

Emigrant Bank v Greene
2015 NY Slip Op 31343(U)
February 24, 2015
Supreme Court, Queens County
Docket Number: 703522/2014
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

EMIGRANT BANK, x
Plaintiff,

Index
Number 703522/2014

-against-

Motion
Date October 21, 2014

GAIL GREENE F/K/A GAIL S. LEE,
DWAYNE T. KIRKLAND, THE BROOKLYN
UNION GAS CO. D/B/A NATIONAL GRID NY,
DEBRA S. TURNER, NEW YORK CITY
PARKING VIOLATIONS BUREAU, NEW
YORK CITY ENVIRONMENTAL CONTROL
BOARD,

Motion Seq. No. 5

“JOHN DOE # 1” TO “JOHN DOE # 10”

inclusive, the names of the ten last name Defendants
being fictitious, real names unknown to Plaintiff,
the parties intended being persons or corporations,
having an interest in or tenants or persons in possession
of, portions of the mortgaged premises described in
the complaint,

Defendants.

x

The following numbered papers read on this motion by defendant Gail Greene s/h/a Gail Greene f/k/a Gail S. Lee pursuant to CPLR 3211(a)(1), (4) and (7) to dismiss the complaint insofar as asserted against her on the grounds that there is a prior action pending between the parties, and for failure to state a cause of action, or in the alternative, for a stay pursuant to CPLR 2201, and for an award of costs, including attorneys' fees in relation to the motion pursuant to CPLR 8101 and 8106.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	26-34
Answering Affidavits - Exhibits	40-41

Upon the foregoing papers it is ordered that the motion is determined as follows:

At the outset, the court notes that the parties have failed to provide the court with a copy of the complaint. Nevertheless, because this action was commenced on May 22, 2014 utilizing the e-filing system, a copy is available for review by the court. In the filed complaint, plaintiff seeks to foreclose the mortgage encumbering the real property known as 23-62 95th Street, East Elmhurst, New York (the subject property), which was allegedly executed, acknowledged and delivered by defendants Gail Greene and Dwayne T. Kirkland to Emigrant Mortgage Company, Inc. as security for the payment of a note executed by defendant Gail Greene, evidencing a loan to Greene in the original principal amount of \$492,000.00. Plaintiff alleges that it is the holder of the mortgage and underlying note by virtue of an assignment, and that defendants Gail Greene and Dwayne T. Kirkland defaulted in paying the monthly mortgage installment due on November 1, 2007.

Plaintiff previously commenced a foreclosure action against defendants Gail Greene and Dwayne T. Kirkland (and others), entitled *Emigrant Bank v Greene*, (Supreme Court, Queens County, Index No. 4509/2008) on February 21, 2008, based upon the same alleged default in payment of the monthly mortgage installment due on November 1, 2007). Plaintiff moved to discontinue voluntarily that action as against defendant Gail Greene without prejudice. By order dated August 9, 2010 and entered on August 13, 2010, the action (Index No. 4509/2008) was discontinued and the notice of pendency was cancelled.

Meanwhile, on June 10, 2010, Gail Greene commenced an action in the United States District Court for the Eastern District of New York entitled *Greene v Emigrant Mortgage Company, Inc.* (Index No. 10-CV-2653), asserting claims against Emigrant Mortgage Company, Inc. and Atlas Home Equities, LLC based upon alleged violations of Federal Truth in Lending Act [15 USC § 1601, *et seq.*] [TILA]; Home Ownership and Equity Protection Act of 1994 [HOEPA] [15 USC § 1639] [an amendment to TILA] and the TILA implementing regulations [found in Federal Reserve Board Regulation Z] [12 CFR 226], General Business Law § 349, and New York State’s “anti-predatory lending law,” fraud, civil conspiracy to commit fraud, and unconscionability, and seeking to rescind the subject mortgage loan, terminating plaintiff’s security interest in the subject property and for award of monetary damages, including punitive damages and costs, including reasonable attorneys’ fees. According to defendant Gail Greene, the claims for statutory damages under TILA and

HOEPA, and violations of the New York State anti-predatory lending law have since been withdrawn in the federal action.

On a motion to dismiss a complaint for failure to state a cause of action (*see* CPLR 3211[a][7]), the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *Uzzle v Nunzie Ct. Homeowners Assn., Inc.*, 70 AD3d 928 [2d Dept 2010]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2d Dept 2003]). A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence may be granted where the documentary evidence utterly refutes the plaintiff's allegations, conclusively establishing a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d at 87; *Matter of White Plains Plaza Realty, LLC v Cappelli Enters., Inc.*, 108 AD3d 634 [2d Dept 2013]; *Palmieri v Biggiani*, 108 AD3d 604 [2d Dept 2013]; *Shuttle Contr. Corp. v Peikarian*, 108 AD3d 516 [2d Dept 2013]).

Defendant Gail Greene asserts that the complaint fails to state a cause of action asserted against her, claiming plaintiff lacks a valid security interest in the subject property. Defendant Gail Greene contends that the subject mortgage contains language imposing several liability upon her and defendant Dwayne T. Kirkland, but because defendant Dwayne T. Kirkland is not a signatory to the promissory note, the subject mortgage is rendered unenforceable as against her.

