

<b>Foster v Seterus, Inc.</b>
2014 NY Slip Op 32572(U)
October 3, 2014
Supreme Court, New York County
Docket Number: 850246/2014
Judge: Manuel J. Mendez
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PRESENT: HON. MANUEL J. MENDEZ PART 13  
*Justice*

PAUL FOSTER,  
Plaintiff,  
-against-

INDEX NO. 850246/14  
MOTION DATE 09-24-2014  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

SETERUS, INC. AS SERVICING AGENT FOR  
FEDERAL NATIONAL MORTGAGE ASSOCIATION,  
  
Defendants.

The following papers, numbered 1 to 9 were read on this motion for an injunction and verified petition to preclude the sale of condominium stock and cross-motion to dismiss pursuant to CPLR 3211(a)[1],[7],[8]:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>4 - 6 , 7 - 8</u>
Replying Affidavits _____	<u>9</u>

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Petitioner's Order to Show Cause seeking an injunction, a CPLR §3408 settlement conference, prohibiting Respondents from the sale, transfer or encumbrance of his shares of capital stock representing his ownership of a cooperative apartment located at 240 East 55<sup>th</sup> Street, Apartment 8E, New York, New York, and to stay further foreclosure proceedings, is granted only to the extent that any existing restraints will remain in effect pending a hearing to determine whether proper UCC §9-611[f] notice was provided to Petitioner.

Respondents' cross-motion to dismiss this proceeding pursuant to CPLR §3211[a],[1],[7],[8], is granted only to the extent of dismissing the claims related to RPAPL §1304 and RPAPL §3408 in the first cause of action, the second, third and fourth causes of action asserted in the petition, which are severed and dismissed. The remainder of the relief sought in the cross-motion is denied.

On January 26, 2007, Petitioner and Stephanie Foster obtained a mortgage and signed a promissory note in the amount of \$343,800.00 with BNY Mortgage Company LLC, for the cooperative apartment located at 240 East 55<sup>th</sup> Street, Apartment 8E, New York, New York (Cross-Mot. Exhs. A & B). On January 26, 2007, they also entered into a Loan Security Agreement permitting the lender to sell, assign or deliver their stock certificates which were used as collateral, in the event of a default, at a public or private sale (Cross-Mot. Exh. B). On March 18, 2011, Petitioner gave power of attorney to Eugene (aka "Gene") Burshtein of Metro Star Realty, Corp., to make payments on the mortgage. Stephanie Foster relinquished her ownership interests to Paul Foster by stipulation dated September 11, 2012 (Mot. Exh. B).

On October 18, 2013, Citimortgage sent notices to Petitioner at various addresses. The first two pages of the notices are blank except for Petitioner's name

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

and address, the third page is titled "Help for the Homeowners at Risk of Foreclosure," and has paragraph titled, "Notice," "Sources of Information and Assistance" and "Foreclosure Rescue Scams" (Cross-Mot. Exh. C). On April 1, 2014, Respondents' attorneys sent a Notice of Default in the form of a letter to Stephanie Foster and Petitioner advising of the payment of arrears required to maintain the mortgage (Cross-Mot. Exh. D). By Notice of Sale dated June 17, 2014, Respondents' attorneys advised Petitioner of the non-judicial sale of the security interest in the stock and proprietary lease scheduled for July 24, 2014 at 10:00am at 60 Centre Street, New York, New York (Cross-Mot. Exh., E). By letter dated July 9, 2014, Petitioner advised Respondents that he was seeking to resume payments and arrange a schedule for the payment of the accumulated arrears (Mot. Exh. E).

On July 18, 2014, Petitioner by Order to Show Cause commenced this proceeding and sought injunctive relief. On August 29, 2014 a reinstatement letter was sent to Petitioner stating that the amount of money needed to reinstate the mortgage was \$40,447.00 due by 2:00 p.m. on September 18, 2014 (Opp. to Cross-Mot. Exh. A). On September 3, 2014 and September 15, 2014, Petitioner's attorneys e-mailed Respondents' attorneys for more detailed information concerning an item in the reinstatement letter titled, "Advances" of \$1,900.00 (Opp. to Cross-Mot. Exh. B), no response was forthcoming from Respondents and the deadline for reinstatement passed.

Respondents oppose the Order to Show Cause and cross-move to dismiss the entire petition pursuant to CPLR §3211[a], [1],[7],[8].

