

Reich v 559 St. Johns PL LLC
2018 NY Slip Op 32734(U)
October 10, 2018
Supreme Court, Kings County
Docket Number: 501910/2015
Judge: Mark I. Partnow
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At an IAS Term, Part 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 10th day of October, 2018.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

-----X
ALEXANDER REICH,

Plaintiff,

- against -

559 ST. JOHNS PL LLC,
423 THROOP LLC,
THE CITY OF NEW YORK,
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY DEPARTMENT OF TAXATION AND FINANCE,
NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT AND "JOHN DOE" #1-40 inclusive,
said persons being fictitious, the person or persons intended
to be tenants or persons or entitled in possession of the
premises being foreclosed or any other person or party having
any interest in said premises,

Defendants.
-----X

MS#7 & MS#8
DECISION AND ORDER

Index No. 501910/2015

Mot. Seq. No. 7, 8

FILED
KINGS COUNTY CLERK
2018 OCT 23 AM 8:08

The following papers numbered 1 to 13 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/Petition/
Cross Motion and Affidavits (Affirmations) Annexed _____

1-3, 4-8

Opposing Affidavits (Affirmations) _____

9-12

Reply Affidavits (Affirmations) _____

13

Upon the foregoing papers, plaintiff Alexander Reich (Reich), as alleged assignee of a certain note and mortgage dated August 21, 2008 from defendants 559 St. Johns Place LLC and 423 Throop LLC, et al., to Nechadim Corp., moves in motion (mot.) sequence (seq.) 7

for an order: (1) pursuant to CPLR 3212, granting him summary judgment against defendant 559 St. Johns PL LLC (St Johns) and dismissing, with prejudice, the affirmative defenses asserted by St Johns in its answer to the amended complaint; (2) awarding Reich partial summary judgment, pursuant to CPLR 3212, as against defendants The City of New York and the New York City Department of Housing Preservation and Development to the extent that their liens, if any, are subordinate to the mortgage Reich seeks to foreclose upon herein; (3) directing that this action be referred to a referee to compute the amount due plaintiff Reich under the note and mortgage; and (4) amending the caption to delete the “John Doe” defendants without prejudice.

Defendant St Johns opposes and cross-moves in mot. seq. 8 for an order granting it summary judgment and dismissing this action, pursuant to CPLR 3212, based upon standing, pursuant to CPLR 3211 (a) (3), and statute of limitations, pursuant to CPLR 3211 (a) (5). Reich has opposed the cross motion.

Background

(1)

On August 21, 2008, defendant St Johns and defendant in default 423 Throop LLC, by their mutual member LaTanya (a/k/a Tanya) Pierce (Pierce) duly executed and delivered both a promissory note, in the principal amount of \$450,000.00, and a blanket mortgage naming Nechadim Corp. (Nechadim), as both lender and mortgagee. The mortgage, which was recorded in the City Registrar’s Office on November 14, 2008, under City Registrar File

Number (CRFN) 2008000442635, covers the premises located at 1308 Caton Avenue in Brooklyn, New York (Block 5074, Lot 3) and 423 Throop Avenue in Brooklyn, New York (Block 1806, Lot 6) (the properties).¹

On November 13, 2014, Reich, as President of Nechadim Corp., executed an assignment of the August 21, 2008 mortgage, “[t]ogether with the bond or note or obligation in said mortgage and the monies due and to grow thereon with interest. . .” to himself individually. This assignment of mortgage was recorded in the City Registrar’s Office on June 4, 2015, under CRFN 2015000096245, against the properties. Reich, however, gave non-party Lennox Pacific LLC (Lennox), a written “collateral assignment” of the subject note and mortgage, as security for a loan obtained by Reich from Lennox, on December 12, 2014, which was also recorded in the City Registrar’s Office on June 4, 2015, under CRFN 2015000189092, against the properties.

According to the complaint, St Johns, Pierce and the other defendants failed to make any payments under the note and mortgage, the first of which was due September 21, 2008 and the final due at maturity on February 21, 2009.

Reich, as the assignee of Nechadim Corp., thereafter commenced this action by filing a summons and complaint in the Kings County Clerk’s Office on February 19, 2015. Following receipt of process, defendant City of New York filed an answer containing 2 affirmative defenses on March 6, 2015. St Johns served and filed an answer containing 15

¹ There seems to be an issue as to whether or not five, and not just two, properties were to be covered under this blanket mortgage.

affirmative defenses on April 1, 2015, and ten days later filed a request for judicial intervention (RJI) and a motion for discovery and/or dismissal of the action. No other defendants have appeared in this action to date, and a default judgment was previously granted in favor of Reich against 423 Throop LLC.

While the motion was pending, Reich sought to serve a supplemental summons and amended complaint, which was rejected by St Johns. However, St Johns thereafter served an answer to the amended complaint with the same 15 affirmative defenses, including Reich's lack of standing to sue and statute of limitations, and a second motion to dismiss this action. The motion to dismiss was denied, but original motion for discovery was granted to the extent that Reich was to produce an original signature for exemplar purposes.

Discussion

Plaintiff's Motion

(1)

Plaintiff Reich has moved for summary judgment against defendant St. Johns seeking dismissal of its answer and affirmative defenses. 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 Hosp.*, 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 factual issues (*see CPLR 3212 [b]; Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). A failure to make that showing requires a denial of the motion, regardless of the adequacy of the opposing papers (*see Vega*

v Restani Constr. Corp., 18 NY3d 499, 503 [2012]; *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). Once a movant makes a prima facie showing, the burden then shifts 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, 562-563 [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 [2d Dept 2010] [internal quotation marks and citations omitted]).

All evidence “must be viewed in the light most favorable to the non-moving party” (see *Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted]). Denial of the motion is necessary “where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Benetatos v Comerford*, 78 AD3d 750, 752 [2d Dept 2010] [internal quotation marks and citations omitted]; see also *Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2d Dept 2005] [denial of summary judgment required where “any doubt as to the existence of a triable issue, or where the material issue of fact is arguable”] [internal quotation marks and citations omitted]).

(2)

“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 default, by proof in admissible form” (*Woori Amn. Bank v Global Univ. Group Ltd.*, 134 AD3d 699, 700 [2d Dept 2015]; *see also* CPLR 3212 [b]; *US Bank N.A. v Madero*, 125 AD3d 757, 757-758 [2d Dept 2015]). “However, where, as here, standing has been made an issue [by defendant], a plaintiff must also provide prima facie proof that it had standing to sue as of the time it commenced the action” (*Citimortgage v Rockefeller*, 155 AD3d 998, 998 [2d Dept 2017]).

(3)

Plaintiff supports its summary judgment motion by submitting a copy of the consolidated fixed rate promissory note, the mortgage, as well as the affirmation of his counsel and a purported sworn affidavit of Reich, averring that a payment default under the terms and conditions of the note and mortgage occurred. However, the affidavit was actually executed by “Harold Schwartz Attorney in Fact for Alexander Reich” and not Reich himself. Mr. Schwartz, neither discloses in the affidavit that he is signing as the attorney in fact, by power of attorney, for Reich, nor does he annex a copy of a previously executed power with a representation that the power of attorney is in full force and effect (*see* General Obligations Law § 5-1501, et seq.). Hence, the court finds that plaintiff has not established, prima facie, its entitlement to summary judgment, and the motion is denied. The remaining parts of

Reich's motion, including an order amending the caption to delete the John Doe defendants, is denied as moot for the reasons below.

(4)

Defendant's Cross Motion

Defendant St Johns cross-moves for an order, pursuant to CPLR 3212, dismissing this action. Specifically, St Johns seeks dismissal of the entire action based upon Reich's alleged lack of standing, pursuant to CPLR 3211 (a) (3), and expiration of the statute of limitations, pursuant to CPLR 3211 (a) (5). St Johns claims that by executing the collateral assignment of the promissory note, before commencement of this action, Reich divested himself of standing to sue and transferred it to nonparty Lennox, who holds the note as collateral.

"In a mortgage foreclosure action, a plaintiff has standing [to sue] where it is the holder or assignee of the underlying promissory note at the time the action is commenced" (*Wells Fargo Bank, N.A. v Charlaff*, 134 AD3d 1099, 1099 [2d Dept 2015]). Either written assignment of the underlying note or its physical delivery to a plaintiff prior to the commencement of the action is sufficient to transfer the debt or obligation (see, *US Bank N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]).

Reich did not annex a copy of the promissory note with the complaint to prove physical delivery (*cf.*, *JP Morgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643 [2d Dept 2016]), nor did Reich provide or disclose the collateral assignment and claim authorization to sue from Lennox. Reich, in his attorney verified complaint, however, claims he "was and is the holder of a certain mortgage (the "mortgage") and Mortgage Note 9THE (sic)

“Note”),” (complaint dated 2/18/15, ¶ 1) covering the subject premises owned by St Johns. The complaint is otherwise silent as to any liens, possessory or otherwise, on the promissory note.

In support of his motion, Reich produced a copy of the assignment to him from Nechadim, and in his opposition to the cross motion, annexes a copy of the purported collateral assignment of the note and mortgage, dated December 12, 2014, along with a purported affidavit “verify[ing] the factual allegations contained in the affidavit signed by HAROLD SCHWARTZ as Power [sic] of attorney and the affidavit of HAROLD SCHWARTZ and the affirmation of” his counsel. Reich admits to giving Lennox a security interest in the note or mortgage, but not any ownership interest therein. Reich’s affidavit, however, is completely silent as to physical possession of the note on the day of commencement, namely, February 19, 2015. Indeed, Reich does not disclose whether or not the security interest given Lennox required him to physically surrender possession of the note.

The collateral assignment of mortgage claims to be subject to a collateral security agreement between Reich and Lennox dated December 12, 2014, a copy of which has not been provided. Further, it claims the assignment is given as collateral security, yet it contains the operative language “[t]ogether with the bond or note or obligation in said mortgage . . . TO HAVE AND TO HOLD the same . . . forever.” In such circumstances, it cannot be said Reich has proven his standing to sue herein.

Indeed, Reich's claim of granting only a security interest in the note and mortgage (i.e. "a mortgage on a mortgage," *see* Wohlberg affirmation in opp, 3/23/18, p.4, ¶ 13) and not an ownership interest, is a distinction without a difference, since "[e]ither 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" (*US Bank NA v Collymore*, 68 AD3d at 754). Simply put, by giving Lennox a security interest in the note and mortgage, Reich also transferred to Lennox the right to enforce the note and collect from St Johns under the note and mortgage in the event of Reich's default on the Lennox loan. Otherwise, the collateral (i.e. the St. Johns debt) would be worthless to Lennox for its intended purpose as collateral to secure Reich's repayment.

(5)

Since Reich did not have standing to sue on the date of commencement, the entire case against all defendants is dismissed. This is appropriate under the facts presented here as 1) it was a joint promissory note and mortgage executed by both St Johns and defaulting defendant 423 Throop LLC; and 2) the 423 Throop property offered as collateral has been foreclosed upon, by another creditor, in the action entitled *The Closing Network LLC v LaTanya Pierce, et al.*, Supreme Court, Kings County, index Number 520535/2016. This court signed a judgment of foreclosure and sale in that action on February 8, 2018, which was entered in the Kings County Clerk's Offices on March 13, 2018. Accordingly, it is

ORDERED that the branch of the motion of plaintiff, Alexander Reich in mot. seq. 7 for summary judgment dismissing, with prejudice, the 15 affirmative defenses asserted by defendant 559 St John's Pl, LLC, in its answer to the amended complaint is *denied* in its entirety; and it is further

ORDERED that the remaining branches of plaintiff's motion are denied as moot; and it is further

ORDERED that the branch of the cross motion of the defendant 559 St John's Place LLC in mot. seq. 8 to dismiss this action, pursuant to CPLR 3212 and CPLR 3211 (a) (3), is *granted* in its entirety, as against all defendants herein.

This constitutes the decision and order of the court.

E N T E R,



Hon. Mark I. Partnow
J. S. C.

HON. MARK I. PARTNOW
SUPREME COURT JUSTICE

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