

**Private Capital Funding Co., LLC v 513 Cent. Park  
LLC**

2014 NY Slip Op 32004(U)

July 29, 2014

Sup Ct, NY County

Docket Number: 850087/2012

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

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PRIVATE CAPITAL FUNDING CO., LLC f/k/a,  
GINSBURG & MISK FUNDING CO. LLC,

Plaintiff,

DECISION AND  
ORDER

-against-

Index No. 850087/2012

513 CENTRAL PARK LLC, EVE STRAUSMAN  
WINSTON, RONALD FRANKEL, BOARD OF  
MANAGERS OF THE PLAZA CONDOMINIUM,  
LISA MACARI, ESQ., BERMAN & FREEDMAN, P.C.,  
DONALD E. FREEDMAN, ESQ. and "JOHN DOE NO. 1"  
to "JANE DOE NO. 10",

Defendants.

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HON. ANIL C. SINGH, J.:

In this action to foreclose a mortgage encumbering a premises, plaintiff Private Capital Funding Co., LLC f/k/a Ginsburg & Misk Funding Co. moves for summary judgment pursuant to CPLR §3212 (i) granting judgment on the first cause of action of the amended verified complaint against defendant 513 Central Park ("513 Central defendants") for their default as the mortgagor, (ii) dismissing defendant Ronald Franke's six affirmative defenses, and (iii) dismissing defendants 513 Central Park, LLC and Eve Strausman Winston's two affirmative defenses. For relief, plaintiff seeks a referee to compute the amount due to plaintiff pursuant to RPAPL §1321. The 513 Central defendants and Eve

Strausman Winston are the only parties to oppose plaintiff's motion. The claims against Berman & Freedman, P.C. and Donald E. Freedman, Esq., have been discontinued.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

Specifically “[a] prima facie showing to warrant summary judgment [in an action for] foreclosure of a mortgage requires the movant to establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment.” (Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept 2007]). Here, plaintiff has proffered executed versions of the note, mortgage and guaranty indicating that plaintiff is the holder of the mortgage for \$700,000 against the 513 Central defendants. Next we analyze whether a material issue of fact exists as to 513 Central defendants' default.

The 513 Central defendants argue that plaintiff agreed to an oral modification of the terms of the note, mortgage and guaranty in so far as Joseph Misk, a principal of plaintiff agreed to accept a \$22,000 payment to make both notes held by plaintiff, including the \$700,000 note at issue and a separate

\$1,500,000 note, current (see Winston Aff.). Additionally the 513 Central defendants allege that plaintiff agreed to accept payment in the last week of August 2012 (id.). The 513 Central defendants made the payment in accordance with the oral modification thus defendants argue the default notice and foreclosure are improper. Plaintiff counters by pointing to the terms of the note which states, “[t]his note may not be changed or terminated orally.” (Mortgage Note §5 (h)). Plaintiff thus argues that any oral modifications would not be enforceable.

The First Department recently reaffirmed on a summary judgment motion that an integration clause that provides, among other things, that any change to the contract must be in writing will be enforced (Nassau Beekman, LLC v Ann/Nassau Realty, LLC, 105 AD3d 33, 40 [1st Dept 2013]). Therefore, defendant’s statement regarding an oral modifications are without merit and defendants have failed to raise a triable issue of fact.

The second position of the 513 Central defendants is that this summary judgment motion is premature because no discovery has taken place. Conversely, plaintiff qualifies defendant’s requests for discovery as illusory since their requested discovery pertain to damages not liability. Pursuant to RPAPL §1321, plaintiff is entitled to a receiver who would calculate damages. Here, it is clear discovery would be an exercise in futility as the facts defendant 513 Central is seeking will not create a dispute as to liability (Prince v Accardo, 54 AD3d 837,

838-39 [2d Dept 2008] (holding summary judgment motion not premature in a foreclosure action)). Moreover, summary judgment is not premature based upon defendant's lack of reasonable opportunity for disclosure since the 513 Central defendants' document requests was served on March 11, 2014, after plaintiff's motion for summary judgment was filed, a day before defendant filed their opposition and almost two years after Plaintiff filed their initial summons and verified complaint (but see *Betz v N.Y.C. Premier Properties, Inc.*, 38 AD3d 815, 816 [2d Dept 2007]). The 513 Central defendants had ample opportunity for discovery. Accordingly, liability on the first cause of action against the 513 Central defendants on the \$700,000 note is granted and pursuant to RPAPL §1321 a referee is hereby appointed to compute the amount due to plaintiff.<sup>1</sup>


As to the affirmative defenses, defendant Ronald Franke has not opposed plaintiff's summary judgment motion seeking the dismissal of his defenses and defendants 513 Central and Eve Strausman Winston have not advocated for their affirmative defenses in their opposition, therefore those affirmative defenses are hereby dismissed on default.

The foregoing constitutes the decision and order of the court.

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<sup>1</sup> This court declines to consider plaintiff's argument regarding the cross default provision of the \$700,000 Note triggering a default of the \$1,500,000 Mortgage Note since it was raised for the first time in plaintiff's reply papers and this issue is not before the court.

Date: July 29, 2014  
New York, New York

  
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Anil C. Singh

**HON. ANIL C. SINGH  
SUPREME COURT JUSTICE**