

Stern-Obstfeld v Nationstar Mtge. LLC

2020 NY Slip Op 32790(U)

August 24, 2020

Supreme Court, New York County

Docket Number: 651804/2019

Judge: Debra A. James

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.

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

PRESENT: HON. DEBRA A. JAMES

PART

IAS MOTION 59EFM

Justice

-----X

INDEX NO. 651804/2019

KATIE STERN-OBSTFELD, SAMUEL STERN-OBSTFELD,

MOTION DATE 03/13/2020

Plaintiffs,

MOTION SEQ. NO. 002 003

- v -

NATIONSTAR MORTGAGE LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 50, 51, 52, 53, 54, 63, 122, 123, 124, 127

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 125, 126

were read on this motion to/for

JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that the motion, pursuant to CPLR 3212, of defendant Nationstar Mortgage LLC (motion sequence number 002) is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of plaintiffs Katie Stern-Obstfeld and Samuel Stern-Obstfeld for a summary judgment declaring that defendant failed to comply with respect to UCC § 9-611(f) (motion sequence number 003) is denied; and it is further

ORDERED that pursuant to CPLR 3212(c), it appearing to the court that triable issues of fact have arisen on defendant's cross motion for summary judgment based upon its affirmative defense pursuant to CPLR 3211(b) that irrefutable documentary evidence defeats plaintiffs' claim that the Notice of Sale was neither compliant nor timely served on plaintiffs pursuant to UCC § 9-611(f) with respect to the public sale of the shares allocated to apartment number 11G of 8 East 83rd Street, New York, New York that took place on September 20, 2019; and it is further

ORDERED that a trial of the issues regarding such Notice of Sale shall be had before the court; and it is further

ORDERED that plaintiffs shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

DECISION

In this declaratory judgment action, defendant Nationstar Mortgage LLC (Nationstar) moves for summary judgment to dismiss the complaint (motion sequence number 002), and plaintiffs Katie Stern-Obstfeld and Samuel Stern-Obstfeld (plaintiffs) move separately for summary judgment on the complaint (motion sequence number 003). Both motions are consolidated for disposition.

Background

This action is the latest round of litigation concerning unit 11G in the residential cooperative apartment building located at 8 East 83rd Street in the County, City and State of New York (the building) (see notice of motion [motion sequence number 003], Rosengarten affirmation, exhibit A [complaint, ¶¶ 1-12]).

Plaintiffs are the unit's owners (*id.*). Defendant Nationstar is the loan servicer for non-party Amalgamated Bank (Amalgamated), which currently holds both the note and the security agreement that are secured by the apartment's shares, and which also holds the apartment's stock certificate and proprietary lease (see notice of motion [motion sequence number 002], Harris aff, ¶¶ 1-14).

Plaintiffs seek to stop Nationstar from closing the non-judicial sale of the unit's shares from Nationstar Mortgage to non-party HSBC Bank USA, N.A. (HSBC).

The circumstances of this case have been discussed at length in a number of decisions in the two prior actions in this court (Index Numbers 116182/09 and 154176/16), and in the proceeding in the United States Bankruptcy Court for the Southern District of New York (Case Number 16-13395-cgm).

The discrete facts that are relevant to the disposition of these motions are as follows.

Plaintiffs defaulted in their payments on the note that secures the apartment's shares on September 1, 2008, and never cured that default (see notice of motion [motion sequence number 002], Harris aff, ¶¶ 11-13).

On December 21, 2015, Nationstar served each plaintiff with a "90-day pre-disposition notice," which is required by UCC § 9-611 before a non-judicial sale of the shares of a co-op apartment unit can be held (see notice of motion [motion sequence number 003], Harris aff, exhibit 15). The only UCC § 9-611 Notice of Sale before this court is dated December 21, 2015. There is also a Notice of Public Auction that is undated that states that the shares sale date is "on April 2, 2019, 10:00 AM in the Rotunda of the New York County Courthouse, 60 Centre Street, New York, New York" (NYSCEF Document No. 7,

Exhibit C to the complaint.) Also attached to the complaint is a letter dated February 22, 2019, in which Defendant's counsel wrote plaintiffs, setting forth the total amount due under the note and mortgage and stating that the public sale would take place on April 2, 2019 (NYSCEF Document Number 6, Exhibit B to the complaint.)

