

SDF46 Bogart 1 LLC v 19 Bogart Realty Dev. Inc.
2017 NY Slip Op 30724(U)
April 3, 2017
Supreme Court, Kings County
Docket Number: 508862/15
Judge: Mark I. Partnow
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At an IAS Term FRP 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of April, 2017.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

-----X
SDF46 BOGART 1 LLC,

Plaintiff,

- against -

Index No. 508862/15

19 BOGART REALTY DEVELOPMENT INC., BO JIN ZHU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, 19 BOGART LOFTS, LLC a/k/a 19 Bogart Loft LLC and "JOHN DOE #1 through "John Doe #12", the last twelve names being fictitious and unknown to Plaintiff, the persons or parties intended being tenants, occupants, persons or corporations, if any, having or claiming an interest upon the premises described in the Complaint,

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion, Affidavit, Affirmation,
and Exhibits Annexed _____

26-47

Affirmation in Opposition and Exhibits Annexed _____

57-63, 65-67, 68-85

Reply Affirmation and Exhibits Annexed _____

88-90

In this action to foreclose mortgages on commercial property, the plaintiff, SDF46 Bogart 1 LLC (SDF46 Bogart 1), moves for an order: (1) granting it summary judgment on all causes of action in the complaint, pursuant to CPLR 3212; (2) striking the answer and affirmative defenses of the defendants, 19 Bogart Realty Development Inc. (19 Bogart Realty), Bo Jin Zhu (Zhu) and 19 Bogart Lofts, LLC a/k/a 19 Bogart Loft LLC (19 Bogart

Lofts); (3) granting it a default judgment against defendant New York State Department of Taxation and Finance, pursuant to RPAPL 1321, “on the grounds that said defendant has appeared in this action but has not served an Answer to the Verified Complaint”;¹ (4) granting it a default judgment against defendants New York City Environmental Control Board and New York City Department of Finance; (5) discontinuing this action against the “John Doe” defendants and excising them from the caption; (6) “correcting paragraph 22 of the second cause of action in the subject complaint, *nunc pro tunc* as of July 17, 2015, to recite the extended maturity date of February 1, 2015, pursuant to CPLR §§ 2001, 3014 and 3026”;² and (7) appointing a Referee to compute the sums due to plaintiff.

Background

The First And Second Mortgages And Plaintiff's Security Interests Against The Property At The Premises

A. The First Mortgage

On July 24, 2013, 19 Bogart Realty, as Borrower, executed an Agreement of Spreader, Consolidation and Modification of Mortgage in the principal amount of \$4,000,000.00 in favor of SDF46 Bogart 1 (First Mortgage), encumbering the premises located at 13, 15, 17 and 19 Bogart Street in Brooklyn (Premises). The First Mortgage was security for the repayment of a July 24, 2013 Amended and Restated Note in the amount of \$4,000,000.00 (Restated Note), which named SDF46 Bogart 1 as “Payee.” The First Mortgage was

¹ See plaintiff's November 2, 2015 Notice of Motion at 2.

² See plaintiffs' Notice of Motion at 2.

recorded in the Office of the New York City Register, Department of Finance, on August 21, 2013, under City Register File Number (CRFN) 2013000331503.

On July 24, 2013, Zhu executed a guarantee of 19 Bogart Realty's obligations under the Restated Note in favor of SDF46 Bogart 1 (the First Guarantee).

SDF46 Bogart 1 further secured the Restated Note with a security interest against 19 Bogart Realty's personal property located at the Premises by filing a UCC-1, which was recorded in the City Register's Office on August 21, 2013 under CRFN 2013000331505.

B. The Second Mortgage

On July 24, 2013, 19 Bogart Realty, as Borrower, executed a Mortgage and Security Agreement in the principal amount of \$1,000,000.00 in favor of SDF46 Bogart 2 LLC (Second Mortgage), encumbering the Premises. The Second Mortgage was security for the repayment of a July 24, 2013 Mortgage Note in the amount of \$1,000,000.00 (Second Note), which named SDF46 Bogart 2 LLC as "Payee." The Second Mortgage was recorded in the City Register's Office on August 21, 2013 under CRFN 2013000331506.

On July 24, 2013, Zhu executed a second guarantee of 19 Bogart Realty's obligations under the Second Note in favor of SDF46 Bogart 2 LLC (the Second Guarantee).

SDF46 Bogart 2 LLC further secured the Second Note with a security interest against the personal property located at the Premises by filing a second UCC-1, which was recorded in the City Register's Office on August 21, 2013 under CRFN 2013000331508.

On July 15, 2015, SDF46 Bogart 2 LLC assigned the Second Mortgage to SDF46 Bogart 1, as evidenced by an allonge to the Second Note and an assignment of the Second Mortgage (Second Mortgage Assignment). The Second Mortgage Assignment was recorded in the City Register's Office on August 20, 2015, under CRFN 2015000289720. SDF46 Bogart 2 LLC also assigned the second UCC-1 to SDF46 Bogart 1 by a UCC-3 assignment.

The Foreclosure Action

A. The Summons And Complaint

Meanwhile, on July 17, 2015, SDF46 Bogart 1 commenced this action against 19 Bogart Realty, 19 Bogart Lofts, Zhu and others by filing a summons and a verified complaint. The action seeks to foreclose on the First and Second Mortgages and the personal property located at the Premises based on 19 Bogart Realty's alleged "fail[ure] to make the payments due on August 1, 2014 and all payments due thereafter" and "fail[ure] to pay the entire unpaid principal balance, plus interest, which became due and payable on the Extended Maturity Date" (complaint at ¶¶ 9-10 and 34-35).

The first cause of action seeks to foreclose on the First Mortgage (*id.* at ¶¶ 1-23). The second cause of action seeks to foreclose on the Second Mortgage (*id.* at ¶¶ 25-47). The third cause of action seeks a deficiency judgment against Zhu, pursuant to the Guarantees (*id.* at ¶¶ 49-50). The fourth cause of action seeks to foreclose on the personal property located at the Premises (*id.* at ¶¶ 52-55).

B. Defendants' Responsive Pleadings

19 Bogart Realty filed its answer to the complaint on August 21, 2015, denying the material allegations therein and asserting thirteen affirmative defenses, including: (1) that plaintiff's claims are barred by documentary evidence; (2) failure to state a cause of action; (3) statute of frauds; (4) failure to mitigate damages; (5) lack of standing; (6) election of remedies; (7) unclean hands; (8) the parol evidence rule; (9) laches, estoppel, waiver, reliance and release; (10) failure to serve pre-commencement notice(s); and (11) payment.

19 Bogart Lofts filed its answer to the complaint on August 27, 2015, denying the material allegations therein and asserting nine affirmative defenses, including: (1) the complaint fails to state a claim; (2) waiver and estoppel; (3) laches; (4) election of remedies; (5) unclean hands; (6) lack of standing; (7) that plaintiff's claims are barred by documentary evidence; and (8) equitable subordination.

Zhu filed his answer to the complaint on October 13, 2015, denying the material allegations therein and asserting thirteen affirmative defenses which are identical to those asserted by 19 Bogart Realty.

C. The Defaulting Defendants

SDF46 Bogart 1 served defendants New York State Department of Taxation and Finance, New York City Environmental Control Board and New York City Department of Finance with the summons and complaint on July 24, 2015, pursuant to CPLR 311 (a). Plaintiff served New York City Environmental Control Board and New York City Department of Finance by delivering the pleadings to the "Clerk," Betty Mazyck, at 100

Church Street in New York. Plaintiff served New York State Department of Taxation and Finance by delivering the pleadings to Charles Gary, Assistant Attorney General in the Attorney General's office at 300 Motor Parkway in Hauppauge. Thus, defendants' responses to the complaint were due on or before August 14, 2015.

On July 29, 2015, the New York State Department of Taxation and Finance filed a Notice of Appearance in this action, but it never filed an answer to the complaint. Similarly, New York City Environmental Control Board and New York City Department of Finance failed to appear, answer or otherwise respond to the complaint.

SDF46 Bogart 1's Instant Motion

On November 5, 2015, SDF46 Bogart 1 filed the instant motion seeking, amongst other relief: (1) an order granting it summary judgment on all of its causes of action against 19 Bogart Realty, 19 Bogart Lofts and Zhu, pursuant to CPLR 3212; (2) an order of reference, pursuant to RPAPL 1321; and (3) a default judgment against the remaining defendants, New York State Department of Taxation and Finance, New York City Environmental Control Board and New York City Department of Finance. In addition, SDF46 Bogart 1 seeks to correct paragraph 22 to the second cause of action to recite the extended maturity date of February 1, 2015, pursuant to CPLR 2001, 3014 and 3026.

In support of the motion, SDF46 Bogart 1 submits the October 29, 2015 affidavit of Brian Shatz (Shatz Affidavit), its "Manager," who attests that he is "fully familiar with the facts of this case and the events that transpired to date by virtue of [his] position with

Plaintiff, and [his] review of the files maintained by Plaintiff in the ordinary course of business” (Shatz Affidavit at ¶ 1).

Shatz attests that 19 Bogart Realty executed the First Mortgage and the Restated Note, in the amount of \$4,000,000.00, in favor of SDF46 Bogart 1 (*id.* at ¶¶ 3-4). Shatz also attests, based on his personal knowledge,³ that SDF46 Bogart 1 is the “owner and holder” of the Second Mortgage and the Second Note, in the amount of \$1,000,000.00, which was assigned to SDF46 Bogart 1 on July 15, 2015, as evidenced by an allonge to the Second Note and an Assignment of the Second Mortgage (*id.* at ¶¶ 6-7, 9-10 and 38).

Shatz further attests, based on his “own knowledge and [his] review of Plaintiff’s books and records,” that 19 Bogart Realty “failed to make the payment due on August 1, 2014 and all payments thereafter under the First Loan” and that 19 Bogart Realty “defaulted on the Loan Documents by failing to pay the entire indebtedness due under the First Loan and Second Loan . . . by the extended maturity date of February 1, 2015” based on his “review of Plaintiff’s books and records” (*id.* at ¶¶ 11, 23 and 24).

19 Bogart Realty and Zhu, in opposition, collectively argue that SDF46 Bogart 1 did not meet its burden of establishing its entitlement to foreclose because it relies on inadmissible hearsay to claim that 19 Bogart Realty defaulted under the loans and fails to establish its standing to foreclose on the Second Mortgage. Specifically, defendants contend

³ Specifically, Shatz attests that “[p]aragraph ‘32’ of the Complaint avers that Plaintiff is the owner and holder of the Second Note and Second Mortgage, *which I know to be true*, and which is reflected in publicly recorded documents including the Assignment” (Shatz Affidavit at ¶ 38 [emphasis added]).

that the Shatz Affidavit “does not attest to personal knowledge of the instant case and does not attest to having reviewed admissible business records” and “does not submit any admissible business records, Defendant’s payment history, or any record of the alleged default.”⁴

19 Bogart Lofts separately opposes SDF46 Bogart 1’s motion by contending that “this action is part of a series of fraudulent real estate transactions in which Mortgagee’s parent company, Madison Realty Capital . . . has colluded with dishonest developers to defraud investors out of millions of dollars.”⁵ While 19 Bogart Lofts claims that 19 Bogart Realty and its principal, Zhu, are “acting in concert” to deprive 19 Bogart Lofts of its contractual right to purchase the Premises under a June 5, 2013 Contract of Sale,⁶ 19 Bogart Lofts did not assert any cross claims against either of these two co-defendants.

Notably, 19 Bogart Lofts admits that “[t]he precise nature of the misconduct of Mortgagee and [19 Bogart Realty] here remains unclear . . .” and contends that the instant summary judgment motion “must be denied until [it] can complete discovery into the legitimacy of [19 Bogart Realty’s] default and the enforceability of the mortgages-in-suit” (19 Bogart Lofts’s Opposing Memorandum at 2).

⁴ See defendants’ January 5, 2016 Memorandum of Law submitted in opposition to the motion (Defendants’ Opposing Memorandum) at 3.

⁵ See 19 Bogart Lofts’ January 6, 2016 memorandum of law in opposition to the motion (19 Bogart Lofts’ Opposing Memorandum) at 1.

⁶ See ¶ 3 of the January 4, 2016 affidavit of Moshe Oratz, a member of 19 Bogart Lofts.

SDF46 Bogart 1, in reply, submitted Shatz's January 28, 2016 reply affidavit (Shatz Reply Affidavit), in which Shatz asserts that defendants' objections to the sufficiency of his moving affidavit are "baseless" (Shatz Reply Affidavit at ¶ 4). Shatz clarified that:

"I had direct personal knowledge of all aspects of the Loans including: origination, funding of the Loans, Borrower Defendants' failure to make monthly payments on the Loans beginning on August 1, 2015; the failure of the Borrower Defendants to pay the Loans in full upon the Extended Maturity Dates; and the assignment of the Second Note and Second Mortgage to Plaintiff. My personal knowledge of these facts was specifically alleged in the October 29, 2015 Affidavit . . ." (*id.*).

Shatz further asserts that 19 Bogart Lofts's opposition "premised entirely upon speculation and conjecture" of facts that are "irrelevant to this matter" cannot defeat summary judgment (*id.* at ¶¶ 9-10).

Discussion

(1)

Summary Judgment Standard

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*see* CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). Failing to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 502

[2012]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Making a prima facie showing, then shifts the burden to the opposing party to produce sufficient evidentiary proof to establish the existence of material factual issues (see *Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, issue-finding rather than issue-determination is the key in deciding a summary judgment motion (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, [1957], *rearg denied* 3 NY2d 941 [1957]). “The court’s function on a motion for summary judgment is to determine whether material factual issues exist, not resolve such issues” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]).

(2)

***SDF46 Bogart I’s Motions For
Summary Judgment And An Order Of Reference***

“A plaintiff seeking summary judgment in a mortgage foreclosure action establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default, by proof in admissible form” (*Woori Am. Bank v Glob. Universal Grp. Ltd.*, 134 AD3d 699, 700 [2015]). “When seeking an order of reference to determine the amount that is due on an encumbered property, a plaintiff must show its entitlement to a judgment. That entitlement may be shown by demonstrating defendant’s default in answering the complaint, or by the plaintiff showing entitlement to summary judgment . . .” (*U.S. Bank N.A. v Miller*, 49 Misc 3d 1205 [A], 2015 NY Slip Op 51428 [U] [Sup Ct, Kings County 2015] [citing RPAPL § 1321; 1-2 Bruce J. Bergman, Bergman on New York Mortgage Foreclosures § 2.01 (4) (k) (note: online edition)]).

Here, SDF46 Bogart 1 has submitted proof of the existence of the First and Second Mortgages and the underlying Notes and of defaults by 19 Bogart Realty. This constitutes a prima facie showing of its entitlement to summary judgment in this foreclosure action (*see JP Morgan Chase Bank, N.A. v Shapiro*, 104 AD3d 411, 412 [2013]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 1173–1174 [2012]; *Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 674-675 [2011]; *Horizon Bancorp v Pompee*, 82 AD3d 935, 936 [2011]; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 755 [2011]).

In response, defendants were required to submit proof sufficient to raise a genuine question of fact rebutting SDF46 Bogart 1's prima facie showing or supporting their affirmative defenses (*Grogg v South Rd. Assoc., L.P.*, 74 AD3d 1021, 1021 [2010]; *Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 833 [2009]). Summary judgment and an order of reference is warranted because defendants failed to demonstrate that they possess a bona fide defense to foreclosure, i.e., one having a plausible ground or basis which is fairly arguable and of substantial character (*Feinstein v Levy*, 121 AD2d 499, 500 [1986]).

(3)

Plaintiff's Motion For Default Judgments

SDF46 Bogart 1 moves, pursuant to CPLR 3215, for a default judgment against New York State Department of Taxation and Finance, which appeared but failed to answer the complaint and the non-appearing defendants, New York City Environmental Control Board and New York City Department of Finance.

SDF46 Bogart 1 has demonstrated, through its affidavits of service, that the foregoing defendants were personally served with the summons and verified complaint, yet they failed to answer within 20 days of service of process – by August 14, 2015. Since there is no opposition to this branch of SDF46 Bogart 1's motion, SDF46 Bogart 1 is entitled to default judgments against each of these three defendants.

(4)

Plaintiffs' Motion To Correct The Complaint

Finally, in the absence of any opposition, SDF46 Bogart 1 is entitled to an order correcting paragraph 22 of the second cause of action in the complaint, nunc pro tunc, as of July 17, 2015, to recite the extended maturity date of the Second Mortgage as February 1, 2015, pursuant to CPLR 2001, 3014 and 3026. Accordingly, it is

ORDERED that the branch of SDF46 Bogart 1's motion for summary judgment, pursuant to CPLR 3212, is granted; and it is further

ORDERED that the branch of SDF46 Bogart 1's for the appointment of a referee to compute is granted; it is further

ORDERED that the branch of SDF46 Bogart 1's motion seeking a default judgment against defendants New York State Department of Taxation and Finance, New York City Environmental Control Board and New York City Department of Finance is granted; and it is further

ORDERED that the branch of SDF46 Bogart 1's motion seeking to correct paragraph 33 of the second cause of action in the complaint, nunc pro tunc as of July 17, 2015 to recite

the extended maturity date of February 1, 2015, pursuant to CPLR 2001, 3014 and 3026, is granted; and it is further

ORDERED that the branch of SDF46 Bogart 1's motion for an order discontinuing the action as against the "John Doe" defendants and excising them from the caption is granted; and it is further

ORDERED that the caption shall read as follows:

-----X

SDF46 BOGART 1 LLC,

Plaintiff,

- against -

19 BOGART REALTY DEVELOPMENT INC., BO JIN
ZHU, NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, NEW YORK CITY
DEPARTMENT OF FINANCE and 19 BOGART LOFTS,
LLC a/k/a 19 Bogart Loft LLC,

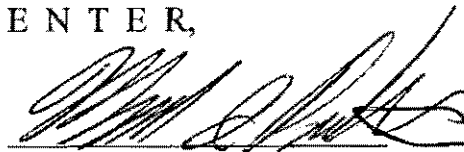
Defendants.

-----X.

This constitutes the decision, order and judgment of the court.

Settle order on notice.

E N T E R,



J. S. C.

HON. MARK I. PARTNOW
SUPREME COURT JUSTICE

Nancy T. Sunshine
NANCY T. SUNSHINE
Clerk

2017 APR 12 AM 9:53

KINGS COUNTY CLERK
FILED