

Reich v 559 St. John's PL LLC
2020 NY Slip Op 32545(U)
August 3, 2020
Supreme Court, Kings County
Docket Number: 506861/19
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 August, 2020.

PRESENT:

HON. MARK I. PARTNOW,

Justice.

ALEXANDER REICH,

Plaintiff,

- against -

559 ST. JOHNS PL LLC, LATANYA PIERCE, LENNOX PACIFIC, LLC, NEW YORK CITY DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD AND "JOHN DOE" #1 through 12, the last twelve names being fictitious and unknown to plaintiff; the persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

DECISION AND ORDER

Index No. 506861/19

Mot. Seq. Nos. 1-2

The following e-filed papers read herein:

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

Opposing Affidavits (Affirmations) _____

Reply Affidavits (Affirmations) _____

NYSCEF Doc. Nos.¹

34-50, 54-62

63-76, 77-80

81, 82

Upon the foregoing papers, defendant 559 St. Johns Place, LLC (St Johns), moves in motion (mot.) sequence (seq.) one for an order: (1) dismissing this action in its entirety, and for such other and further relief as this court deems just and proper. Defendant St Johns also moves, in mot. seq. two, for an order vacating a September 11,

¹ New York State Courts Electronic Filing Document Numbers

2019 ex parte order appointing a receiver in this mortgage foreclosure action. Plaintiff Alexander Reich (Reich) has opposed both motions.

Background

(1)

On August 21, 2008, defendant St Johns, by member LaTanya (a/k/a Tanya) Pierce (Pierce), duly executed and delivered both a \$450,000 promissory note and a blanket mortgage naming Nechadim Corp. (Nechadim) as both lender and mortgagee. The mortgage, recorded in the City Registrar's Office on November 14, 2008, under City Registrar File Number (CRFN) 2008000442635, covers the premises located at 1308 Caton Avenue in Brooklyn (Block 5074, Lot 3).²

On November 13, 2014, Reich, as Nechadim Corp.'s President, executed an assignment of the August 21, 2008 mortgage, to himself, individually, "TOGETHER with the bond or note or obligation in said mortgage and the monies due and to grow thereon with the interest. . ." (see NYSCEF Doc. No. 4, at 2, annexed as exh C to complaint herein). This mortgage assignment was recorded in the City Registrar's Office on March 20, 2015, under CRFN 2015000096245, against all the properties subject to the blanket mortgage. However, Reich gave defendant Lennox Pacific LLC (Lennox), a written "collateral assignment" of the subject note and mortgage on December 12, 2014, as security for a loan he obtained from Lennox. This collateral

² This blanket mortgage covered either two or up to five properties, but it is undisputed that it covered the premises herein.

assignment of the \$450,000 note and mortgage was also recorded in the City Registrar's Office, on June 4, 2015, under GRFN 2015000189092, against all the properties.

(2)

Plaintiff's complaint alleges (NYSCEF Doc. No. 1, Reich complaint at 8, ¶ 34) that St Johns failed to make payment of interest and principal when due under the note and mortgage, i.e., the first payment due September 21, 2008 through the final payment due at maturity on February 21, 2009.

Reich, as Nechadim Corp.'s assignee, thereafter commenced an action by filing a summons and complaint in the Kings County Clerk's Office on February 19, 2015, under index number 501910/2015. Defendant City of New York, after receipt of process, filed an answer containing two affirmative defenses on March 6, 2015. St Johns served and filed an answer containing 15 affirmative defenses on April 1, 2015, and, 10 days later, filed a request for judicial intervention (RJI) as well as a motion for discovery and/or that action's dismissal. No other defendants have appeared in that action, and a default judgment was previously granted in Reich's favor against 423 Throop LLC., a defendant therein.

(3)

Reich sought to serve a supplemental summons and amended complaint while that motion was pending, but St. Johns rejected it. However, St Johns thereafter served an answer to the amended complaint with the same 15 affirmative defenses, including Reich's lack of standing to sue and statute of limitations, as well as a second motion to

dismiss that action. The dismissal motion was denied, but the original discovery motion was granted to the extent that Reich was to produce an original signature for exemplar purposes.

(4)

Reich, before producing the original note for exemplar purposes, moved for summary judgment dismissing defendants' answer. Defendant St Johns cross-moved for summary judgment under CPLR 3211 (a) (3) for plaintiff's lack of standing as well as for other grounds. An October 10, 2018 decision and order denied Reich's summary judgment motion and granted the cross motion³ (see NYSCEF Doc. No. 36, annexed as exhibit A to movant's mot. seq. one papers).

Reich commenced the instant action, while that case is on appeal, by filing a summons and complaint in the Kings County Clerk's Offices on March 28, 2019, under index number 506861/2019, pursuant to CPLR 205 (a). This time Reich annexed a copy of the promissory note, mortgage, mortgage assignment, collateral assignment and collateral security agreement to the complaint as exhibits A through E, inclusively (see NYSCEF Doc. Nos. 1-6). Moving defendant St Johns filed an answer, with counterclaims, on April 25, 2019 and defendant Pierce filed her pro se answer, also with

³ The decretal paragraph stated that the cross motion was "granted in its entirety" which has caused some confusion on defendant's part. The term "granted in its entirety" references the type of summary judgment given, not the grounds for it. Defendant had cross-moved in that prior action on two separate grounds, standing and statute of limitations. The decision and order, which granted summary judgment on standing and thus mooted reaching the statute of limitations grounds, is currently on appeal to the Second Department, has been perfected, but has not yet been calendered for oral argument.

counterclaims, on April 30, 2019. The instant motion practice ensued shortly thereafter. No other named defendants have appeared in this action.

Discussion

Defendant's Motion to Dismiss

(1)

Defendant St Johns seeks to dismiss this action in its entirety, pursuant to CPLR 3211 (a) (7), (a) (8) and (a) (10) (see August 9, 2018 affirmation of movant's counsel at 1, ¶ 2, annexed to movant's mot. seq. one papers). However, that affirmation's remaining paragraphs also argue for dismissal based upon various defenses contained in CPLR 3211 (a) (3), (a) (4) and (a) (5). Therefore, this decision and order addresses all these sections.

(2)

CPLR 3211 (a) (7) - Failure to State A Cause of Action

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851 [2d Dept 2012, as amended 2013] [internal quotation marks and citations omitted]).

"Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment,⁴ the question becomes whether the plaintiff has a

⁴Here, this motion is not being treated as one for summary judgment.

cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Atalaya Asset Income Fund II, LP v HVS Tappan Beach, Inc.*, 175 AD3d 1370, 1371 [2d Dept 2019] [internal quotation marks and citations omitted]).

A review of the detailed complaint easily satisfies the above requirements, as the complaint alleges the parties to the transaction, Reich's standing, the existence of the mortgage and note, and a default under same. Therefore, dismissal on this ground is denied.

(3)

CPLR 3211 (a) (8) - Lack of Personal Jurisdiction

St Johns seeks dismissal, not for itself, but on behalf of codefendant Pierce, who has not moved for such relief. Generally, there is a prohibition on one party raising the legal rights of another party (*see e.g. Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991]). The theory underlying this principle is that a party lacks standing to assert the rights of another.⁵ Here, St Johns clearly does not have standing to assert this defense for codefendant Pierce, as it is personal to her. Further, Pierce's defense of lack of personal jurisdiction has been waived for failing to move to dismiss within 60 days after serving her answer, pursuant to CPLR 3211 (e) (*see e.g. Generation Mtge. Co. v Medina*, 138 AD3d 688, 689 [2d Dept 2016]). Therefore, dismissal on this ground is also denied.

⁵ However, that rule does not apply where a party is an assignee of another party and "steps into the shoes of another party" (*see 28 N.Y. Prac., Contract Law § 15:2*).

(4)

CPLR 3211 (a) (10) - The Court Should Not Proceed in the Absence of a Person Who Should Be a Party

In the previous case, Lennox Pacific LLC (Lennox) was not made a party. Reich only presented the collateral assignment agreement, not the collateral security agreement. It appeared that Reich, without having the benefit of reviewing that collateral security agreement, had no standing as he assigned his interest in the note and mortgage to Lennox. However, Lennox has now been made a party and it appears all necessary parties to this action have been served.⁶

Further, St Johns does not identify the party allegedly missing from this action nor provide an explanation as to the necessity of that party. Therefore, dismissal on this ground is also denied.

(5)

CPLR 3211 (a) (3) - Lack of Capacity to Sue (i.e. No Standing)

“A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage or the holder or assignee of the underlying note at the time the action is commenced” (*US Bank N.A. v Guy*, 125 AD3d 845, 846 [2d Dept 2015] [internal quotation marks and citations omitted]). “[T]o commence a foreclosure action, a plaintiff must have a legal or equitable interest in the mortgage” (*Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d

⁶ Lennox’s interest derives from Reich, and thus Lennox could have been made either a defendant or co-plaintiff in this action.

636, 637 [2d Dept 2011]). A foreclosure plaintiff establishes a legal or equitable interest in the mortgage “by demonstrating that it is both the holder or assignee of the subject mortgage and 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” (*Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888 [2d Dept 2011] [internal quotation marks and citation omitted]). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” (*US Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]). “An assignment of a mortgage without assignment of the underlying note or bond is a nullity, and no interest is acquired by it” (*Deutsche Bank Natl. Trust Co.*, 88 AD3d at 637; *see also Bank of N.Y. v Silverberg*, 86 AD3d 274, 280 [2d Dept 2011]).

Where a defendant raises standing as a defense in a motion to dismiss, “the burden is on the moving defendant to establish, prima facie, the plaintiff’s lack of standing as a matter of law” (*Deutsche Bank Natl. Trust Co. v Murray*, 176 AD3d 1172, 1173 [2d Dept 2019], quoting, *New York Community Bank v McClendon*, 138 AD3d 805, 806 [2d Dept. 2016]). “To defeat a defendant’s motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff’s submissions raise a question of fact as to its standing” (*Deutsche Bank Natl. Trust Co.*, 176 AD3d at 1173, quoting *Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 60 [2d Dept 2015]). “Here, the defendants failed to meet their burden of establishing, prima facie, that the plaintiff lacked standing to commence this action. The attachment

of an endorsed note to the complaint in a foreclosure action is sufficient to demonstrate, prima facie, that the plaintiff was the holder of the note when the action was commenced” (*Deutsche Bank Natl. Trust Co.*, 176 AD3d at 1173, quoting *Bank of N.Y. Mellon v Chamoula*, 170 AD3d 788, 791 [2d Dept 2019]). In the prior action, the issue of standing was open to collateral attack as Reich did not attach the promissory note to the complaint. However, in this action, Reich not only disclosed in the complaint the series of transfers of the note, he annexed a copy of the promissory note, assignment, collateral assignment and collateral security agreement to the complaint at the time of filing. Therefore, dismissal on this ground is also denied.

(6)

CPLR 3211 (a) (4) - Another Pending Action between the Parties

CPLR 3211 (a) (4) states that

“[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires.”

Here, the other pending action is the appeal of the dismissal of the 2015 action before the Second Department.

“Dismissal is always discretionary, as the statute specifically provides that the court ‘may’ dismiss the action, not ‘shall.’ In exercising that discretion, courts may examine the circumstances under which the second action is brought” (Hon. Mark C.

Dillon, 2019 Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:15). Clearly, this action was instituted to correct the infirmities of the 2015 action, and should the decision in that action be affirmed, plaintiff would presumably be entitled to a six-month window to recommence pursuant to CPLR 205 (a), and if not affirmed and the prior action is reinstated, these actions can be consolidated as the parties in each action are not identical. Therefore, and in the court's discretion, dismissal based upon CPLR 3211 (a) (4) is denied at this time, with leave to renew at a later date after the appeal is decided.

