrated the merits of its claim by submitting, among other proof, an affidavit of merit and the summons and verified complaint with proof of service (see CPLR 3215[f]). Although served with the summons and verified complaint, defendants International, BNB, Chase, Board and Beauty failed to submit answers thereto. Plaintiff Velocity has taken proceedings for the entry of judgment within one year of the default by defendants International, BNB, Chase, Board and Beauty (see CPLR 3215[c]). Thus, plaintiff Velocity is entitled to a default judgment against these defendants.

That branch of the motion by plaintiff Velocity for leave to amend the caption, as proposed, is granted.

Since plaintiff Velocity has been awarded summary judgment against defendants Hyung Joo Nam and Meyunghii Nam and a default judgment against defendants International, BNB, Chase, Board and Beauty, plaintiff Velocity is also entitled to an order appointing a referee to compute amounts due under the Note, the Subject Mortgage and Guarantees (see RPAPL 1321).

Accordingly, that branch of the motion by plaintiff Velocity for leave to appoint a referee is granted.

The referee to compute shall be named in the order to be entered hereon.

Submit order.

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HOWARD G. LANE, J.S.C.