

**936 Coogans Bluff, LLC v 936-938 Cliffcrest Hous.
Dev. Fund Corp.**

2017 NY Slip Op 32674(U)

December 18, 2017

Supreme Court, New York County

Docket Number: 850011/13

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X **Decision and Order**

936 COOGANS BLUFF, LLC,
Plaintiff,

-against-

Index No. 850011/13

936-938 CLIFFCREST HOUSING DEVELOPMENT
FUND CORPORATION, THE DEPARTMENT OF
HOUSING PRESERVATION AND DEVELOPMENT
OF THE CITY OF NEW YORK, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW
YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, AND JOHN AND JANE DOES
1-10, ABC LLC 1-10, XYZ CORP. 1-10,
Defendants.

-----X

936-938 CLIFFCREST HOUSING DEVELOPMENT
FUND CORPORATION,
Third-Party Plaintiff

-against-

THE WAVECREST MANAGEMENT TEAM
LTD., COMMUNITY CAPITAL BANK n/k/a
CARVER FEDERAL SAVINGS BANK, LEE
WARSHAVSKY, SHUHAB HOUSING
DEVELOPMENT FUND CORPORATION,
JOHN AND JANE DOES 11-20, the identity of
such persons being unknown to the Third-Party
Plaintiff, but intended to describe those persons
who corruptly influenced their employer,
THE DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT OF
THE CITY OF NEW YORK to look away from
their defalcations of the Third-Party Plaintiff's
funds,
Third-Party Defendants.

-----X

JOAN A. MADDEN, J.

In this mortgage foreclosure action, plaintiff 936 Coogans Bluff, LLC ("Coogans Bluff")

or “plaintiff”) moves for an order permitting the substitution of 938 St. Nicholas Avenue Lender, LLC (“St. Nicholas”) as plaintiff in the above entitled action in the place and stead of Coogans Bluff and amending the caption accordingly. Defendant/third-party plaintiff Cliffcrest Housing Development Fund Corporation (“Cliffcrest”) opposes the motion, which is granted for the reasons below.

Background

Cliffcrest is tenant owned development company and the owner of the property located at 938 St. Nicholas Avenue, New York, New York (“the Building”). Cliffcrest became the owner of the Building through defendant The Department of Housing Preservation and Development of the City of New York’s (HPD’s) Third-Party Transfer Program (“TPT”), established by Local Law 37 of 1996, which provides an alternative to in-rem foreclosure. The goal of the program is to transfer tax-delinquent buildings in poor condition to new owners capable of rehabilitating the buildings and managing them as low income housing.

Pursuant to the TPT, residential properties, on which the City holds tax liens, are transferred, first, to a private not-for-profit entity and, then, to a sponsor which agrees to provide construction or permanent financing, typically, in conjunction with partial funding by HPD, in accordance with HPD guidelines. HPD holds two mortgages on the Building which were originally provided as part of a joint construction loan, originated in 2002, with Fleet National Bank (“Fleet”), to provide construction financing to rehabilitate the Building (hereinafter “the HPD mortgages”).¹ In connection with this financing, on December 19, 2002, HPD and Fleet

¹According to HPD, on September 29, 2006, three mortgages originally made and dated December 19, 2002, in the principal amount of \$2,512,103, were consolidated into one mortgage under which Cliffcrest was required to pay interest at a rate of .62% per annum starting on

executed a Construction Loan Participation Agreement (“Participation Agreement”) with respect to HPD’s construction funding.

The rehabilitation of the Building was purportedly completed in September 2006.² On or about January 27, 2007, title to the Building was transferred to Cliffcrest and the conversion closed. The individual units in the Building were sold to the current unit owners as low-income cooperative apartments at prices below market value. As part of the transfer, Cliffcrest assumed the obligations under all the mortgages on the Building, including the HPD and Fleet mortgages, and the construction loan was converted to a permanent loan.

On September 28, 2006, Cliffcrest executed and delivered to Community Capital Bank (“CCB”)³ a Mortgage Note (“the Note”) evidencing a commercial loan made to it in the principal amount of \$1,650,000, plus interest as set forth in the Note. The majority of the proceeds of the loan was used to pay off the Fleet loan,⁴ and for various charges related to the formation of Cliffcrest.

November 1, 2006, in monthly installments through November 1, 2036. Also, on September 29, 2006, two mortgages originally made and dated December 19, 2002 in the principal amount of \$947,500, were consolidated into a second HPD mortgage, which is “a standing loan” with no interest or payments required with the debt to be forgiven barring a default. Cliffcrest paid the interest under the first HPD mortgage until April 2012 but has not made any payments since that time.

²One of the issues raised in the third-party action is whether all of the funds from the loan were used to rehabilitate the Building.

³ At Cliffcrest’s request, the third-party action was discontinued without prejudice against defendant CCB n/k/a Carver Federal Savings Bank, and the court denied Cliffcrest subsequent motion to renew to reassert its third-party claims against CCB.

⁴The record shows that \$1,269,681.65 of the loan was used to pay off Fleet’s successor, Bank of America.

Simultaneously with the execution of the Note, Cliffcrest executed and delivered to CCB a Mortgage, Assignment of Leases and Rents and Security Agreement, which provided partial security for the money due and owing CCB under the Note. That same day, CCB assigned to Peny & Co. (Peny), the original plaintiff in this action, the Note and the Mortgage along with the Leases and Rents (together “the Loan Documents”). There is evidence in the record that Peny paid CCB \$1,650,000 for the assignment of the Loan Documents. The HPD mortgages are subordinate to the Mortgage pursuant to a subordination agreement HPD and CCB entered into on September 29, 2006, under which HPD agreed that the HPD mortgages, shall be subject and subordinate in time and payment and to the liens, terms and covenants in the Loan Documents.

From 2006 until 2012, Cliffcrest made payments to Peny as agreed to under the Note and Mortgage without objection or reservation. However, it is alleged that beginning in March 2012, Cliffcrest ceased making monthly payments of principal and interest due under the Loan Documents, and that Cliffcrest failed to make payments for real estate taxes assessed against the Building and failed to provide proof of insurance covering the Building. When Cliffcrest failed to cure its alleged defaults, Peny commenced this foreclosure action in 2013. Peny also filed an application for the appointment of a temporary receiver, which the court granted by order dated March 17, 2015. While this action was pending, the Loan Documents were assigned from Peny to SONYMA, and, by order dated March 30, 2015, this court substituted SONYMA as plaintiff. SONYMA subsequently assigned the Loan Documents to Coogans Bluff.

While the other parties to the action agreed to stipulate to substitute Coogans Bluff as plaintiff, Cliffcrest opposed the substitution, and SONYMA moved to substitute Coogans Bluff as plaintiff in this action, and Cliffcrest opposed the motion. In its decision and order dated

September 21, 2016, the court granted plaintiff's motion, finding that the uncontroverted evidence demonstrated the valid of the assignment of the Loan Documents to Coogans Bluff. The court rejected, *inter alia*, Cliffcrest's argument that substitution was not appropriate based on "chain of title discrepancies" and "whether transfers thus far are valid," noting that such arguments were unsubstantiated and insufficient to raise issues as to the validity of the assignment to Coogans Bluff or the prior assignments, which were supported by documentary evidence.

By letter dated June 26, 2017, a member of Coogans Bluff notified through Del-Mar Management Services that the loan had been assigned that day to St. Nicholas.

The Instant Motion

Coogans Bluff now moves to substitute St. Nicholas as plaintiff and in support of its motion, submits documentary evidence that on June 16, 2017, Coogans Bluff assigned the Loan Documents and its rights in this action to St Nicholas. Specifically, plaintiff submits, (1) an Allonge to the Note dated June 16, 2017, executed by a representative of Coogans Bluff, to pay to the order of St Nicholas without recourse, except as set forth in a loan purchase and sales agreement between Coogans Bluff and St. Nicholas; (2) the Assignment of Mortgage dated as of June 16, 2017, (and executed on June 23, 2017) which was recorded in the Office of the City Register of the City of New York on September 6, 2017 under CRFN 2017000332619, (3) the Assignment of Assignment of Leases and Rents dated as of June 16, 2017 (and executed on June 23, 2017), which Assignment was recorded in Office of the City Register of the City of New York under CRFN 201700332566, (4) the Assignment and Assumption agreement dated as of June 16, 2017 (and executed on June 23, 2017); (5) UCC-3 Amendment evidencing the

assignment; and (6) Assignment of Causes of Action dated as of June 16, 2017 (and executed on June 23, 2017). Plaintiff also submits the affirmation of counsel in which he states that “[m]y client has provided me with proof that they are in possession of the original Loan Documents including the Note and Mortgage and attaches copies of the documents.”

Cliffcrest opposes the motion, arguing that: (1) questions of fact exist as to the validity of the loan at the time this action was commenced, (2) there are substantial and material defects in the documentary evidence submitted in the instant motion in support of the most recent transfer, (3) Cliffcrest was not given proper notice of the transfer since the June 26 letter which purported to inform it of the assignment was sent to Cliffcrest’s former management company, (4) the surrounding circumstances of the transfer weigh against substitution of the new purported holder of the underlying note and mortgage.

In support of its position, Cliffcrest attaches its opposition papers to plaintiff’s prior motion to substitute Coogans Bluff for SONYMA as plaintiff, which, as noted above, were found by the court to be insufficient to deny the prior motion to substitute.

In reply, plaintiff argues that this is the third time Cliffcrest has sought to oppose plaintiff’s motion to substitute, based on the same or similar arguments that have been rejected by the court, including Cliffcrest’s challenges to the validity of the Loan Documents and the transfer of such documents. Plaintiff also notes that although Cliffcrest filed two Notice of Appeal related to the court’s prior substitution orders, Cliffcrest failed to timely perfect such appeals.

As for the merits of Cliffcrest’s opposition, plaintiff asserts that Cliffcrest’s challenges to the chain of title with respect to prior transfers are contrary to the documentary evidence

previously submitted to the court on prior motions, which it submits again in reply. Plaintiff also notes that it brought all the original Loan Documents and assignments to the court on the return date of its prior motion to substitute for examination in open court by Cliffcrest and Clifferest brought an expert to review the documents and the expert made no objection. As for the assignment to St. Nicholas, plaintiff argues that the documentary evidence and, in particular, the Allonge to the Note demonstrate that the Note was properly assigned to St Nicholas. In addition, counsel for plaintiff states that he has “personally reviewed the original Allonge to the Note transferring the loan from Coogans Bluff to 938 St. Nicholas Avenue and my client is in possession of the commercial paper at issue.”

Discussion

When there is a transfer of a plaintiff's interest in a mortgage foreclosure action, the action may continue in the name of the original plaintiff or there may be a substitution or joinder of the assignee/transferee. See CPLR 1018 (providing that “upon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action”). “The determination to substitute or join a party pursuant to CPLR 1018 is within the discretion of the trial court.”

Aurora Loan Services, LLC v. Lopa, 130 AD3d 952, 952 (2d Dept 2015).

In the exercise of such discretion, courts have granted motions for substitution of the transferee/assignee in mortgage foreclosure actions when the validity of the assignment has been established, and there is no prejudice to the opposing party. See HSBC v. Guyerzeller Bank AG v. Chascona N.V., 42 AD3d 381 (1st Dept 2007)(court properly exercised its discretion in granting substitution motion in mortgage foreclosure action as the plaintiff and assignee were

corporate affiliates and were involved in the underlying transactions from inception, and the defendants and the receiver were aware of the assignee's and the plaintiff's claims and roles, and the foreclosure complaint detailed the mortgage history and assignment); Aurora Loan Services, LLC v. Lopa, 130 AD3d at 952 (granting motion to substitute assignee as plaintiff based on evidence demonstrating that the subject note, indorsed in blank by the lender, was in the assignee's possession, that the mortgage was assigned to the assignee after commencement of the action and the assignee was the real party in interest); Washington Mutual Bank v. Nussen, 138 AD3d 828 (2d Dept 2016)(trial court erred when it denied motion to substitute assignee of plaintiff where assignee was the holder of the note and mortgage);see generally, 3 NY Prac, Com Litig in New York State Courts § 19:8 (4th ed. Sept 2016).

Under this standard, the motion to substitute St. Nicholas is granted based on evidence demonstrating that the assignment of the Loan Documents to St. Nicholas is valid, and in the absence of prejudice to Cliffcrest. As to Cliffcrest's argument that questions of fact exist as to the validity of the loan at the time this action was commenced, such argument is unsupported by any evidence. Moreover, as indicated above, in granting plaintiff's motion to substitute Coogans Bluff as plaintiff, the court found that plaintiff submitted sufficient documentary evidence to demonstrate the validity of the loan and subsequent assignments of the Loan Documents, including to Coogans Bluff. With regard to the assignment from Coogans Bluff to St Nicholas, contrary to Cliffcrest's unsubstantiated position, there are no substantial or material defects in the documentary evidence related to this assignment. In this connection, insofar as Cliffcrest argues that the Note was not assigned to St Nicholas, the court finds that the Allonge submitted by plaintiff is sufficient to establish such assignment. See U.S. Bank, N.A. v. Collimore, 68 AD3d 752 (2d Dept 2009)("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, and the mortgage passes with the debt as an inseparable incident”). Furthermore, in reply, counsel for plaintiff states that he has personal knowledge that St. Nicholas is in possession of the Note.

Next, with respect to notice of the assignment, Cliffcrest argues that such notice was defective as it was sent to Cliffcrest’s prior management company. Such argument, however, is insufficient to invalidate the transfer as Cliffcrest has failed to demonstrate prejudice resulting from this error, particularly as counsel for plaintiff informed the court and counsel for all parties to this action of the transfer to St. Nicholas on or about July 2017, or shortly after the date of the notice. Finally, Cliffcrest’s argument that the surrounding circumstances weigh against substitution does not provide a legally sufficient basis for denial of this motion.

In view of the above, it is

ORDERED that Coogans Bluff’s motion to substitute St. Nicholas as plaintiff in the above entitled action in the place and stead of Coogans Bluff is granted; and it is further

ORDERED that the caption is amended to reflect the substitution of 938 St. Nicholas Avenue Lender LLC as plaintiff, in the place and stead of 936 Coogans Bluff, LLC ; and it is further

ORDERED that all papers, pleadings and proceedings in the above-entitled action be amended by substituting the name of plaintiff 936 Coogans Bluff, LLC with 938 St. Nicholas Avenue Lender LLC , without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that 936 Coogans Bluff, LLC shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (room 158),

who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that the amended caption shall read:

938 ST. NICHOLAS AVENUE LENDER , LLC,
Plaintiff

Index No.
850011/13

-v-

936-938 CLIFFCREST HOUSING DEVELOPMENT
FUND CORPORATION, THE DEPARTMENT OF
THE CITY OF NEW YORK, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW
YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, NEW YORK CITY DEPARTMENT
OF FINANCE,
Defendants.

and it is further

ORDERED that the caption in the third-party action shall remain the same.

Dated: December 18, 2017

J.S.C.
HON. JOAN A. MADDEN