

H&A Realty Assoc. LLC v LCP NPL 6 2018 LLC

2020 NY Slip Op 31978(U)

May 8, 2020

Supreme Court, Queens County

Docket Number: 706063/19

Judge: Allan B. Weiss

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This opinion is uncorrected and not selected for official publication.

FILED

**5/14/2020
10:04 AM**

Short Form Order

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**COUNTY CLERK
QUEENS COUNTY**

Present: Hon. Allan B. Weiss
Justice

IAS PART 2

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H&A REALTY ASSOCIATES LLC,

Plaintiff,

Index No. 706063/19

- against -

Motion Date: 11/6/19

Motion Seq. No.: 2

LCP NPL 6 2018 LLC and NATIONAL
BANK OF NEW YORK CITY, N.A.,

Defendants.

-----X

The following papers electronically filed (EF) and numbered below read on this motion by defendant, National Bank of New York, N.A., for an order dismissing plaintiff's complaint against said defendant pursuant to CPLR 3211 (a)(7) and/or CPLR 3212; cross-motion by the plaintiff for an order granting plaintiff leave to file and serve an amended complaint in the form provided.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits - Memo of Law	EF59 - EF78
Notice of CM - Affidavits - Exhibits - Memo of Law	EF78 - EF101
Memo of Law (opp to CM and further support of Motion)	EF103
Memo of Law (opp to CM by plaintiff)	EF104
Reply Affs. - Exhibits (support of CM)	EF105 -EF107

Upon the papers filed in support of the within motion and cross-motion and the papers filed in opposition or relation thereto, the within motion and cross-motion are determined as follows:

The parties' respective allegations, summarized as Points I and II below, were

previously set forth in this Court's order dated July 24, 2019.

I. The Complaint

Plaintiff H&A Realty Associates LLC (H&A) began this action by the filing of a summons and verified complaint on April 5, 2019. The complaint alleges, *inter alia*, defendant National Bank of New York City, N.A. (NB) made a loan to plaintiff H&A which the lender secured by a mortgage on premises known as 81-38 Baxter Avenue, Elmhurst, New York (the subject property). By letter dated February 6, 2019, NB demanded from H&A payment of \$621,775.29 in full satisfaction of the mortgage. Upon plaintiff H&A's receipt of the letter, it contacted NB's president to obtain written instructions concerning the payment of the balance due on the loan. Although NB promised to transmit wiring instructions, it did not do so promptly, and by email dated March 9, 2019, plaintiff H&A repeated its request for wiring instructions. By letter dated March 12, 2019, defendant LCP NPL6 2018 LLC (LCP), the assignee of the note and mortgage, demanded a sum to satisfy the loan which included an amount for default interest allegedly accruing from January, 2019 through March 12, 2019. LCP also demanded legal fees and late fees in the amount of \$25,658.54. On April 3, 2019, H&A sent LCP \$634,309.82, but the latter rejected payment in that amount as insufficient.

Plaintiff's first cause of action is for a judgment declaring that LCP has no right to default interest, late fees, or legal fees and compelling LCP to accept the amount of \$634,309.82 in full payment of the loan. The second cause of action alleges that NB breached the terms of the note and mortgage by refusing to provide wiring instructions to H&A and that the latter is entitled to indemnification from the former for the payment of default interest, late fees and legal fees. The third cause of action is for a judgment declaring that LCP is not entitled to default interest, late fees, or legal fees in connection with the note and mortgage. The fourth cause of action alleges that defendant LCP's actions slandered plaintiff H&A's title to the premises.

II. Defendants' Allegations

Defendant NB alleges that it loaned \$900,000 to plaintiff H&A on February 1, 2007, which it secured by a mortgage on the subject property, and that defendant NB and plaintiff H&A entered into five successive extension agreements which had the effect of extending the maturity date of the loan to January 2, 2019. Defendant NB further alleges that H&A failed to pay the loan on the maturity date, which constituted an event of default under the mortgage.

By letter dated February 6, 2019, NB notified H&A of the default and informed the

latter that, if it intended to pay the loan on or before February 15, 2019, it would have to remit the total sum of \$621,775.29. The letter further stated: “This letter shall further serve as notice that unless the Bank receives payment in full by February 15, 2019, the Bank may pursue its remedies. Failure to remit per the above by the specified date will result in interest accruing at the ‘Default Rate’ of 21% per annum effective as of February 16, 2019.” In response, H&A sent a check to defendant NB in the amount of \$5,159.27. NB returned the check to H&A with a letter stating: “[y]our loan matured on January 2, 2019 and was due in full.”

On March 5, 2019, defendant NB assigned the note and mortgage to defendant LCP which informed plaintiff H&A by letter that the March 12, 2019 payoff amount was \$688,736.67. On or about April 3, 2019, plaintiff H&A wired defendant LCP \$634,309.82. Defendant LCP returned the wire and sent an email informing H&A that the wire did not fully satisfy the outstanding balance due on the loan.

III. Subsequent Activity

Upon return of the wire transfer and receipt of the email from LCP advising that the wire did not satisfy the outstanding balance due on the loan, plaintiff commenced this action on April 5, 2019, and, by an order to show cause (Weiss, J.), dated April 11, 2019, H&A sought an equitable tolling of interest and an injunction directing LCP to accept H&A’s payment. H&A’s application was denied by the above-referenced order dated July 24, 2019.

H&A then sought and received from LCP updated payoff information via email dated August 6, 2019. By letter dated August 20, 2019, H&A advised LCP that it was prepared to payoff the loan in full, although it believed the payoff amount provided by LCP to be incorrect, and that it would not be discontinuing this suit challenging the amount sought by the payoff letter. H&A then paid off the loan, as evidenced by the satisfaction of mortgage executed August 22, 2019, and recorded/filed in the Office of the City Register of the City of New York on September 4, 2019.

