

416 W 25th St. Lender LLC v 416 W. 25th St. Assoc.
2019 NY Slip Op 31370(U)
May 13, 2019
Supreme Court, New York County
Docket Number: 850242/2018
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

-----X

416 W 25TH STREET LENDER LLC,

Plaintiff,

- v -

416 W. 25TH STREET ASSOCIATES, LLC, ANDREAS STEINER,
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, L&L
CAPITAL PARTNERS LLC, JOHN DOE #1 THROUGH JOHN DOE
#12,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46, 60, 61, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for APPOINT - FIDUCIARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 53, 54, 55, 56, 57, 59, 63, 64, 65

were read on this motion to/for DISMISS.

DECISION AND ORDER

Motion Sequence Numbers 001 and 002 are consolidated for disposition. The motion (MS001) to appoint a temporary receiver is denied as moot. The motion (MS002) by defendants 416 W. 25th Street Associates, LLC and Andreas Steiner ("Movants") to dismiss the complaint is granted.

Background

This commercial foreclosure action arises out of a Consolidation, Extension and Modification Agreement ("CEMA") from 2014 for premises located at 416 West 25th Street in Manhattan. The parties disagree about whether the CEMA confers standing or whether standing is based on the various notes that were purportedly consolidated in the CEMA.

Movants allegedly defaulted on the CEMA by entering into a subordinate mortgage, which was expressly prohibited in the CEMA. Movants seek to dismiss on the grounds that plaintiff lacks standing to prosecute this case and that it did not receive proper notice to cure the violation as provided for in the CEMA. Movants contend that this is merely a technical default and that they have made the payments under the CEMA. In opposition, plaintiff contends that it has standing based on its possession of the notes and that it sent the cure notice.

Discussion

“[W]e first assume as true the facts alleged in the amended complaint because, on a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. The Court may consider affidavits submitted by plaintiffs to remedy any defects in the complaint, because the question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one” (*Al Rushaid v Pictet & Cie*, 28 NY3d 316, 327, 45 NYS3d 276 [2016] [internal quotations and citations omitted]).

Paragraph 21 of the CEMA provides that for “non-monetary defaults” the “Mortgagor shall have thirty (30) days from the date of such notice to cure the default, except that, with respect to such defaults which are curable but which are incapable of being cured in said thirty (30) day period, the Mortgagor shall commence to cure such default within thirty (30) days, shall proceed promptly and diligently to cure the same and shall complete such cure within sixty (60) days after such notice date” (NYSCEF Doc. No. 50 [Copy of Complaint, exh D, ¶ 21]).

Here, the notice dated June 25, 2018 sent to Movants declares that an “Event of Default has occurred and is continuing under the CEMA” related to the subordinate mortgage (*id.* exh I).

On June 27, 2018, Movants responded to plaintiff with a letter from their counsel confirming that they had taken out a second loan on the property and it was done “without the knowledge that it was a breach of the terms of your loan” (NYSCEF Doc. No. 54). Movants stressed that they had not defaulted on any payments and intended to work with plaintiff to resolve the issue quickly given that the loan would be paid off in a few months (*id.*). Plaintiff responded on June 28, 2018 with an email stating that “Our position is that the lien needs to be removed within 30 days of the letter we sent you” (NYSCEF Doc. No. 55).

The Court grants the motion because plaintiff did not send the required notice to cure the default as provided for in the CEMA. The June 25 notice makes no mention of a cure period, nor does it mention that Movants had 30 days (or even 60 days) to cure the alleged default. Instead, it appears to be a default notice that fails to provide Movants with any opportunity to fix the issue; that is not a valid basis upon which to foreclose upon this CEMA. The fact that plaintiff sent an email three days later clarifying its belief that the June 25 notice was the notice to cure does not compel a different outcome. Plaintiff did not purport to start the 30-day notice period with this email nor did plaintiff draft a new notice that specifically served as the notice to cure. Plaintiff cannot save its previous default notice with this subsequent email. Moreover, it was not Movants' responsibility to infer that the June 25 notice contained a cure period where that notice failed to make a single mention of a cure period.

And as Movants point out, this is a technical default—there is no allegation that Movants failed to make payments. While that is not wholly dispositive, it requires the Court to closely consider the nature of the default. “[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]). The Court declines to permit foreclosure based on a *technical* default of a CEMA where plaintiff failed to comply with the *technical* requirements of the CEMA.

Because the Court is granting Movants' motion to dismiss, plaintiff's motion for the appointment of a temporary receiver is denied as moot.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a temporary receiver is denied as moot; and it is further

ORDERED that the motion by defendants 416 W. 25th Street Associates, LLC and Andreas Steiner to dismiss is granted.

5-13-19

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL JUDGMENT
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

~~HON. ARLENE P. BLUTH~~

APPLICATION:

CHECK IF APPROPRIATE: