

**West 45 Debt LLC v Clinton Assoc. LLC**

2015 NY Slip Op 31052(U)

June 18, 2015

Supreme Court, New York County

Docket Number: 850104/15

Judge: Cynthia S. Kern

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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 55

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WEST 45 DEBT LLC,

Plaintiff,

Index No. 850104/15

-against-

**DECISION/ORDER**

CLINTON ASSOCIATES LLC, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, "JOHN DOE #1" through "JOHN DOE #12," the last twelve 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 upon the premises described in the complaint,

Defendants.

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**HON. CYNTHIA KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross-Motion and Affidavits Annexed.....	<u>2</u>
Replying Affidavits.....	<u>3,4</u>
Exhibits.....	<u>5</u>

Plaintiff West 45 Debt LLC ("West") commenced the instant action to foreclose on a Consolidation, Modification and Extension Agreement (the "Mortgage") dated August 18, 2003 covering the property located at 438-440 West 45<sup>th</sup> Street, New York, New York, Block 1054, Lot 53 (the "subject premises"). Plaintiff now moves for an Order appointing a temporary

receiver in this foreclosure action concerning the subject premises. Defendant Clinton Associates LLC ("Clinton") cross-moves for an Order dismissing the complaint. For the reasons set forth below, plaintiff's motion is granted and Clinton's cross-motion is denied.

The relevant facts are as follows. On or about August 18, 2003, the Mortgage was executed by Clinton, as borrower, in favor of New York Community Bank ("NYCB") to secure the principal sum of \$1,900,000.00. The Mortgage was given as security for the repayment of a Substitute and Restated Promissory Note (the "Note") in the amount of \$1,900,000.00. On or about August 27, 2013, NYCB transmitted to Clinton an Extension Letter which extended the original maturity date of the Note from September 1, 2013 to November 1, 2013 (the "First Extension"). On or about October 9, 2013, NYCB transmitted to Clinton an Extension Letter which extended the maturity date of the Note for a second time from November 1, 2013 to February 1, 2014 (the "Second Extension"). On or about August 12, 2014, Clinton executed an agreement which extended the maturity date of the Note to January 1, 2015 (the "Final Extension").

On or about January 31, 2014, NYCB assigned the Mortgage to plaintiff pursuant to an Assignment of Mortgage (the "Assignment"). In or around March 2015, plaintiff commenced the instant action seeking to foreclose on the subject premises on the ground that Clinton has failed to pay the entire unpaid principal balance, plus interest, which became due and payable on January 1, 2015. Specifically, plaintiff alleges that the present unpaid principal balance due under the Note is \$1,541,847.68 plus interest thereon. Additionally, the complaint alleges that due to Clinton's failure to properly maintain the subject premises, the subject premises has two active New York City Department of Buildings' violations as of March 26, 2015. Plaintiff now

moves for an Order appointing a temporary receiver in this action. Clinton cross-moves for an Order dismissing the complaint.

The court first turns to Clinton's cross-motion for an Order dismissing the complaint. As an initial matter, Clinton's cross-motion for an Order pursuant to CPLR § 3211(a)(1) dismissing the complaint based on documentary evidence is denied. In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. See *Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1<sup>st</sup> Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. See *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

In the instant action, Clinton's cross-motion to dismiss the complaint based on documentary evidence is denied as the evidence relied upon by Clinton does not definitively dispose of plaintiff's claims. In support of its cross-motion, Clinton relies on Paragraph 33 of the Mortgage agreement, which states as follows:

[NYCB] shall provide [Clinton] written notice of any default herein. If [Clinton] is in default in the payment to [NYCB] of any sum or amount of money which may fall due or be payable from time to time under the terms of the Agreement hereunder ("a monetary default"), [Clinton] shall have a period of ten (10) days after [NYCB's] giving of such notice within which time such default must be cured.

Specifically, Clinton asserts that it did not receive the ten day notice to cure its monetary default as required by the Mortgage and thus, the complaint must be dismissed as said requirement was a condition precedent to commencing a foreclosure action. However, it is undisputed that in August 2014, Clinton and NYCB executed the Final Extension, which extended the maturity date of the Note until January 1, 2015, and which provides as follows:

Upon the occurrence of any Termination Event:

- a. Lender may immediately commence enforcing its rights and remedies pursuant to the Loan Documents and/or otherwise;
- b. All Obligations, including, without limitation, all Extension Rate interest that has accrued since the occurrence of the Existing Default shall be immediately due and payable in full, without demand, notice, or protest, all of which are hereby expressly **WAIVED**....

Contrary to defendant's contention, the documentary evidence provided in this action demonstrates that defendant waived its right to be given an opportunity to cure its monetary default. Thus, Clinton's motion to dismiss the complaint based on documentary evidence is denied.

Clinton's assertion that its motion to dismiss should be granted on the ground that the Final Extension attached to plaintiff's motion papers is unsigned and that Clinton never received a signed copy of said agreement from plaintiff is without merit. Plaintiff has remedied any evidentiary deficiency by providing a copy of the Final Extension signed by all parties in opposition to Clinton's cross-motion to dismiss. Moreover, Clinton does not dispute that it signed and executed the Final Extension or that it was granted and received the benefit of the extension of the maturity of the Note by NYCB until January 1, 2015.

Additionally, Clinton's cross-motion for an Order pursuant to CPLR § 3211(a)(10) dismissing the complaint on the ground that plaintiff has failed to join necessary parties is denied. Pursuant to CPLR § 3211(a)(10), "the court should not proceed in the absence of a person who should be a party." Indeed, "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." CPLR § 1001(a).

In the instant action, Clinton's cross-motion to dismiss the complaint on the ground that

