

Rubin v Bank of N.Y. Mellon
2013 NY Slip Op 33763(U)
October 21, 2013
Supreme Court, Westchester County
Docket Number: 52778/13
Judge: Mary H. Smith
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DECISION AND ORDER

FILED & ENTERED

10/21/13

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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SUSAN SALZBERG RUBIN, Individually, as
Preliminary Executor of the Estate of David
Rubin, deceased, as trustee of the Susan
Salzberg Rubin Revocable Trust and as Co-
Trustee of the David Rubin Revocable Trust,
ROBERT SALZBERG, AS Co-TRUSTEE of the David
Rubin revocable Trust and JOSEPHINE RUBIN,

MOTION DATE:10/4/13
INDEX NO.: 52778/13

Plaintiffs,

-against-

BANK OF NEW YORK MELLON f/k/a BANK OF
NEW YORK, BANK OF AMERICA, RESIDENTIAL CREDIT
SOLUTIONS, INC., SAFEGUARD PROPERTIES,
LLC and RICHARD EDWARD FORNESS, JR.,

Defendants.

-----X
The following papers numbered 1 to 11 were read on this motion by defendant Residential Credit Solutions, Inc. for a pre-answer dismissal of plaintiffs' amended complaint pursuant to CPLR 3211, subdivision (a), paragraph 7, and on this cross-motion by plaintiffs for a preliminary injunction against defendants Bank of New York Mellon f/k/a Bank of New York, Residential Credit

Solutions, Inc., and any of their successors.¹

Papers Numbered

Notice of Motion - Affirmation (Andreoli) - Exhs. (1-6) -	
Memorandum of Law	1-4
Notice of Cross-Motion - Affirmation (Zolotaryova) - Exhs.	
(A-Q) - Memorandum of Law	5-8
Answering/Replying Affirmation (Andreoli) - Exhs. (1-12) -	
Memorandum of Law	9-11

Upon the foregoing papers, it is Ordered and adjudged that this motion by defendant Residential Credit Solutions, Inc. ("Residential") for pre-answer dismissal of plaintiffs' amended complaint pursuant to CPLR 3211, subdivision (a), paragraph 7, is granted. As plaintiffs themselves concede, plaintiffs have alleged no wrong-doing against defendant Residential, which merely had become the servicer of the underlying subject mortgage held by defendant Bank Of New York, as of June 16, 2013, months after the trespasses about which plaintiffs complain had occurred. Rather, the most plaintiffs assert as against Residential is that its predecessors, Bank of America and Safeguard, had "committed numerous acts of trespass and property destruction at plaintiffs' home," and that plaintiffs "understandably fear that Residential will turn out to be the new vandal."

¹The Court notes that counsel for defendant Bank of New York Mellon states that defendant's proper name is Bank of New York f/k/a Bank of New York, as Trustee for the Certificateholders of CWMBS, Inc., Alternative Loan Trust 2006-8T1, Mortgage Pass-Through Certificates, Series 2006-7 and that defendant Bank of America's correct name is Bank of America, N.A.

Such fear, however, without allegations of any facts demonstrating that Residential is threatening or is about to do an act in violation of the plaintiffs' rights, see CPLR 6301, does not suffice as a claim against Residential and is insufficient for the issuance of a preliminary injunction. Since Residential's alleged status as a servicer of the mortgage loan in and of itself is entirely lawful, and there are no allegations which give rise to any liability by Residential, defendant Residential's motion for dismissal of this action necessarily is granted.

Concomitantly, plaintiffs' cross-motion seeking a preliminary injunction against Residential, no longer is a party herein, must be and is hereby denied. See CPLR 6301.

The Court next addresses the remainder of plaintiffs' cross-motion seeking a preliminary injunction as against defendant Bank of New York which, according to plaintiffs, is responsible for previously having abusively directed defendants Bank of America and Safeguard to wrongfully enter plaintiffs' house, resulting in trespasses and damage to plaintiffs' property.

