

Novato 2012, LLC v Coney Is. Ave., LLC
2015 NY Slip Op 32506(U)
December 9, 2015
Supreme Court, Kings County
Docket Number: 506585/2013
Judge: Carolyn E. Wade
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FILED

JAN 15 2016

KINGS COUNTY CLERK'S OFFICE

At Part 84 of the Supreme Court of
the State of New York, held in and
for the County of Kings, at the
Courthouse, located at Civic Center,
Brooklyn, New York on
the 9th day of December 2015

PRESENT:

HON. CAROLYN E. WADE,

Justice

-----X
NOVATO 2012, LLC,

Plaintiff,

Index No.
506585/2013

-against-

DECISION/ORDER

CONEY ISLAND AVENUE, LLC, ELIAT OILMAN,
DORIS MENASHE, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, and "JOHN DOE #1" through
"JOHN DOE #15," the fifteen 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 the premises described in the complaint,

Defendants.

-----X
**Recitation, as required by CPLR §2219(a), of the papers considered in the review of
CFS-4 V, LLC's Motion:**

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1 _____
Cross-Motion and Affidavits/Affirmations.....	_____
Answering Affidavits/Affirmations.....	2 _____
Reply Affidavits/Affirmations.....	3 _____
Memoranda of Law.....	_____

Upon the foregoing cited papers, and after oral argument, CFS-4 V, LLC's motion to be substituted as the plaintiff, and to amend the caption, is decided as follows:

The underlying action was commenced by Novato 2012, LLC ("Plaintiff") to foreclose on a mortgage which encumbers real property located at 1812 Coney Island Avenue, Brooklyn, NY 11230. According to the pleadings, GreenPoint Mortgage Funding, Inc. ("GreenPoint") assigned the note and mortgage to Plaintiff prior to the commencement of this action (Exhibit "3" of Defendant's opposition). An Amended Verified Answer was interposed by defendant borrower, Coney Island Avenue LLC, with several affirmative defenses and counterclaims, including allegations that Plaintiff misapplied its real estate tax payments towards the mortgage.

In support of the instant motion, CFS-4 V, LLC submits a supporting affidavit from Julie A. Tumia ("Tumia"), its authorized representative. Tumia attests that on March 6, 2015, Plaintiff "transferred, sold, and assigned all of its interests" in the subject note and mortgage to CFS-4 V, LLC. To buttress her averment, CFS-4 V, LLC submits a copy of the note allonge (Exhibit "B" of CFS-4 V, LLC's motion). Tumia asserts that the defendants will not be prejudiced by the substitution of CFS-4 V, LLC as the plaintiff since the "rights and obligations of the lender under the note and mortgage remain the same no matter who the lender is."

By opposition, mortgagor Coney Island Avenue LLC, and defendant Doris Menashe, a

guarantor of the mortgage note (collectively “Defendants”), argue that Plaintiff collected property tax escrow payments from the entity but did not pay the property taxes (Exhibit “1” of Defendants’ opposition). They contend that the Notice of Default not only inaccurately states that Concy Island Avenue LLC owes property tax arrears and fees of \$10,597.34, but also accelerates the payment of \$195,933.59 in unpaid principal, interest and late fees (Exhibit “2” of Defendants’ opposition). The Defendants add that Plaintiff is attempting to avoid liability by substituting CFS-4 V, LLC, and request that the instant application be denied.

CFS-4 V, LLC, in reply, asserts that it was aware of the default in the note at the time of transfer; thus, it is not avoiding “potential liability arising from the counterclaims and defenses asserted by the Defendants.” Consequently, CFS-4 V, LLC maintains that it should be substituted as the plaintiff since there is no prejudice to the Defendants.

CPLR §1018 provides that “[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action.”

In the instant case, Tumia states that on March 6, 2015, Plaintiff “transferred, sold and assigned [emphasis added] all of its right[s], title, and interest in and to the Note and Mortgage” to CFS-4 V, LLC. CFS-4 V, LLC submits a note allonge, which makes reference to a paid transfer of the note from Plaintiff to it (Exhibit “B” of Defendants’ opposition). However, it does not produce a written assignment. Moreover, at the bottom of the note allonge, the following statement is found in large bold letters: “THIS NOTE ALLONGE SHOULD BE PERMANENTLY AFFIXED TO THE PROMISSORY NOTE DESCRIBED ABOVE.” The court notes that the subject note and mortgage are not annexed to the moving papers.

Furthermore, the second paragraph of the note allonge provides, in pertinent part: "Pay to the order of CFS-4 V, LLC [...] without recourse, representation or warranty, express or implied, **except as provided in that certain sold Loan Sale Agreement, dated March 4, 2015 [...].**"

CFS-4 V, LLC neither produces the loan sale agreement nor does its affiant provide information about the exception referenced therein. Consequently, this court determines that CFS-4 V, LLC has not submitted sufficient documentary evidence to support the relief requested (see *Citimortgage, Inc. v. Forbes*, 2013 NY Slip Op 50577(U) [Sup Ct, Kings Cty 2013]).

Accordingly, based upon the above, CFS-4 V, LLC's motion to be substituted as the plaintiff is denied without prejudice. All remaining contentions, have been meticulously examined, and are now rendered moot.

This constitutes the Decision/Order of the court.



HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

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