

Prune Danish, LLC v Kerr
2019 NY Slip Op 34041(U)
July 3, 2019
Supreme Court, Kings County
Docket Number: 507401/2017
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 3rd day of July, 2019.

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.

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PRUNE DANISH, LLC.,

Plaintiff,

- against -

DUPLICATE ORIGINAL
DECISION AND ORDER

Index No. 507401/2017

MS#1 & MS#2

ROYAN KERR; MELISSA MATTHIAS;
JOSEPH MATTHIAS; PAMELA MATTHIAS
A/K/A PAMELA MATTHIAS-CARTER;
EQUABLE ASCENT FINANCIAL LLC;
FAYE'S BEAUTY EMPIRE, INC.; U.S.
BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR THE C-BASS MORTGAGE
LOAN ASSET-BACKED CERTIFICATES,
SERIES 2007-MX1; ET. AL.,

Defendants.

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The following papers numbered 1 to 9 read herein:

Papers Numbered

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

1-3; 4-6 _____
7-8; 9 _____

Upon the foregoing papers, defendant US Bank National Association (US Bank) moves, in motion sequence I, for an order pursuant to CPLR 3211 (a)(1), (a)(4), and (a)(5) to dismiss the instant action as against the US Bank. Prune Danish, LLC (Prune) cross-

moves, in motion sequence 2, for an order pursuant to CPLR 3212(b) to dismiss the US Bank's affirmative defenses and counterclaims.

US Bank's motion pursuant to CPLR 3211(a)(1) is denied as US Bank failed to submit any documentary evidence that would resolve the factual issues as a matter of law, and conclusively dispose of the Prune's claim (see *Bayview Loan Servicing, LLC v. Windsor*, 172 AD3d 799, 801 [2d Dept 2019]). "A senior lienor may enter into an agreement with the mortgagor modifying the terms of the underlying note or mortgage without obtaining the consent of any junior lienors" (*Fleet Bank of N.Y. v. County of Monroe Indus. Dev. Agency*, 224 AD2d 964, 964-965 [4d Dept 1996]). If the senior lienor enters into such an agreement without obtaining consent, and the agreement substantially impairs the security interest of the junior lienors or effectively destroys their equity, courts have divested the senior lienor of its priority and elevated the junior lienors to a position of superiority (*id.*). Where, however, the actions of the senior lienor prejudice the junior lienors but do not substantially impair their security interest or destroy their equity, the senior lienor will be required to relinquish to the junior lienors its priority with respect to the modified terms only (*id.*).

US Bank's motion pursuant to CPLR 3211 (a)(1) is denied as the documents submitted in support of its motion establish that a loan modification agreement was recorded after plaintiff recorded its spreader agreement modifying the original loan by adding new money in the amount of \$66,416.78 without any evidence that plaintiff consented to the modification.

US Bank's motion pursuant to CPLR 3211 (a)(5) is likewise denied. "Res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action..." (quoting *Albanez v. Charles*, 134 AD3d 657, 657-658 [2d Dept 2015] [internal citations omitted]). "The doctrine is applicable to an order or judgment taken by default which has not been vacated, as well as to issues which were or could have been raised in the prior proceeding" (*id.*). Although it appears that the time for Prune to answer in US Bank's pending foreclosure action has expired (2015 foreclosure action), no orders were issued in that action and US Bank has not obtained a judgment (see *Santiago v. Lalani*, 256 AD2d 397, 398 [2d Dept 1998]). Thus, US Bank's motion pursuant to 3211 (a)(5) must be denied.

US Bank's motion pursuant to CPLR 3211 (a)(4) is granted to the extent that this action shall be joined for trial with the 2015 foreclosure action filed by US Bank under Index Number 515142/2015 (see *Gutman v. Klein*, 26 AD3d 464, 465 [2d Dept 2006]). "Pursuant to CPLR 3211 (a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same" (*JPMorgan Chase Bank, National Association v. Luxama*, 172 AD3d 1341, 1341 [2d Dept 2019] [internal citations omitted]). "It is not necessary that the precise legal theories

the same or substantially the same” (*id.*). In paragraph 16 of Prune’s instant summons and complaint, Prune alleges that US Bank is named as a defendant because US Bank has, a mortgage interest which is, in part, subordinate to Prune’s as shown in the lien search. However, in paragraph 15 of the summons and complaint filed in the 2015 foreclosure action, US Bank seeks “[t]hat each and all of the defendants herein have or claim to have some interest in, or lien upon the said mortgaged premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of the said mortgage, and is subject and subordinate thereto.”

Since Prune’s relief against US Bank is substantially the same as the relief US Bank seeks in its pending 2015 foreclosure action, the Court deems it appropriate to join the issue for trial rather than dismiss Prune’s instant action against US Bank. US Bank filed its summons and complaint on December 14, 2015 alleging that defendants liens are subject and subordinate to US Bank’s. However, in the roughly three and a half years since the time to answer expired, US Bank has not sought or obtained a default judgment against any named defendant in its 2015 foreclosure action, including Prune. Thus, under these circumstances, the Court finds it appropriate to join the actions for trial. Prune’s motion for summary judgment is denied without prejudice to renew once the appropriate motions are filed in the 2015 foreclosure action. Accordingly, it is hereby

ORDERED that US Bank's motion to dismiss (sequence 1) is granted to the extent that this action is joined for trial with U.S. Bank's pending foreclosure action under Index Number 15142/2015; and it is further

ORDERED that Prune's motion to dismiss (sequence 2) is denied without prejudice to renew.

This constitutes the decision and order of the court.

E N T E R,



Hon. Mark I Partnow,

J. S. C.