A motion to dismiss pursuant to CPLR §3211[a],[8], is derived from a lack of jurisdiction, only a prima facie showing is required for the plaintiff to maintain an action (*Opticare Acquisition Corp. v. Castillo*, 25 A.D. 3d 238, 806 N.Y.S. 2d 84 [N.Y.A.D. 2<sup>nd</sup> Dept., 2005]). Pursuant to CPLR §403[d], "an order to show cause may be served in lieu of a notice of petition at a time and manner specified therein." An order to show cause and petition may be served in any manner directed by the Court which will provide reasonable notice, including on the attorney for a party (*Invar Intern., Inc. v. Zorlu Enerji Elektrik Uretim Anonim Sirketi*, 86 A.D. 3d 404, 927 N.Y.S. 2d 330 [1<sup>st</sup> Dept., 2011]). Pursuant to CPLR §311[a][1], personal service upon a corporation may be made upon a, "... managing or general agent...or any other agent authorized by appointment or law to receive service." Proof is required to establish whether or not an attorney is an authorized agent to accept service on behalf of a corporation (*6 Davis Associates, Inc. v. Rye Castle Apartment Owners, Inc.*, 242 A.D. 3d 528, 662 N.Y.S. 2d 83 [2<sup>nd</sup> Dept., 1997]).

Respondents were served as directed by this Court through their attorneys as agent for service of process. Respondents' attorneys have sent the notices of default and sale to the Petitioner as agents on behalf of the Respondents. Notice of the Order to Show Cause and this proceeding was received by the Respondents as demonstrated by the Affidavit of Anita Johnson, Lien Specialist for Seterus, Inc., annexed to the cross-motion papers. Respondents attorneys have not provided sufficient evidence in support of their contention that they are not agents for service of process on behalf of their clients.

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the party seeking dismissal produce documentary evidence that "utterly refutes plaintiff's factual

allegations, conclusively establishing a defense as a matter of law.” (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]).

Respondents contend that the notices sent to Petitioner (Cross-Mot. Exhs. C, D & E), are documentary evidence that utterly refutes the Petitioner's claims and establishes that this proceeding should be dismissed. Respondents rely on the affidavit of Anita Johnson, Lien Specialist for Seterus, Inc.. She states that the loan was serviced by Citimortgage through February 1, 2014, and then transferred to Seterus, Inc.. Anita Johnson also states she obtained personal knowledge solely through review of business records currently in the possession of Seterus Inc., and that the notices were properly written on colored paper, with the title in bold, twenty-point font and the remainder of the notice in fourteen point font. Respondents also contend that the Notice of Default dated April 1, 2014 and a Notice of Sale dated June 17, 2014, (both sent by Respondents' attorneys), properly complied with statutory requirements and are a basis to dismiss the petition.

The record provided by Respondents offers no proof of their contention that as of February 1, 2014, Seterus Inc., assumed the servicing for the Petitioner's loan from Citimortgage. Anita Johnson has not stated the manner in which documents were acquired by Seterus Inc., personal knowledge of the preparation and mailing of Citimortgage's notices, or personal knowledge of the creation and maintenance of physical and electronic records which include the notices. The documentary evidence submitted by Respondents does not utterly refute the claims asserted in the petition related to UCC §9-611[f] notice.

Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim (Leon v. Martinez, 84 N.Y. 2d 83, supra). Pleadings that consist of bare legal conclusions and factual assertions which are clearly contradicted by documentary evidence, or are inherently lacking in credibility, will not be presumed to be true and are susceptible to dismissal (Dragon Head LLC v. Elkman, 102 A.D. 3d 552, 958 N.Y.S. 2d 134 [N.Y.A.D. 1<sup>st</sup> Dept., 2013] and Tal v. Malekan, 305 A.D. 2d 28, 760 N.Y.S. 2d 431 [N.Y.A.D. 1<sup>st</sup> Dept. 2003]).