On March 27, 2019, plaintiffs commenced this (third) action for a declaratory judgment to stop Nationstar's (third) attempt to hold a non-judicial sale of unit 11G's shares (id., Rosengarten affirmation, exhibit A [complaint]). Plaintiffs' complaint was accompanied by an order to show cause that sought a temporary restraining order as well as a preliminary injunction to halt such sale to take place on April 2, 2019 (id., Rosengarten affirmation, exhibit D).

On March 28, 2019, this court granted the temporary restraining order set forth in such order to show cause, which stated that "[p]ending the hearing of this motion, it is ORDERED that the auction of the shares of the cooperative apartment located at 8 East 83rd Street, Unit 11G, New York, New York is stayed." The only public auction sale date that existed at that time was for April 2, 2019.

On July 29, 2019, this court issued a decision that vacated the temporary restraining order and denied plaintiffs' request for a preliminary injunction, on the grounds that plaintiffs had

demonstrated no irreparable harm as the issuance of the temporary restraining order provided plaintiffs full relief from the auction sale in question, i.e. the public auction set for April 2, 2019 (id., Rosengarten affirmation, exhibit E). With respect to merits of the complaint, the court stated in its opposition papers to the application for a preliminary injunction, Nationstar "fails to refute the alleged infirmities in the 90 days-notice since it refers to but did not append any copy of such notice to its opposition papers" (id.).

On November 19, 2019, the parties entered into a preliminary conference order (PCO) to set a discovery schedule in this action (id., Rosengarten affirmation, exhibit F). The PCO stated that "Parties agree that no discovery is required in this matter. The non-judicial sale scheduled for September 20, 2019 proceeded to sale . . . [but Nationstar] will not proceed with the closing of said sale until the court decides the dispositive motions that will be filed on or before January 17, 2020" (id.).

There is no dispute that the non-judicial sale of the apartment's shares was, in fact, held on September 20, 2019, when HSBC and Amalgamated executed a "binding contract," although no closing has yet been scheduled (id., Harris aff, exhibit 13).

That sale took place approximately three and one-half months after the dissolution of the temporary restraining order staying the sale scheduled for April 2, 2019. At no time did plaintiffs amend their complaint to append any purported notice of public auction on any date other than April 2, 2019, let alone file a new order to show cause to stay the sale on September 20, 2019. As set forth in the PCO, the plaintiffs and defendant submitted their respective summary judgment motions on January 17, 2020 (see notice of motion [motion sequence number 002]; notice of motion [motion sequence number 003]), and thereafter, each side filed opposition and reply papers on February 26, 2020 as well, at which point this matter was fully submitted (see Rosengarten affirmation in opposition [motion sequence number 002]; Ricciardi affirmation in opposition [motion sequence number 003]; Rosengarten reply affirmation [motion sequence number 003]).

Discussion

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g., Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); Sokolow, Dunaud, Mercadier & Carreras v Lacher, 299 AD2d 64, 70 (1st Dept 2002). Once this showing 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 material issues of fact which require a trial of the action. See e.g., Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340, 342 (1st Dept 2003).

Plaintiffs seek a declaratory judgment that New York law recognizes as a discretionary remedy that may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; see e.g., Jenkins v State of N.Y., Div. of Hous. & Community Renewal, 264 AD2d 681 (1st Dept 1999). The complaint specifically seeks declarations that: (1) Nationstar "may not conduct a sale of the subject cooperative apartment without complying with UCC § 9-611"; and (2) "UCC § 9-611 requires that plaintiffs be given 90-days notice prior to selling the cooperative unit, which notice must include the statement required by UCC § 9-611 (f) (3), and be printed as mandated by UCC § 9-611 (f) (2)" (see notice of motion [motion sequence number 002], exhibit V [complaint] at 3).¹

¹ The complaint also requested an injunction against Nationstar holding the non-judicial sale scheduled on April 2, 2019, as set forth in the Notice of Sale appended thereto, and as set forth in paragraph 7 of the complaint. See notice of motion (motion sequence number 002), exhibit V (complaint) at 3. However, the court's July 29, 2019 decision denied that request, as moot. Id., exhibit 24.

Defendant cross moves for a summary judgment declaring that the public sale that took place on September 20, 2019 is valid based upon its affirmative defense that irrefutable documentary evidence defeats plaintiffs' claim that defendant failed to comply with UCC § 9-611 (f).

UCC § 9-611 (f) provides as follows:

"(f) Additional pre-disposition notice for cooperative interests.

"(1) In addition to such other notification as may be required pursuant to subsection (b) of this section and section 9-613 of this article, a secured party whose collateral consists of a residential cooperative interest used by the debtor and whose security interest in such collateral secures an obligation incurred in connection with financing or refinancing of the acquisition of such cooperative interest and who proposes to dispose of such collateral after a default with respect to such obligation, shall send to the debtor, not less than ninety days prior to the date of the disposition of the cooperative interest, an additional pre-disposition notice as provided herein.

"(2) The notice required by this subsection shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the notice required by subsection (b) of this section, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page.

"(3) The notice required by this subsection shall appear as follows:

"Help for Homeowners at Risk of Foreclosure
New York State Law requires that we send you this information about the foreclosure process. Please read it carefully.

"Notice

"You are in danger of losing your home. You are in default of your obligations under the loan secured by your rights to your cooperative apartment. It is important that you take action, if you wish to avoid losing your home.

"Sources of Information and Assistance

"The State encourages you to become informed about your options, by seeking assistance from an attorney, a legal aid office, or a government agency or non-profit organization that provides counseling with respect to home foreclosures.

"To locate a housing counselor near you, you may call the toll-free helpline maintained by the New York State Banking Department at (enter number) or visit the Department's website at (enter web address).

"One of these persons or organizations may be able to help you, including trying to work with your lender to modify the loan to make it more affordable.

"Foreclosure rescue scams

"Be careful of people who approach you with offers to 'save' your home. There are individuals who watch for notices of foreclosure actions or collateral sales in order to unfairly profit from a homeowner's distress. You should be extremely careful about any such promises and any suggestions that you pay them a fee or sign any papers that transfer rights of any kind to your cooperative apartment. State law requires anyone offering such services for profit to enter into a contract which fully describes the services they will perform and fees they will charge, and which prohibits them from taking any money from you until they have completed all such promised services."

UCC § 9-611 (f).

As the PCO stated "the non-judicial sale scheduled for September 20, 2019 proceeded to sale," but the parties agreed

that "no discovery is required in this matter" and that "defendant will not proceed with the closing of said sale until the court decides the dispositive motions." (see notice of motion [motion sequence number 003], Rosengarten affirmation, exhibit F [PCO]).

In deciding the current motions, the court's task is complicated as it must consider the effect of the fact of the sale having proceeded, with the March 28, 2019 temporary restraining order only staying and effectively cancelling the initial public auction date of April 2, 2019, the only sale date challenged in the pleadings before this court.

In summary, this court finds that neither party, on their respective motion for summary judgment, comes forward with prima facie proof of their claim or defense with respect to the timeliness of service or the adequacy of the content of the UCC § 9-611(f) Notice of Sale for the public auction that took place on September 19, 2020, and that there must be an immediate trial to resolve such issues of fact. See Waithe v Citigroup, Inc., 42 Misc.3d 1205(A) (Sup. Ct., Kings Co. 2013). The plaintiffs' acquiescence in the auction sale that took place on September 19, 2020, and failure to amend their complaint with respect to any subsequent notices does not non-suit them, as each side, upon resting their evidence at trial, may move to conform the

pleadings to the proof. See Gonfiantini v Zino, 184 AD2d 368 (1st Dept. 1992).

Nationstar's motion advances several untenable arguments. First, Nationstar asserted that "[p]laintiffs' sole claim in their complaint is that they were not served with the 90-day notice" (see notice of motion [motion sequence number 002], Ricciardi affirmation, ¶ 24). This court disagrees.

First, the complaint states, in pertinent part:

"8. Toward the end of January 2019, defendant mailed to plaintiffs a notice of default and Notice of Sale of the co-op apartment.

"9. The notices were sent less than 90 days prior to the auction date in violation of UCC § 9-611.

"10. The notice did not contain the statement required by UCC § 9-611 (f) (3).

"11. In addition, the notice did not comply with UCC § 9-611 (f) (2)" (id., Harris aff, exhibit 22 [complaint], ¶¶ 8-11).

In such paragraphs, plaintiffs explicitly acknowledge that they were served with the required 90-day UCC § 9-611 notices in January 2019, but they allege that such notices were defective.

Second, despite plaintiffs' acknowledgement that they received the subject notices in January 2019, Nationstar only presented proof of the service of the notices which it effected on plaintiffs in 2015 and 2016 (see, notice of motion [motion sequence number 002], Harris aff, exhibits 27-32). Nationstar's

moving papers do not contain any proof of service of 90-day notices in 2019 at any point before the September 20, 2019 (third) non-judicial sale of apartment 11G's shares was scheduled to be held.² Instead, Nationstar argues, without any supporting authority, that "[u]nlike a 90-day notice pursuant to RPAPL § 1304 in a judicial foreclosure, there is no expiration of a 90-day notice served pursuant to UCC § 9-611 (f)" (see notice of motion [motion sequence number 002], Ricciardi affirmation, ¶ 26). The text of UCC § 9-611 (f) does not contain any such provision, and none of the case law that interprets such statute has adopted that purported rule.³

Plaintiffs' arguments on their motion do not fare any better. First, plaintiffs contradict the complaint's allegation that Nationstar served the 90-day UCC § 9-611 notices on them "toward the end of January 2019," by claiming that, "by letter

² The court queries whether Nationstar's February 22, 2019 letter was accompanied by a statutorily compliant 90-day UCC § 9-611 notice, and, whether Exhibit C, presumably, as referred to in the complaint, Nationstar's "end of January 2019" UCC § 9-611 notice included such an attachment. *Id.*, Rosengarten affirmation, exhibit C; Harris aff, exhibits 15-20.

³ *Stern-Obstfeld v Bank of Am.*, 30 Misc 3d at 906, *supra*, refutes Nationstar's counsel's unsupported assertion that "[u]nlike a 90-day notice pursuant to RPAPL § 1304 in a judicial foreclosure, there is no expiration of a 90-day notice served pursuant to UCC § 9-611 (f)." See notice of motion (motion sequence number 002), Ricciardi affirmation, ¶ 26. Instead, such opinion holds that compliance with UCC § 9-611 (f) is a "condition precedent" to a non-judicial sale of co-op shares, which a secured party must meet by serving successive notices, if necessary, before it can conduct such a sale.

dated February 22, 2019 and notice of sale, [Nationstar] notified plaintiffs that it would conduct an auction of the co-op on April 10, 2019" (see notice of motion [motion sequence number 003], Rosengarten affirmation, ¶ 4; exhibit C). The court notes that April 2, 2019 is indeed less than 90 days from February 22, 2019; however, it agrees with plaintiffs that this is irrelevant because the proposed April 2, 2019 non-judicial sale was (i) first stayed by the order to show cause that was signed on March 28, 2019, and (ii) later held to have been cancelled, nunc pro tunc by the court's decision of July 29, 2019 on the preliminary injunction motion (id., Rosengarten affirmation, ¶¶ 5-6; exhibits D, E.)

More troublesome is plaintiffs' next assertion that "by letter and notice of sale dated August 27, 2019, defendant notified plaintiffs that it would conduct an auction of the co-op on September 20, 2019" (see notice of motion [motion sequence number 003], Rosengarten affirmation, ¶ 8). Although such a notice would indeed provide less than 90-days notification of the impending non-judicial sale, the court cannot resolve that issue because plaintiffs have not presented a copy of any letter or notice dated August 27, 2019. Indeed, it appears that there is no proof of the existence of this notice (or of proof of its service) other than plaintiffs' counsel's uncorroborated statement that it was sent. It is well

settled that "[a]n attorney's affidavit is of no probative value on a summary judgment motion unless accompanied by documentary evidence which constitutes admissible proof." Adam v Cutner & Rathkopf, 238 AD2d 234, 239 (1st Dept 1997). Therefore, the court cannot consider counsel's statement about the alleged August 27, 2019 letter and notice and must likewise reject plaintiffs' argument that that alleged letter and notice were defective because they "were mailed less than ninety days prior to the proposed sale" (see notice of motion [motion sequence number 003], Rosengarten affirmation, ¶ 14). For the same reason, the court likewise rejects plaintiffs' assertion that the alleged August 27, 2019 letter and notice were defective because the notice failed to incorporate the font size requirement specified in UCC § 9-611 (f) (2) or the specified language set forth in UCC § 9-611 (f) (3) (id., Rosengarten affirmation, ¶¶ 13-20). As plaintiffs did not present a copy of the alleged August 27, 2019 letter and notice, there is no way to assess their assertions.

Finally, this court rejects plaintiffs' argument that the July 29, 2019 decision disposing of their original order to show cause (motion sequence number 001) constitutes "law of the case," and "is binding on the parties and establishes plaintiffs' right to summary judgment" (see notice of motion [motion sequence number 003], Rosengarten affirmation, ¶¶ 21-

22). Such decision, which was not resolving a dispositive motion but only one seeking a provisional remedy, found that, with respect to plaintiffs' likelihood of prevailing on the merits of their claim, that "defendant fails to refute the alleged infirmities in the 90 days-notice since it refers to but did not append any copy of such notice to its opposition papers" (id.; exhibit E). It was not a substantive ruling on the legal sufficiency (or lack thereof) of Nationstar's UCC § 9-611 notices. Although Nationstar's current moving papers suffer from the same lack of evidence, there is no justification for plaintiffs' assertion that the (still missing) UCC § 9-611 notices fail to meet the requirements of UCC § 9-611 (f) (2) and (3). Without a copy of the alleged notice to examine, the court cannot determine whether it complies with the statute. Therefore, plaintiff's "law of the case" argument is of no avail.

As observed earlier, plaintiffs seek declarations that: (1) non-judicial sales of the shares of defaulted cooperative apartments cannot be held absent compliance with UCC § 9-611; and (2) UCC § 9-611 (f) imposes a 90-day notice requirement that includes certain obligatory language and certain font specifications (see notice of motion [motion sequence number 002], exhibit V [complaint] at 3).

Should the plaintiffs, at trial, prove by a fair preponderance of the credible evidence that defendant failed to send a timely and adequate Notice of Sale under UCC § 9-611 (f), the non-judicial sale must be set aside, and declared invalid. See Arthur v 1809-15 7th Avenue Housing Development Fund Corp., 150 AD3d 447 (1st Dept. 2017). Should defendant meet its burden and establish by irrefutable documentary evidence proof of such notices and testamentary proof of service thereof in compliance with UCC §9-611(f), the court shall issue a declaration validating the sale. See Chase v Wells Fargo Bank, N.A., 175 AD3d 1460 (2nd Dept. 2010).

8/24/2020

DATE

Debra A. James
 DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE