

East Fordham DE LLC v U.S. Bank N.A.

2016 NY Slip Op 32426(U)

November 3, 2016

Supreme Court, Bronx County

Docket Number: 260551/2014

Judge: Julia I. Rodriguez

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

-----X **Index No. 260551/2014**

East Fordham DE LLC,

Plaintiff,

-against-

DECISION and ORDER

U.S. Bank National Association et al.,

Present:

Defendants.

Hon. Julia I. Rodriguez

-----X Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of plaintiff's order to show cause for contempt and sanctions and defendants U.S. Bank and Torchlight Loan Services' order to show cause for relief pursuant to CPLR 2221(a).

<u>Papers Submitted</u>	<u>Numbered</u>
Pls. OSC, Affirmation & Exhibits	1
Nagi's Affirmation in Opposition & Exhibit	2
Van Roy's Affirmation in Opposition & Exhibit	3
Def. Memorandum of Law in Opposition	4
Def. OSC, Affirmation & Exhibits	5
Def. Memorandum in Support	6
Pls. Affirmation in Opposition & Exhibits	7
Pls. Memorandum of Law in Opposition	8

In the instant action, plaintiff moves by order to show cause for an order: (1) punishing defendants for violating the terms of a July 13, 2015 Order by the Hon. John A. Barone which directed defendants to close on plaintiff's loan refinancing, (2) directing defendants to immediately comply with J. Barone's July 13, 2015 Order, and (3) awarding plaintiff its costs, legal fees, and disbursements.

Defendants U.S. Bank National Association ("U.S. Bank") and Torchlight Loan Services, LLC ("Torchlight") move by order to show cause for an order, pursuant to CPLR 2221(a), resettling J. Barone's July 13, 2015 Order to clarify whether or not the assignment documents to be delivered by U.S. Bank can include a reservation of rights related to the pending appeal of said Order.

Upon reviewing the submissions of the parties with respect to plaintiff's prior order to show cause for a preliminary injunction and a temporary restraining order, J. Barone's

Memorandum Decision dated May 21, 2015, and J. Barone's Order dated July 13, 2015, the Court decides the parties' respective motions as follows:

This matter involves a dispute concerning plaintiff's attempt to refinance a \$47,500,000 real estate mortgage loan. In its prior motion, plaintiff sought an Order: (1) enjoining defendants from seeking to enforce the Loan Modification Agreement dated May 11, 2012, (2) enjoining defendants from reopening the appraisal process established by said Loan Modification Agreement, (3) directing the defendants to close on plaintiff's refinancing application, and (4) awarding plaintiff's costs, fees and expenses.

In J. Barone's May 21, 2015 Memorandum Decision, the Court noted that "the obligation of the parties are clearly spelled out in the Modification Agreement and the remedy requested by plaintiff only requires that defendants fulfill their obligations to appear at and execute, provide, or sign those documents required at that closing." In that decision, J. Barone ordered defendants "to close on the refinance agreement entered into with plaintiff in accordance with the Loan Modification Agreement, based on the value of the subject property as established by the respective appraisals of plaintiff's appraiser, the Leitner Group and defendants' appraisers, Cushman Wakefield. Notably, in arriving at his decision, J. Barone considered the affidavit of Harry Erreich, a Title Officer of Royal Abstract of New York LLC ("Royal") who states as follows: He was retained by East Fordham DE LLC, plaintiff herein, in connection with the refinancing of a mortgage loan encumbering the commercial property known as 300-318 East Fordham Road, Bronx, New York. Closing on the refinancing was scheduled to take place on June 11, 2014. On June 10, 2014, Royal received from Berkadia Commercial Mortgage LLC ("Berkadia"), the servicer for the holder of the Loan and Mortgage being paid and satisfied and a defendant in this action, "a package of closing documents" that included, among other things, the following: A cover letter of instructions, an executed Assignment of Mortgage from U.S. Bank to East Fordham's new lender, SDF89 East Fordham Road LLC ("New Lender"), two UCC-3 Financing Termination Statements and two Limited Powers of Attorney. (Copies of those documents were attached to his affidavit.) The cover letter provided, *inter alia*, that "[Erreich is] hereby charged to hold the enclosed loan and assignments in escrow until such time that

Berkadia acknowledges receipt of the payoff funds in accordance with the Payoff Demand Statement.” On June 11, 2014, all closing documents were executed at the offices of counsel for New Lender, however, the closing did not proceed “because no payoff letter was received from [U.S. Bank] or its servicer, Berkadia.” (Apparently, U.S. Bank failed to deliver a payoff letter at the scheduled closing because it disputed the method by which the value of the property was calculated.)

In his Memorandum Decision, J. Barone directed the parties to “Settle Order.” J. Barone’s Order enjoins defendants from reopening the completed appraisal process and directs the defendants to “close on the Plaintiff’s refinancing application package based on the value of the Property as established by C&W’s appraisal report dated January 7, 2014 and Leitner’s appraisal report dated February 13, 2014, and in accordance with the amounts (\$30,542,319.15) and terms of the Loan Payoff Statement dated June 9, 2014 and issued by the Defendant Berkadia for and as of the parties’ law day, June 11, 2014 *nunc pro tunc* (as per Exhibit C to Reply Affirmation of Ricardo E. Oquendo, Esq. In Further Support of Order to Show Cause for Preliminary Injunction).” The Order also awarded plaintiff costs, fees and expenses to be determined by a Special Referee.

Given that J. Barone considered the loan documents provided by Royal’s title officer in reaching his conclusions, this Court assumes that the form of those documents is what J. Barone is referring to when he concluded that the relief granted to plaintiff required, *inter alia*, that defendant “execute, provide, or sign those documents required at that closing.”

Nor will this Court sanction a revision to “those documents” which frustrates the accomplishment of the directives set forth by J. Barone.

Based upon the foregoing, Plaintiff’s order to show cause is **granted to the extent that it** is hereby

ORDERED, that Defendants are directed to comply forthwith with J. Barone’s July 13, 2015 Order and deliver to Royal Abstract of New York LLC unconditional original executed Loan Assignment Documents, and it is further

ORDERED, that the Plaintiff is awarded costs, fees and expenses, and it is further

ORDERED, that the amount of costs, fees and expenses shall be referred for an inquest by reference to a Special Referee to hear and report with recommendations.

Defendants' order to show cause is denied.

Dated: Bronx, New York
November 3, 2016

A handwritten signature in black ink, appearing to read 'Julia I. Rodriguez', written in a cursive style.

Hon. Julia I. Rodriguez, J.S.C.