

Corning Fed. Credit Union v Georgilis

2019 NY Slip Op 35247(U)

November 14, 2019

Supreme Court, Queens County

Docket Number: Index No. 710044/16

Judge: Timothy J. Dufficy

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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
CORNING FEDERAL CREDIT UNION,

Plaintiff,

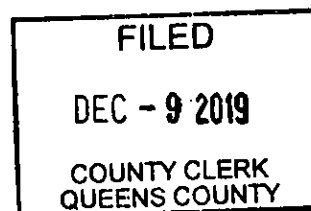
-against-

Index No.: 710044/16

Mot. Date: 8/3/19

Mot. Seq. 7

**STEVEN GEORGILIS, DIBENEDETTO
PROPERTIES, INC., JASON GEORGILIS,
QUONTIC BANK and JOHN DOE 1 and 2,
the Names of the "John Doe" defendants being
Fictitious and Unknown to Plaintiff, but intended
to be the Parties, if any, Having or Claiming an
Interest in the Real Property Described Herein,**



Defendants,

-and-

BOKF, NA,

Intervenor-Defendant.

-----X
The following papers were read on this motion by defendant Quontic Bank (Quontic) for summary judgment seeking dismissal of plaintiff's complaint as against it, pursuant to CPLR 3212.

PAPERS
NUMBERED

Notice of Motion - Affirmation - Exhibits	EF 229 - EF 237
Answering Affirmation - Exhibits	EF 238 - EF245
Reply Affirmation	EF 247 - EF48

Upon the foregoing papers, it is ordered that the motion by defendant Quontic Bank (Quontic) is denied, as follows:

In July, 2010, non-party, American Made Tire, Inc. (AMT) entered into a Mortgage Term Promissory Note (Mortgage Note) and Commercial Term Loan Note and Security Agreement (Commercial Note) with the plaintiff. Defendant Steven Georgilis guaranteed payment of the notes. Both notes were breached by AMT and Georgilis, resulting in an April

2017 Judgment, in Chemung County, New York, in favor of the Plaintiff, and against Georgilis, in an amount in excess of \$400,000.00, which Judgment has not been satisfied.

Prior to the commencement of the Chemung County action, in May, 2013, Georgilis owned a one-half interest in the property, located at 37-22 59th Street, Woodside, New York. In December, 2013, during the pendency of the Chemung County action, Georgilis transferred his one-half interest in the Woodside property to defendant DiBenedetto Properties (DiBenedetto) for \$30,000.00. In July, 2014, DiBenedetto transferred its one-half share of the Woodside property to Jason Georgilis for \$200,000.00. It is alleged that, in 2017, the appraised market value of the Woodside property was \$990,000.00.

A previous motion by the plaintiff was granted to the extent that the Complaint and Notice of Pendency were amended to add Quontic Bank as a party defendant, which amendment was completed and Quontic Bank has since appeared and answered. The branch of said motion seeking to set aside the transfer of property interest from Georgilis to DiBenedetto was denied, as premature, pending the inclusion and appearance of Quontic Bank. Thereafter, BOKF, N.A. (BOKF), as alleged assignee of Quontic Bank, successfully moved to intervene in this action.

Quontic now moves for summary judgment seeking dismissal of the action as against it, contending that it assigned the subject mortgage and note to BOKF prior to the service of the Amended Complaint adding Quontic Bank as a party defendant. In support of its motion, movant proffers an affidavit of George Lazaridis, Chief Lending Officer and President of its mortgage division; a MERS summary page; a Purchase Advice from BOKF; an undated Note Allonge; an Assignment of Mortgage, signed by Mr. Lazaridis on April 6, 2018, and allegedly recorded/filed on December 13, 2018. Plaintiff opposes, asserting that such evidence fails to remove all issues of fact with regard to Quontic Bank's entitlement to summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept

2008]. Summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; see *Charlery v Allied Transit Corp.*, 163 AD3 914 [2d Dept 2018]; *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

“[T]he proponent of a summary judgment motion 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” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Quontic has failed to demonstrate, *prima facie*, the absence of any material issues of fact in support of its argument for dismissal. Liberally construing the evidence in a light most favorable to the non-moving plaintiff, and affording it the benefit of every favorable inference (see *Lau v Margaret E. Pescator Parking, Inc.*, 30 NY3d 1025 [2017]; *Ruggiero v DePalo*, 153 AD3d 870 [2d Dept 2017]; *D’Esposito v Manetto Hill Auto Service, Inc.*, 150 AD3d 817 [2017]), movant’s evidence fails to prove that the assignment of the mortgage and note to BOKF was properly made prior to the issuance of the amended complaint herein, thereby relieving Quontic of any stake in the loan or in the subject property. As with the issue of standing to commence an action, the inverse would apply, *i.e.*, the lack of title to, or possession of, the mortgage and note would discharge Quontic from any obligation of the documents or property. The assignment of the underlying note, or physical delivery of said document to another, prior to the amended complaint herein, would have such unburdening effect (see, generally *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015]; *Bank of New York Trust Company, N.A. v Obadia*, – AD3d –, 2019 NY Slip Op. 07561 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Atedgi*, 170 AD3d 1079 [2d Dept 2019]).

Movant’s supporting evidence does not accomplish this goal. Contrary to Lazaridis’ assertions, the MERS summary and Purchase Advice fail to manifest, or even reference, the assignment. Similarly, the Note Allonge, submitted to evidence the transfer of the debt

instruments to BOKF, is undated, and there has been no proof offered that it was attached to the mortgage and note prior to the date of the amended complaint, leaving those issues extant (see *Bank of New York Mellon v Ettinger*, – AD3d –, 2019 NY Slip Op. 07759 [2d Dept 2019]). Further, while the Assignment of Mortgage, by its terms, specifically assigns the note, such document was signed, on behalf of Quontic, after the date of the Amended Complaint, by the same Mr. Lazaridis, who is attesting to the propriety of the transfer. Additionally, the proffered Recording document for such Assignment contains an incorrect “Document Date,” a facially incorrect “Assignor,” and was recorded in December, 2018 - over eight months after the Assignment was allegedly signed.

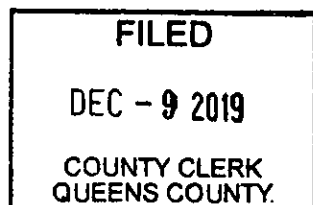
As such, the defendant’s “own submissions demonstrated that there are triable issues of fact” (*Yao Zong Wu v Zhen Jia Yang*, 161 AD3d 813, 814 [2d Dept 2018]; see *Karwowski v Grolier Club of City of N.Y.*, 144 AD3d 865 [2d Dept 2016]). Such issues of fact are sufficient to negate defendant’s *prima facie* entitlement to judgment (see *Cabrera v Arrow Steel Window Corp.*, 163 AD3d 758 [2d Dept 2018]; *Alvarez v Vingsan, L.P.*, 150 AD3d 1177 [2d Dept 2017]). As defendant has failed to substantiate its *prima facie* burden in the first instance, it is unnecessary to consider whether plaintiff’s opposition papers were sufficient to raise a triable issue of fact (see *Artis v. Lucas*, 84 AD3d 845 [2011]; *Ianello v. Vazquez*, 78 AD3d 1121 [2010]).

Movant’s remaining contentions and arguments are either without merit, or need not be addressed in light of the foregoing determination.

Accordingly, it is

ORDERED, that defendant Quontic Bank’s motion, seeking summary judgment herein, is denied.

Dated: November 14, 2019




TIMOTHY J. DUFFICY, J.S.C.