

**Board of Mgrs of 11-15 E. 70th St. Condominium v  
11 E. 70th Corp.**

2016 NY Slip Op 30838(U)

May 4, 2016

Supreme Court, New York County

Docket Number: 158552/2013

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

THE BOARD OF MANAGERS OF 11-15 EAST 70TH STREET CONDOMINIUM,

Plaintiff,

-against-

11 EAST 70TH CORP., BERRY HILL GALLERIES, INC., HSBC BANK USA, NATIONAL ASSOCIATION, PAULSON & CO. INC., ROBERT BURNS, THE NEW YORK STATE DEPARTMENT OF LABOR, 624 ART HOLDINGS LLC, THE NEW YORK CITY DEPARTMENT OF FINANCE, THE NEW YORK CITY ENVIRONMENTAL CONTROL BOARD and THE NEW YORK CITY PARKING VIOLATIONS BUREAU,

Defendants.

INDEX NO. 158552/2013
MOTION DATE 03-02-2016
MOTION SEQ. NO. 004
MOTION CAL. NO.

PAULSON & CO., INC.,

Counterclaim Plaintiff, Cross-claim Plaintiff, and Third-Party Plaintiff,

-against-

BOARD OF MANAGERS OF 11-15 EAST 70TH STREET CONDOMINIUM,

Counterclaim Defendant,

-and-

11 EAST 70TH CORP., BERRY HILL GALLERIES, INC., HSBC BANK USA, NATIONAL ASSOCIATION, ROBERT BURNS, THE NEW YORK STATE DEPARTMENT OF LABOR, 624 ART HOLDINGS LLC, THE NEW YORK CITY DEPARTMENT OF FINANCE, THE NEW YORK CITY ENVIRONMENTAL CONTROL BOARD and THE NEW YORK CITY PARKING VIOLATIONS BUREAU,

Cross-claim Defendants,

-and-

THE NEW YORK CITY DEPARTMENT OF TAXATION AND FINANCE,

Third-Party Defendant.

The following papers, numbered 1 to 15 were read on this motion to/for Summary Judgment:

Table with 2 columns: Description of papers and PAPER NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [ ] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered, that Paulson & Co. Inc.'s motion for summary judgment, pursuant to CPLR §3215 for a default judgment and pursuant to RPAPL §1321, to appoint a referee to compute the amounts due, is granted as stated herein. It is Ordered that, plaintiff, The Board of Managers of 11-15 East 70th Street Condominium's motion for summary judgment seeking to foreclose on the liens against the Units for unpaid common charges, striking the answers, defenses and counterclaims of the appearing defendants, pursuant to CPLR §3215, for a default

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

judgment and pursuant to RPAPL §1321 to appoint a referee to compute the amounts due, filed under Motion Sequence 005, is granted as stated herein.

Berry-Hill Galleries, Inc. (hereinafter referred to as "Berry Hill") was the entity listed as owner of the commercial units. On March 1, 2007 Berry-Hill entered into a mortgage for a revolving credit line of \$35,700,000.00 and security agreement with American Capital Financial Services, Inc. (hereinafter referred to as "ACFS") (Blades Aff. in Supp. Exh. D). On January 15, 2008, Berry Hill transferred ownership of the units to 11 East 70<sup>th</sup> Corp., and the ACFS mortgage and agreement was assigned to Chinatrust Bank U.S.A. (hereinafter referred to as "Chinatrust"). On January 15, 2008, Chinatrust entered into a gap mortgage for \$5,360,000.00 and a loan consolidation, modification and extension agreement for sixteen million dollars, with 11 East 70<sup>th</sup> Corp., which assumed the obligations of all prior notes and mortgages (Blades Aff. In Supp. Exhs. F and G). On July 12, 2010, Chinatrust assigned the mortgages and agreements with 11 East 70<sup>th</sup> Corp., to Chinatrust Capital Corporation (Blades Aff. In Supp., Exh. H).

On February 23, 2011, Chinatrust Capital Corporation assigned the mortgages and agreements with 11 East 70<sup>th</sup> Corp., to Paulson & Co. Inc. (hereinafter referred to as "Paulson") (Blades Aff. in Supp. Exh. I). On April 13, 2011, Paulson entered into a mortgage for one million dollars and obtained a promissory note and security agreement from 11 East 70<sup>th</sup> Corp., incorporating the ACFS and Chinatrust notes and loan documents (Blades Aff. In Supp., Exhs. N and O). On November 30, 2011, Paulson obtained a second amended and restated promissory note for one million dollars from 11 East 70<sup>th</sup> Corp. (Blades Aff. in Supp. Exh. N). On November 30, 2011, HSBC entered into a consolidation term loan agreement for fourteen million dollars of which five million were new funds, together with a security agreement, assignment of leases and rents, a mortgage and a promissory note from 11 East 70<sup>th</sup> Corp. (Blades Aff. in Supp. Exhs. A, B and C). On June 9, 2015, HSBC unconditionally sold and assigned all of its mortgages, notes and agreements with 11 East 70<sup>th</sup> Corp., to Paulson (Blades Aff. in Supp., Exhs. L and M).

It is alleged that 11 East 70<sup>th</sup> Corp. has materially breached the agreements by failing to provide financial statements and income tax returns for 2011 through 2014, and 2015, and has defaulted on the mortgages, promissory notes, and security agreements (Blades Aff. in Supp., Exhs. P-BB).

Paulson seeks summary judgment pursuant to CPLR §3212: (i) declaring and adjudging that Paulson's first and second mortgages have priority over the interests, claims, judgments and liens of the plaintiff, except to the extent plaintiff has priority over Paulson's second mortgage, (ii) dismissing any claims asserted against Paulson by the answering defendants and cross-claim defendants, (iii) entitlement to foreclosure on the first and second mortgages of record and on the mortgaged property, and (iv) forever barring subordinated claims against Paulson subject to receipt of all amounts owed under the first and second mortgages, with the subordinated claims entitled to any proceeds after Paulson's liens are satisfied. Paulson also seeks a default judgment pursuant to CPLR §3215, for the non-appearing defendants and pursuant to RPAPL §1321, appointing a referee to compute the amounts due to Paulson.

Plaintiff's motion filed under Motion Sequence 005, seeks summary judgment pursuant to CPLR §3212: (i) against Paulson, Robert Burns, AH, and the New York City Department of Finance, striking their answers and third-party claims, adjudging and declaring that, plaintiff can foreclose on the liens for unpaid common charges, that plaintiff has priority over any interests, claims judgments and liens of the defendants except Paulson's first mortgage of record, that the units be sold free of all liens, claims

and encumbrances except as stated in the Condominium Declaration or as otherwise required by law, (ii) for a judgment against 11 East 70<sup>th</sup> Corp. in an amount no less than \$992,883.96 for common charges owed as of November 2, 2015, plus interest, together with all common charges, fees and assessments accrued since November 2, 2015 plus interest and costs and (iii) that the defendants be forever barred from asserting any claims against the plaintiff with respect to the units, subject only to defendants' rights to foreclosure sale proceeds after plaintiff's liens are satisfied.

Plaintiff also seeks a default judgment pursuant to CPLR §3215, against the non-appearing defendants and pursuant to RPAPL §1321 appointing a referee to compute the amount due to plaintiff.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, requiring a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]). Conclusory assertions, speculation, surmise and conjecture without admissible evidence are insufficient to raise any issues of fact (*Smith v. Johnson Prods. Co.*, 75 A.D. 2d 675, 463 N.Y.S. 2d 464 [1<sup>st</sup> Dept., 1983]).

Plaintiff concedes that the first mortgage has priority over its claim on the liens for common charges, costs, and attorneys fees (Mot. Seq. 005, Wallack Aff. in Supp., Exhs. 4 -7).

