LBUBS 2005-C2 N.Y. Retail, LLC v AC I Southwest Broadway LLC
2013 NY Slip Op 34269(U)
April 22, 2013
Supreme Court, New York County
Docket Number: Index No. 850074/12
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

LBUBS 2005-C2 NEW YORK RETAIL, LLC, AND LBUBS 2005-C2 FOURTEEN MILE ROAD, LLC,	
Plaintiffs,	Index No. 850074/12
-against-	DECISION AND ORDER
AC I SOUTHWEST BROADWAY LLC, BENJAMIN O. RINGEL, AC I STERLING HEIGHTS LLC, BOARD OF MANAGERS OF THE NEW WEST CONDOMINIUM, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, THE CITY OF NEW YORK, PEOPLE OF THE STATE OF NEW YORK and "JOHN DOE" NOS. 1-25,	Motion Sequence No. 001
Defendants.	
The Names of the "John Doe" Defendants Being Fictitious and Unknown to Plaintiff, the Persons and Entities Intended Being Those Who May Be in Possession of, or May Have Possessory Liens or Other Interests in, the Premises Herein Described.	

MELVIN L. SCHWEITZER, J.:

Background

Plaintiff LBUBS 2005-C2 New York Retail, LLC (LBUBS New York) seeks to foreclose a mortgage encumbering real property located at 250 West 90th Street, New York, New York (the Mortgaged Property). The mortgage secures amounts due under a promissory note in the original principal amount of $18,060,000 made by AC I Southwest Broadway LLC (AC I Southwest or Borrower). The mortgage also secures amounts due under a guaranty of payment made by AC I

Southwest in connection with a loan made to AC I Sterling Heights LLC (AC I Sterling) in the original principal amount of $3,440,000.

Defendants AC I Southwest, AC I Sterling and Benjamin O. Ringel (Ringel) have filed a motion pursuant to CPLR 3211 (a) (1) and (7) seeking to dismiss this action on the grounds that (i) LBUBS New York's acquisition of the loan documents relating to the $18,060,000 loan was champertous under Section 489 (1) of New York's Judiciary Law; (ii) the complaint fails to state a claim for a deficiency judgment against AC I Southwest, AC I Sterling or Ringel; and (iii) the joinder of LBUBS Fourteen Mile Road, LLC (LBUBS Fourteen Mile) as a plaintiff in this action was improper.

The Loan

Lehman Brothers Bank, FSB (Original Lender) loaned Borrower the principal sum of $18,060,000 (the Loan). Borrower executed and delivered to Original Lender a Promissory Note, dated February 18, 2005 (the Note). To secure repayment of the Note, Borrower executed and delivered to Original Lender a Mortgage and Security Agreement, dated February 18, 2005 (the Mortgage), in which Borrower mortgaged the Mortgaged Property to Original Lender. To further secure repayment of the Note, AC I Sterling and Ringel executed and delivered to Original Lender a Guaranty of Payment dated as of February 18, 2005 (the AC I Sterling Guaranty) and a Guaranty of Recourse Obligations of Borrower dated on or about February 18, 2005 (the Ringel Guaranty).

By assignments dated as of February 22, 2005 but effective as of April 20, 2005, Original Lender assigned all of its right, title and interest in and to the loan documents to LaSalle Bank National Association, in its capacity as Trustee for the registered holders of LB-UBS

Commercial Mortgage Trust 2005-C2, Commercial Mortgage Pass-Through Certificates, Series 2005-C2 (Assignee #1). By assignments dated April 27, 2012, Bank of America, N.A., as successor by merger to Assignee #1, assigned all of its right, title and interest in and to the loan documents to U.S. Bank National Association, a national banking association organized and existing under the laws of the United States of America, not in its individual capacity but solely in its capacity as Trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C2, Commercial Mortgage Pass-Through Certificates, Series 2005-C2 (Assignee #2). By assignments dated as of June 21, 2012, Assignee #2 assigned all of its right, title and interest in and to the loan documents to LBUBS New York.

Borrower's Default Under The Loan

On January 11, 2008, Borrower defaulted under the Note and Mortgage by failing to pay the principal, interest and other payments due thereunder. By letters dated July 1, 2008 and November 7, 2008, LNR Partners, LLC (LNR) – which is the special servicer of the Loan – gave Borrower written notice of its default. By letter dated April 20, 2012, LNR accelerated all outstanding sums due from Borrower under the Note and Mortgage. To date, Borrower has not paid all of the amounts due under the Note and Mortgage.

LBUBS New York commenced this action to foreclose the Mortgage. As the Mortgage also secures sums presently due under a Guaranty of Payment held by LBUBS Fourteen Mile, LBUBS Fourteen Mile is also named as a plaintiff. The Guaranty of Payment was given by AC I Southwest to secure a loan made to AC I Sterling in the original principal amount of $3,440,000.

Discussion

Defendants' argue that the instant action is barred by Section 489 (1) of the Judiciary Law (the Statute), which provides in relevant part:

> . . . no corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon . . .

(citing *Lee v Community Capital Corporation*, 67 Misc 2d 699 (Sup. Ct. Nassau Co. 1971).

They contend that the Statute is penal in nature, the Statute manifests the State of New York's public policy of prohibiting such practices, and hence renders all such transactions void.

They argue plaintiff LBUBS New York clearly acquired the Loan Documents with the sole intent and purpose of bringing an action or proceeding thereon, as it acquired the Loan Documents in late June 2012 and instituted the instant action shortly thereafter. They say, it is undeniable that LBUBS New York violated the Statute, and the instant action must be dismissed.

Alleged Champertous Claims

Plaintiffs contend that the doctrine of champerty, codified in the Statute, is a doctrine that has always been "limited in scope." *Trust for the Certificate Holders of Merrill Lynch Mortgage Investors, Inc. Mortgage Pass-Through Certificates, Series 1999-C1 v Love Funding Corp.*, 13 NY3d 190, 199 (2009) (Merrill Lynch), quoting *Bluebird Partners v First Fidelity Bank*, 94 NY2d 726, 734 (2000).

Plaintiffs argue "New York cases agree that if a party acquires a debt instrument for the purpose of enforcing it, that is not champerty simply because the party intends to do so by

litigation." *Merrill Lynch*, 13 NY3d at 200. They say, "the champerty statute does not apply when the purpose of an assignment is the collection of a legitimate claim. What the statute prohibits, as the Appellate Division stated over a century ago, 'is the purchase of claims with the "intent and for the purpose of bringing an action" that . . . may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up . . . in [an] effort to secure costs.'" 13 NY3d at 201 (citation omitted). They also say "the financial industry is critical to New York's economy, and its courts are rightfully wary of fomenting uncertainty in its vibrant secondary debt markets by exposing the purchasers of debt instruments to charges of champerty." *Justinian Capital SPC v WestLB AG*, 37 Misc 3d 518, 526 (Sup. Ct. NY Co. 2012).

Defendants' claims contradict well-settled law in New York. As is evident from the allegations of the Verified Complaint, LBUBS New York acquired the Loan for the lawful purpose of enforcing a legitimate debt. That LBUBS New York elected to enforce this legitimate debt by litigation is not champertous. *See Merrill Lynch*, 13 NY3d at 200; *Justinian Capital SPC*, 37 Misc 3d at 525; *See v Community Capital Corp.*, 67 Misc 2d 699 (Sup. Ct. Nassau Co. 1971) – does not hold to the contrary

Deficiency Claims

As alleged in the Verified Complaint, AC I Southwest is named as a party defendant "by reason of being a borrower and guarantor of debt secured by [the Mortgage]." Ringel "is named as a party defendant to adjudicate any deficiency under the Note and Mortgage *for which he may be liable* as a guarantor." (emphasis added). And, "AC I Sterling is named as a party defendant to adjudicate any deficiency under the subject note and mortgage *for which it may be liable as a guarantor*." (emphasis added). Plaintiffs do not claim that they are presently entitled to a

deficiency judgment, but allege that they are entitled to "any deficiency which may remain, *or so much thereof as the Court may determine to be just and proper.*" (emphasis added).

Since AC I Southwest Broadway, AC I Sterling and Ringel may be held liable to plaintiffs for a deficiency resulting from a foreclosure sale, they can properly be made defendants in this foreclosure action.[1] As set forth by Bruce J. Bergman in his treatise, "there can be no deficiency judgment unless the judgment of foreclosure and sale contains an adjudication of the parties responsible for the deficiency." "A deficiency judgment cannot be entered against a person not served with a summons and complaint in the foreclosure action since jurisdiction is not obtained against that person."

Plaintiffs are required to name AC I Southwest, AC I Sterling and Ringel as defendants in order to preserve any possible deficiency claims against them. Defendants' motion to dismiss is denied.

LBUBS Fourteen Mile

Plaintiffs allege that LBUBS Fourteen Mile is owed certain sums under a Guaranty of Payment dated as of February 18, 2005, executed and delivered by AC I Southwest. Plaintiffs allege that the sums due under the Guaranty of Payment are secured by the Mortgage. These allegations – which must be accepted as true for purposes of defendants' motion to dismiss – are sufficient to state a cognizable claim by LBUBS Fourteen Mile against AC I Southwest for monies due under the Guaranty of Payment.

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[1] AC I Southwest may be held liable for a deficiency under the circumstances set forth in Sections 14(b) and (c) of the Note (Compl., Ex. C) and Sections 13.3 and 13.4 of the Mortgage (Compl., Ex. D). The circumstances under which Ringel may be held liable for a deficiency are set forth on pages 1 and 2 of his Guaranty of Recourse Obligations of Borrower (Compl., Ex. F). And, AC I Sterling is fully liable for any deficiency under its Guaranty of Payment (Amended Compl., Ex. G), regardless of the circumstances. Plaintiffs are entitled to preserve their deficiency claims against these defendants at least through any foreclosure sale.

Motion to Amend Complaint

Plaintiffs request leave to amend and supplement the complaint pursuant to CPLR 3025 for the purpose of correcting one of the exhibits and adding a new judgment lien.

Plaintiffs seek to amend their Verified Complaint in order to attach a correct copy of the AC I Sterling Guaranty. Plaintiffs seek to supplement their Verified Complaint by adding a new judgment lien. Defendants would not be prejudiced by either. Plaintiffs' cross-motion for leave to amend and supplement the complaint is granted.

ORDERED that defendants' motion to dismiss is denied; and it is further

ORDERED that plaintiffs' cross-motion to amend and supplement the complaint is granted.

Dated: April 22, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER