

Shaw Funding, LP v Cleveland St. LLC
2020 NY Slip Op 30360(U)
February 4, 2020
Supreme Court, Kings County
Docket Number: 500838/19
Judge: Lawrence S. Knipel
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At an IAS Term, Commercial Part 6 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 4th day of February, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X
SHAW FUNDING, LP,
Plaintiff,

- against -

CLEVELAND STREET LLC,
ANTHONY MYERS, a/k/a ANTHONY D. MYERS, et al.,
Defendants.
-----X

DECISION AND ORDER

Index No. 500838/19

Mot. Seq. No.

KINGS COUNTY CLERK
FILED
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NYSCEF No.

The following e-filed papers read herein:

Order to Show Cause, dated Jan. 8, 2020,	
Supporting Affirmation and Exhibits Annexed _____	<u>67-78, 79</u>
Affirmation in Opposition and Exhibits Annexed _____	<u>82-85</u>
Defense Counsel's Post-Oral Argument Letters to the Court, dated January 15 and 29, 2020 _____	<u>86-87</u>

✓
NO.

In this action to foreclose a mortgage on commercial real property, defendants Cleveland Street LLC (defendant) and Anthony Myers, also known as Anthony D. Myers (Myers), jointly move for an order: (1) pursuant to CPLR 3212, granting them summary judgment dismissing the complaint as against them on the ground that plaintiff Shaw Funding, LP (plaintiff) lacked “sufficient interest to commence this action and file [a] lis pendens” against the underlying real property; (2) pursuant to RPAPL 1331 and CPLR 5311, to vacate the lis pendens for failure to join an indispensable party (*i.e.*, Mission Dupree Ltd. [Mission]); (3) pursuant to the equitable powers of this court, adjusting “the debt’s default interest and late fees because they are punitive in nature” under the circumstances; and (4) pursuant to CPLR 3025 (b), granting them leave to amend their answer to assert an affirmative defense of lack of standing. Plaintiff opposes.

Background

On June 15, 2016, defendant executed and delivered to plaintiff and nonparty Mission a mortgage note in the principal amount of \$950,000 (the note), secured by a mortgage on the underlying real property (the mortgage). Myers guaranteed defendant's obligations under the note.

Initially, plaintiff held a 68.5% interest in the note, whereas Mission held the remaining 31.5% interest in the note. By assignment, dated Sept. 13, 2016, Mission sold the entirety of its interest in the note and mortgage to plaintiff (Motion, Ex. C). The assignment, unlike the mortgage, was unrecorded.

On Jan. 14, 2019, plaintiff commenced the instant action and, on the same date, filed a notice of pendency against the underlying real property. Plaintiff alleged (in ¶ 5 of its complaint) that it "has purchased [Mission's] 31.5% interest of the loan," and, as such, it "now has full 100% interest to enforce the . . . note and . . . mortgage." Plaintiff further alleged (in ¶ 7 of its complaint) that it "has possession of the . . . note, which note is secured by . . . [the] mortgage." A copy of the note and mortgage is annexed to the complaint. On Mar. 7, 2019, defendant and Myers (collectively, defendants) joined issue. By order, dated Mar. 5, 2019 and e-filed on Mar. 15, 2019, the Court (Vaughan, J.) appointed Bruno Codispoti, Esq., of Codispoti & Associates, P.C., 111 John Street, Suite 800, New York, NY 10038, as the temporary receiver for the underlying real property. By order to show cause, dated Jan. 8, 2020, defendants moved for the aforementioned relief in Seq. No. 2, whereas one day prior plaintiff had moved for summary judgment in Seq. No. 1. The Court heard oral argument on defendants' motion on Jan. 10, 2020 and reserved decision.

Discussion

The primary issue raised by defendants' motion is whether plaintiff has standing to foreclose. As defendants correctly point out, "a plaintiff has standing where it is both (1) the holder or assignee of the subject mortgage and (2) the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint" (*Aurora Loan Servs. LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]). Further, "as long as the plaintiff can establish its lawful status as assignee, either by written assignment or physical delivery, prior to the filing of the complaint, the recording of a written assignment after the commencement of the action does not defeat standing" (*id.*).

At this juncture, it is defendants' burden on their motion to establish prima facie that plaintiff lacked standing (*see Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59-60 [2d Dept 2015]). To defeat defendants' motion, plaintiff has no burden of establishing its standing as a matter of law; rather, defendants' motion will be defeated if, at a minimum, plaintiff's submissions raise a question of fact as to its standing (*id.* at 60).

Applying this standard here, defendants, as the moving parties, have failed to make a prima facie showing that plaintiff lacked standing. Defendants are not claiming that plaintiff was not the holder of the note prior to the commencement of this action. To the contrary, defendants' counsel concedes (in ¶ 3 [c] of her opening affirmation) that "[on] September 13, 2016 [*i.e.*, before the commencement of this action], Mission . . . signed an assignment of its interest to Shaw Funding, LP [*i.e.*, plaintiff]." That the assignment was not recorded is not fatal to plaintiff's case because "an assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery" (*U.S. Bank Natl. Assn. v Dellarmo*, 94 AD3d 746, 749 [2d Dept 2012] [internal quotation marks omitted]). Here, the

aforementioned allegations in the complaint, together with the sworn statement of plaintiff's managing director that "[p]laintiff . . . has physical possession of the [n]ote and had taken physical delivery prior to the commencement of the action,"¹ are sufficient to defeat defendants' motion.

In light of the foregoing, the remaining branches of defendants' motion are rendered academic.

Conclusion

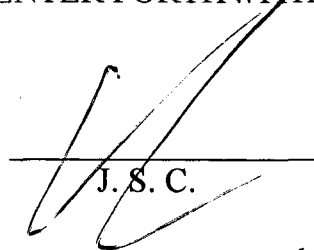
Accordingly, it is

ORDERED that defendants' motion in Seq. No. 2 is *denied in its entirety*; and it is further

ORDERED that plaintiff's counsel shall electronically serve a copy of this Decision and Order on defendants' counsel and the temporary receiver, and shall electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

This constitutes the decision and order of the Court.

ENTER FORTHWITH,


J. S. C.

Justice Lawrence Knipel

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¹ See Affidavit in Support of Motion of Summary Judgment, dated Oct. 8, 2019, ¶ 10, which affidavit is annexed as Exhibit C to Plaintiff's Affirmation in Opposition, dated Jan. 9, 2020.