

Phoenix Grantor Trust v Exclusive Hospitality, LLC
2016 NY Slip Op 32915(U)
June 20, 2016
Supreme Court, Queens County
Docket Number: 710949/15
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

PHOENIX GRANTOR TRUST

Index Number: 710949/15

Plaintiff,

Motion Date: 3/16/16

-against-

Motion Seq. No.: 1 & 2

EXCLUSIVE HOSPITALITY, LLC, HIREN SHAH,
VISHNU PATEL, DINESHCHANDRA G. PATEL,
MUKESH I. PATEL, VIKAS B. PATEL,
MAULESHKUMAR PATEL, AMRUT PATEL,
KANAIYALAL K. PATEL, DILIPKUMAR I. PATEL,
VIKRAM G. PATEL, CHANDRESH M. PATEL,
KAUSHIK PATEL, NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE, THE NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY DEPARTMENT OF FINANCE, and
JOHN and JANE DOES 1-10, ABC LLC 1-10
XYZ CORP, 1-10,

Defendants.

FILED
JUN 22 2016
COUNTY CLERK
QUEENS COUNTY

The following papers read on this motion Seq. No. 1 by defendants Exclusive Hospitality, LLC (Exclusive), Hiren Shah, Chandresh M. Patel and Kaushik Patel (1) pursuant to CPLR 3211(a)(1), (3), (5) and (7) to dismiss the complaint insofar as asserted against them, (2) pursuant to CPLR 6514(a) and (b) to cancel and vacate the notice of pendency filed on October 21, 2015, and (3) pursuant to CPLR 6514(c) and 22 NYCRR 130.1-1, for an award of costs and expenses, including reasonable attorneys' fees, and (4) pursuant to Uniform Commercial Code § 3-407 to discharge any amounts owed or claimed to be owed by defendant Exclusive and any guarantors arising from a loan taken on or around May 20, 2008, and to cancel and vacate any and all mortgages and documents relating to the loan; and this motion Seq. No 2 by defendants Maulesh Patel, Vishnu V. Patel, Mukesh Patel, Vakram G. Patel, Dinesh G. Patel, Amrut K. Patel, Dilipkumar I. Patel, Vikas Patel and Kanaiyalal K. Patel (1) pursuant to CPLR 3211(a)(1), (3) and (7) to dismiss the complaint insofar as asserted against them, (2) pursuant to CPLR 6514(a) and (b) to cancel and vacate the notice of pendency filed on October 21, 2015, (3) pursuant to CPLR 6514(a) and

22 NYCRR 130.1-1 for an award of costs and expenses, including reasonable attorneys' fees, and (4) pursuant to UCC 3-407 to discharge any amounts owed or claimed to be owed by defendant Exclusive and any guarantors arising from a certain loan taken on or around May 20, 2008, and to cancel and vacate any and all mortgages and documents relating to the loan.

Papers
EF Numbered

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Upon the foregoing papers it is ordered that the motion (Seq. No. 1) and motion (Seq. No. 2) are determined together as follows:

Plaintiff commenced this action by e-filing a copy of the summons and complaint on October 21, 2015, seeking foreclosure of a consolidated mortgage given by defendant Exclusive Hospitality LLC (Exclusive) on the real property known as 53-01 and 53-05 Queens Boulevard, Queens, New York, to secure payment of money owing to National Republic Bank of Chicago (NRBC), as evidenced by an "Amended, Restated and Consolidated" note dated as of May 20, 2008 in the principal amount of \$10,500,000.00 with interest. In the complaint, plaintiff alleges that defendant Exclusive and NRBC entered into a mortgage, consolidation, extension and agreement dated May 20, 2008 with plaintiff, which consolidated an original mortgage and new mortgage into a single mortgage lien in the principal amount of \$10,500,000.00 plus interest. Plaintiff also alleges defendant Exclusive also entered into a building loan agreement, and a security agreement, whereby Exclusive granted and assigned NRBC a security interest in certain collateral. Plaintiff further alleges and that defendants Hiren Shah, Vishnu Patel, Dineschandra G. Patel, Mukesh Patel, Vikas Patel, Mauleshkumar Patel, Amrut Patel, Kainaiyala K. Patel, Dilipkumar I. Patel and Vikram G. Patel (defendant guarantors), and Chandresh M. Patel, and Kaushek Patel (defendant limited guarantors) are guarantors of the indebtedness owed to plaintiff by defendant Exclusive pursuant to their respective guaranties. Plaintiff additionally alleges it is successor by assignment to Phoenix NPL, LLC (Phoenix), as the assignee of the Federal Deposit Insurance Corp. (FDIC) in its capacity as the receiver for NRBC, and the owner of the subject mortgage and related debt instruments and loan documents. It is alleged that defendant Exclusive defaulted under the loan documents by failing to make payment of the balance of the mortgage debt at maturity on October 18, 2015, and to pay real estate taxes and assessments. It is also alleged that defendant Exclusive, and defendants guarantors and

limited guarantors, are in default by reason of their failure to make payment of the mortgage debt on the October 18, 2015 maturity date, along with payment of outstanding real estate taxes. It is further alleged that although plaintiff provided defendants Exclusive, guarantors and limited guarantors with a notice of default, they failed to cure their default, and as a consequence, plaintiff has accelerated the loan. Plaintiff seeks to adjudge defendants to be liable for any deficiency remaining after the foreclosure sale of the mortgaged premises.

In lieu of answering defendants Exclusive, Hiren Shah, Chandresh M. Patel and Kaushik Patel move to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(1), (3), (5) and (7). Likewise, defendants Maulesh Patel, Vishnu V. Patel, Mukesh Patel, Vakram G. Patel, Dinesh G. Patel, Amrut K. Patel, Dilipkumar I. Patel, Vikas Patel and Kanaiyalal K. Patel move to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(1), (3) and (7). They assert that the consolidated note relied upon by plaintiff to demonstrate the maturity date of the mortgage loan is not the genuine note, executed by Kaushik Patel, Chandresh M. Patel and Vishnu Patel, as managers of Exclusive, but rather is the product of a fraudulent alteration, whereby the second page of the genuine note has been substituted for the original one, without the consent of defendant Exclusive, so to modify the term of the loan from ten years to five years. Defendants Hiren Shah, Vishnu Patel, Mukesh Patel, Vikas Patel, Amrut Patel, Kanaiyalal K. Patel, Dilipkumar I. Patel, Vikram G. Patel, Chandresh M. Patel, and Kaushek Patel also assert that they did not guarantee a five-year mortgage loan. Defendants Exclusive, Hiren Shah, Chandresh M. Patel, Kaushik Patel, Maulesh Patel, Vishnu V. Patel, Mukesh Patel, Vakram G. Patel, Dinesh G. Patel, Amrut K. Patel, Dilipkumar I. Patel, Vikas Patel and Kanaiyalal K. Patel further assert that defendant Exclusive made escrow payments to NRBC for real estate taxes on the subject property. Plaintiff opposes the motions. Defendants Dineshchandra G. Patel and Mauleshkumar Patel have not appeared in relation to the motions.

When determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the pleading must be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87, [1994]), the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d at 87–88). “A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211(a)(1) has the burden of submitting documentary evidence that ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim’ ” (*Sullivan v State of New York*, 34 AD3d 443, 445 [2d Dept 2006], quoting *Nevin v Laclede Professional Prods.*, 273 A.D.2d 453, 453 [2d Dept 2000]; *see Leon v Martinez*, 84 NY2d at 88).

Construed liberally, plaintiff's complaint states a valid cause of action against defendant Exclusive for foreclosure and to adjudge defendants Exclusive, Hiren Shah, Chandresh M. Patel, Kaushik Patel, Maulesh Patel, Vishnu V. Patel, Mukesh Patel, Vakram G. Patel, Dinesh G. Patel, Amrut K. Patel, Dilipkumar I. Patel, Vikas Patel and Kanaiyalal K. Patel liable for a deficiency¹ following a foreclosure sale. The affidavits dated November 20, 2015 and March 12, 2016 of defendant Kaushik Patel, a manager of defendant Exclusive, even when considered with the submitted documents, do not conclusively refute plaintiff's allegations that the maturity date of the mortgage loan is October 18, 2015, and defendants Exclusive, Hiren Shah, Chandresh M. Patel, Kaushik Patel, Maulesh Patel, Vishnu V. Patel, Mukesh Patel, Vakram G. Patel, Dinesh G. Patel, Amrut K. Patel, Dilipkumar I. Patel, Vikas Patel and Kanaiyalal K. Patel defaulted in payment of the amount due under the alleged note and mortgage at maturity, and failed to pay real estate taxes in accordance with the loan documents (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]; *see also Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

To the extent defendants Exclusive, Hiren Shah, Chandresh M. Patel, Kaushik Patel, Maulesh Patel, Vishnu V. Patel, Mukesh Patel, Vakram G. Patel, Dinesh G. Patel, Amrut K. Patel, Dilipkumar I. Patel, Vikas Patel and Kanaiyalal K. Patel move to discharge their obligations under the alleged note and guaranties, on the ground that the note was materially altered after its execution, and to cancel and vacate the mortgage and related loan documents, they have not answered the complaint and at this pre-answer juncture, have not asserted counterclaims for affirmative relief. To the extent they move to dismiss the complaint insofar as asserted against them based upon a defense predicated upon UCC 3-407, the alteration of a negotiable instrument by a holder will result in the discharge of the obligation, against any person other than a holder in due course, only where the alteration is both fraudulent and material (UCC 3-407[2][a]). No other alteration results in a discharge (UCC 3-407[2][b]).

