KBS Sheapshead Bay, LLC v Terrapin Design Group LLC
2019 NY Slip Op 31367(U)
May 13, 2019
Supreme Court, New York County
Docket Number: 850121/2016
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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KBS SHEAPSHEAD BAY, LLC,

Plaintiff,

- v -

TERRAPIN DESIGN GROUP LLC, CITY OF NEW YORK DEPARTMENT OF FINANCE, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, BOARD OF MANAGERS VALHALLA II CONDOMINIUM, BANK OF NEW YORK, AS TRUSTEE FOR THE BENEFIT OF CERTIFICATEHOLDERS, CWALT, INC., ALTERNATIVE LOAN TRUST 2007-HY4 MORTGAGE PASSTHROUGH CERTIFICATES, SERIES 2007-HYF, COLIN RATH, PAMELA RATH, JOHN DOE #1 - JOHN DOE #99

Defendants.

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INDEX NO. 850121/2016

MOTION DATE 04/18/2019

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 313

were read on this motion to/for JUDGMENT - SUMMARY

The motion by plaintiff ("KBS") for *inter alia* partial summary judgment against defendant Bank of New York, as Trustee for the Benefit of Certificateholders, CWALT, Inc., Alternative Loan Trust 2007-HY4 Mortgage Passthrough Certificates, Series 2007-HYF ("BNY") dismissing BNY's counterclaims for quiet title and unjust enrichment is granted. BNY's cross-motion for summary judgment dismissing the complaint is denied.

Background

The main issue in this mortgage foreclosure action is the priority of mortgages between KBS and BNY. It is undisputed that BNY's mortgage was executed in 2007 and KBS entered into its mortgage in 2015. Ordinarily, this would mean that BNY's mortgage would have priority. Both mortgages cover Unit 1 at 121 West 15th Street in Manhattan, a property owned by defendant Terrapin Design Group LLC ("Terrapin Design"). This entity is controlled by the former owner of the unit, defendant Colin Rath. The entire condominium consists of three units.

After Terrapin Design failed to make payments, BNY commenced a foreclosure action ("BNY's Action") against Terrapin Industries, LLC ("Terrapin Industries"), Colin Rath and Pamela Harvey-Rath on March 11, 2008. On that same date, BNY filed a notice of pendency against unit 1. BNY subsequently moved for summary judgment and, in September 2008, Terrapin Industries filed a bankruptcy petition. The judge assigned to the case held that the motion for summary judgment was "marked off calendar as the Defendant Terrapin Industries LLC has filed for bankruptcy. Plaintiff has indicated its intent to file a new motion addressing certain title issues in lieu of proceeding with this motion . . . Plaintiff indicates it will not proceed at this time due to the bankruptcy stay" (Decision dated February 6, 2009). However, the bankruptcy proceeding was dismissed on January 8, 2009 (NYSCEF Doc. No. 135).

For the next three years nothing happened in BNY's Action. On March 30, 2012, the case was marked disposed although it is unclear exactly how the case got this marking. BNY filed a motion on June 10, 2013 to restore BNY's Action. Justice Hagler, then assigned to the case, denied the motion and found that "plaintiff failed to attach an affidavit of merit as to the allegations of the merit of their causes of action and no one with personal knowledge attached

copies of the Note and Mortgage. Also the excuse is conclusory and lacks any detail for this Court to decipher" (Decision dated October 21, 2013).

For some reason, BNY waited until October 6, 2014 to file another motion to restore the action (NYSCEF Doc. No. 166). And BNY later withdrew that motion (*see* NYSCEF Doc. No. 167 [Decision dated February 23, 2015]).

During the pendency of these curious litigation decisions by BNY, Terrapin Industries commenced an action seeking to discharge and cancel the mortgage ("Terrapin's Action"). BNY did not answer Terrapin's Action and a default judgment was entered against BNY by Justice Kenney on June 2, 2014. A few months later, an amended judgment was uploaded in August 2014 that added language about the when the mortgage to be discharged was recorded and its CFRN number. (The parties disagree over their interpretations of the handwritten CFRN number in this order).

BNY finally made a motion to vacate Terrapin Industries' default judgment on April 10, 2015. Justice Kenney denied BNY's motion on May 28, 2015. The First Department reversed and reinstituted the Terrapin Action on March 17, 2016.

In September 2014, the Raths transferred the unit to Terrapin Design (a deed that was recorded on October 16, 2014). Terrapin Design then entered into a note and mortgage on the unit with an entity called RCN for $985,000. KBS claims it was assigned the RCN mortgage and note on February 12, 2015 and recorded on February 25, 2015. KBS also claims that on February 17, 2015 it secured a gap mortgage for $1.175 million and this was recorded on February 25, 2015. On February 17, 2015, Terrapin Design and KBS entered into a consolidation, extension and modification agreement ("CEMA') that combined the RCN and gap

mortgage into a single lien for $2.16 million (this was also recorded on February 25, 2015). The Raths also entered into a guaranty for repayment of the KBS mortgage.

In March 2016, BNY brought a third motion to restore the BNY Action and Justice Hagler granted the motion on July 11, 2016.

KBS points out that while it was negotiating with the Raths in January and February 2015, its due diligence revealed that the BNY mortgage was discharged and BNY's Action had been marked disposed for nearly three years. KBS admits that BNY's second motion to restore the BNY Action (filed in October 2014 and denied as withdrawn in February 2015) was pending during this time period, but contends it had no knowledge of it at the time. Besides, it is uncontested that the notice of pendency by BNY had expired and was not renewed; therefore, there was no notice of pendency to alert KBS that BNY was still litigating the case.

KBS claims that Terrapin Design defaulted on the mortgage and it commenced a foreclosure action. KBS argues that it has priority over BNY's mortgage because when it entered into the mortgage, its due diligence revealed that there were no mortgages on the property and no active notices of pendency. KBS contends that BNY is not entitled to pursue its counterclaim for unjust enrichment because BNY did not begin paying property taxes for the unit until March 13, 2009, a year after BNY's Action began.

BNY cross-moves for summary judgment to dismiss the complaint on the grounds that KBS has not established its mortgage, and that KBS's mortgage does not have priority over BNY's mortgage. BNY argues that the mortgage that was discharged by Justice Kenney in the Terrapin Action was different from BNY's mortgage. BNY claims that the Raths executed an EMA in 2007 after Terrapin Industries deeded the property to the Raths with a new note and mortgage and that this new mortgage was recorded with a different CFRN number than the one

in the discharge order. BNY claims that this EMA substituted for the one that was discharged rather than an extension. BNY also argues that this EMA was not mentioned in the discharge order.

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 a 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], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Priority of Mortgage

As an initial matter, the Court finds that KBS established its mortgage. Although BNY correctly points out that that the mortgage documents reference GMA USA LLC, Terrapin

Design ratified the mortgage by making payments under the terms of KBS' mortgage. Even if the Court questioned the authority of Andrew Alberstein to enter into the mortgage on behalf of Terrapin Design, the fact is that Terrapin Design started making payments as if it entered into a mortgage with KBS. Moreover, the Court finds that BNY does not have standing to raise this argument especially because Terrapin Design is a defendant in this action and did not deny that Alberstein had the requisite authority or that the mortgage was with KBS.

With respect to the EMA issue, the fact is that BNY's Action seeks to foreclose the mortgage that was discharged in Justice Kenney's case (*see* Complaint for Index No. 103643/08, ¶ 4). The fourth paragraph contains the exact same CFRN number as in Justice Kenney's discharge order and judgment.[1] Justice Kenney's order also provides the date of the mortgage and when it was recorded. These match the dates in the 2008 complaint as well (*id.*). This leads to only one conclusion—that the note and mortgage in the BNY Action and in Justice Kenney's discharge action are the same. This means that BNY's arguments about the EMA make no sense; if the EMA was the operative mortgage, then why did BNY sue on the very same note and mortgage that was later discharged by Justice Kenney rather the purported replacement mortgage (the EMA)?

The timeline described above compels the Court to grant the branch of KBS' motion to dismiss BNY's counterclaim for quiet title. "Laches is an unreasonable delay by a plaintiff that prejudices a defendant. Because the effect of delay may be critical to an adverse party, delays of even under a year have been held sufficient to establish laches" (*Philippine Am. Lace Corp. v*

[1] While BNY argues that the amended judgment before Justice Kenney stated the last six numbers of the CFRN number were 205051, the Court rejects that claim as a misreading of less than perfect handwritten numbers (sixes misinterpreted as zeroes). The Court reads the final six numbers as 265651—the same as the CFRN number in BNY's 2008 complaint.

236 West 40th St. Corp., 32 AD3d 782, 784, 822 NYS2d 25 [1st Dept 2006] [internal quotations and citations omitted]).

BNY's conduct in prosecuting the 2008 case can only be described as apathetic and indifferent. BNY started its case *more than* 10 years ago. While the Court recognizes that Terrapin Industries initially delayed BNY's Action by filing for bankruptcy in late 2008, that does not explain why BNY did nothing between February 6, 2009 (when its motion for summary judgment was marked off calendar) and June 10, 2013 (when BNY first moved to restore the case). And the Court observes that the dismissal filing in the bankruptcy proceeding shows that case was over in January 2009. BNY could have moved for summary judgment immediately after receiving the denial of its first summary judgment motion in February 2009 because, at that point, there was no longer an ongoing bankruptcy proceeding.

Although the dismissal of BNY's Action in March 2012 is not dispositive proof that BNY abandoned its case—there is no indication as to what exactly precipitated this dismissal—it evidences BNY's complete and utter lack of attention to its case. The dismissal demonstrates not only that BNY did nothing for more than three years prior to the dismissal,[2] BNY did not check on the status of the case after the dismissal for more than a year. The Court does not understand how BNY did not take a single action in its case for four years. It did not make another motion for summary judgment or ask for a status conference. And this failure to monitor the status of the case let the inadvertent dismissal of the action remain for over a year before BNY moved to restore.

But the failure to prosecute its case did not stop in 2013. After Justice Hagler denied BNY's first motion to restore the BNY Action in October 2013, BNY did not bring another

[2] The Court finds it unlikely that the case would have been marked disposed if BNY had prosecuted its case. In fact, it may have been resolved on the merits had BNY moved its case.

motion to restore until October 2014—a motion that, for some reason, BNY withdrew in February 2015. It does not take an entire year to make a new motion to restore given that BNY could have easily remedied the deficiencies identified by Justice Hagler in his decision denying the first motion.

Even worse, throughout BNY's inability to successfully restore its case, it failed to renew or file a new notice of pendency on the unit. That failure let the notice of pendency lapse and removed a clear and obvious public notice of BNY's interest in the property. These errors and omissions provided an opportunity for the Raths to bring the case to discharge the mortgage, an opportunity that initially proved successful because BNY again did nothing. BNY failed to answer and the Raths secured an order on default discharging the mortgage. From August 2014 through April 2015, BNY did not do anything that would have alerted KBS that BNY had any interest in the property; if BNY did not sit on its rights, then it could have prevented KBS from taking over a note and mortgage for the subject apartment. Although this Court is reluctant to apply the doctrine of laches, this case is full of unreasonable delays and failures by BNY that led to KBS taking over a note and mortgage with the absolutely reasonable understanding that BNY's interest had been discharged.

"[A]n action to foreclose a mortgage is addressed to a court of equity, which should determine the rights of the parties to the suit according to equity and good conscience" (*Futterman v Calce*, 226 AD2d 306, 308, 642 NYS2d 220 [1st Dept 1996] [internal quotations and citation omitted]). Here, equity and good conscience compels this Court to find that KBS' mortgage has priority. KBS details the due diligence it did and that it hired a title insurance agency to help it consider whether to enter into the mortgage agreement (NYSCEF Doc. No. 111, ¶ 19). Everything KBS' title insurance agency found indicated that BNY's Action was

disposed and BNY's mortgage was discharged (*id.* ¶ 21). To permit BNY to assert priority over KBS under these circumstances would be wrong and would ignore the lack of the notice of pendency. For this court to put KBS in a second position to BNY, when KBS did everything it was supposed to do and BNY did nothing it was supposed to do, would violate equity and good conscience.

