

FTBK Invs. v Megan Holding LLC

2013 NY Slip Op 33440(U)

December 2, 2013

Supreme Court, New York County

Docket Number: 810162/2011

Judge: Eileen A. Rakower

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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

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 810162/2011
FTBK INVESTOR II LLC
vs.
MEGAN HOLDING LLC
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

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). 1, 2, 3, 4, 5, 6

Answering Affidavits — Exhibits _____ | No(s). 7, 8, 9, 10, 11

Replying Affidavits _____ | No(s). 12

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

FILED

DEC 05 2013

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

NEW YORK
COUNTY CLERKS OFFICE

DEC 05 2013

FILED

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

Dated: 12/2/13

HON. EILEEN A. RAKOWER 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: PART 15

-----X
FTBK INVESTORS, AS TRUSTEE FOR NY
BROOKLYN INVESTOR II TRUST 5,

Index No.
810162/2011

Plaintiff,

-v-

Decision and
Order

MEGAN HOLDING LLC, NEW YORK
STATE DEPARTMENT OF TAXATION
AND FINANCE, NEW YORK CITY
DEPARTMENT OF FINANCE, SEAN KU,
NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY
DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT,

Mot Seq. #6

FILED

DEC 05 2013

NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

-----X

This action was commenced by JPMorgan Chase Bank, N.A. ("Chase") on May 20, 2011 to foreclose an Amended and Restated Mortgage Security Agreement, Assignment of Leases and Rents and Fixture Filing ("Mortgage"), dated August 12, 2005, and a Mortgage, Consolidation Modification and Extension Agreement ("the Consolidation") both executed by defendant Megan Holding, LLC ("Megan Holding") in favor of Washington Mutual Bank ("WAMU") to secure the principal sum of \$847,500.00 on the property located at 159 East 106th Street, New York, NY 10029 ("Property"). The Mortgage was given as security for an Amended and Restated Promissory Note executed by Megan Holding on August 12, 2005 in the principal sum of \$847,500.00.

Plaintiff FTBK Investors II LLC ("FTBK"), as trustee for NY Brooklyn Investor II Trust 5, now moves for an Order, pursuant to CPLR §3212, for summary judgment in favor of Plaintiff, striking and dismissing the answer and affirmative defenses of defendant/mortgagor Megan Holding and holding the non-answering defendants in default, appointing a referee, and staying discovery.

Defendant Megan Holding opposes and cross moves to amend its answer to include the following affirmative defenses: champerty, lack of standing, and that Plaintiff is not a holder in due course. Megan Holding also seeks to expand upon their existing defense of unclean hands.

Defendant Sean Ku (“Ku”) moves for an Order to dismiss pursuant to CPLR 3211(a)(8) based on lack of jurisdiction, or in the alternative permitting Ku to serve an answer.

In support of its motion, Plaintiff submits the Affirmation of Regularity of Jerold C. Feuerstein, Plaintiff’s counsel, the affidavit of Josh Zegen, a managing member of FTBK and NY Brooklyn Investor II LLC, the affidavit of Lowell Bacchus, a Special Credits Asset Manager II for Chase, and the affidavit of Jake Bade, a Special Credits Senior Asset Manager and Head of Commercial Term Lending Note Sales for the Commercial Bank division of Chase.

As set forth in the affidavit of Zegen, a managing member of FTBK and NY Brooklyn Investor II LLC, on or about September 25, 2008, Chase purchased certain assets including all loans held by WAMU, including the subject Mortgage and Note, and certain other assets of WAMU from FDIC, acting as receiver for WAMU. A copy of the Affidavit of an authorized representative of FDIC dated October 2, 2008 is attached to Feuerstein’s affirmation, along with a copy of the applicable loan Purchase and Assumption Agreement, dated September 25, 2008, entered between Chase and the FDIC.

Zegen further avers that on or about August 19, 2011, the Mortgage was assigned by Chase to NY Brooklyn Investor II, LLC, pursuant to an Assignment of Mortgage. A copy of the recorded assignment is annexed to the Bade and Zegen Affidavits.

Zegen further avers that on or about September 12, 2011, the Mortgage was further assigned to the Plaintiff by NY Brooklyn Investor II, LLC, pursuant to an Assignment of Mortgage, a copy of which is annexed to the Zegen affidavit.

Zegen further avers that as of the date of Plaintiff’s application, Plaintiff has delivered the original Note to its counsel and counsel is now in physical possession

of the Note on behalf of Plaintiff.

As set forth in the Bacchus Affidavit, Megan Holding breached its obligations under the Note by failing to tender the monthly debt service payment due on January 1, 2011, and all subsequent payments. Chase thereafter accelerated the indebtedness owed under the Note.