IV. Present Applications

Nearly contemporaneous with the payoff of the loan, defendant NB brought the present motion seeking to dismiss H&A’s complaint pursuant to CPLR 3211 (a)(7), upon the claim that same fails to state a cause of action. Alternatively, NB seeks summary judgment and the dismissal of H&A’s complaint pursuant to CPLR 3212. Plaintiff H&A opposes and cross moves to amend its complaint.

V. Discussion and Determination

As to assessing whether H&A has pled a viable cause of action for breach of contract, “[w]hen assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff ... the benefit of every possible inference” (*AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005] [internal quotation remarks omitted]). The court’s sole criterion being “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]).

Insofar as this motion is brought by NB for dismissal of H&A’s claims against it, to wit, the second cause of action, the question is whether the facts concerning NB’s failure to provide timely wiring instructions to H&A, which resulted in an alleged default and resultant in additional interest, late fees, and legal fees fit within the legal theory of breach of contract. To establish a breach of contract, plaintiff is required to show the existence of a contract, plaintiff’s performance pursuant to the terms of the contract, defendant’s breach of the contract obligations, and damages resulting from the breach (*Reznick v. Bluegreen Resorts Mgt., Inc.*, 154 AD3d 891 [2d Dept. 2017]). In this regard, the Court finds that the elements of a breach of contract can be found in plaintiff’s pleadings, the parties having entered into the note and mortgage agreement, plaintiff H&A having sought to perform its payoff obligation by having requested information directing the manner in which it was to be done, defendant NB’s failure to provide timely wiring instructions being sufficient to plead a breach of NB’s contractual obligations, and resultant damages, namely, the amount due and owing to satisfy the note having been increased to the detriment of H&A (*see Preferred Group of Manhattan, Inc. v. Fabius Maximus, Inc.*, 51 AD3d 889 [2d Dept. 2008] [referee providently exercised his discretion in determining that the mortgagee not entitled collect interest at the default rate of 16% per annum, referee having properly considered the fact that the mortgagee’s failure to provide a timely and accurate payoff letter prevented the mortgagor from making the final balloon payment]).

In light of the preceding, that branch of defendant NB’s motion which seeks dismissal of plaintiff’s action insofar as asserted against it pursuant to CPLR 3211 (a) (7), is denied.

In addition, NB has not established its entitlement to summary judgment, the affidavits submitted by the principals for both parties making it apparent that issues of fact preclude the granting of summary judgment (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). On the present record, the parties have confirmed this Court’s determination in the order of July 24, 2019, that “there are issues of fact concerning the amount due under the

note and mortgage and whether this amount increased because the defendants breached the terms of the note and mortgage by not complying with the plaintiff's demand for wiring instructions."

The argument that plaintiff H&A's payment of the amount claimed due in the payoff letter of LCP requires dismissal of plaintiff's case pursuant to the voluntary payment doctrine, which bars the recovery of payments voluntarily made with full knowledge of the facts and in the absence of fraud or mistake of a material fact or law (*see Dillon v. U-A Columbia Cablevision of Westchester*, 100 NY2d 525 [2003]), is not dispositive under the present facts. To overcome the harsh effects of the doctrine, an appropriate protest must be lodged, that is, a written protest made at the time of payment (*see Neuner v. Newburgh City Sch. Dist.*, 92 AD2d 888 [2d Dept. 1983]). Such a protest must also indicate that H&A was reserving its rights when it made the payment (*see DRMAK Realty LLC v. Progressive Credit Union*, 133 AD3d 401 [1st Dept. 2013]), and must be communicated to the party receiving the payment (*cf Walton v. New York State Dept. of Correctional Services*, 13 NY3d 475 [2009]). Here, while plaintiff did pay the amount claimed in LCP's August 6, 2019 payoff letter on or about August 22, 2019, H&A's letter of August 20, 2019 did advise that the amount was disputed and that it would not comply with LCP's request that H&A discontinue the pending action, stating that such demand was "patently inappropriate and an obvious tactic designed to force [plaintiff H&A] to discontinue [its] challenges to the amount sought in the pay off." This Court finds such correspondence to have clearly advised defendants that H&A protested the amount claimed, and was reserving its rights, insofar as H&A refused to discontinue this action.

Consequently, defendant NB's alternative application for an order granting summary judgment and dismissing plaintiff's complaint is likewise denied.

Turning to plaintiff H&A's cross-motion for leave to amend its complaint, in the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely given, unless it appears that the proposed amendment is palpably insufficient or patently devoid of merit (CPLR 3025 [b]; *United Fairness, Inc. v. Town of Woodbury*, 113 AD3d 754 [2d Dept. 2014]). Additionally, a court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt (*see Lucido v. Mancuso*, 49 AD3d 220 [2d Dept. 2008]).

There being no apparent prejudice or surprise in the allegations set forth in the amended complaint, and this matter having not yet even been reached for a preliminary conference, plaintiff H&A's cross-motion for leave to serve an amended complaint is granted.

Accordingly, it is hereby

ORDERED that defendant NB's motion is denied in its entirety; and it is further

ORDERED that plaintiff H&A's cross-motion is granted to the extent that plaintiff H&A is granted leave to interpose an amended verified complaint, in the form provided, same is deemed served upon the defendants, and the defendants shall have thirty (30) days from service of the within order with notice of entry to serve their respective answers; and it is further

ORDERED that all other requested relief sought in the motion and cross-motion which is not specifically addressed herein is denied.

The foregoing constitutes the decision and order of this Court.

Date: May 8, 2020
D# 62



J.S.C.

FILED

**5/14/2020
10:04 AM**

**COUNTY CLERK
QUEENS COUNTY**