Deutsche Bank Natl. Trust Co. v Knierim
2015 NY Slip Op 31784(U)
July 17, 2015
Supreme Court, Suffolk County
Docket Number: 8551/13
Judge: Thomas F. Whelan

[* 1]

MEMO DECISION & ORDER

COPY

INDEX No. 8551/13

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 10/9/14
SUBMIT DATE: 6/12/15
Mot. Seq. #001 - MG
CDISP Y____ N x

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for Long Beach Mortgage Loan Trust 2006-8,

Plaintiff,

-against-

DIANE KNIERIM, ERIC KNIERIM, A PORCEL TRADING CORP., ALL ISLAND MARINE TRANSPORT, INC., GTS BUILDERS SUPPLY INC., HOLBROOK CORPORATE CENTER, LLC, AMERICAN EXPRESS TRAVEL RELATED SERVICES, AMERICAN EXPRESS BANK, FSB BANK OF AMERICA, NA, as assignee of Brown Bark, III, LP, CHASE BANK USA, NA, COMMISSIONER OF TAXATION AND FINANCE , GE MONEY BANK a/p/o PALISADES COLLECTIONS, LLC, NATIONAL CITY BANK, PORTFOLIO RECOVERY ASSOCIATES, LLC, PROVIDENT BANK, PUTNAM LEASING COMPANY, INC., SOUTH SHORE ALARMS, INC., DISCOVER BANK, SWEZEY FUEL CO., INC., WELLS FARGO BANK, KMT EAST, LLC, ADVANTAGE ASSETS II, INC., UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, MIDLAND FUNDING, LLC, "JOHN DOES" and "JANE DOES", said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim a lien against the premises,

Defendants.

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Attys. For Plaintiff
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Batavia, NY 14020

DIANE & ERIC KNIERIM
Defendants
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Sayville, NY 11782

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57 E. Main St.
Patchogue, NY 11772

LAWRENCE LAMBERT, ESQ.
Atty. For Def. Bank of America
20 W. Main St.
Bay Shore, NY 11706

ERIC T. SCHNEIDERMAN, ESQ.
Atty. For Def. Comm. of Taxation
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Hauppauge, NY 11788

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Upon the following papers numbered 1 to 3 read on this motion for summary judgment, among other things, ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Answering papers ; Reply papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that those portions of this motion (#001) by the plaintiff for summary judgment dismissing the affirmative defenses asserted in the answer of defendant, Bank of America, N.A., as assignee of Brown Bark, III, LP, and for a severance of its cross claim against its co-defendants, are granted; and it is further

ORDERED that those portions of this motion (#001) wherein the plaintiff seeks accelerated judgments on the complaint served in this action, a deletion of the unknown defendants and the appointment of a referee to compute is granted only as to the plaintiff's First cause of action set forth in its complaint which sounds in foreclosure and sale; and it is further

ORDERED that the remaining portions of this motion (#001) wherein the plaintiff seeks a substitution of itself for an entity whose relationship to the plaintiff and the subject matter of this action is not described and for accelerated judgments against the defendants on the plaintiff's Second cause of action for a reformation of the subject mortgage indenture are denied and said Second cause of action is hereby severed from the First cause of action, which alone, shall continue herein; and is further

ORDERED that any final judgment of foreclosure and sale that is entered in this action must reflect the severances herein directed, namely, the severance of the cross claim asserted in the answer of defendant, Bank of America, N.A., as assignee of Brown Bark, III, LP., and the severance of the plaintiff's Second cause of action for reformation.

The plaintiff commenced this action to foreclose the lien of an August 16, 2006 mortgage executed by Knierim defendants in favor of Long Beach Mortgage Company to secure a mortgage note of the same date likewise executed by said defendants. In a separate, Second cause of action advanced in the complaint, the plaintiff seeks a judgment reforming the description of the mortgaged premises that is set forth in the mortgage indenture.

