

VFC Partners 25 LLC v Freeport Henry Realty LLC
2014 NY Slip Op 33799(U)
January 15, 2014
Supreme Court, Nassau County
Docket Number: 015548/11
Judge: Stephen A. Bucaria
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ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

VFC PARTNERS 25 LLC,

Plaintiff,

-against-

FREEPORT HENRY REALTY LLC, ALLEN
PILEVSKY, JOHN & JACKIE SUNRISE DELI
& CONVENIENCE STORE INC., OMNIPOINT
COMMUNICATIONS INC. and JOHN DOE
DEFENDANT NOS. 1-25, the Names of "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,

Defendants.

The following papers read on this motion:

- Order to Show Cause..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... X

Motion by defendants for leave to reargue plaintiff VFC Partners 25 LLC's motion for summary judgment is **denied**.

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This is an action to foreclose a commercial mortgage which was “packaged” as collateral for an issue of mortgage-backed securities. Defendant Freeport Henry Realty LLC is the owner of commercial property located on Henry Street in Freeport. Defendant Allen Pilvesky is a member of Freeport Henry.

On December 18, 2006, Freeport Henry entered into a consolidation, modification and restatement of notes agreement with Bear Stearns Commercial Mortgage, Inc. In the consolidation agreement, Freeport Henry confirmed that the aggregate principal amount outstanding on the notes was \$1,550,000. In Article 14, the consolidation agreement provides that the lender shall not enforce the note against the borrower, or a member of borrower, except for loss caused by fraud of the borrower, gross negligence of the borrower, misapplication or conversion of rents following a default, and certain other causes. The consolidation agreement recites that the note is secured by a mortgage covering the Freeport property, for the benefit of the Mortgage Electronic Recording Systems, Inc. Additionally, the borrower executed an assignment of leases and rents, as further security for the mortgage debt.

On the same date, the parties entered in an indemnity agreement in favor of Bear Stearns, whereby Freeport Henry and Pilevsky indemnified the lender against loss caused by fraud of the borrower, gross negligence of the borrower, misapplication or conversion of rents following a default, and other causes similar to those in the consolidation agreement. In the indemnity agreement, Freeport Henry and Pilevsky also guaranteed the debt in the event that the borrower filed, or consented to the filing of, a bankruptcy petition.

The original trustee for Bear Stearns Commercial Mortgage Securities, Inc was LaSalle Bank National Association. LaSalle’s successor by merger was Bank of America, National Association. On November 1, 2011, this action was commenced by U.S. Bank National Association, as trustee for Bear Stearns and successor to Bank of America. The present plaintiff, VFC Partners 25 LLC, was assigned the foreclosure cause of action by U.S. Bank National Association after the action was commenced.

Plaintiff alleges that the borrower defaulted on the loan on February 1, 2011. In the first cause of action, plaintiff requests a judgment of foreclosure. In the second cause of action, plaintiff seeks a deficiency judgment against defendants Freeport Henry Realty and Allen Pilevsky pursuant to the indemnity agreement. Plaintiff alleges that on August 16, 2011 it served a demand that Freeport Henry remit all rents to the lender, but Freeport Henry has

failed to do so. Thus, plaintiff asserts that the indemnity agreement was triggered based upon the misapplication or conversion of rents provision. By order dated November 16, 2011, Susan E Dantzig, Esq was appointed receiver of the mortgaged premises, including the rents.

By order dated October 21, 2013, the court granted plaintiff's motion for summary judgment to the extent of liability on its first and second causes of action. The court directed a hearing as to the amount of the deficiency judgment, limited to the amount of the misapplied rents, upon submission of the referee's report of the sale. Plaintiff's motion to discontinue the action as against defendants Omnipoint Communications, Inc. and T-Mobile Northeast, LLC was also granted in the order.

Defendants move for leave to reargue plaintiff's motion for summary judgment to the extent that the court granted liability on the first two causes of action. In moving for leave to reargue, defendants assert that the court overlooked the fact that the notes and allonges were assigned to plaintiff VFC Partners on March 28, 2013, after the foreclosure action was commenced. Defendants further argues that it has not been established that the indemnity agreement was assigned to plaintiff.

In order to commence a foreclosure action, a plaintiff must have a legal or equitable interest in the mortgage (*HSBC Bank v Hernandez*, 92 AD3d 843 [2d Dept 2012]). Nevertheless, where the mortgage, but not the note, is transferred to the Mortgage Electronic Recording System, plaintiff may establish standing by effectuating an assignment of the note by physical delivery of the note before the action is commenced (*Bank of New York Mellon Trust v Sachar*, 95 AD3d 695 [1st Dept 2012]).

Pursuant to the securities offering, the mortgage, but not the note, was transferred to the Mortgage Electronic Recording System as nominee for Bear Stearns. However, in its original motion, plaintiff established prima face that, at the time the foreclosure action was commenced, U.S. Bank National Association was the assignee and holder of both the note and the mortgage. Defendants failed to raise a triable issue as to U.S. Bank's status as the holder of those instruments.

Upon any transfer of interest, the action may be maintained by the original party, or by the person to whom the interest has been transferred, if the court directs that the transferee be substituted or joined (CPLR § 1018; *Wells Fargo Bank v Hudson*, 98 AD3d 576 [2d Dept 2012]). Although the court directed that VFC Partners, the transferee of U.S. Bank National Association, be substituted as plaintiff, U.S. Bank was not divested of standing to

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maintain the foreclosure action.

Pursuant to an Omnibus Assignment dated September 6, 2011, Bank of America assigned to U.S. Bank National Association the Freeport Henry notes and mortgages “together with any other documents or instruments executed and/or delivered in connection with or otherwise related to the [note and mortgage]” (Defendants’ Exhibit 4.A, ex 11). Since the indemnity agreement was incorporated by reference, it was transferred to U.S. Bank pursuant to the omnibus assignment.

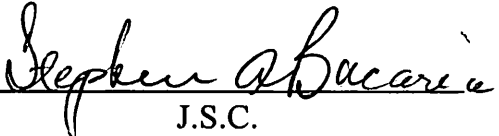
Moreover, as a general matter, the mortgage passes as “an incident of the note,” once a promissory note is tendered to and accepted by the mortgagee (*Bank of New York v Silverberg*, 86 AD3d 274, 280 [2d Dept 2011]). Assignment of a note carries with it the security for the note, even though the security is not formally assigned (Id).

The indemnity agreement was an incident of the note because it was intended as security, in addition to the mortgage. Thus, the indemnity agreement would have been transferred to U.S. Bank by operation of law, even if it had not been incorporated by reference in the omnibus assignment.

Defendants have not established that the court overlooked or misapprehended any matter of fact or law in interpreting the indemnity agreement as applying to misapplied rent. Defendants’ motion for leave to reargue plaintiff VFC Partners 25 LLC’s motion for summary judgment is **denied**.

So ordered.

Dated JAN 15 2014


J.S.C.

ENTERED

JAN 17 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE