Dacosta-Harris v Aurora Bank, FSB
2013 NY Slip Op 34006(U)
February 13, 2013
Supreme Court, Nassau County
Docket Number: 12037/12
Judge: Jeffrey A. Goodstein
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEFFREY A. GOODSTEIN,
A.J.S.C.

PATRICE DACOSTA-HARRIS,

Plaintiff,

- against -

AURORA BANK, FSB, SELENE FINANCE AND SRMOF II 2011-1 TRUST,

Defendants.

TRIAL/IAS PART 34
Index No. 12037/12
Motion Date: 02/04/13

Sequence No.: 001

The following papers were read on this motion:

Order to Show Cause, Affidavit, Affirmation and Exhibits..1
Affirmation in Opposition, Affidavit in Opposition, and Exhibits..2
Affirmation in Response, Affidavit, and Exhibits......3

The instant matter revolves around a pending UCC liquidation sale of Plaintiff's shares of stock and proprietary lease appurtenant in a cooperative apartment unit. On or about June 11, 2007, Lehman Brothers's Bank, FSB granted the Plaintiff, Patrice DaCosta-Harris, a loan in the amount of $108,000.00. Plaintiff simultaneously executed a loan security agreement, whereby she pledged the shares of stock and proprietary lease appurtenant to 957 Fenwood Drive, Apartment 3, Valley Stream, NY 11580 as collateral security for said loan (hereinafter "the collateral security"). Subsequently, Lehman Brother's Bank assigned the collateral security to Defendants, Selene Finance and SRMOF II 2011-1 Trust (hereinafter "Selene"). The Plaintiff defaulted on the terms of the aforementioned Note and Loan Security Agreement on or about February 1, 2009. At the time of said default, said loan was serviced by Defendant, Aurora Loan Services, LLC (hereinafter "Aurora"). The Defendants contend that at the time of

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Plaintiff's default, Aurora sent the Plaintiff a "90 Day Notice" in accordance with UCC § 9-611(f), outlining the foreclosure process. The Plaintiff, however, contends that she was not served with the appropriate 90 Day Notice, and that any notice she received regarding foreclosure did not conform with the specific requirements listed in UCC § 9-611(f).

Initially, the foreclosure sale of Plaintiff's shares of stock and proprietary lease was scheduled for October 1, 2012. The Plaintiff filed the instant Order to Show Cause on September 26, 2012, seeking an order staying the Defendants or their agents or their attorneys from conducting a sale of the aforementioned shares on October 1, 2012, or any subsequent date; restraining the Defendants from taking any action against the Plaintiff on the cooperative mortgage; and granting the Plaintiff a "mandatory settlement conference" pursuant to CPLR Rule 3408. The Honorable Anthony Parga so ordered a stay on all foreclosure proceedings in this matter pending a hearing/resolution of the instant motion. Currently, said stay is still in place.

First, the Court will address Plaintiff's allegations that she was never properly served with the requisite 90 Day Pre-Disposition Notice mandated by UCC § 9-611(f). "Shares in a cooperative apartment are personal property rather than real property, and UCC Article 9 controls security interests in the shares." (Goldman v. Emigrant Sav. Bank Long Island, 32 Misc.3d 1238(A),3 [N.Y. Sup. Queen's County 2006]; see State Tax Commission v. Shor , 43 NY2d 151 [1977]). "In late 2009, a bill requiring similar notice to residential homeowners of cooperative apartments and offering similar protections to them as RPAPL § 1304 became law, and the bill is now codified as UCC § 9-611(f). (Goldman, 32 Misc.3d at 3; see Stern-Obstfeld v. Bank of America, 30 Misc.3d 901 [N.Y. Sup. New York County 2011]). UCC § 9-611 provides that:

> [A] secured party whose collateral consists of a residential cooperative interest used by the debtor and whose security interest in such collateral secures an obligation incurred in connection with financing or refinancing of the acquisition of such cooperative interest and who proposes to dispose of such collateral after a default with respect to such obligation, shall send to the debtor, not less than ninety days prior to the date of the disposition of the cooperative

> interest, an additional pre-disposition notice as provided herein.

UCC § 9-611 further provides that the pre-disposition notice must conform to certain standards and include specific language. (UCC § 9-611(f)(1)(2)(3)). For example, subsection (1) dictates that said notice "shall be in bold, fourteen-point type and shall be printed on colored paper..." and subsection (3) provides that the notice shall be titled as "Help for Homeowners at Risk of Foreclosure."

Here, the pre-disposition notice that Aurora allegedly sent to the Plaintiff does not meet the exacting standards set out in UCC § 9-611(f). First, the notice, a copy of which is annexed to the Defendants' Affirmation in Opposition as Exhibit E, is printed on white paper rather than "colored paper" as the statute dictates. Furthermore, the text making up the body of the notice is not in bold as subsection (1) of the statute mandates. Additionally, the notice is titled "Help for Homeowners in Foreclosure", rather than "Help for Homeowners at Risk of Foreclosure". Although these may seem like only minor variations, "UCC 9-611(f), like RPAPL 1304, must be strictly construed." (Goldman, 32 Misc.3d at 4; see Aurora Loan Services, LLC v. Weisblum, 85 AD3d 95 [2d Dept. 2011]). Thus, because of the aforementioned deviations, the pre-disposition notice was improperly served, and "[p]roper notice of a UCC 9-611(f) notice complying with the statutory mandates is a condition precedent to foreclosure". (Goldman, 32 Misc.3d at 4; see Aurora Loan Services, LLC, 85 AD3d 95; Stern-Obstfeld, 30 Misc.3d at 906). Accordingly, a foreclosure sale of Plaintiff's property cannot take place until a valid pre-disposition notice has been properly served upon her.

Next, the Court must address Plaintiff's contentions that she is entitled to a "mandatory settlement conference" before foreclosure pursuant to CPLR Rule 3408. CPLR Rule 3408(a) provides that:

> [i]n any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference within sixty days after the date when proof of service is filed with the county clerk, or on such adjourned date as has been agreed to

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> by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents...

The definition of "home loan" under New York Banking Law sections 6-l and 6-m has been recently amended to include mortgage loans on cooperative apartments occupied by the borrowers as their principal residence. However, the definition of "home loan" codified in RPAPL § 1304 is a loan "secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or a condominium unit..." and makes no reference to loans on cooperative apartments. Since CPLR Rule 3408 dictates that mandatory settlement conferences should be held only for residential foreclosure actions involving home loans as defined solely by RPAPL § 1304, the Plaintiff is not entitled to such a conference, regardless of the definition of "home loan" supplied by the Banking Law.

Accordingly, it is hereby;

ORDERED, that Plaintiff's motion is **GRANTED** only to the extent that the sale of Plaintiff's shares that collateralize her cooperative mortgage on the subject property is stayed until such time that Defendant, Selene Finance, serves a new pre-disposition notice on the Plaintiff that complies with the requirements set out in UCC § 9-611. And it is further;

ORDERED, that any other relief not otherwise expressly granted is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: February 13, 2013
Mineola, New York

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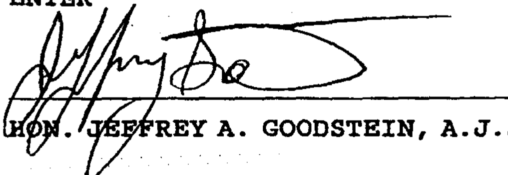

HON. JEFFREY A. GOODSTEIN, A.J.S.C.