It is axiomatic that a mortgage is a security lien encumbering the title of the mortgagor. Where a covenant for the payment of the sum intended to be secured by the mortgage is expressed in the mortgage or in a note, bond or other separate instrument, a mortgagee may seek to enforce the mortgage debt by foreclosure, or maintain an action at law to recover the amount due upon the mortgage debt. However, where such covenant is not expressed in the mortgage or in another separate instrument signed by a mortgagor, the remedies of the mortgagee against that mortgagor are confined to the property mentioned in the mortgage. It is true that a transaction in which a mortgagor is not a borrower or debtor obligated to make repayment pursuant to the underlying note, bond or obligation, is not the most common mortgage situation. The characteristic attribute of such a mortgagor's status is that the individual is not personally obligated, but that his or her property is charged (*see* 1 Drussel, Foran and Baum, *Mortgages and Mortgage Foreclosure in New York* § 5:2). Nevertheless, a mortgagee not entitled to deficiency judgment against a mortgagor because he or she did not sign the note, bond or obligation, is still entitled to foreclosure of the

secured property because the mortgagor signed the mortgage (*see Kawai Am. Corp. v Hilton*, 205 AD2d 1021, 1022 [3d Dept 1994], *lv dismissed* 87 NY2d 968 [1996]).

The language in the subject mortgage that the lender “may enforce Lender’s rights under this Security Instrument against each of us individually or against all of us together” (Exhibit “B” of defendant Gail Greene at ¶ 13) is a restatement of the common-law rule that debtors to a joint obligation are jointly and severally liable (*see Coolidge E. Equities v Babcock*, 283 AD2d 968 [4th Dept 2001]). The subject mortgage also explicitly provides that “[h]owever, if one of us does not sign the Note ... that Person is signing this Security Instrument only to give that Person’s rights in the Property to Lender under the terms of this Security Instrument ... that Person is not personally obligated to pay the Sums Secured...” (Exhibit “B” of defendant Gail Greene at ¶ 13). Whether plaintiff may seek a deficiency judgment against defendant Dwayne Kirkland (because Kirkland did not sign the subject note), does not mean plaintiff is prohibited from foreclosing the subject mortgage against the premises (*see Kawai Am. Corp. v Hilton*, 205 AD2d at 1022).

Furthermore, the case *Coolidge E. Equities v Babcock*, (283 AD2d 968 [4th Dept 2001]), cited by defendant Gail Greene in support of her motion, is inapposite, and hence does not alter such conclusion. In *Babcock*, two co-owners of real property signed a mortgage in 1988 to secure a certain debt. One of the mortgagors signed a subsequent note in 1992 memorializing a separate and distinct debt. The creditor in *Babcock* argued that the 1988 mortgage contained an alleged “dragnet” clause, which made the mortgage also applicable to future advances, and thereby functioned to secure repayment of the 1992 note. The Appellate Court determined, however, that the language used in the dragnet clause in the 1988 mortgage was insufficient to secure debt evidenced by the 1992 note signed by only one of the mortgagors.

In this case, and unlike the facts in *Babcock*, the subject note and mortgage were signed contemporaneously with each other, and the subject mortgage makes clear that it secures the debt memorialized in the note. In addition, although the other case *Wells Fargo Home Mortg. v Moutopoulos* (2011 WL 6689886, 2011 NY Misc LEXIS 6071, 2011 NY Slip Op 33374[U], Sup Ct Nassau 2011]) cited by defendant Gail Greene in support of her motion is entitled to due consideration, it is not binding precedent on this court, and this court respectfully declines to follow its reasoning.

Plaintiff has stated a cause of action for foreclosure against defendant Gail Greene and defendant Gail Greene has failed to demonstrate the documentary evidence utterly refutes plaintiff’s allegations, conclusively establishing a defense as a matter of law. That branch of the motion by defendant Gail Greene to dismiss the complaint insofar as asserted against

her based upon failure to state a cause of action and on the ground that a defense is founded on documentary evidence is denied.

To the extent defendant Gail Greene moves to dismiss the complaint insofar as asserted against her due to the pendency of the federal action, CPLR 3211(a)(4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties for the same cause of action (*see Whitney v Whitney*, 57 NY2d 731 [1982]). Here, the caption in the federal action does not reflect that the plaintiff herein is a named party therein, and each action is based on a separate theory of recovery (*see Haller v Lopane*, 305 AD2d 370 [2d Dept 2003]). Plaintiff seeks foreclosure herein, and in the federal action, defendant Gail Greene seeks rescission pursuant to federal law, and damages pursuant to New York statutory and common law. Under such circumstances, the court, in an exercise of discretion, denies that branch of the motion by defendant Gail Greene to dismiss the complaint insofar as asserted against her due to the pendency of the federal action.

With respect to that branch of the motion by defendant Gail Greene for a stay of this action pending the outcome of the federal action, this action and the federal action do not share a complete identity of parties, claims, and reliefs sought” (*Green Tree Fin. Servicing Corp. v Lewis*, 280 AD2d 642, 643 [2d Dept 2001]; *see CPLR 2201; Tribeca Lending Corp. v Crawford*, 79 AD3d 1018 [2d Dept 2010]). Thus, that branch of the motion by defendant Gail Greene for a stay of this action pending the outcome of the federal action is denied in an exercise of discretion.

That branch of the motion by defendant Gail Greene for an award of attorneys’ fees is denied.

Dated: February 24 , 2015

D#52

J.S.C.