Bieberstein v AAMAA Corp.
2017 NY Slip Op 30389(U)
February 15, 2017
Supreme Court, Queens County
Docket Number: 22561/12
Judge: Howard G. Lane
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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
IA PART 6

LENORA BIEBERSTEIN and KAREN G. EDGAR, as Co-Trustees of the THADDEUS R. BIEBERSTEIN TESTAMENTARY TRUST, Plaintiffs, -against- AAMAA CORP., et al., Defendants.	BY: **LANE, J.** DATED: February 15, 2017 INDEX NO.: 22561/12 MOTION DATE: September 15, 2016 MOTION CAL. NO.: 107 MOTION SEQUENCE NO.: 5

The plaintiffs have moved pursuant to CPLR 3212 for summary judgment, dismissal of defendants' counterclaims, default judgment against the non-answering defendants, an order of reference pursuant to RPAPL § 1321 for the appointment of a referee to compute and report the amount due plaintiffs, and amendment of the caption excising defendants "XYZ Corp. No. 1" through "XYZ Corp. No. 10" from this action. The defendants AAMAA Corp. and New York Builders of Stairs, Inc. have cross moved to dismiss the plaintiffs' complaint.

The plaintiffs commenced this action by filing a copy of the summons and complaint and notice of pendency on November 7, 2012. Plaintiffs seek to foreclose on a mortgage on the subject real property known as 54-05 Grand Avenue, Maspeth, Queens, New York to secure repayment of a note, evidencing a loan

in the original principal amount of $400,000. Plaintiffs allege that they are the holder of the mortgage and underlying obligation and that the defendant defaulted under the terms of the mortgage and note by failing to make the monthly installment payment due on January 1, 2012 and as a consequence, they elected to accelerate the entire mortgage debt.

Plaintiffs have made a prima facie showing of entitlement to judgment as a matter of law against the borrower defendant by submission of the mortgage, the unpaid note, and proof of default (*see GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2012]; *Capstone Business Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882 [2010]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002]). Furthermore, the plaintiffs have established that they complied with all contractual conditions precedent to bring this suit including sending a notice of default and acceleration of debt. Additionally, each of the defendants' affirmative defenses and counterclaims are without merit.

The opponent of a summary judgment motion must present admissible evidence that is sufficient to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). In opposition, the defendants failed to meet their burden. The defendants have failed to demonstrate the existence of a triable issue of fact (*see Capstone Business Credit, LLC*, 70 AD3d at 884;

EMC Mtge. Corp., 291 AD2d at 370). The defendant Mechel opposed the plaintiff's motion arguing on procedural grounds arguing that a TRO that was granted in related corporate dissolution actions under Index No. 701547/12 and 701549/12 should prevent a foreclosure sale in this action. Inasmuch as the plaintiff is not a party in the corporate dissolution action and the court deleted those provisions in the Order to Show cause that would have stayed this foreclosure action, the TRO in the corporate dissolution actions does not stay this action. Furthermore, any claim by the defendant Mechel that the distribution of assets of AAMAA Corp. is in jeopardy due to an imminent sale of the property is misplaced as this motion is for summary judgment and an order of reference and a foreclosure sale is not imminent.

The defendants AAMAA Corp. and New York Builders of Stairs, Inc.'s argument in opposition and in support of their cross motion that the plaintiff lacks standing does not warrant denial of this motion or dismissal of the action. The defendants by failing to submit an answer raising the affirmative defense of standing have waived that defense *(see Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989 [2d Dept 2010]; *HSBC Bank, USA v Dammond*, 59 AD3d 679 [2d Dept 2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007]). While defendants claim that their answer asserts the affirmative defense of lack of standing, this is not correct as the answer does not assert

the affirmative defense of lack of standing.

The defendants' argument that the affidavit of merit put forth by the plaintiff is insufficient to support the motion as it was inadmissible as it did not contain a certificate of conformity as required by CPLR 2309 is without merit. The affidavit submitted by the plaintiff did in fact contain a certificate of conformity.

The defendants' argument that if summary judgment is granted they would be deprived of their right to a jury trial is without merit. Inasmuch as the court has determined that the plaintiff established its right to judgment as a matter of law there is no right to a jury trial (CPLR 3212[b]). Furthermore, inasmuch as mortgage foreclosure is an equitable action, the defendants are not entitled to a jury trial (*see April M's Enters. v Scott*, 178 AD2d 572 [2d Dept 1991]).

Finally, the defendants cannot claim that the motion should be held in abeyance pending discovery, as they did not demonstrate that facts essential to justify opposition are in the exclusive possession of another party (CPLR 3212[f]; *see Morris v Hochman*, 296 AD2d 481 [2d Dept 2002]; *Drug Guild Distribs. v 3-9 Drugs*, 277 AD2d 197 [2d Dept 2000]; *Thomas v Woodmere Health Care Ctr*, 258 AD2d 516 [2d Dept 1999]). The mere hope that sufficient evidence to defeat the motion will be found through disclosure does not warrant denial of the motion (*see Piltser v Donna Lee*

Mgt. Corp., 29 AD3d 973 [2d Dept 2006]).

Accordingly, the motion is granted. The caption is amended as proposed. A referee to compute shall be named in the order to be entered hereon. The cross motion is denied.

Settle order and submit to the Motion Support Office, Room 140.

Howard G. Lane, J.S.C.