The Court has no idea why BNY had zero interest in timely pursuing its foreclosure action and why it failed to make sure the notice of pendency renewed, but BNY's inaction created an opportunity for the borrowers to discharge the note and mortgage and get new financing. KBS, a bona fide encumbrancer for value of the unit, should not suffer (by having its mortgage rendered junior to BNY's mortgage) because of BNY's inaction.

Unjust Enrichment

"[I]n order to adequately plead such a claim, the plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516, 950 NYS2d 333 [2012]). "[A] plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party" (*id.*).

BNY claims that it paid the real estate taxes and insurance and KBS should not get the benefit of BNY's payments. The Court dismisses this counterclaim because BNY does not have a sufficiently close relationship with KBS. BNY made the payments in its own interest to protect its investment in the unit. It did not make the payments with any consideration towards KBS.

And the Second Department has held that making voluntary payments to protect an interest in a property during the pendency of a mortgage foreclosure action does not state a cause of action for unjust enrichment (*see Wells Fargo Bank, N.A. v Burke*, 155 AD3d 668, 671, 64 NYS3d 228 [2d Dept 2017] [finding that the bank's payment of property taxes were voluntary and could not support a claim for unjust enrichment because they were not the product of fraud or mistake]). There is no claim that BNY made these payments from a mistaken belief about the circumstances surrounding this foreclosure action. BNY made these payments fully aware of the facts and to to protect its investment.

Remaining Branches of KBS' Motion

The remaining branches of KBS' motion are granted without opposition. KBS is entitled to summary judgment and the appointment of a referee to calculate the amount due.

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion for partial summary judgment against defendant Bank of New York, as Trustee for the Benefit of Certificateholders, CWALT, Inc., Alternative Loan Trust 2007-HY4 Mortgage Passthrough Certificates, Series 2007-HYF dismissing this defendant's counterclaims for quite title (first counterclaim) and for unjust enrichment (third counterclaim) is granted and the cross-motion by Bank of New York is denied; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment against defendants Terrapin Design Group LLC, Colin D. Rath, and Pamela Harvey Rath and striking their affirmative defenses and counterclaims is granted without opposition; and it is further

ORDERED that Mark McKew, 1725 York Avenue, Suite 29A, NY, NY 10128 (212) 876-6783 is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount

due to Plaintiff for principal, interest and other disbursements advanced as provided for in the note and mortgage upon which this action is brought, and to examine whether the mortgaged property can be sold in parcels; and it is further

ORDERED that the Referee may take testimony pursuant to RPAPL § 1321; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of $350 shall be paid to the Referee for the computation of the amount due and upon the filing of her/his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale

within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that the caption be amended to remove John Doe #1 through John Doe #99 as defendants; and it is further

ORDERED that the caption shall read as follows:

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

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KBS SHEAPSHED BAY, LLC,

Plaintiff,

v.

TERRAPIN DESIGN GROUP LLC, CITY OF NEW YORK, DEPARTMENT OF FINANCE, CITY OF NEWY ORK ENVIRONMENTAL CONTROL BOARD; BOARD OF MANAGERS VALHALLA II CONDOMINIUM, BANK OF NEW YORK, AS TRUSTEE FOR THE BENEFIT OF CERTIFICATEHOLDERS, CWALT, INC., ALTERNATIVE LOAN TRUST 2007-HY4 MORTGAGE PASSTHROUGH CERTIFICATES, SERIES 2007-HYF, COLIN D. RATH, PAMELA HARVEY RATH,

Defendant(s).

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and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre

Street, Room 119), who are directed to mark the court's records to reflect the parties being removed; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (ww.nycourts.gov/supctmanh)]; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

Next Conference: July 16, 2019 @ 2:15 p.m.

5.13.19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE