CSMC 2007-CI Old Country Off., LLC v 1025 Realty Assoc. LLC
2014 NY Slip Op 32888(U)
September 5, 2014
Supreme Court, Nassau County
Docket Number: 018014/11
Judge: Randy Sue Marber
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

5

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 13

X

CSMC 2007-C1 OLD COUNTRY OFFICE, LLC,

Plaintiff,

Index No. 018014/11
Motion Sequence...05, 06, 08
Motion Date...07/22/14

-against-

1025 REALTY ASSOCIATES LLC, JEFFREY WASSERMAN, LONG ISLAND PIPE SUPPLY INC., PAULUS, SOKOLOWSKI & SARTOR ENGINEERING P.C., KEYSPAN ENGINEERING ASSOCIATES, INC., DBA PAULUS SOKOLOWSKI & SARTOR, G&E MECHANICAL CORP., NATIONAL BANK OF NEW YORK CITY, SARTOR ENGINEERING P.C., THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, INTERBANK OF NEW YORK, "JOHN DOE #1" through "JOHN DOE #20," the last twenty names being fictitious and unknown to the Plaintiff, the person or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon premises,

Defendants.

X

Papers Submitted:
Notice of Motion (Mot. Seq. 05).....x
Memorandum of Law.....x
Affirmation in Support.....x
Memorandum of Law in Opposition.....x
Reply Affirmation.....x
Reply Memorandum of Law.....x
Sur-Reply Affirmation.....x
Sur-Reply Memorandum of Law.....x
Notice of Cross-motion (Mot. Seq. 06).....x
Memorandum of Law.....x

Memorandum of Law in Opposition.....x
Reply Memorandum of Law.....x
Notice of Cross-motion (Mot. Seq. 08).....x
Affidavit in Opposition.....x
Affidavit in Opposition.....x
Affirmation in Opposition.....x
Memorandum of Law in Opposition.....x
Reply Memorandum of Law.....x

Upon the foregoing papers, the motion (Mot. Seq. 05) by the attorneys for the Plaintiff, CSMC 2007-C1 Old Country Office, LLC, seeking an order pursuant to CPLR § 3212 granting the Plaintiff (i) summary judgment against all of the Defendants on the Plaintiff's first cause of action for foreclosure, (ii) against the Defendants, 1025 Realty Associates, Inc. and Jeffrey Wasserman dismissing their counterclaim; and against the Defendant, National Bank of New York City, dismissing its counterclaim; appointing a referee to compute; and severing the Plaintiff's second cause of action against the Defendant, Jeffrey Wasserman; the cross-motion (Mot. Seq. 06) by the attorneys for the Defendant, National Bank of New York City, ("NBNYC") seeking the denial of the Plaintiff's motion for summary judgment and pursuant to CPLR § 3211 (a) (7) and § 3211 (e) dismissing the Plaintiff's complaint against it; and the cross-motion (Mot. Seq. 08) by the attorneys for the Defendants, 1025 Realty Associates LLC and Jeffrey Wasserman, seeking an order pursuant to CPLR § 3212 for summary judgment dismissing the Plaintiff's second cause of action against the Defendant, Jeffrey Wasserman, are determined as hereinafter set forth.

On January 4, 2007, the Defendant, 1025 Realty Associates ("1025 Realty") obtained a $27 million loan from Column Financial Inc. ("Column") secured by a mortgage

on a commercial office building located at 1025 Old Country Road, Westbury, New York (the "subject property") with a personal guaranty by the Defendant, Jeffrey Wasserman.

In March 2007, Column transferred its interest in the loan to a commercial mortgage trust for which Wells Fargo Bank N.A. is trustee. To service the various securitized loans in the trust, a Pooling and Servicing Agreement (the "PSA"), dated March 1, 2007, was entered into by Wells Fargo, as Trustee, Credit Suisse First Boston Mortgage Securities Corp. as Depositor of the securitized loan, Capmark Finance Inc., as Master Servicer, and Midland Loan Servicer, Inc. as Special Servicer.

By April 2009, 1025 Realty was in default. Midland, as Special Servicer, sent a notice of default to 1025 Realty. Following a series of negotiations between Midland and 1025 Realty, on March 18, 2010, Midland sent 1025 Realty a proposed letter agreement (the "proposed Letter Agreement") whereby, in essence, the $27 million loan would be satisfied in exchange for a payment of $9 million. 1025 Realty executed the Letter Agreement. The Letter Agreement was specifically conditioned upon approval of "the Lender's Credit Committee."

On April 1, 2010, LNR, as the Controlling Class Representative of the committee, disapproved the settlement. One week later, on April 8, 2010, LNR replaced Midland as special servicer and served until April 2013.

Non-party, Mazel Productions, LLC ("Mazel") owns parcels of vacant land across the street from the subject property at 1025 Old Country Road, known as 51 State

Street, 60 Brooklyn Avenue, Westbury, New York (Sec. 11, Block 79, Lots 258-259, 271-273, 313, 315 and 317 (the "60 Brooklyn Avenue property") and at 19 State Street, Westbury, New York (Sec. 11, Block 79, Lot 319 ("19 State Street property") (referred to herein collectively as the "Mazel Properties").

In addition to the subject property that secures the CSMC mortgage, the loan is also secured with an appurtenant easement for parking pursuant to a "Perpetual Easement Agreement" between 1025 Realty and Mazel Productions for the use of one of the parcels at 51 State Street for automobile parking for the office building at 1025 Old Country Road owned by the Defendant, 1025 Realty. The "Perpetual Easement Agreement" was executed simultaneously with the documents securing the CSMC $27 million mortgage. The Plaintiff does not hold a mortgage on the easement parcel, only a mortgage on the subject property (1025 Old Country Road) that as dominant parcel has the benefit of an appurtenant easement. For an appurtenant easement to exist, two landowners must be involved. One must receive a benefit and the other must accept a burden. The land that benefits from an easement appurtenant is called the dominant tenant or estate (1025 Old Country Road). The land that must suffer and allow the use is called the servient tenant or estate (51 State Street). The original mortgagee, Column Financial, for itself, its successors or assigns, accepted the Easement Agreement as security for its loan, subject to the terms of the Agreement, including the agreed upon and bargained for right of 1025 Realty and Mazel to modify the terms of the Agreement, with no need for the consent of Column Financial or its successors.

Subsequent thereto, the Mazel parcel was mortgaged by Mazel to secure a series of four loans taken by Mazel from the Defendant, NBNYC. Wasserman alleges that the proceeds of these loans were used for the benefit of the property at 1025 Old Country Road. The NBNYC Mortgages are all cross-collateralized. The Defendant, NBNYC, holds a series of four consolidated notes payable to it by Mazel and secured by four mortgages on the Mazel properties (the "NBNYC Mortgages").

On July 15, 2010, the Defendant, NBNYC, made a loan to Mazel Productions in the amount of $400,000.00 secured by a second mortgage on the premises at 51 State Street – the servient parcel under the Easement Agreement. 1025 Realty assumed the payments due on the NBNYC Mortgage. On May 24, 2007, NBNYC and Mazel entered a cross-collateralization agreement with respect to this mortgage and three prior mortgages securing the loan from NBNYC to Mazel.

According to Wasserman, the funds obtained from NBNYC were used for the benefit of 1025 Realty and the property at 1025 Old Country Road. NBNYC asserts it agreed to make loans to Mazel for the benefit of 1025 Old Country Road, knowing that Mazel had no source of income to pay its debts but for the income stream generated by the building at 1025 Old Country Road.

The Plaintiff, CSMC, who holds by assignment the mortgage given by 1025 Realty, executed simultaneously with the Easement Agreement, seeks to foreclose the mortgage.

In paragraph 9 of the amended complaint, the Plaintiff alleges that NBNYC is made a defendant because of "possible claims or interest in possession or liens against the mortgaged premises." In paragraph 79 of its Verified Answer, NBNYC alleges that ". . . the plaintiff intends to foreclose the servient parcel (51 State Street, the Easement Parcel) to the extent of the easement, and to declare that the rights of NBNYC are . . . inferior and subject to the easement and Easement Agreement as amended." In paragraph 37 of the Verified Reply to Counterclaim by National Bank of New York City, the Plaintiff "Denies the allegations set forth in Paragraph 29 of the Verified Answer but admits that plaintiff seeks to foreclose the easement located at 51 State Street and the rights of NBNYC are, for all purposes, inferior and subject to the easement."

In short, whether styled an answer or counterclaim, the Plaintiff and the Defendant, NBNYC, have charted a course and framed an issue – the priority of the respective mortgages that cannot be determined without joining Mazel as a party defendant. Consequently, the Plaintiff's application dismissing NBNYC's counterclaim must be denied.

RPAPL § 1311 (1) and (3) define necessary parties to a foreclosure action as "[e]very person having an estate or interest, in possession, or otherwise, in the property" and "[e]very person having any lien or incumbrance upon the real property which is claimed to be subject and subordinate to the lien of the plaintiff." Clearly Mazel has an "interest, in possession, or otherwise" in the servient estate (*NC Venture I, L.P. v. Complete Analysis, Inc.*, 22 A.D.3d 540; *Polish Nat. Alliance of Brooklyn v. White Eagle Hall Co.*, 98 A.D.2d

400, 403). "The rationale for joinder of these interests derives from the underlying objective of foreclosure actions – to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale (*NC Venture I, L.P. v. Complete Analysis, Inc., supra*, quoting from *Polish Nat. Alliance of Brooklyn v. White Eagle Hall Co., supra* at 404; *see 6820 Ridge Realty LLC v. Goldman*, 263 A.D.2d 22, 25-26)." "The absence of a necessary party in a mortgage foreclosure action leaves such party's rights unaffected by the judgment of foreclosure and sale and the foreclosure sale may be considered void as to the omitted party" (*Mortgage Electronic Registration Systems, Inc. v. Davis*, 9 Misc3d 1126[A], Slip Copy, 2005 WL 2934576 [Supreme Court, Queens County 2005]; *see Jemzura v. Jemzura*, 36 N.Y.2d 496).

The attorney for the Plaintiff acknowledges that the Defendant, NBNYC, has a mortgage on the fee interest in the easement parcel. The Plaintiff's assertion that it cannot and will not foreclose on NBNYC's interest in the easement parcel is contradicted by previously referenced Paragraph 37 of its Reply to the Counterclaim. Mazel is the owner of the easement parcel. The Plaintiff asserts it is seeking to only foreclose on its mortgage on 1025 Old Country Road's interest in the easement on the easement parcel whose fee is owned by Mazel.

In footnote 8 (pg. 12) to its Reply Memorandum of Law in Further Support of its Motion for Partial Summary Judgment, the attorney for the Plaintiff attempts to make the following analogy:

> "assume that there are two houses which share a driveway. One homeowner owns the driveway, and the other owner has an easement permitting it to use the driveway. If the homeowner who owns the driveway thereafter mortgages his property, and a foreclosure action is commenced, the mortgagee would be foreclosing on the home including the driveway; however, this foreclosure action would not eliminate the owner of the adjacent home's easement right to continue to use the driveway. This is the same situation we have in this case with respect to the Easement Parcel. NBNYC can foreclose on its mortgage on the ownership interest in the Easement parcel, however, the purchaser at the foreclosure sale would take title subject to the prior Easement."

However, what distinguishes the facts in the within action from those in the above analogy is that the maintenance of the servient easement is contingent on payment by the owner of the dominant easement whose property is the subject of the within mortgage foreclosure proceeding.

The NBNYC counterclaim seeks a declaratory judgment that the foreclosure of the Plaintiff's interest in 1025 Old Country Road will not extinguish the borrower's "obligations" under the Easement and Modification Agreement to pay the NBNYC mortgages on the easement parcel and the purchaser of 1025 Old Country Road at a foreclosure sale would be required to continue to pay Mazel's obligation to pay the NBNYC mortgage on the easement.

Mazel Productions is a necessary and indispensable party to this action. Should the Plaintiff succeed in its argument that since the modification agreement was executed after the Plaintiff's mortgage, it would not affect the "later in time" NBNYC mortgage or bind the purchaser at the Plaintiff's foreclosure sale to pay Mazel a sum equal to its taxes and

mortgage carrying charges on the easement fee. Mazel (with no other source of income to pay its debts) will be subjected to a perpetual easement without any right to demand payment of the agreed upon consideration and would be "aggrieved." Mazel is one whose interests may be "inequitably affected by a judgment in that action" and is, therefore a necessary party (CPLR § 1001 [a]; *Di Leo v. Pecksto Holding Corporation,* 304 N.Y. 505, 514).

The Defendant, Wasserman, asserts that LNR Partners, LLC ("LNR"), a special servicer for the trust, refused to accept a $10 million settlement agreed to with the prior servicer. Pursuant to the settlement, the $27 million loan would be satisfied by 1025 Realty Associates by a reduced payoff amount of $9 million as well as other incidental costs and fees amounting to over $1 million in the aggregate for a total package of about $10 million. Wasserman, in his counterclaim, alleges that LNR refused a discounted payoff so that it could reap for itself the financial benefits associated with servicing the loan. Specifically, Wasserman contends that by rejecting the settlement and by servicing the mortgage under the Pooling and Service Agreement, dated March 1, 2007, LNR stood to collect servicing fees; application, assumption, modification, earnout and defeasance fees; workout fees; and liquidation fees.

During the pendency of the within action, the Defendants, 1025 Old Country Road and Wasserman, commenced a separate action in the Commercial Division of this Court against LNR (*1025 Realty Associates LLC and Jeffrey Wasserman v. LNR Partners, LLC*, Nassau County Supreme Court, Index No. 6032691/13, hereinafter referred to as the

"LNR action"). In both the within foreclosure action and the LNR action, 1025 Old Country Road and Wasserman argue that LNR acted improperly in rejecting the proposed discounted pay-off of the loan and by taking actions to allegedly depress the value of the property so that LNR could acquire the property at a discount. They claim that LNR's actions constituted a breach of duty. These issues were decided against 1025 Old Country Rd. and Wasserman in the LNR action. Justice Vito DeStefano, in a Short Form Order dated June 6, 2014 and entered in the Nassau County Clerk's Office June 18, 2014, found that LNR's actions were not done with the sole purpose of harming 1025 Old Country Road and Wasserman. LNR did not use dishonest or illegal means that amounted to a crime or an independent tort. LNR's actions were permissible under the applicable agreements. There was no fiduciary duty owed to 1025 Old Country Road and Wasserman. These findings are binding upon 1025 Old Country Road and Wasserman in this action and are dispositive with respect to their unclean hands defense to the foreclosure cause of action and their counterclaim for breach of duty. 1025 Old Country Rd. and Wasserman's unclean hands defense and the their counterclaim for breach of duty in this foreclosure action are barred by the doctrine of collateral estoppel. *Res judicata* or collateral estoppel preclude a party from re-litigating claims or issues that were resolved in prior actions (*see Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 440, 455; *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494).

The Defendant, Wasserman, has cross-moved for summary judgment dismissing the guaranty claim. The Plaintiff seeks to hold Wasserman liable under the

Guaranty with regard to mechanic's liens, unfunded security deposits, environmental issues and the modification of the easement agreement created to provide additional parking for 1025 Old Country Rd.

The Guaranty sets forth eleven items, subject to the following prefatory language at the beginning of Section 1.2 (a): "as used herein, the term 'Guaranteed Obligations' means (a) obligations and liabilities of the Borrower to the Lender for any loss, damage, cost, expense, liability, claim and any other obligation incurred by the Lender (including attorneys' fees and costs reasonably incurred) arising out of or in connection with the following: [items numbered (i) to (xi)]". Those eleven items include:

> (iii) the breach of any material representation, warranty, covenant or indemnification provision in the Environmental Indemnity or in the Mortgage concerning environmental laws, hazardous substances and asbestos and any indemnification of Lender with respect hereto in either document;
>
> * * *
>
> (vi) Failure to pay charges for labor or materials or other charges that can create Liens on any portion of the Property; provided, however, such liability shall not be applicable to the extent that there is insufficient available cash flow at any time to enable Borrower to pay all operating expenses (including taxes) then due and payable, necessary property improvement expenditures and the amounts due and payable under the Loan Documents (as demonstrated to the reasonable satisfaction of Lender), and Borrower applies all available cash flow to the payment of any one or more of the foregoing items;
>
> (vii) any security deposits, advance deposits or any other deposits collected with respect to the Property which are not delivered to Lender upon a foreclosure of the Property or action in lieu thereof, except to the extent any such security deposits were applied in accordance with the terms and conditions of any of the Leases prior

> to the occurrence of the Event of Default that gave rise to such foreclosure or action in lieu thereof.

In support of his motion to dismiss the Guaranty cause of action, the Defendant, Wasserman, argues that the Plaintiff has not suffered any loses due to alleged environmental issues. A September 22, 2010 environmental report issued to LNR found no environmental issues of concern:

> Based on the findings from the Limited Phase II ESA performed at the Site, no olfactory evidence of contamination was observed in the four (4) groundwater monitoring wells at the Property. Laboratory analysis of the four (4) groundwater samples obtained at the Site did not detect the presence of VOC or SVOC concentrations in excess of laboratory detection limits. Based on this information, no further investigation of the groundwater monitoring wells is recommended at this time. (*See* Eisenberg Aff., Ex. N, pg. 19, ¶ 3).

Further, the Defendant, Wasserman, asserts the Plaintiff has not incurred "any loss, damage, cost, expense, liability, claim and any other obligation" relating to any mechanics lien (Subsection 1.2 [a] [vii]) or security deposit (Subsection 1.2 [a] [vii]) and the complaint alleges that the perpetual Easement Modification Agreement constitutes a "lien" or "transfer" in violation of the Guaranty. The Guaranty states that:

> "Lien" shall mean any mortgage, deed of trust, assignment, security interest or any other encumbrance, charge, or transfer of, on or affecting the Borrower, the Property, or any portion thereof.

The Defendant, Wasserman, argues that the Plaintiff fails to explain how the definition of "Lien" encompasses the Perpetual Easement Modification Agreement; and the word "charge" is at best ambiguous as used in the definition quoted above since the word's

common meaning would result in a violation of the loan agreement any time 1025 Realty Associates agreed to pay for any service or thing – such as utility contract, or the hiring of a contractor.

The Guaranty defines "Transfer" as follows:

> (i) sell, convey, mortgage, grant, bargain, encumber, pledge, assign, grant options with respect to, or otherwise transfer or dispose of (directly or indirectly, voluntarily or involuntarily, by operation of law or otherwise, and whether or not for consideration or of record) the Property or any part thereof or any legal or beneficial interest therein or (ii) permit a Sale or Pledge of an interest in any Restricted Party (collectively, a "Transfer").

As previously indicated, the borrower had the right to modify the easement agreement. There is nothing in the pleadings to demonstrate that the modification of the easement constituted a "transfer" in violation of the Guaranty. A guaranty must be construed in the strictest manner (*see Wider Consol. Inc. v. Melillo*, 107 A.D.3d 883). The Defendant, Wasserman, has made an adequate *prima facie* showing of entitlement to summary judgment dismissing the cause of action for breach of the Guaranty.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v. Associated Fur Mfgrs., Inc.*, 46 N.Y.2d 1065. Conclusory statements are insufficient. *Sofsky v. Rosenberg*, 163 A.D.2d 240, *aff'd* 76 N.Y.2d 927; *Zuckerman v. City of New York*, 49 N.Y.2d 557; *see Indig v. Finkelstein*, 23 N.Y.2d 728;

Werner v. Nelkin, 206 A.D.2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v. Petrides*, 80 A.D.2d 781, *app dismissed.* 53 N.Y.2d 1028; *Jim-Mar Corp. v. Aquatic Construction, Ltd.*, 195 A.D.2d 868, *lv app denied.* 82 N.Y.2d 660).

The Plaintiff has failed to rebut the Defendant, Wasserman's *prima facie* showing of entitlement to dismiss the cause of action for breach of the contract. The Plaintiff's argument that Wasserman made a transfer of the mortgaged premises in violation of the Guaranty is misplaced. No where in the submission before the Court has the Plaintiff demonstrated that Wasserman transferred any part of the fee that comprises the mortgaged property. At all times the fee title to the easement was vested in Mazel. Nor has the Plaintiff demonstrated that Wasserman violated the Single Purpose Entity provisions of the Loan Agreement which violation would occur if:

> (a) Borrower became "obligated for the debts" of another Person, in violation of the Single Purpose Entity provisions of the Loan Agreement; and
>
> (b) Borrower incurred liabilities not in the ordinary course of business relating to the routine administration of Borrower's business, which liabilities exceeded more than 1% of the approximately $27 million principal balance of the Loan, and which liabilities were made for a term more than 60 days past the date they were incurred.

The obligation to pay expenses associated with the easement was not an obligation to pay the debt of another entity, but rather directly benefitted the borrower. Further, the obligation to pay for the use of the easement was incurred in the ordinary course of the business of 1025 Realty. The Plaintiff has failed to demonstrate that Wasserman

incurred a "voluntary lien" on 1025 Old Country Road within the meaning of § 1.2 (b) (iv) of the Guaranty and § 5.2.2 of the Loan Agreement without the bank's prior written consent.

The Plaintiff has failed to show that it has incurred or will incur any damages relating to hazardous substances allegedly located on the property. The Plaintiff's opposition only shows that the hazardous substances allegedly located on the subject property emanated from another property, who would be responsible for the remediation of any hazardous substances, rather than 1025 Realty Associates.

The Plaintiff has failed to demonstrate with any degree of specificity damages it sustained from the filing of the mechanic's lien or that the assignee has incurred damages due to alleged failure to retain security deposits. " '[A]verments merely stating conclusions of fact or of law, are insufficient' " to " 'defeat summary judgment' " (*Banco Popular North America v. Victory Taxi Management, Inc.*, 1 N.Y.3d 381, 384, quoting from *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 N.Y.2d 285, 290).

Accordingly, it is hereby

ORDERED, that the Plaintiff is directed to add Mazel Productions, LLC as a party defendant forthwith; and it is further

ORDERED, that the Plaintiff shall file and serve a Supplemental Summons and Amended Complaint to add Mazel Productions, LLC as a party defendant and shall serve same upon it within thirty (30) days; and it is further

ORDERED, that the branch of the Plaintiff's motion (Mot. Seq. 05) seeking summary judgment for foreclosure and the appointment of a receiver is **DENIED** without

prejudice; and it is further

ORDERED, that the branch of the Plaintiff's motion (Mot. Seq. 05) seeking dismissal of the Defendants, 1025 Realty's and Wasserman's counterclaim is **GRANTED** and it is further

ORDERED, that the Defendant, Jeffrey Wasserman's cross-motion (Mot. Seq. 08) seeking summary judgment dismissing the Plaintiff's second cause of action against the Defendant, Wasserman, on the guaranty, is **GRANTED**; and it is further

ORDERED, that the Defendant, National Bank of New York City's cross-motion (Mot. Seq. 06) is **DENIED** and the Defendant, National Bank of New York City's and the Plaintiff's conflicting claims are referred to the Trial Court; and it is further

ORDERED, that counsel for all parties shall appear for a status conference on November 10, 2014 at 9:30 a.m. in IAS Part 13 hereof; and it is further

ORDERED, that the Stay of the trial of this matter shall remain in effect until the further Order of this Court.

This constitutes the decision and order of this court.

DATED: Mineola, New York
September 5, 2014

Hon. Randy Sue Marber, J.S.C.