Defendant Bank of New York opposes the cross-motion, arguing firstly that this Court's prior granting of a preliminary injunction in favor of plaintiffs as against defendants Bank of America and Safeguard Properties LLC has no bearing on the instant motion since said relief had been issued ex parte, no party having

retained counsel at the time of plaintiffs' earlier Order to Show Cause. Additionally, defendant Bank of New York argues that plaintiffs' allegations of trespass "are hotly contested and as a matter of law ... cannot serve as a basis for a preliminary injunction ...". According to defendant Bank of New York, in light of the express mortgage provisions providing, upon plaintiffs' default, for plaintiff's entry onto the subject premises to protect its rights in said property, and its further expressed right, even absent a default by plaintiffs, permitting plaintiff to enter upon the premises to inspect, plaintiffs cannot satisfy their burden of demonstrating entitlement to a preliminary injury, and specifically the likelihood of their success on the merits of their claims. Further, defendant Bank argues that plaintiffs have not demonstrated that they have or will suffer any injury, let alone irreparable injury, absent the issuance of a preliminary injunction, nor have they established that the equities tip in plaintiffs' favor. Rather, defendant Bank of New York argues that plaintiffs are in default on a \$2.323 million debt and that they have no right to deprive plaintiff, as lender, of its contractual right to protect its security interest under the mortgages.

CPLR 6301 provides that "a preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be

done, an act in violation of the plaintiff's rights ...” The fundamental purpose of a preliminary injunction is to preserve the status quo in an action while the legal issue are determined in a deliberate manner. See Trump on the Ocean, LLC v. Ash, 81 A.D.3d 713, 715 (2nd Dept. 2011); Merscorp, Inc. v. Romaine, 295 A.D.2d 431 (2nd Dept. 2002); Heisler v. Gingras, 238 A.D.2d 702 (3rd Dept. 1997). It is well-settled that in order to be entitled to the drastic remedy of a preliminary injunction, the movant must establish the likelihood of his ultimate success on the merits, irreparable injury in the absence of the granting of the preliminary injunction, and a balancing of the equities in his favor. See W.T. Grant C. v. Stroggi, 52 N.Y.2d 496, 517-518 (1981); Stockley v. Gorelik, 24 A.D.3d 535 (2nd Dept. 2005); O’Connell v. Ricigliano, 232 A.D.2d 386 (2nd Dept. 1996); Merrill Lynch Realty Associates, Inc. v. Burr, 140 A.D.2d 589, 592 (2nd Dept. 1988); Family Haircutters, Inc. v. Detling, 110 A.D.2d 745 (2nd Dept. 1985). It is only upon the clearest evidence and only when required by urgent circumstances that a preliminary injunction will be granted which, in effect, will award movant the identical relief which is sought by final judgment. See Allied-Crossroads Nuclear Corp. v. Atcor, Inc., 25 A.D.2d 643 (1st Dept. 1966).² The burden

²Plaintiffs seek in their thirteenth cause of action as against all defendants a permanent injunction.

of establishing an undisputed right to a preliminary injunction on the law and on the facts rests upon the movant and in the absence of a clear right to the relief demanded, injunctive relief "should not be granted until the issues have been fully explored and the entire matter resolved after a plenary trial." Town of Southeast v. Gonnella, 26 A.D.2d 550 (2nd Dept. 1966). However, an opposing party's presentation of evidence sufficient to raise an issue of fact as to any of such elements is not in itself grounds for denial of the motion. See CPLR 6312, subd. (c).

After this Court's careful consideration of the parties' respective arguments on the preliminary injunction issue and upon application of controlling principles of law, the Court, in the exercise of its discretion, grants plaintiffs' motion for the issuance of a preliminary injunction. Accordingly,

IT IS HEREBY ORDERED, that defendant Bank of New York Mellon f/k/a Bank of New York, and their successors, agents and assigns, are hereby temporarily enjoined from entering onto the premises located at 148 McLain Street, Bedford Corners, New York, other than during normal weekday business hours with at least 48 hours written notice to plaintiff Susan Salzberg Rubin, and said Bank further is enjoined from entering inside said premises, other than during normal weekday business hours with at least 48 hours written notice to plaintiff Susan Salzberg Rubin and additionally setting forth in

said notice the Bank's reasonable purpose for said interior inspection.