In the complaint served and filed herein, the subject mortgage loan is alleged to have gone into default in April of 2008 and allegedly remains as such and without cure. Following service of the summons and complaint and other initiatory papers, the Knierim defendants failed to appear herein by answer as did all other defendants, except Bank of America, N.A., [hereinafter "BOA"] as assignee of Brown Bark, III, LP., an alleged subordinate lienor. In its answer, BOA asserts some fourteen affirmative defenses and one cross claim against all "defendants" which appears to sound in indemnification and/or contribution.

By the instant motion (#001), the plaintiff seeks summary judgment dismissing the affirmative defenses asserted in the answer of BOA and accelerated judgments against all defendants on the plaintiff's complaint, the deletion of the unknowns defendants, a substitution of the plaintiff for another entity, and a severance of BOA's cross claim against its co-defendants. The motion is granted to the extent set forth below.

The plaintiff is awarded summary judgment dismissing the affirmative defenses asserted in the answer of BOA, as the moving papers demonstrated, prima facie, that none of those defenses have merit (*see* CPLR 3212[b]; ***Central Mtge. Co. v McClelland***, 119 AD3d 885, 991 NYS2d 87 [2d Dept 2014]). Since BOA failed to oppose the plaintiff's motion, no question of fact was raised and there is no basis for a denial of the relief requested by the plaintiff with respect to the affirmative defenses of defendant BOA (*see* ***Citimortgage, Inc. v Chow Ming Tung***, 126 AD3d 841, 7 NYS3d 147 [2d Dept 2015]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 1044, 943 NYS2d 551 [2d Dept 2012]). The affirmative defenses asserted in BOA's answer are thus dismissed. The plaintiff's request for a severance of the cross claim BOA asserted against its co-defendants is also granted.

The plaintiff's further demand for accelerated judgments on its First cause of action for foreclosure and sale is also granted. The moving papers established the plaintiff's entitlement to summary judgment on its First cause of action to the extent it asserts claims against the answering defendants as such papers included copies of the mortgage and the unpaid note, executed by the obligor/mortgagor defendants, together with due evidence of a default under the terms thereof secured by the mortgage (*see* CPLR 3212; RPAPL §1321; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***Solomon v Burden***, 104 AD3d 839, 961 NYS2d 535 [2d Dept 2013]), and evidence of a lack of merit in all affirmative defenses and counterclaims asserted in the answer served (*see* ***Bank of New York Mellon Trust Co. v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]). The moving papers of the plaintiff further established all of the elements necessary for an award of default judgment against the non-answering defendants except the amounts due (*see* ***Todd v Green***, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; ***U.S. Bank, Natl. Ass'n v Razon***, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]). The plaintiff thus demonstrated its entitlement to accelerated judgments pursuant to CPLR 3212 and 3215 against all defendants jurisdictionally joined as party defendants to the First cause of action for foreclosure and sale and the appointment of a referee to compute amounts due under the subject note and mortgage as contemplated by RPAPL § 1321 (*see* CPLR 3212; 3215[f]; RPAPL § 1321). The plaintiff's further application for an order deleting the unknown defendants listed in the caption is granted as is the application to amend the caption to reflect same. Also granted is the plaintiff's application for the appointment of a referee to compute amounts due under the terms of the subject mortgage (*see* RPAPL § 1321).

However, the moving papers failed to establish the plaintiff's entitlement to accelerated judgments on its Second cause of action in which it seeks a judicial reformation of the description of the mortgaged premises set forth in the mortgage indenture.

Claims for equitable relief in the nature of a judicial reformation of a description of the mortgaged premises set forth in a recorded mortgage have long been recognized as actionable, independently, in an equitable action for such relief, or in an action in which other equitable relief such as foreclosure and sale is demanded (*see* ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]*; see also Warren's Weed New York Real Property*; Chapter 117, Reformation §117.03). Recent appellate case authorities have held that cognizable claims for such relief must be premised upon allegations of either mutual mistake of the parties or their agents, including scriveners, who cause an error in the description of the mortgaged premises in a recorded mortgage indenture or deed (*see* ***McPherson v Goldstein***, 256 AD 1006, 10 NYS2d 971 [2d Dept 1939]), or a unilateral mistake by one party coupled with fraud (*see* ***Janowitz Bros. Venture v 25-30120th St. Queens Corp.***, 75 AD2d 203, 429 NYS2d 215 [2d Dept 1980]).

Reformation on grounds of mutual mistake requires proof, by clear and convincing evidence, that an agreement does not express the true intentions of either party (*see* ***Migliore v Manzo***, 28 AD3d 620, 621, 813 NYS2d 762 [2d Dept 2006]; ***Miller v Seibt***, 13 AD3d 496, 788 NYS2d 126 [2d Dept 2004]). In the case of a scrivernor's error, reformation based upon such an error requires proof of a prior agreement between parties which, when subsequently reduced to writing, fails to accurately reflect the prior agreement (*see* ***Harris v Uhlendorf***, 24 NY2d 463, 467, 301 NYS2d 53 [1969]; ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, *supra*; ***US Bank Natl. Ass'n v Lieberman***, 98 AD3d 422, 950 NYS2d 127 [1st Dept 2012]). While the pleading and procedural requirements applicable to quiet title claims of the type contemplated by RPAPL Article 15 (*see* RPAPL §1519) are not necessarily applicable to an equitable claim for reformation of a legal description of the mortgaged premises by or against the parties to the loan transaction, where the relief requested would adversely affect persons other than those parties due to an enlargement of the premises encumbered by any proposed reformation of the description of the mortgaged premises, the joinder of such parties to the claim is required in order to afford complete relief to all persons whose interest may be inequitably affected by the judgment (*see* CPLR 1001[a]; *see also Warren's Weed New York Real Property*; Chapter 117, Reformation §117.32[2]).

Here, the allegations asserted in the plaintiff's Second cause of action rest upon claims that "the legal description recorded with the mortgage is erroneous due to a scrivener's error in the last course". However, that error is neither apparent nor explained in either the complaint or the in the moving papers. Viable claims for reformation of the description of the mortgaged premises are thus not discernable by the court. Moreover, neither the complaint nor the moving papers adequately describe the effects such reformation might have upon the rights of others and whether persons or entities other than those joined herein as party defendants would be adversely affected by the granting of the relief requested. For these reasons and those set forth above, the court thus finds that the plaintiff is not entitled to accelerated judgments in the form of summary judgment against the answering defendants nor default judgments against those who did not appear by answer with respect to its Second cause of action. However, the denial of this relief is without prejudice to the interposition of a new application for an order re-joining the now severed Second

cause of action with the First and for an order and judgment granting accelerated judgments on the Second cause of action for reformation provided such application contains more elaborate allegations as to the nature of, and grounds for, the requested reformation and some proof of the plaintiff's entitlement thereto (*see* ***Bank of New York v Stein***, ___ AD3d___, 2015 WL 3972186 [2d Dept 2015]; ***Wells Fargo Bank, NA v Ambrosov***, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]).

Also denied is the plaintiff's request for a substitution of another entity in its place as the plaintiff in this action (*see* CPLR 1018). The moving papers failed to demonstrate the relation of this entity to the plaintiff or to the subject matter of this action. In addition, there are no allegations that this entity consents to its substitution herein for the named plaintiff, that it is willing to take up the prosecution of this action and that it appears herein by counsel of its own choosing and submits to the jurisdiction of this court.

In view of the foregoing, this motion is granted only to the extent set forth above. It is denied with respect to the SECOND cause of action, which cause of action is hereby severed and continued, as is the cross claim asserted in the answer of Bank of America, N.A., as assignee of Brown Bark, III, LP. Any final judgment of foreclosure and sale that is entered on the First cause of action in this action *must* reflect the severances herein directed, namely the severance of the cross claim asserted in the answer of defendant Bank of America, N.A., as assignee of Brown Bark, III, LP., and the severance of the plaintiff's Second cause of action for reformation.

Proposed Order of Reference, as modified by the court to reflect the terms of this memo decision and order, has marked signed.

DATED: 7/17/15

THOMAS F. WHELAN, J.S.C.