

Sunkyung LLC v Porto Resources LLC
2017 NY Slip Op 30432(U)
March 1, 2017
Supreme Court, New York County
Docket Number: 850123/2012
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : PART 32

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 SUNKYUNG LLC, AS ASSIGNEE OF BPD BANK,

Plaintiff,

-against-

DECISION & ORDER
Index No. 850123/2012

Mot. Seq. 009

PORTO RESOURCES LLC, JOSEPH PORTO, THE CITY OF NEW
 YORK ENVIRONMENTAL CONTROL BOARD, JOHN DOE #1
 THROUGH JOHN DOE #10,

Defendants.

-----X

The motion by plaintiff for summary judgment and an order of reference is denied and the cross-motion by Porto Resources, LLC (“Porto Resources”) to dismiss plaintiff’s complaint pursuant to CPLR 3211 is denied.

Background

This foreclosure action arises out of a mortgage covering the premises located at 517 West 158th Street, New York, New York and 560 West 173rd Street, New York, New York. Plaintiff claims that Porto Resources and defendant Porto secured a mortgage encompassing both properties that totaled \$975,000.

Plaintiff contends that the mortgage was modified pursuant to three written agreements dated November 1, 2009, June 2, 2010 and October 15, 2010. Plaintiff argues that the last modification matured on April 15, 2012 and no new modifications were entered into by the parties subsequent to that date. Plaintiff acknowledges that there were discussions regarding a

further modification agreement in April 2012, but that no agreement was entered into or signed by both parties. Plaintiff argues that the loan has matured, the debt was not paid and that defendants are in default. This proceeding began on November 9, 2012.

Porto Resources says there was a fourth modification to remedy the alleged default on the mortgage of these properties. Porto Resources claims, therefore, that there was a novation and the action should be dismissed.

While the parties were submitting their papers for the instant motion, the First Department, Appellate Division affirmed a decision by Justice Rakower that denied plaintiff's cross-motion for summary judgment. The First Department's decision found that there were issues of fact presented by a June 18, 2012 letter from plaintiff's predecessor in interest to defendant Porto and emails to defendant Porto from defendant's relationship manager at the bank stating the extension had been approved (*Sunkyung LLC v Porto Resources LLC*, 145 AD3d 444, 41 NYS3d 707 (Mem) [1st Dept 2016]).

In light of this ruling, Porto Resources insists that the only additional material discovery conducted was the deposition of Martin Paniagua, plaintiff's employee.

Plaintiff insists that there was no modification agreed to after April 15, 2012, but acknowledges that the Appellate Division's decision occurred prior to the deposition of Mr. Paniagua. Plaintiff argues that Mr. Paniagua did not have authority to bind the bank and that he was only the negotiator, rendering his deposition immaterial.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *aff’d* 99 NY2d 647, 760 NYS2d 96 [2003]).

“A plaintiff in a mortgage foreclosure action establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of the defendant’s default” (*LNV Corp. v Francois*, 134 AD3d 1071, 1071-72, 22 NYS3d 543 [2d Dept 2015]).

Although the parties devote enormous time arguing for their respective motions, the Court denies both plaintiff’s motion and Porto Resources’ cross-motion because it is unclear whether the parties entered into the fourth loan modification.

Plaintiff's Motion

As an initial matter, plaintiff fails to adequately explain how the First Department's decision does not foreclose the instant motion.¹ The First Department held that "Issues of fact are presented by the June 18, 2012 letter from plaintiff's predecessor in interest (the bank) to defendant Joseph Porto setting forth the structure of the new loan term, and emails to Joseph Porto from defendants' relationship manager at the bank stating that the extension had been approved" (NYSCEF Doc. No. 354).

This decision references the purported 'fourth' loan modification that Porto Resources insists was entered into by both parties. Further, the above decision affirmatively states that there are issues of fact, does not mention outstanding discovery, or insist that plaintiff's motion was premature. Therefore, this Court must also find that there are issue of facts regarding whether another loan modification was entered into by the parties.

The deposition of Mr. Paniagua also does not support plaintiff's claim. Mr. Paniagua refers to an approved extension agreement in May 2012 on pages 69-70 of his deposition transcript (*see* NYSCEF Doc. No. 337). This plainly does not demonstrate that new facts have been discovered that would require this Court to grant summary judgment in light of the Appellate Court's decision.

Porto Resources' Cross- Motion

As Porto specifically moved to dismiss the complaint pursuant to CPLR 3211 (with no subsection specified), the Court will treat its motion as such. "On a CPLR 3211 motion to

¹As Porto Resources argues and NYSCEF makes clear, this is plaintiff's third motion for summary judgment and an order of reference.

dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]). A motion to dismiss based on documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

Porto Resources claims that a novation occurred and that this compels the Court to dismiss plaintiff’s case. Porto Resources also contends that there was a fourth modification entered into between the parties, which included a loan expiration date of April 2015, a new interest rate of 5.5 percent, payments of \$3,653 and an amortization of 25 years.

In opposition, plaintiff argues that Porto Resources’ modification argument is contradicted by defendant Porto’s written statement made prior to the litigation. Plaintiff cites to a letter dated October 15, 2012 in which defendant Porto expressed that “the current interest rate of 5.5% is an outrageous interest rate, yet, I was willing to accept it if the bank ha[d] negotiated in good faith” (NYSCEF Doc. No. 357).

In reply, Porto Resources contends that the letter is simply a response to plaintiff’s attempt for a ‘do over’ after plaintiff tried to change a deal after six months.

The Court is unable to dismiss plaintiff’s complaint based on the evidence presented. Here, the October 15, 2012 letter (NYSCEF Doc. No. 357) makes it appear as though defendant Porto never entered into the modification agreement, particularly with his statement that he “was willing to accept” the loan modification if the bank had negotiated in good faith (*id.*). This

statement elicits a reasonable inference that there was no fourth loan modification. On this type of motion – a motion to dismiss– the Court cannot simply ignore this language and dismiss plaintiff’s complaint.

In addition, the loan modification agreement attached by Porto Resources contains the signature of Joseph Porto but the signature line for BPD Bank is blank (NYSCEF Doc. No. 333). There is also a blank in the first paragraph: “but dated the __ day of July, 2012” (*id.*). Further, the third loan modification (dated January 31, 2011) states, in paragraph 13, that “No further modification will be deemed effective, unless in writing, executed by both parties” (NYSCEF Doc. No. 315). Because the evidence presented indicated that the fourth purported loan modification was signed by only one party, the Court is unable to grant Porto Resources’ motion to dismiss.

All other requests for relief are denied.

Accordingly, it is hereby

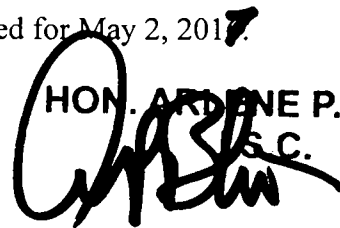
ORDERED that plaintiff’s motion for summary judgment is denied; and it is further

ORDERED that Porto Resources’ cross-motion to dismiss is denied; and it is further

ORDERED that a discovery conference is scheduled for May 2, 2017.

This is the Decision and Order of the Court.

Dated: March 1, 2017
New York, New York


HON. ARLENE P. BLUTH
S.C.

ARLENE P. BLUTH, JSC