The petition asserts five causes of action, the first cause of action states that Respondents failed to provide proper notice as required pursuant to U.C.C. §9-611[f] and RPAPL §1304 and RPAPL §3408; the second cause of action states that Respondents have engaged in unlawful acts and practices pursuant to General Business Law (GBL) §349; the third cause of action states that Respondents conduct is in contravention with its obligation under HAMP and the U.S. Department of Treasury Guidelines and due to duplicity have not pursued modification; the fourth cause of action states that Respondents breached their covenants of good faith and fair dealing that are required pursuant to UCC §2-103[1][b]; and the fifth cause of action states that Respondents conduct and actions amount to overreaching. The petition seeks relief in the form of preclusion of the sale of stock.

Respondents contend that the claims asserted in the first cause of action of the petition related to RPAPL §1304 and CPLR §3408 apply only to residential foreclosure actions related to real property and not to cooperative shares. Respondents argue

there is no basis to maintain the claims in the first cause of action related to UCC §9-611[f], because documentary evidence establishes proper notices were timely sent.

Shares in a cooperative apartment are personal property and not real property, therefore claims related to security interests are governed by UCC Article 9 and not the RPAPL (Brief v. 120 Owners Corp., 157 A.D. 2d 515, 549 N.Y.S. 2d 706 [1<sup>st</sup> Dept., 1990]). UCC §9-611[f], requires notice be provided to residential owners of cooperative apartments, prior to disposition of collateral in the form of shares. Pursuant to UCC §9-611[f], a secured party must send a specific type of notice to a homeowner 90 days prior to sale or other disposition of cooperative shares held as collateral. The statute has specific requirements related to the timing, type, and information to be provided on notices sent. A lender is also required to send a notice to the homeowner ten (10) days prior to disposition of the property. Failure to comply with the UCC §9-611[f] notice requirements will result in a stay of the sale of shares pending compliance (Stern-Obstfeld v. Bank of America, 30 Misc. 3d 901, 915 N.Y.S. 2d 456 [Sup. Ct., New York County, 2011], Goldman v. Emigrant Savings Bank-Long Island, 32 Misc. 3d 1238(A), 938 N.Y.S. 2d 227 [Sup. Ct., Queens County, 2011] and Waithe v. Citigroup, Inc., 42 Misc. 3d 1205(A), 983 N.Y.S. 2d 207 [Sup. Ct., Kings County, 2013]).

Petitioner has not stated a claim pursuant to RPAPL §1304 and RPAPL §3408, since those statutory provisions do not apply to the disposition of cooperative shares. This is not a foreclosure proceeding. Respondents are seeking to conduct a non-judicial sale of the collateral pledged by Petitioner in the form of his shares of the cooperative apartment. A potentially meritorious claim has been asserted concerning the timing of, service and manner of UCC §9-611[f] notice provided to petitioner.

Respondents contend that Petitioner has not stated a basis for the second cause of action for violation of GBL § 349. Pursuant to GBL §349, a prima facie case is established by, (1) a showing of injury resulting from "consumer-oriented conduct" taking place in New York; (2) that the defendant is engaging in an act or practice that is materially misleading or deceptive, likely to result in injury to the reasonable consumer; (3) and that resulted in injury to the plaintiff (Osewego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y. 2d 20, 647 N.E. 2d 741, 623 N.Y.S. 2d 529 [1995]). The defendants actions must have, "...broad impact on consumers at large, private contract disputes unique to the parties...would not fall within the ambit of GBL §349." (Gomez-Jimenez v. New York Law School, 103 A.D. 3d 13, 956 N.Y.S. 2d 54 [N.Y.A.D. 1st Dept., 2012]).

Petitioner has failed to state a cause of action under GBL §349. He has not established that his claims related to failure to modify the terms of the Loan Security Agreement, derived from his default, are based on materially misleading or deceptive conduct. He has also not demonstrated that his claims have a broader impact on the public or consumers at large.

There is no entitlement to loan modification or settlement or private right of action under HAMP and the United States Department of Treasury guidelines for the failure to modify the terms of an agreement ( Wells Fargo Bank, N.A. v. Van Dyke, 101 A.D. 3d 638, 958 N.Y.S. 2d 331 [N.Y.A.D. 1<sup>st</sup> Dept., 2012]). Petitioner has not stated a basis to maintain the third cause of action asserted in the petition because this is not

a foreclosure proceeding and the relief sought seeks a modification of the Security Loan Agreement, not the mortgage.