Pursuant to CPLR 6312, subdivision (b), plaintiffs shall post within ten (10) days after the date hereof an undertaking in the sum of \$5,000.00.

Defendant Bank of New York correctly notes that paragraphs 9 of the underlying subject two mortgages provides:

Lender's Right to Protect its Rights in the Property:

If (a) I do not keep my promises and agreements in this Security Instrument ... then lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and Lender's right under this Security Instrument.

Further, paragraphs 7(b) provide that, even absent the borrower's default,

Lender, and others authorized by Lender, may enter on and inspect the property. They will do so in a reasonable manner and at reasonable times. If it has a reasonable purpose, Lender may inspect the inside of the home or other improvements on the Property. Before or at the time an inspection is made, Lender will give me notice stating a reasonable purpose for such interior inspection.

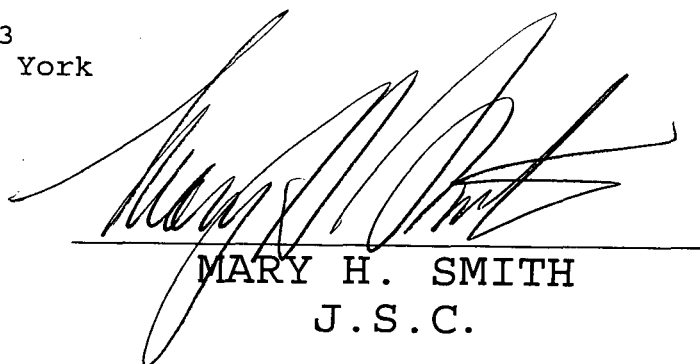
While defendant Bank of New York relies upon the foregoing provisions to support its argument that plaintiffs cannot prevail upon the merits of their trespass claims, notably, said defendant does not deny any of the specific allegations made by plaintiffs describing plaintiffs' agents' multiple entries onto their property and forceful entries into their house which, if true, clearly do

not support any finding that plaintiff's had entered "in a reasonable manner," as contractually required. Moreover, the Court notes that defendant Bank of New York fails to proffer any proof that it had afforded plaintiffs the required notice of its intended inspection, nor has the Bank set forth, even at this time, any reasonable purpose for its apparently undertaken "interior inspection." In the face of plaintiffs' unrefuted allegations, the Bank neither has demonstrated the "reasonableness" nor the "appropriateness" of its agents' alleged actions herein, and upon the unrefuted allegations the Court necessarily cannot agree with said defendant that plaintiffs have failed to demonstrate the likelihood of their success herein. Further, it is beyond cavil that plaintiff, a then recent widow who had returned home alone after a short absence to learn of the alleged trespasses by defendant Bank of New York and its agents, had suffered distress and injury at that time and that she will experience further future irreparable injury and distress if she once again is caused to experience any trespass by plaintiff in the same alleged manner. Finally, the Court finds that the equities tip in plaintiffs' favor because, notwithstanding plaintiffs' apparent defaults under the mortgages, the Bank cannot act in an intimidating and harassing manner, and must instead act reasonably, in a lawfully authorized manner. Moreover, the Court notes that the Bank of New York

suffers no harm from the issuance of the preliminary injunction since the Bank merely is being enjoined from acting in an unlawful manner. In the event that plaintiff is able to articulate future circumstances or occurrences which actually threaten its security interest in the property, the bank remains entitled and empowered to act appropriately and/or seek Court intervention.

The parties shall appear in the Compliance Conference Part, Room 800, at 9:30 a.m., on February 4, 2014.

Dated: October 21, 2013
White Plains, New York



MARY H. SMITH
J.S.C.

Bryan Cave LLP
Attys. For Defts. Residential, Bank of New York, Bank of Am.
1290 Avenue of the Americas
New York, New York 10104

Allegaert Berger & Vogel LLP
Attys. For Pltff.
111 Broadway, 20th fl.
New York, New York 10006

Carolyn Carpenito