In opposition, Megan Holding submits the attorney affirmation of Umar A. Sheikh and the affidavit of Emmanuel Ku, the managing member of Megan Holding.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

In mortgage foreclosure actions, it is well settled that a mortgagee makes a *prima facie* showing of entitlement to judgment as a matter of law when it “produce[s] the mortgage documents underlying the transaction and undisputed evidence of nonpayment (*Red Tulip, LLC v. Neiva*, 2007 NY Slip Op 6340, *5 [1st Dept. 2007]) (citation omitted). Once a mortgagee fulfills its initial burden, it becomes incumbent on the party opposing summary judgment to come forward with competent evidence of any defenses to raise an issue of fact (*see Barcov Holding Corp. v. Bexin Realty Corp.*, 16 A.D.3d 282, 283 [1st Dept. 2005]).

Here, Plaintiff has made its *prima facie* showing of entitlement to summary judgment as against Megan Holding. Plaintiff has annexed copies of the mortgage documents underlying the subject property and assignments, and has submitted proof of nonpayment. Defendant Megan Holding has failed to provide evidence demonstrating any triable issues of fact to preclude summary judgment.

Turning now to Megan Holding's cross motion to amend its Answer to add additional affirmative defenses of champerty, lack of standing, and that Plaintiff is not a holder in due course and to expand upon their unclean hands defense, CPLR §3025(b) provides, "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences at any time at any time by leave of court.... Leave shall be freely given upon such terms as may be just...." "CPLR §3025 allows liberal amendment of pleadings absent demonstrable prejudice." (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). Notwithstanding the absence of prejudice, leave to amend a pleading must be denied where the proposed amendment is plainly lacking in merit. (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]). Here, Megan Holding is now seeking to add affirmative defenses after Plaintiff moved for summary judgment. Aside from the resulting prejudice that would ensue to Plaintiff, Megan Holding's proposed amendment is plainly lacking in merit as Plaintiff has demonstrated proper standing and entitlement to summary judgment.

As for non-appearing defendant Ku's cross motion, Ku was served with the Summons and Complaint on March 15, 2012, as evidenced by the Amended Affidavit of Service and filed on March 15, 2012. The Amended Affidavit of Service states that service was done by delivering the Order for Extension of Time, Summons and Complaint, personally "to the spouse of Sean Ku" at "No. 70 Sec. 1 Keelung Road, 2nd Floor, Taipei, Taiwan." Plaintiff also submits affidavits of service showing service at Ku's place of employment: "Falconstor, 6F-1, No. 521, Sec. 1, Wunsin Rd., Taichung, Taiwan" on September 26, 2012. Plaintiff states that Defendant appeared by his counsel Law Office of Yat T. Man by Notice of Appearance filed on July 25, 2012, but failed to answer the Complaint.

In support of his motion to dismiss based on lack of jurisdiction, Ku submits an affidavit, which states that he does not reside at the address of No. 70 Sec. 1 Keelung Road, 2nd Floor, Taipei, Taiwan, has not resided there since 2004 although his wife and son continue to reside there, and therefore was not properly served at his actual residence as required under CPLR §308(2). Ku further avers that he was not served at his place of employment at a company called "Falconstor." Ku states that he never worked at "Falconstor." However, Ku fails to address the Law Office of Yat T. Man's notice of appearance filed on his behalf on July 25, 2012.

As for Ku's alternative relief for permission to file a late answer, CPLR §3012(d) provides, "Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." In order to be permitted to serve an untimely answer as timely, Defendant must provide both a reasonable excuse for the delay and demonstrate potentially meritorious defenses to the action. *Pagan v. Four Thirty Realty LLC*, 50 A.D. 3d 265, 266 [1st Dept 2008]. Here, Ku fails to provide either a reasonable excuse for the delay or potentially meritorious defenses to the action.

Wherefore it is hereby

ORDERED that plaintiff's motion for summary judgment as against defendant Megan Holding LLC is granted; and it is further

ORDERED that this action be and the same is hereby referred to Kent D. Arthur, Sr., 1501 Newkirk Ave., Brooklyn, NY 11226, (347) 240-2876, as Referee, to Compute the amount due to the Plaintiff, to ascertain and compute the amount due to the Plaintiff for principal, interest, and other disbursements advances as provided for in the note and mortgage upon which this action was brought, to examine and report whether or not the mortgaged premises can be sold in parcels, and that the referee make his/her report to the Court with all convenient speed; and it is further

ORDERED that the Referee's hearing be had in the County of New York; and it is further

ORDERED that by accepting this appointment the referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to, section 36.20 (Disqualifications From Appointment), and section 36.2(d) (Limitations on Appointments Based on Compensation); and it is further

ORDERED that Plaintiff's attorney serve a conformed copy of this order upon the County Clerk and the Trial Support Office for amendment of their record; and it is further

ORDERED that defendant Megan Holding, LLC's cross motion to amend is denied; and it is further

ORDERED that defendant Sean Ku's cross motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: ^{December 2} ~~NOVEMBER 27~~, 2013



EILEEN A. RAKOWER, J.S.C.

FILED
DEC 05 2013
NEW YORK
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