Respondents contend there is no basis to sustain the fourth cause of action for violation of UCC §2-103 [1][b]. UCC §2-103 [1][b], defines "good faith" as, "...honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." The provisions of UCC §2-103 [1][b] would only apply to the commercial reasonableness of the sale of Petitioner's shares of stock, which has not yet occurred (*Waithe v. Citigroup, Inc.*, 42 Misc. 3d 1205(A), *supra*). Petitioner has not established that UCC §2-103 [1][b] applies to this proceeding seeking review and modification of the Loan Security Agreement.

Petitioner argues that the August 29, 2014 reinstatement letter was an offer to modify the mortgage and prevent foreclosure. He contends that the fifth cause of action should not be dismissed because equity is needed to compel compliance and prevent overreaching, given the refusal to reply to questions posed regarding the August 29, 2014 reinstatement letter. Respondents' reply papers at paragraph 8, state that Petitioner has the ability to reinstate his loan up to the date of sale, but that there has been no basis asserted for an unlimited stay.

The fifth cause of action states that Respondents conduct amounts to overreaching. Equity may be applied to prevent a default or forfeiture resulting in no prejudice to a creditor, "...to prevent unconscionable overreaching." (*Fifty States Management Corp. v. Pioneer Auto Parks, Inc.*, 46 N.Y. 2d 573, 389 N.E. 2d 113, 415 N.Y.S. 2d 800 [1979]). The language of the fifth cause of states a potentially meritorious equitable claim resulting from Respondents failure to act in good faith regarding Petitioner's questions related to reinstatement. Respondents are obligated to act in good faith, including responding to Petitioner's questions, related to reinstatement of the loan to the extent the offer remains in effect up to the date of sale.

The Order to Show Cause seeks to prohibit the auction sale by Respondents and a temporary, preliminary and permanent injunction. Respondents oppose the injunctive relief arguing there is no basis to maintain this proceeding.

A movant seeking a stay or injunction, is required to show, "(1) the likelihood of ultimate success on the merits; (2) irreparable injury to him absent granting of the preliminary injunction; and (3) that a balancing of the equities favors his position" (*Do v. Axelrod*, 73 N.Y. 2d 748, 532 N.E. 2d 1272, 536 N.Y.S. 2d 44 [1998] and *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y. 3d 839, 833 N.E. 2d 191, 800 N.Y.S. 2d 48 [2005]).

Petitioner has stated a basis for a temporary stay pending a hearing on the timing of, service and manner of UCC §9-611[f] notice provided by the Respondents.

Accordingly, it is ORDERED that Petitioner's Order to Show Cause seeking an injunction, a CPLR §3408 settlement conference, prohibiting Respondents from the sale, transfer or encumbrance of his shares of capital stock representing his ownership of a cooperative apartment located at 240 East 55<sup>th</sup> Street, Apartment 8E, New York, New York, and to stay further foreclosure proceedings, is granted only to the extent of maintaining any existing restraints in effect pending a hearing to determine whether

proper UCC §9-611[f] notice was provided to Petitioner; and it is further,

ORDERED that, the remainder of the relief sought in Petitioner's Order to Show Cause is denied, and it is further,

ORDERED that, Respondents' cross-motion to dismiss this proceeding pursuant to CPLR §3211[a],[1],[7],[8], is granted only to the extent of dismissing the claims related to RPAPL§1304 and RPAPL §3408 in the first cause of action, the second, third and fourth causes of action asserted in the petition, and it is further,


ORDERED that, the claims related to RPAPL§1304 and RPAPL §3408 in the first cause of action, the second, third and fourth causes of action asserted in the petition are severed and dismissed, and it is further,

ORDERED that, Petitioner shall serve a copy of this Order with Notice of Entry on the Respondent and the General Clerk's Office (Room 119) within ten (10) days of the date of this Order, and it is further,

ORDERED that, Respondents shall serve an answer to the claims asserted in the first cause of action concerning UCC §9-611[f] notice, within twenty (20) days from service of a copy of this Order with Notice of Entry, and it is further,

ORDERED that, the parties shall appear for a hearing to determine whether proper UCC §9-611[f] notice was provided to Petitioner, on December 3, 2014 at 2:30p.m in IAS Part 13.

ENTER:

  
 \_\_\_\_\_  
 MANUEL J. MENDEZ,  
 J.S.C.

MANUEL J. MENDEZ  
 J.S.C.

Dated: October 3, 2014

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
 Check if appropriate:     DO NOT POST                       REFERENCE