Based upon the submissions, a question of fact exists as to whether defendant Exclusive, by the counsel representing it in connection with the mortgage loan transaction, assented to an alteration of the note, whereby a different page was substituted for the second page. To the extent the alteration was with the consent of defendant Exclusive, the guaranty of payment and the limited guaranty each contain a covenant that the guaranty shall remain and continue in full force and effect as to any modification of the note. That branch of the motion by defendants Exclusive, Hiren Shah, Chandresh M. Patel, Kaushik Patel, Maulesh

¹

Defendants Chandresh M. Patel and Kaushik Patel are alleged to have executed a limited guaranty whereby they unconditionally guarantee payment of the mortgage debt as evidenced by the alleged note and mortgage, up to \$5,000,000.00.

Patel, Vishnu V. Patel, Mukesh Patel, Vakram G. Patel, Dinesh G. Patel, Amrut K. Patel, Dilipkumar I. Patel, Vikas Patel and Kanaiyalal K. Patel to discharge their obligations under the alleged note and guaranties and to cancel and vacate any and all mortgages and documents relating to the loan is denied.

With respect to that branch of the motions by defendants Exclusive, Hiren Shah, Chandresh M. Patel, Kaushik Patel, Maulesh Patel, Vishnu V. Patel, Mukesh Patel, Vakram G. Patel, Dinesh G. Patel, Amrut K. Patel, Dilipkumar I. Patel, Vikas Patel and Kanaiyalal K. Patel to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(3), the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law (*see U.S. Bank Nat. Assn. v Guy*, 125 AD3d 845 [2d Dept 2015]). "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (*Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 60 [2d Dept 2015]; *see Arch Bay Holdings, LLC—Series 2010B v Smith*, 136 AD3d 719 [2d Dept 2016]; *HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983 [2d Dept 2015]).

A plaintiff in a mortgage foreclosure action has standing where it is the holder or assignee of the underlying note at the time the action is commenced (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]).

Plaintiff claims it has standing to be entitled to relief. It relies upon, among other things, a copy of the consolidated note (i.e., the alleged operative version of the note), an allonge dated as of February 20, 2015 and endorsed by Sherry Marchand, as attorney-in-fact for the FDIC as receiver for NRBC, to Phoenix, without recourse, an omnibus loan assignment dated February 20, 2015, assigning the loan documents, including the note, mortgage and guaranties, from the FDIC as receiver for NRBC to Phoenix, an assignment of mortgage dated March 25, 2015, assigning the subject mortgage from the FDIC as receiver for NRBC to Phoenix, an assignment of mortgage dated June 16, 2015 from Phoenix to plaintiff, and an omnibus loan assignment dated June 16, 2015, assigning the loan documents, including the note, mortgage and guaranties to plaintiff.

To the extent plaintiff relies upon the note and allonge, defendants Exclusive, Hiren Shah, Chandresh M. Patel, Kaushik Patel, Maulesh Patel, Vishnu V. Patel, Mukesh Patel, Vakram G. Patel, Dinesh G. Patel, Amrut K. Patel, Dilipkumar I. Patel, Vikas Patel and Kanaiyalal K. Patel have failed to make a prima facie showing that the claimed five-year note

is not the genuine note underlying the subject mortgage. Nor have they shown, prima facie, that the allonge is not “so firmly affixed” to the note “as to become a part thereof” (*see* UCC 3-202; *cf. HSBC Bank USA, Nat. Assn. v Roumiantseva*, 130 AD3d 983), notwithstanding it reads “THIS ALLONGE IS TO BE ATTACHED TO AND MADE AN INTEGRAL PART of the [note],” was filed as an exhibit to the copy of the complaint separate from the note, and is submitted in opposition to the motions as an exhibit (Exhibit “G”) to the affirmation of Mark A. Slama, Esq. dated January 13, 2016, separate from the copy of the note (Exhibit “A”).

To the extent defendants Exclusive, Hiren Shah, Chandresh M. Patel, Kaushik Patel, Maulesh Patel, Vishnu V. Patel, Mukesh Patel, Vakram G. Patel, Dinesh G. Patel, Amrut K. Patel, Dilipkumar I. Patel, Vikas Patel and Kanaiyalal K. Patel claim that the omnibus loan assignment dated June 16, 2015 from Phoenix to plaintiff is invalid insofar as it is not notarized, an assignment of a note need not be in writing (*see Bank of New York v Silverberg*, 86 AD3d 274 [2d Dept 2011]), and hence need not be notarized (*see Sterling Nat. Bank v Polyseal Packaging Corp.*, 104 AD3d 466 [1st Dept 2013]). Furthermore, when the underlying note is assigned to the foreclosure plaintiff prior to the commencement of the foreclosure action, such assignment is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]).

Furthermore, the assignment of a principal obligation carries with it, as an incident thereto, any guarantee of that obligation, even if the guaranty is not specifically assigned or formally transferred in writing, unless the guaranty is expressly reserved or excepted from the assignment (*see Stillman v Northrup*, 109 NY 473, 482 [1888], citing *Craig v Parkis*, 40 NY 181, 181 [1869]; *Levy v Cohen*, 103 App Div 195, 198 [1st Dept 1905]; *Hayden Asset V, LLC v JGBR, LLC*, 44 Misc 3d 1220[A], 2014 NY Slip Op 51214[U] [Sup Ct, Suffolk County 2014]). The respective omnibus loan assignments do not include any express reservation or exceptions relative to the guaranties, but rather specifically transfer them.

That branch of the motions by defendants Exclusive, Hiren Shah, Chandresh M. Patel, Kaushik Patel, Maulesh Patel, Vishnu V. Patel, Mukesh Patel, Vakram G. Patel, Dinesh G. Patel, Amrut K. Patel, Dilipkumar I. Patel, Vikas Patel and Kanaiyalal K. Patel to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(3) is denied.

With respect to the branch of the motion by defendants Exclusive, Hiren Shah, Chandresh M. Patel and Kaushik Patel pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against them based upon the statute of frauds, the burden is on the moving defendant to establish, prima facie, that the alleged agreement to pay the alleged mortgage debt is void under the statute of frauds (*see Pank v 2734 Washington Ave. Realty Corp.*,

298 AD2d 664 [3d Dept 2002]). Under New York’s Statute of Frauds, an agreement not reduced to writing is void if, by its terms, it cannot be performed within one year of its making (see General Obligations Law § 5-701[a][1]; *Sheehy v Clifford Chance Rogers & Wells LLP*, 3 NY3d 554, 559–560 [2004]; *D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454 [1984]; *JNG Const., Ltd. v Roussopoulos*, 135 AD3d 709 [2d Dept 2016]). In addition, all promises to answer for the debt of another person must be in writing and subscribed by the party to be charged therewith (see General Obligations Law § 5-701[a][2]).

The claimed five-year note permits prepayment of the principal balance “at any time upon not less than thirty days and not greater than sixty days prior written notice to the lender,” and thus is capable of being repaid in one year. With respect to defendant Hiren Shah, plaintiff offers a guaranty of payment executed by Shah whereby Shah unconditionally guarantees payment of the mortgage debt, as evidenced by the note and mortgage, and Shah has failed to demonstrate prima facie that he did not guarantee repayment of the claimed five-year note. With respect to defendants Chandresh M. Patel and Kaushik Patel, plaintiff offers a limited guaranty executed by those defendants, whereby Chandresh and Kaushik unconditionally guarantees payment of the mortgage debt, as evidenced by the note and mortgage, up to \$5,000,000.00 and those defendants have failed to demonstrate prima facie that they did not guarantee repayment of the claimed five-year note. That branch of the motion by defendants Exclusive, Hiren Shah, Chandresh M. Patel and Kaushik Patel to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(5) is denied.

That branch of the motions by defendants Exclusive, Hiren Shah, Chandresh M. Patel, Kaushik Patel, Maulesh Patel, Vishnu V. Patel, Mukesh Patel, Vakram G. Patel, Dinesh G. Patel, Amrut K. Patel, Dilipkumar I. Patel, Vikas Patel and Kanaiyalal K. Patel to cancel and vacate the notice of pendency pursuant to CPLR 6514(a) and (b) is denied.

That branch of the motions by defendants Exclusive, Hiren Shah, Chandresh M. Patel, Kaushik Patel, Maulesh Patel, Vishnu V. Patel, Mukesh Patel, Vakram G. Patel, Dinesh G. Patel, Amrut K. Patel, Dilipkumar I. Patel, Vikas Patel and Kanaiyalal K. Patel pursuant to CPLR 6514(c) and 22 NYCRR 130.1-1, for an award of costs and expenses, including reasonable attorneys’ fees is denied.

Dated: June 20 2016



J.S.C.

FILED
JUN 22 2016
COUNTY CLERK
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