

<b>Avant Capital 52 E. 64th St. LLC v 52 E. 64th St. LLC</b>
2020 NY Slip Op 30778(U)
March 11, 2020
Supreme Court, New York County
Docket Number: 850138/2019
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 14

*Justice*

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INDEX NO. 850138/2019

AVANT CAPITAL 52 EAST 64TH STREET LLC,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

52 EAST 64TH STREET LLC, NEW YORK CITY  
DEPARTMENT OF FINANCE, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE, NEW YORK  
CITY ENVIRONMENTAL CONTROL BOARD, JOHN DOE  
#1 THROUGH JOHN DOE #12,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for

JUDGMENT - SUMMARY

The motion by plaintiff for summary judgment and an order of reference is denied. The cross-motion by defendant 52 East 64th Street LLC ("Defendant") for summary judgment dismissing this case is granted.

**Background**

This foreclosure case arises out of a property owned by Defendant located at 52 East 64th Street in Manhattan. Plaintiff claims that Defendant failed to pay the principal sum of \$9.5 million on the fourth maturity date specified in the loan.

In opposition and in support of its cross-motion, Defendant claims that when plaintiff started this action, it had assigned its interest in the property to Northeast Bank. Defendant argues that plaintiff executed a collateral assignment dated March 30, 2017 (which was later recorded on June 26, 2019). Defendant contends that this assignment was terminated on

September 10, 2019, well after this litigation began. By its terms, the collateral assignment was governed by Massachusetts law, and defendants contends that said laws of Massachusetts hold that such an assignment completely divests the assignor of its rights in the collateral that is assigned. Defendant concludes that plaintiff lacked standing to prosecute this case when it commenced the action because of this collateral assignment.

In reply, plaintiff emphasizes that a collateral assignment is a pledge of an interest as collateral and is not, in fact, an assignment. Plaintiff characterizes it as a mortgage on a mortgage.

### Discussion

The key issue on this motion is whether the collateral assignment eliminated or so limited plaintiff's interest in the property such that plaintiff lacked standing when this case was commenced. In a mortgage foreclosure action, a plaintiff must establish that it possessed the note prior to the commencement of the foreclosure action (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 360-61, 12 NYS3d 612 [2015]).

The collateral assignment at issue states that plaintiff "hereby sells, assigns, transfers, pledges and conveys (subject to the terms of Section 1 below) unto Northeast Bank . . . those Collateral Assets described on Exhibit A attached hereto and all accounts, chattel paper, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letter of credit, month, supporting obligations and collateral security related to such Collateral Assets" (NSYCEF Doc. No. 44)

Section 1 provides that "This Assignment is a collateral assignment and is executed pursuant to, and is subject to all of the terms and conditions of, a certain Loan Agreement dated as of even date herewith, between Assignor, various affiliates of Assignor and Assignee" (*id.* ¶

1). The description of the collateral assets under Exhibit A of the agreement includes the “Amended and Restated Note dated May 4, 2017 made by [Defendant] in favor of Original Lender in the original principal amount of \$9,500,000.00” (*id.* exh A).

On the face of this document, Defendant met its prima facie burden to dismiss the case. The collateral assignment transfers the note to Northeast Bank—the agreement says “*sells, assigns, transfers pledges and conveys.*” And Defendant cites Massachusetts cases which hold that an assignment divests the assignor of its rights (NYSCEF Doc. No. 43 ¶ 5).

Although defendant’s cases address assignments and not collateral assignments, plaintiff’s opposition/reply does not address how Massachusetts law views a collateral assignment or distinguishes a collateral assignment from a plain assignment. Instead, plaintiff cites to centuries-old New York cases despite the fact that the collateral assignment expressly chose Massachusetts law.

Plaintiff also cites to the loan agreement between it and Northeast Bank, but only attaches a few pages of it (NYSCEF Doc. No. 46). This Court cannot base a decision on only a few pages of an agreement. Moreover, the provision cited by plaintiff (5.14) appears to require a borrower (the plaintiff here) which starts a foreclosure proceeding to sell the property to a designated REO entity (*id.*). The agreement bars the borrower from taking title to property secured by a collateral asset (*id.*). Because the Court does not have the full agreement, the Court has no idea whether Northeast Bank has to approve the commencement of a foreclosure proceeding or whether there is a procedure to permit a borrower (such as plaintiff) to pursue a foreclosure action on Northeast’s behalf. In other words, this provision standing alone does not rebut the terms of the collateral assignment which clearly states that the note which is the subject of this lawsuit was transferred to Northeast Bank and, therefore, that plaintiff did not have the note when this case

began. That lack of standing requires the Court to grant Defendant's cross-motion to dismiss this case.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is denied and the cross-motion by Defendant for summary judgment dismissing the case is granted, and the clerk is directed to enter judgment accordingly and to cancel the notice of pendency filed in connection with this case.

3/11/2020  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT

<input checked="" type="checkbox"/>	OTHER
<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: