

East Fordham DE LLC v U.S. Bank Natl. Assn.

2018 NY Slip Op 30883(U)

April 10, 2018

Supreme Court, Bronx County

Docket Number: 260551/2014

Judge: Julia I. Rodriguez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X **Index No. 260551/2014**

East Fordham DE LLC,

Plaintiff,

-against-

DECISION and ORDER

U.S. Bank National Association et al.,

Defendants.

Present:

Hon. Julia I. Rodriguez
Supreme Court Justice

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in review of defendants US Bank and Torchlight's order to show cause for vacatur/modification of the Court's Order dated May 24, 2017, and defendant Keybank's motion to renew/reargue said Order pursuant to CPLR 2221.

<u>Papers Submitted</u>	<u>Numbered</u>
Def. OSC, Affirmation & Exhibits	1
Nagi's Affirmation in Support	2
Pls. Affirmation in Opposition & Exhibits	3
Zafarani Affirmation in Opposition & Exhibits	4
Brandofino Supplemental Affirmation & Exhibit	5
Zafarani Supplemental Affirmation & Exhibits	6
Not. of Motion & Affirmation	7
Brandofino Affirmation in Support	8
Pls. Affirmation in Opposition & Exhibits	9
Reply Brief/Affirmation	10

Background

This matter involves a dispute concerning plaintiff's attempt to refinance a \$47,500,000 real estate mortgage loan. On May 11, 2012, plaintiff East Fordham DE LLC ("Borrower") entered into a Loan Modification Agreement ("LMA") with U.S. Bank National Association ("Lender") by and through the loan's Special Servicer, Torchlight Loan Services, LLC ("Torchlight"). Under the LMA, Borrower was entitled to prepay the loan if it obtained alternative financing and delivered to the Lender "the minimum Net Proceeds" required under the LMA. The LMA provides that the minimum Net Proceeds must be at least equal to "94 percent of the as-stabilized value" of the subject property, established by the average of two MAI appraisals, one obtained by Borrower and the other obtained by Lender. In October 2013,

Borrower informed Lender that it had an opportunity to refinance the loan with a new lender and would be doing so pursuant to the LMA. By February of 2014, Borrower and Lender had obtained and exchanged MAI appraisals (the "2014 appraisals"); however, each report stated that the value was "as-is." On or about May 8, 2014, Lender's loan servicer sent Borrower a letter setting forth a payoff amount due under the LMA in the amount of \$30,675,862 (the "Payoff Letter"). This payoff amount was determined using the average of the 2014 appraisals. The parties agreed that, on June 11, 2014, Borrower would close on its refinancing with the new lender and payoff its loan with Lender. On May 23, 2014, Lender's loan servicer revoked and rescinded the Payoff Letter for the stated reason that the 2014 appraisals did not reflect the "as-stabilized" value of the property as required under the LMA. Borrower's refinancing with the new lender was contingent upon obtaining a payoff letter from Lender. When Lender failed to provide a payoff letter on June 11, 2014, the closing did not proceed. Thereafter, Borrower commenced the instant action seeking specific performance under the LMA and money damages it incurred as a result of the failure of the closing to proceed on June 11, 2014.

After conference with the parties on March 24, 2017, the Court granted plaintiff's order to show cause seeking a preliminary injunction. The March 24, 2017 Order (the "Order") enjoins the Lender from, *inter alia*, seeking to enforce the LMA, including declaring the Borrower in default and commencing a foreclosure proceeding.

Defendants Lender and Torchlight ("Defendants") now move by order to show cause, for a "limited" vacatur or modification of the preliminary injunction, pursuant to CPLR 6314, "for the purpose of allowing Lender to declare Plaintiff in default under the subject loan documents as a result of Plaintiff's failure to pay the property taxes and assessments due July 1, 2017 and January 1, 2018 . . . and appointing a temporary receiver of the property." Under the LMA, the failure to pay property taxes and assessments when due is an event of default and a ground for seeking the appointment of a temporary receiver.

Defendant Keybank National Association ("Keybank"), Lender's Master Servicer, separately moves for an Order granting renewal/reargument and amending the Order "to permit defendants to enforce their rights and remedies under the applicable loan documents, including

but not limited to declaring the Plaintiff in default.” Keybank contends that the Order is overbroad to the extent that it bars defendants from seeking to enforce their rights and remedies through the judicial system, and that to the extent that it “prevents the Defendants from ‘declaring’ that the Plaintiff is in default of the Loan,” it is an unconstitutional “prior restraint on free speech.”

I. Lender and Torchlight Motion pursuant to CPLR §§6314 and 6401

Under CPLR §6314, a defendant enjoined by a temporary restraining order may move to vacate or modify it. A TRO or preliminary injunction should not be continued whenever continuing it in force would not serve the objectives of the remedy it was designed to achieve. *See Margolies v. Encounter, Inc.*, 42 N.Y.2d 475, 398 N.Y.S.2d 877 (1977). To prevail on such a motion, a defendant must establish new or changed facts that moot the harm to the plaintiff and obviate the plaintiff’s right to continued injunctive relief. *See DeCarlo v. Sanese*, 65 A.D.2d 945, 410 N.Y.S.2d 490 (4th Dept. 1978).

Here, there are no new facts which moot the harm to the Plaintiff and obviate its right to continued injunctive relief. The sole basis asserted for vacatur/modification of the Order is plaintiff’s alleged failure to pay property taxes and assessments due July 1, 2017 and January 1, 2018. However, all real estate taxes and assessments due through June 30, 2018 have been paid. While the Court does not condone the Plaintiff’s unilateral decision to make monthly payments in anticipation of a tax refund, there is no evidence that the property has been in danger of a possible tax lien foreclosure as Defendants contend. The Court also notes that, in his supplemental affirmation, Plaintiff’s managing member acknowledges that his failure to make timely tax payments because he was expecting a property tax refund was not a “prudent business decision for [him] to make,” and he represents that all real estate taxes and assessments will be paid when due going forward.

Also, as the issue of whether any of the parties defaulted under the LMA is at the heart of this lawsuit, and the rights and remedies of the parties under the LMA have not yet been determined, allowing Defendants to declare Plaintiff in default under the LMA and proceed with foreclosure proceedings would be premature at this juncture.

Under CPLR 6401, the Court may appoint a temporary receiver of property during the pendency of an action where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. As discussed above, the property taxes and assessments relative to the property are current so the property is not in danger of a tax lien foreclosure. Also, the violations against the property cited by Defendants do not rise to the level where a temporary receiver is necessary to protect the property from falling into disrepair or being destroyed.

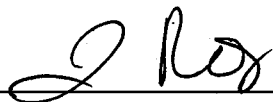
Based upon the foregoing, the OSC brought by Defendants U.S. Bank National Association and Torchlight is **denied** in its entirety.

II. Keybank's Motion to Renew/Reargue pursuant to CPLR §2221

At the outset, the Court finds that Keybank's argument that preventing Defendants from "declaring" Plaintiff in default is an unconstitutional prior restraint on free speech lacks merit. Keybank, through its representatives, may say whatever it wants. Nor is the Order overbroad. The Order merely prevents Defendants from taking action on an issue that is currently being litigated.

As Keybank has failed to establish that the Court overlooked or misapprehended a matter of fact or law, or that new facts not offered on the prior motion would change the prior determination, Keybank's motion to renew/reargue, pursuant to CPLR §2221, is **denied**.

Dated: Bronx, New York
April 10, 2018



Hon. Julia I. Rodriguez, J.S.C.