RPL §339-z permits the lien for unpaid common charges except for "all sums unpaid on a first mortgage of record..." A foreclosure sale on the first mortgage extinguishes all other liens, except to the extent that there are proceeds in excess of the first mortgage, then the condominium board is entitled to unpaid common charges (*Bankers Trust Co. v. Board of Mgrs. of Park 900 Condominium*, 81 N.Y. 2d 1003, 616 N.E. 2d 848, 600 N.Y.S. 2d 191 [1993]). A common charges lien does not have priority over a consolidation agreement (*Plotch v. Citibank, N.A.*, 120 A.D. 3d 1210, 992 N.Y.S. 2d 114 [2<sup>nd</sup> Dept., 2014]).

Pursuant to RPL §339-z, Paulson has established prima facie entitlement to summary judgment against plaintiff on the first mortgage (*Blades Aff. in Supp.*, Exh. C). The first mortgage consolidates and incorporates all prior mortgages, including the March 1, 2007 mortgage between Berry Hill and ACFS, and is the first mortgage of record.

Paulson does not dispute that plaintiff's lien for common charges are superior to, and have priority over the second mortgage. Paulson agrees that plaintiff is entitled to common charges after the first mortgage is satisfied. It is Paulson's contention that pursuant to RPL §339-e[2], regardless of whether the by-laws allow plaintiff to collect legal fees, it is not entitled to attorney fees, late fees or "double charges" for shortfalls resulting from 11 East 70<sup>th</sup> Corp.'s failure to pay. Paulson also argues that any disputes concerning calculations of plaintiff's common charges can be determined by the referee and should not prevent summary judgment.

The plaintiff is entitled to late fees, interest and attorney fees to the extent that they are provided for in the condominium by-laws, and challenges to the amount due may be addressed by a referee (*Board of Managers of Cent. Park Place Condominium v.*

Potoschnig, 111 A.D. 3d 586, 975 N.Y.S. 2d 665 [1<sup>st</sup> Dept., 2013] and Glenridge Mews Condominium v. Kavi, 90 A.D. 3d 604, 933 N.Y.S. 2d 730 [2<sup>nd</sup> Dept., 2011]).

Paulson has stated a prima facie case entitling it to summary judgment on the foreclosure claims and as having priority interests over AH's claims. AH has not established fraudulent conveyance prior to expiration of the statute of limitations, or that alternatively those claims may be sustained pursuant to CPLR §203, under the relation back doctrine.

The statute of limitations on a proceeding to challenge or set aside a fraudulent conveyance pursuant to Debtor and Creditor Law § 273, is six years (Ren-Cris Litho v. Vantage Graphics, 194 A.D. 2d 302, 598 N.Y.S. 2d 945 [1<sup>st</sup> Dept. ,1993] and CPLR §213[8]). The parties do not dispute that the alleged fraudulent conveyance of the property from Berry Hill to 11 East 70<sup>th</sup> Corp. occurred on January 15, 2008. The six year statute of limitations expired in January of 2014. AH did not commence any independent action to set aside the alleged fraudulent conveyance prior to the expiration of the statute.

The Board of Managers of 11-15 East 70<sup>th</sup> Street Condominium (hereinafter referred to as "plaintiff") commenced this action against 11 East 70<sup>th</sup> Corp., seeking to recover unpaid common charges and foreclose on a lien against both unit 1A and the Gallery Unit located at 11 East 70<sup>th</sup> Street, New York, N.Y. 10021-4097 (hereinafter referred to as "Premises"). On June 23, 2015 the complaint was amended to add additional defendants.

On July 20, 2015, Paulson answered the plaintiff's amended complaint asserting cross-claims and counterclaims for foreclosure on the first and second mortgages and commenced a third-party action. 624 Art Holdings LLC (hereinafter referred to as "AH") and Robert Burns served an answer to the amended complaint each asserting counterclaims as holders of money judgments against Berry-Hill. The New York City Department of Finance filed a Notice of Appearance and Waiver. AH and Robert Burns also served answers to the third-party action asserting counterclaims and cross-claims. Plaintiff served a reply to Paulson's counterclaims.

The complaint dated September 18, 2013, only asserted claims against 11 East 70<sup>th</sup> Street Corp., Paulson and Berry Hill were not yet named as parties. The amended complaint, for the first time naming AH as a party to the action was filed on June 3, 2015, more than a year after the statute of limitations had expired. AH's answer to the amended complaint was dated and filed on July 7, 2015, and was already untimely. AH's answer to the amended complaint did not assert any claims, counterclaims or cross-claims of fraudulent conveyance.

CPLR §203[d], provides that claims or defenses arising out of the same transactions as claims asserted in the complaint, are not barred by the statute of limitations, even if they would be barred if asserted in an independent action. The claim asserted by the defense must be tightly intertwined or related to those asserted in the complaint (Greenspan v. Miron, 130 A.D. 3d 1181, 13 N.Y.S. 3d 659 [3<sup>rd</sup> Dept., 2015]).

AH's asserted claims of fraudulent conveyance are derived from the allegations of the 2015 amended complaint, and are not protected by the relation back doctrine. The statute of limitations had already expired before the amended complaint was filed. AH's answer to Paulson's third-party complaint filed and served after the amended complaint, is also untimely and cannot be saved by the relation back doctrine. AH's claims of

fraudulent conveyance are barred by the statute of limitations, and the remainder of AH's arguments opposing summary judgment are unavailing.

AH cannot sustain its argument that summary judgment should be denied because discovery is needed to determine whether Paulson had knowledge of the lack of consideration in the transfer between Berry Hill and 11 East 70<sup>th</sup> Corp., "among other things."

Pursuant to CPLR §3212[f], summary judgment may be denied if there are facts essential to opposition in existence that cannot be stated, and there is evidence exclusively in the movant's possession that would enable the presentation of triable issues of fact. Summary judgment cannot be avoided by a claim that discovery is needed unless an evidentiary basis is provided establishing that the discovery sought will produce relevant evidence, mere speculation or conjecture is insufficient. (*Miller-Francis v. Smith-Jackson*, 113 A.D. 3d 28, 976 N.Y.S. 2d 34 [1<sup>st</sup> Dept., 2013] and *CSMC 2007-C1 Oswego Road LLC v. Kimbrook Route 31, LLC*, 120 A.D. 3d 1539, 993 N.Y.S. 2d 394 [4<sup>th</sup> Dept., 2014]).

AH alleges that it was initially unaware of the alleged fraudulent conveyance. AH relies on hearsay arguments presented by its attorney and speculates that Paulson should have been aware of the fraudulent conveyance upon conducting reasonable due diligence. "An encumbrancer for value is protected in its title unless it had previous notice of fraudulent intent of its immediate grantor" (RPL§266, *Fleming-Jackson v. Fleming*, 41 A.d.3d 175, 838 N.Y.S. 2d 506 [1<sup>st</sup> Dept., 2007]). A bona fide encumbrancer is protected if there is no obvious defect in the chain of title that would raise suspicions (*Miller-Francis v. Smith-Jackson*, 113 A.D. 3d 28, supra and *O'Reilly v. Keene*, 136 A.D. 3d 482, 24 N.Y.S. 3d 508 [1<sup>st</sup> Dept.,2016]). AH avoids the fact that Paulson assumed mortgages and notes from Chinatrust Capital Corporation before entering into its own mortgage, notes and agreements with 11 East 70<sup>th</sup> Corp.. Chinatrust Capital Corporation obtained the mortgages, notes and agreements between 11 East 70<sup>th</sup> Corp. and both ACFS and Chinatrust, immediately after the alleged fraudulent conveyance. AH's vague conjecture that Paulson had knowledge or there was a conspiracy to commit fraud is not sufficient to deny summary judgment for discovery.

Plaintiff has established that it is entitled to summary judgment on the lien asserted against the units for unpaid common charges, which have priority of interest over interests, claims, judgments and liens of all the answering defendants, other than Paulson on the first mortgage of record, attorneys fees, costs and expenses as stated in the by-laws.

AH only partially opposed plaintiff's motion for summary judgment filed under Motion Sequence 005, arguing that a material issue of fact remains as to the true title owner of the property. AH also argues that the borrower, specifically 11 East 70<sup>th</sup> Corp. had no authority to encumber security for the mortgages. AH's arguments are unavailing and do not raise issues of fact on plaintiff's motion for summary judgment, for the reasons stated under Paulson's motion, filed under Motion Sequence 004.

Both Paulson and the plaintiff have provided sufficient proof to establish that they are entitled to a default judgment pursuant to CPLR §3215 under both Motion Sequence 004 and Motion Sequence 005.

Accordingly, it is ORDERED, that Paulson & Co. Inc.'s motion for summary judgment, pursuant to CPLR §3215 for a default judgment against 11 East 70<sup>th</sup> Corp., Berry-Hill Galleries, Inc., HSBC Bank USA, National Association, the New York State

Department of Labor, the New York City Environmental Control Board, and the New York City Parking Violations Bureau and third-party defendant New York State Department of Taxation and Finance, and pursuant to RPAPL §1321, to appoint a referee to compute the amount due, is granted as stated herein, and it is further,

ORDERED that, Paulson & Co. Inc., is granted summary judgment on the cross-claims, counterclaims, and third-party claims asserted on the first mortgage of record, and a default judgment against 11 East 70<sup>th</sup> Corp., Berry-Hill Galleries, Inc., HSBC Bank USA, National Association, the New York State Department of Labor, the New York City Environmental Control Board, and the New York City Parking Violations Bureau and third-party defendant New York State Department of Taxation and Finance, and directed to settle order on notice, by serving upon the General Clerk's Office (Room 119 - Order Section) a copy of the proposed order for their review, to be forwarded to this Court, and it is further,

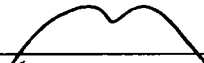
ORDERED, that the proposed order to be settled under Motion Sequence 004, shall include reference to a Referee designated by this Court, to ascertain and compute the amount due to Paulson & Co., Inc. under the first mortgage, and to the extent any proceeds exist, prior to foreclosure on the second mortgage, to ascertain and compute the amount due to plaintiff, The Board of Managers of 11-15 East 70<sup>th</sup> Street Condominium, including all unpaid common charges, late charges and assessments, interest and reasonable attorney fees, and it is further,

ORDERED that, plaintiff, The Board of Managers of 11-15 East 70<sup>th</sup> Street Condominium's motion for summary judgment seeking to foreclose on the liens against the Units for unpaid common charges, striking the answers, defenses and counterclaims of the appearing defendants, pursuant to CPLR §3215, for a default judgment against 11 East 70<sup>th</sup> Corp., Berry-Hill Galleries, Inc., HSBC Bank USA, National Association, the New York State Department of Labor, the New York City Environmental Control Board, and the New York City Parking Violations Bureau, and pursuant to RPAPL §1321, to appoint a referee to compute the amount due, filed under Motion Sequence 005, is granted as stated herein, and it is further,

ORDERED that, plaintiff is granted summary judgment against all of the answering and appearing defendants, except Paulson & Co., Inc. on the first mortgage of record, and a default judgment against 11 East 70<sup>th</sup> Corp., Berry-Hill Galleries, Inc., HSBC Bank USA, National Association, the New York State Department of Labor, the New York City Environmental Control Board, and the New York City Parking Violations Bureau, and directed to settle order on notice, under Motion Sequence 005, by serving upon the General Clerk's Office (Room 119 - Order Section) a copy of the proposed order for their review, to be forwarded to this Court.

ENTER:

**MANUEL J. MENDEZ**  
J.S.C.

  
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**MANUEL J. MENDEZ,**  
J.S.C.

Dated: May 4, 2016

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if appropriate:     DO NOT POST                       REFERENCE