

**Bayview Loan Servicing, LLC v 1052 Greene Ave.
Assoc. Inc.**

2014 NY Slip Op 32770(U)

October 8, 2014

Supreme Court, Kings County

Docket Number: 502096/2012

Judge: David I. Schmidt

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part COM-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of October, 2014.

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.

-----X
BAYVIEW LOAN SERVICING, LLC,

Plaintiff,

- against -

Index No. 502096/12

1052 GREENE AVE. ASSOC. INC., NEW YORK STATE DEPARTMENT OF TAXATION, BAYVIEW LOAN SERVICING, LLC, LINDA HUNT and John Doe #1 through John Doe #50, said names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

-----X

The following papers numbered 1 to 13 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavit (Affirmation) _____
Reply Affidavit (Affirmation) _____
Other Papers _____

1-3 4-6 7-9
8-9 10-11
12, 13

Upon the foregoing papers in this commercial foreclosure action, plaintiff Bayview Loan Servicing, LLC (Bayview) moves, pursuant to CPLR 3212, for an order granting it summary judgment as against defendant, Linda Hunt (Hunt), and limiting fact issues for trial.

Bayview further moves, by separate motion, for an order: (1) pursuant to CPLR 3215 granting a default judgment against all non-appearing defendants; (2) pursuant to RPAPL §1321, appointing a referee to compute the amount of the mortgage debt owed; and (3)

pursuant to CPLR 3025, amending the caption by: (a) replacing “John Doe #1,” “John Doe #2” and “John Doe #3” with “Greater St. Paul Healing & Deliverance Church,” Charles H. Churn Jr. Christian Center Inc.” and “Charles Churn Christian Academy,” respectively, as party defendants and (b) by striking “John Doe #4” through “John Doe #50” as defendants.

Hunt cross-moves, pursuant to 3212, for an order granting her summary judgment dismissing the complaint and declaring the underlying mortgage void.

Background

The Max Mortgage

Hunt purchased the commercial property at 1052 Greene Avenue in Brooklyn (Property) from Max InCorp Limited (Max) by a March 9, 2000 deed which was recorded in the New York City Register’s Office, Department of Finance (City Register) on June 5, 2000. Hunt financed her purchase of the Property with a \$122,600.00 purchase money mortgage from Max (Max Mortgage), which was thereafter assigned to Max Clain on March 15, 2000.

The Interbay Mortgage

About seven years later, Hunt sold the Property to defendant, 1052 Greene Avenue Associates Inc. (1052 Greene), by a December 7, 2007 deed which was recorded with the City Register on January 28, 2008. 1052 Greene executed a mortgage and a promissory note on December 7, 2007 for \$483,000.00 in favor of Interbay Funding LLC (Interbay Mortgage). Proceeds of the Interbay Mortgage (\$97,215.18) were used to satisfy both the Max Mortgage and a UCC Financing Statement (\$277,420.84) that were recorded against the Property.

Thereafter, the Interbay Mortgage and promissory note were assigned to Bayview by a February 15, 2008 assignment, which was recorded with the City Register on April 3, 2008.

The Instant Foreclosure Action

Bayview commenced this foreclosure action against 1052 Greene, Hunt and others on July 25, 2012, alleging that 1052 Greene defaulted in making monthly payments that were due under the Interbay Mortgage on June 1, 2010 and monthly thereafter.

Defendants 1052 Greene, New York State Department of Taxation and Bayview Loan Servicing, LLC failed to answer the complaint or otherwise appear in the action.

Hunt Alleges That The Interbay Mortgage Is Invalid

Hunt answered the complaint on or about September 25, 2012, denying the material allegations contained therein and asserting nine affirmative defenses, including that Bayview “lacks standing to bring this action because there is no valid mortgage encumbering the subject premises” (Hunt Answer ¶ 17) and that “[t]he deed purportedly vesting title of the subject premises into defendant [1052] GREENE’s ownership is void” (*id.* at ¶ 22). Additionally, Hunt asserted one counterclaim against Bayview for misrepresentation (*id.* at ¶ 80).

Hunt alleges that she was the victim of a fraudulent “sale leaseback” scheme orchestrated by Desmond Grenardo, an alleged agent of Interbay, whereby she was fraudulently induced to sell the Property to 1052 Greene (*id.* at ¶¶ 26-34). Hunt thus alleges:

“With intent to defraud HUNT, Grenardo explained to her that the contract of sale to 1052 GREENE would enable her to payoff the then-existing mortgage to Max Clain, use proceeds from the sale to renovate the property, and use some proceeds to continue paying the carrying costs of the property as the occupant until she could buy the property back from 1052 GREENE” (*id.* at ¶ 33).

According to Hunt, Grenardo “wrongfully absconded from the closing with funds in excess of \$400,000” (*id.* at ¶ 35). Hunt further alleges that Bayview or its predecessors in interest “had actual or constructive knowledge of Grenardo’s fraudulent conduct . . .” (*id.* at ¶ 38) or “willfully or negligently ignored Grenardo’s fraudulent conduct . . .” (*id.* at ¶ 39).

Hunt asserted five cross-claims against 1052 Greene, Empire General Abstract, LLC and Grenardo for breach of contract, to compel a determination of Hunt's interest in the Property and for fraud.

The March 2013 Order

Hunt moved for a default judgment against the cross-claim defendants, seeking rescission of the deed to the Property that she granted to 1052 Greene. The court, by a March 13, 2013 order (March 2013 Order), granted Hunt's motion, on default, and held:

“Defendant Linda Hunt is granted her motion to default co-defendant 1052 Greene Ave. Assoc., Inc. as well as cross-claimed defendants Empire General Abstract, LLC and Desmond Grenardo.

“To the extent default judgment is entered against 1052 Greene Ave. Assoc., Defendant Linda Hunt is granted rescission of the Deed she signed which gave 1052 Greene Ave. Assoc., Inc. ownership of the Property being foreclosed in this action. Notwithstanding the rescission granted, Linda Hunt's ownership, title, and interest in the property shall expressly remain subject to Plaintiff's mortgage lien unless and until Linda Hunt obtains an adjudication that invalidates (in whole or in part) Plaintiff's mortgage lien.

“If Linda Hunt is not successful in obtaining such an adjudication or Plaintiff obtains an adjudication of its lien being valid and enforceable, Plaintiff's foreclosure shall proceed in the ordinary course as the property will be encumbered by Plaintiff's mortgage, as will any right, title or interest Linda Hunt has therein. . . .”

Thus, this Court granted Hunt rescission of the deed, yet expressly held that Hunt's ownership, title and interest in the Property remained subject to the Interbay Mortgage until Hunt obtains a contrary adjudication.

The Instant Motions

Bayview now moves for summary judgment as against Hunt and to limit fact issues for trial. Bayview also moves, by separate motion, for an order of reference, for a default judgment against the non-appearing defendants and to amend the caption in this case regarding the “John Doe” defendants.

Hunt opposes Bayview's summary judgment motion on the ground that she requires discovery regarding Bayview's relationship with Gernardo and cross-moves for summary judgment seeking a declaration that the Interbay Mortgage is void.

Discussion

(1)

Summary Judgment Standard

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). A failure to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (*see Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, then the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*see Alvarez*, 68 NY2d at 324).

Accordingly, issue-finding rather than issue-determination is the key in deciding a summary judgment motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, [1957], *rearg denied* 3 NY2d 941 [1957]). Evidence presented by the non-moving party "must be viewed in the light most favorable to the non-moving party" (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Denial thus occurs "where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Benetatos v Comerford*, 78 AD3d 750, 752 [2010] [internal quotation marks and citations omitted]; *see also Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2005] [denial of summary judgment

required upon developing “any doubt as to the existence of a triable issue, or where the material issue of fact is arguable” [internal quotation marks and citations omitted]).

(2)

Hunt’s Summary Judgment Motion

Hunt seeks an order granting her summary judgment dismissing Bayview’s foreclosure action and declaring that the mortgage upon which this action is based is void. Hunt contends that a determination that the mortgage is void is “incidental” to this Court’s March 2013 Order granting Hunt rescission of the deed that she granted to 1052 Greene.

However, RPL § 266 protects the “title of a purchaser or incumbrancer for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor” (*LaSalle Bank Natl. Assoc. v Ally*, 39 AD3d 597, 599 [2007]). “A mortgagee is under a duty to make an inquiry where it is aware of facts that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue. A mortgagee who fails to make such an inquiry is not a bona fide encumbrancer for value” (*JP Morgan Chase Bank v Munoz*, 85 AD3d 1124, 1125-1126 [2011][citations and internal quotation marks omitted]). The Appellate Division, Second Department has recently reaffirmed the principle that “a mortgagee is not protected in its title if it had previous notice of potential fraud by the immediate seller, or knowledge of facts which put it on inquiry notice as to the existence of a right in potential conflict with its own” (*Williams v Mentore*, 115 AD3d 664, 764 [2014]).

Hunt’s cross motion is denied because Hunt failed to produce evidence that Bayview or Interbay had actual or constructive knowledge that Grenardo fraudulently induced Hunt to transfer the Property to 1052 Greene.

(3)

Bayview's Summary Judgment Motion

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 1080 [2010] [internal quotation marks omitted]; see *US Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez*, 49 AD3d 711 [2008]). In its moving papers, Bayview includes copies of the executed mortgage and loan documents and the affidavit of Gary Locke, who identifies himself therein as a Document Coordinator of Bayview. Mr. Locke avers that 1052 Greene defaulted under the loan documents by failing to tender the installment which became due and payable on June 1, 2010 and monthly thereafter.

Bayview made a prima facie showing of entitlement to judgment as a matter of law by submitting the mortgage, the unpaid note, and the affidavit of Mr. Locke attesting to the default (see *People's United Bank v Hallock Landing Assocs., LLC*, 114 AD3d 835 [2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 655 [2013]). Further, there is no dispute that 1052 Greene failed to pay the outstanding principal and interest that was due.

Hunt opposes Bayview's summary judgment motion on the grounds that Bayview and/or Interbay has “key documentary evidence detailing the nature and extent of its pre-existing relationship with . . . Grenardo . . .”¹ Hunt's request for an order denying Bayview's summary judgment motion so that she may embark on a fishing expedition for evidence is denied. According to Bayview, “[t]he details of the relationship between Interbay . . . and

¹ See the February 19, 2014 affirmation of Isa Abdur-Rahman, Esq. submitted in support of Hunt's cross motion for summary judgment at ¶ 2.

Mr. Grenardo . . . were fully disclosed during deposition testimony and otherwise. There is nothing more to be disclosed that would go to a material fact.”²

“[W]hile CPLR 3212(f) permits an opposing party to obtain discovery under certain circumstances (*see Urcan v Cocarelli*, 234 AD2d 537 [1996]), ‘it should not be resorted to where, as here, there has been a failure to demonstrate that the discovery sought would produce relevant evidence to support the plaintiff’s allegations’ (*Frith v Affordable Homes of Am.*, 253 AD2d 536, 537 [1998]; *see Greenberg v McLaughlin*, 242 AD2d 603, 604 [1997])” (*Riddy v HSBC USA*, 21 AD3d 465, 466 [2005]).

Where a party’s “request for additional discovery [is] not calculated to develop any additional information relevant to the plaintiff’s claim and can be characterized as nothing more than a fishing expedition, relief pursuant to CPLR 3212(f) [is] properly denied” (*Downey v Schneider*, 23 AD3d 514, 517 [2005]; *accord Town of Brookhaven v Mascia*, 38 AD3d 758, 759 [2007] [the denial of summary judgment pursuant to CPLR 3212(f) requires a showing that the request for additional discovery is calculated to yield facts that would warrant the denial of summary judgment]).

Hunt’s cross-moving papers do not contain evidence to suggest that additional discovery may lead to proof sufficient to demonstrate a bona fide defense to foreclosure. Hunt’s request for an order denying Bayview’s summary judgment motion so that she may embark on a fishing expedition is denied.

(4)

Bayview’s Motion For Default Judgment

Bayview moves, pursuant to CPLR 3215, for a default judgment against all non-appearing defendants, including 1052 Greene, and concedes that the motion was not made

² See the April 2, 2014 affirmation of Helmut Borchert, Esq. submitted in opposition to Hunt’s cross motion at ¶ 20.

within one year of default. Bayview contends that its three-month delay in seeking a default judgment should not preclude the relief it seeks because it has taken “several proceedings within such time period in pursuit of its claim for foreclosure.”³ Specifically, Bayview argues that it did not abandon its foreclosure claims because it sought the appointment of a receiver in September 2012 and opposed Hunt’s motion for a default judgment in March 2013. Importantly, Bayview does not provide any excuse for the three-month delay.

“Where a plaintiff fails to seek leave to enter a default judgment within one year after the default, he or she must offer a reasonable excuse for the delay and demonstrate that the complaint is meritorious” (*First Nationwide Bank v Pretel*, 240 AD2d 629, 629 [1997] [holding that settlement discussions excused bank’s delay in seeking a default judgment]). Furthermore, “[w]hether an excuse is reasonable is a determination committed to the sound discretion of the court” (*Costello v Reilly*, 36 AD3d 581, 581 [2007] [affirming dismissal of complaint under CPLR 3215 (c) because “Supreme Court providently exercised its discretion” in failing to excuse delay based on law office failure]; *see also Sicurella v 111 Chelsea, LLC*, 67 AD3d 996, 996 [2009] [holding that trial court improvidently exercised its discretion in denying motion to dismiss complaint under CPLR 3215 (c) because “plaintiffs failed to offer a reasonable excuse for the three-year delay in seeking a default judgment”]).

Here, Bayview’s failure to provide any excuse for its admitted delay in seeking a default judgment warrants dismissal of the complaint against the non-appearing defendants without prejudice. Accordingly, it is

ORDERED that Bayview’s motion for summary judgment as against Hunt is granted; and it is further

³ See the January 13, 2014 affirmation of David V. Mignardi, Esq. in support of Bayview’s motion for an order of reference, default judgment and amendment of caption at ¶ 26.

ORDERED that the branch of Bayview's motion seeking an order replacing "John Doe #1," "John Doe #2" and "John Doe #3" with "Greater St. Paul Healing & Deliverance Church," Charles H. Churn Jr. Christian Center Inc." and "Charles Churn Christian Academy," respectively, is granted; and it is further

ORDERED that the branch of Bayview's motion seeking an order amending the caption by excising the fictitious named defendants "John Doe #4" through "John Doe #50" as defendants is granted; and it is further

ORDERED that the branch of Bayview's motion seeking a default judgment against non-appearing defendants 1052 Greene, New York State Department of Taxation Bayview Loan Servicing, LLC, Greater St. Paul Healing & Deliverance Church, Charles H. Churn Jr. Christian Center Inc. and Charles Churn Christian Academy, and for an order appointing a referee to compute is denied and Bayview's complaint is dismissed without prejudice; and it is further

ORDERED that defendant Hunt's cross motion for summary judgment is denied. This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

HON. DAVID I. SCHMIDT