(7)

CPLR 3211 (a) (5) - Statute of Limitations, Collateral Estoppel, and Res Judicata

“On a motion to dismiss pursuant to CPLR 3211 (a) (5), the moving [party] must establish, prima facie, that the time in which to commence an action has expired” (*Romanelli v Disilvio*, 76 AD3d 553, 554 [2d Dept 2010] [internal quotation marks and citations omitted]). “The burden then shifts to the [nonmovant] to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies” (*id.*).

“The statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment, or from the time the mortgagee is entitled to demand full payment, or from the date the mortgage debt has been accelerated (*Plaia v Safonte*, 45 AD3d 747, 748 [2d Dept 2007]). It is “well settled that, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due

and the Statute of Limitations begins to run on the entire debt” (*EMC Mtge Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001] [internal citations omitted]). “Once the mortgage debt [is] accelerated, the borrowers’ right and obligation to make monthly installments ceased and all sums became immediately due and payable” (*Federal Natl. Mtge Assn. v Mebane*, 208 AD2d 892, 894 [2d Dept 1994] [internal citation omitted]).

The statute of limitations is six years from the due date of each unpaid installment, or if acceleration has occurred, six years from the date of acceleration on the entire balance then due and owing (*see Goldman Sachs Mtge. Co. v Mares*, 135 AD3d 1121, 1122 [3d Dept 2016]; *see also*, CPLR 213 [4]). According to the complaint, the subject mortgage was given on August 21, 2008, and was a six-month balloon mortgage. Defendants failed to make any payments, the first being due on September 21, 2008. By its terms, the note and mortgage were accelerated and the principal and accumulated interest became due on February 21, 2009, and since there is no evidence that acceleration occurred before that date, the statute of limitations on the principal balance expired on February 21, 2015.

The prior action on appeal was commenced on February 19, 2015, two days before the expiration of the statute of limitations.⁷ Therefore, the prior action was timely.

⁷ It appears that the statute of limitations has run on the individual monthly interest payments between September 2008 and January 2009. However, pursuant to paragraphs 9 and 9a of the mortgage rider, it appears defendants have waived any defense based upon the statute of limitations, as those paragraphs each state that [t]he MORTGAGORS expressly waive[] the right to interpose any defense based on any statute of limitations or any claim of laches” (*see* NYSCEF Doc. No. 48, Mortgage with Rider at 9-10, annexed as exhibit M to affirmation of movant’s counsel accompanying the mot. seq. one papers).

CPLR 205 (a), entitled new action by plaintiff, provides:

“If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.”

The prior action was dismissed on October 23, 2018, the day the order was entered in the Kings County Clerk’s Offices. This action was commenced on March 28, 2019 by purchase of an index number and filing of the summons and complaint with the Kings County Clerk’s Offices. Reich, under the CPLR 205 (a) time frame, had until April 23, 2019 to commence this action; therefore it is timely under the statute.

However, St Johns argues that the prior action was dismissed on the merits and therefore, CPLR 205 (a) does not apply. St Johns claims that since the motion, which resulted in the dismissal order, was one for summary judgment pursuant to CPLR 3212, and not dismissal pursuant to CPLR 3211, it is the equivalent of a trial and therefore has preclusive finality under both the principles of res judicata and collateral estoppel. St.

Johns further argues that since it mentioned so many different grounds in their moving papers, relief was granted on those grounds even though the decision and order never reached those arguments. Such a position is without merit (*see* n 3, *supra*).

The sole grounds for dismissal of the prior action was based on Reich's apparent lack of standing as a result of assigning the note and mortgage to Lennox on November 13, 2014. The "granting in its entirety" language contained in the decretal paragraph referenced the *type* of summary judgment granted (i.e. full or partial), and not the grounds upon which it was granted. Similarly, "[u]nder the last antecedent rule of statutory construction . . . , relative and qualifying words or clauses in a statute are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to others more remote" (*Colon v Martin*, 35 NY3d 75, 2020 NY Slip Op 02681, *1 [May 7, 2020] [internal quotation marks and citations omitted]).

Such a dismissal on standing grounds falls under CPLR 3211 (a) (3) as a lack of capacity to sue (*see Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007] ["The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution"]). Dismissal on such grounds is not a final judgment on the merits and therefore, does not have either *res judicata* or collateral estoppel effect (*see Brown v Lutheran Med. Ctr.*, 107 AD3d 837, 838 [2d Dept. 2013]).

The other three grounds under CPLR 205 (a) are likewise inapplicable, and dismissal on this ground is thus also denied.

(8)

Defendant's Motion To Vacate the Appointment of a Receiver

On September 11, 2019, the court (Vaughan, J.), signed an order appointing a receiver in this action. The application made by Reich was ex parte, after service of the summons and complaint, and pursuant to paragraphs 5 and 13 of the mortgage and paragraphs 10 and 22 of the mortgage rider. St Johns objects in mot. seq. two to the order — in addition to the grounds contained in its motion to dismiss in mot. seq. one — based on CPLR 6401 (a).⁸ Specifically, St Johns claims that there is no need for a receiver since the premises is owner occupied and not in danger of being “removed from the state, or lost, materially injured or destroyed.”

⁸ CPLR 6401 (a) states

“Appointment of temporary receiver; joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party.”

Reich counters that the application was not made pursuant to or governed by CPLR 6401 (a), but Real Property Law (RPL) § 254 (10)⁹ and Real Property Actions and Proceedings Law (RPAPL) § 1325 (1)¹⁰ and the aforementioned mortgage paragraphs.¹¹

It is a basic tenant of statutory construction that when two or more statutes appear to control, the more specific provisions [RPL § 254 and RPAPL § 1325 (1)] control the more general one [CPLR 6401 (a)] (*see Edmond v United States*, 520 US 651, 657 [1997]; *see also Islam v Option One Mortg. Corp.*, 432 F Supp 2d 181, 192 [D Mass 2006]). Further, the language of CPLR 6401 (a) seems to support the conclusion that it was intended for personal chattel, as real property cannot be relocated outside the state,¹² whereas both RPL § 254 and RPAPL § 1325 (1) specifically deal with real property.

⁹ RPL § 254 entitled “Construction of clauses in mortgages and bonds or notes,” provides in subparagraph 10 that: “Mortgagee entitled to appointment of receiver. A covenant ‘that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver,’ must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness.”

¹⁰ RPAPL § 1325 (1) states that “[w]here the action is for the foreclosure of a mortgage providing that a receiver may be appointed without notice, notice of a motion for such appointment shall not be required.”

¹¹ § 5 of the mortgage and § 10 of the mortgage rider both track the language of RPL § 254 exactly.

¹² While real property can be lost due to deed theft, it cannot be lost by misplacement.

Under those statutes, as well as the applicable mortgage paragraphs, Reich is entitled to have a receiver appointed without notice to St Johns or the other defendants. Therefore, this motion is denied in its entirety.

(9)

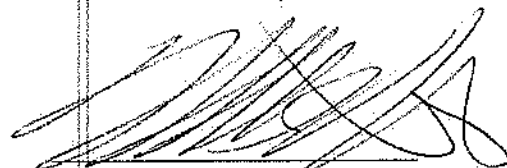
St Johns remaining contentions concerning the allegedly fraudulent documents utilized by Reich in this action, specifically the collateral assignment and collateral security agreement, concern factual issues more appropriately resolved at trial, as opposed to a motion to dismiss. Additionally, St Johns' contention that there is no difference between "effectuated" and "complete" in the statutes pertaining to service of process is also without merit. Accordingly, it is

ORDERED that St. Johns motion, mot. seq. one, to dismiss Reich's complaint, is denied in its entirety; and it is further

ORDERED that St. John's motion, mot. seq. 2 to vacate the order appointing a receiver in this matter is also denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



Hon. Mark I. Partnow
J. S. C.