

**Zebra Stripes Catchall LLC v Quincy Marcus 504
Dev. Corp.**

2021 NY Slip Op 32167(U)

November 1, 2021

Supreme Court, Kings County

Docket Number: Index No. 523526/20

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 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 1st day of November, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
ZEBRA STRIPES CATCHALL LLC,

Plaintiff,

- against -

Index No. 523526/20

QUINCY MARCUS 504 DEVELOPMENT CORP.;
CHERYL IGHODARO; CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD; CITY OF
NEW YORK TRANSIT AUTHORITY; NEW YORK
CITY DEPARTMENT OF FINANCE; NEW YORK
DEPARTMENT OF TAXATION & FINANCE; NEW
YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT; ALEXANDRA
PERDOMO; PARK AVENUE BUILDING & ROOFING
SUPPLIES, INC.; PARK AVENUE BUILDING &
ROOFING SUPPLIES, LLC; THE CITY OF NEW
YORK and JOHN DOE #1 through JOHN DOE #99,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

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

96-111

Opposing Affidavits (Affirmations) _____

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Reply Affidavits (Affirmations) _____

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Upon the foregoing papers in this action to foreclose a commercial mortgage, plaintiff Zebra Stripes Catchall LLC (Zebra) moves (in motion sequence [mot. seq.] four) for an order: (1) granting it summary judgment against defendants City of New York (City)

and New York City Department of Housing Preservation and Development (HPD) (collectively, answering defendants), pursuant to CPLR 3212; (2) granting it a default judgment against the non-answering and non-appearing defendants, pursuant to CPLR 3215; (3) appointing a referee to compute the amount due under the note and mortgage and to examine and report whether the properties may be sold, pursuant to RPAPL 1321; and (4) amending the caption to delete the “John Doe” defendants.

Background

On November 24, 2020, Zebra commenced this action seeking to foreclose on six properties in Brooklyn (Properties)¹ that are owned by defendant Quincy Marcus 504 Development Corp. (Quincy or borrower) based on its alleged failure to pay the amounts due under a June 20, 2007 mortgage in the principal amount of \$1,560,826.00, which was recorded on July 13, 2007 at CRFN 2007000359593. The original complaint alleged that defendant HPD was named as the holder of a subordinate mortgage.

On December 28, 2020, HPD answered the complaint, denied that it held a subordinate mortgage, asserted that the City holds a June 20, 2007 mortgage in the amount of \$3,741,674 encumbering the Properties, which was recorded (City Mortgage).

¹ Zebra’s mortgage encumbers the Properties at: (1) 66 Lewis Avenue in Brooklyn (Block 1588, Lot 38) (Lewis Property); (2) 116 Marcus Garvey Boulevard in Brooklyn (Block 1769, Lot 41); (3) 277 Quincy Street in Brooklyn (Block 1803, Lot 76); (4) 336 Throop Avenue in Brooklyn (Block 1776, Lot 44); (5) 67 Stuyvesant Avenue in Brooklyn (Block 1599, Lot 4); and (6) 16 Menahan Street in Brooklyn (Block 3313, Lot 4).

By a December 30, 2020 stipulation, Quincy, the borrower, and Cheryl Ighodaro, the guarantor, appeared in the action and waived all defenses to the foreclosure of the Properties.

On February 18, 2021, the City and HPD moved to dismiss the complaint on the grounds that documentary evidence proves that the City Mortgage cannot be extinguished by foreclosure because it is equal in priority to plaintiff's mortgage. Zebra opposed defendants' dismissal motion and cross-moved to compel defendants to respond to outstanding discovery regarding the City Mortgage and to substitute the City in place of a John Doe defendant.

By an April 21, 2021 decision and order, this court granted the answering defendants' dismissal motion and denied Zebra's cross motion as moot. This court held that documentary evidence conclusively establishes that the City Mortgage is equal in priority and not subordinate to Zebra's mortgage. The April 21, 2021 decision and order further held that:

“Research has disclosed no cases regarding an equal mortgage, like the City Mortgage at issue here, however, an equal mortgage should be treated similar to a superior mortgage since it is not extinguished by the foreclosure of plaintiff's mortgage, as a matter of law. Consequently, HPD and the City are not necessary parties to this foreclosure action and dismissal of the complaint as against HPD is warranted.”

On May 4, 2021, Zebra moved to reargue on the ground that HPD and the City actually have two liens on the mortgaged property: (1) the City Mortgage, and (2) a June 20, 2007 regulatory agreement (Regulatory Agreement) that was expressly subordinated to

Zebra's mortgage by virtue of a June 20, 2007 subordination agreement (Subordination Agreement). Alternatively, Zebra requested leave to file an amended complaint to name the City and HPD solely as parties to the Regulatory Agreement, which is subordinate to Zebra's mortgage.

By a June 4, 2021 decision and order, this court granted that branch of Zebra's motion seeking to amend the complaint to add the City and HPD as defendants based solely on the allegation that they are holders of the Regulatory Agreement that is subordinate to Zebra's mortgage by virtue of the Subordination Agreement.

On June 9, 2021, Zebra served its supplemental summons and amended complaint. Regarding the City and HPD, paragraph 11 of the amended complaint alleges that:

“The City . . . and [HPD] are named [] parties as [] holder[s] of a subordinate Regulatory Agreement dated June 20, 2007 and recorded against the Properties on July 13, 2007 under CRFN2007000359590 (the ‘Regulatory Agreement’). The Regulatory Agreement is subordinate to Plaintiff's mortgage by virtue of a subordination agreement dated June 20, 2007 and recorded on July 13, 2007 under [CRFN]2007000359591” (amended complaint at ¶ 11).

Collectively annexed as Exhibit B to the amended complaint are: (1) a copy of the June 20, 2007 mortgage encumbering the Properties, and (2) the \$1,560,826.00 promissory note with a November 30, 2016 allonge endorsed by Grupo Popular Investments Corp. in favor of Cross River Bank, a December 2, 2016 allonge endorsed by Cross River Bank in favor of JFKYYZ Maspeth LP and a January 7, 2019 allonge endorsed by JFKYYZ Maspeth L.P. in favor of Zebra.

On or about July 22, 2021, the City answered the amended complaint on behalf of itself and HPD, denied the truth of the allegations in paragraph 11 and stated that:

“the City is a party to a regulatory agreement dated, June 20, 2007, and recorded July 13, 2007, in the Office of the City Register, Kings County, in CRFN 2007000359590 (the ‘Regulatory Agreement’), encumbering the [P]roperties . . . and that the Regulatory Agreement is referenced within a subordination agreement, dated June 20, 2007, and recorded July 13, 2007, as CRFN 2007000359591 (‘Subordination Agreement’), and that the Regulatory Agreement *is not subordinate* to Plaintiff’s mortgage, by virtue of the Subordination Agreement, *until all conditions within the Subordination Agreement are met, including but not limited to, the sale of the Premises by foreclosure*” (answer at ¶ 2 [emphasis added]).

Zebra’s Instant Summary Judgment Motion

On September 15, 2021, Zebra filed the instant motion for summary judgment, an order of reference and a default judgement against the non-appearing defendants. Zebra submits an “Affirmation of Merit” from Mordechai Senderovits (Senderovits), its member, based on his review of Zebra’s business records, “which include the books and records of Plaintiff’s assignors, JFKYYZ Maspeth L.P., the assignee of Cross River Bank, the assignee of Grupo Bank/BDP Bank, the originating lender.”

Senderovits affirms that “BPD Bank made a loan to Borrower on June 20, 2007, in the original aggregate principal amount of \$1,560,826.00” evidenced by a note which was secured by a mortgage on the Properties recorded on July 13, 2007. Senderovits also affirms that “[i]n or around 2013, BDP Bank was taken over by its affiliate, Grupo Popular Investment Corporation, and Grupo Popular Investment Corporation became the owner

and holder of the Loan Documents.” Senderovits affirms to the following assignments of the mortgage: (1) a November 27, 2013 mortgage assignment from BDP Bank to Grupo Popular Investment Corporation, which was recorded on January 7, 2014; (2) a November 30, 2016 mortgage assignment from Grupo Popular Investment Corporation to Cross River Bank, which was recorded on January 10, 2017; (3) a December 2, 2016 mortgage assignment from Cross River Bank to JFKYYZ Maspeth LP, which was recorded on January 13, 2017; and (4) a January 7, 2019 mortgage assignment from JFKYYZ Maspeth L.P. to Zebra, which was recorded on February 1, 2019. Senderovits also affirms that Zebra “is the current holder and owner of the Loan Documents and is currently in possession of all original Loan Documents” having received them from JFKYYZ Maspeth L.P. on January 7, 2019. Senderovits references the allonges to the promissory note annexed as Exhibit B to the amended complaint.

Senderovits alleges that Zebra and its assignors entered into Note Extension Modification Agreements with the borrower extending the maturity date of the loan to March 31, 2020. According to Senderovits:

“The Borrower has defaulted under the terms of the Loan Documents by, inter alia, (1) failing to timely make the payment due on the maturity date of March 31, 2020 as set forth in the extension agreement and (2) subjecting the Lewis property to [a] mechanic’s lien. The Borrower failed to cure the defaults.”

Senderovits further affirms that Zebra sent a default notice to the borrower on or about April 30, 2020.

Regarding HPD, Senderovits notes that “on or about April 30, 2020, Plaintiff notified Defendant HPD of [HPD’s] option to cure the Borrower’s default prior to Plaintiff filing this complaint, however no payment has been received and the time frame set forth in the letter expired.” Senderovits further affirms that “[p]ursuant to a subordination agreement between HPD and the Plaintiff’s assignors, HPD agreed to subordinate the obligations under the regulatory agreement to BDP [Bank] and also provided . . . HPD an opportunity to cure any defaults under the Plaintiff’s Mortgage.” Senderovits explicitly acknowledges that “the regulatory agreement will be cut off at a foreclosure sale or a deed in lieu.”

Zebra’s counsel submits an affirmation asserting that Zebra is entitled to an order of reference since the borrower and guarantor “consented to the foreclosure action and waived all defenses in lieu of Plaintiff’s agreement not to seek a deficiency judgment against [them].” Zebra’s counsel further asserts that through the submission of the loan documents, the Senderovits Affirmation and the verified complaint, Zebra has met its prima facie burden entitling it to a judgment and order of reference. Regarding the City and HPD, Zebra’s counsel asserts that:

“Subsequent to executing the Regulatory Agreement, the Answering Defendants agreed to subordinate the restrictions in the Regulatory Agreement in the event there was a default under Plaintiff’s loan and a foreclosure action was filed or the deed was exchanged in lieu of the foreclosure.”

The City and HPD's "Partial" Opposition

The City and HPD submit an attorney affirmation in "partial" opposition to Zebra's motion "to the extent that it seeks an order granting summary judgment against the City" because the City has an "interest" which arises from its June 20, 2007 Regulatory Agreement with the borrower. Defense counsel argues that "[t]he Regulatory Agreement is not subordinate to Plaintiff's mortgage, by virtue of the Subordination Agreement, until all conditions within the Subordination Agreement are met, including but not limited to, the sale of the Premises by foreclosure." Defense counsel notes that Zebra's counsel "acknowledges and agrees that pursuant to the Subordination Agreement, the Regulatory Agreement ceases to run with the land either upon a *foreclosure sale* or a *deed in lieu*." Defense counsel contends that "a mere default, or the filing of a foreclosure action, does not result in the automatic removal of the restrictions outlined within the Regulatory Agreement." Defense counsel argues that:

"given that the Regulatory Agreement is not extinguishable until all conditions within the Subordination Agreement are met, which includes the actual sale of the Premises, any order of reference and/or judgment of foreclosure and sale, must note its existence and preserve this interest."

In addition, defense counsel asserts that "any judgment of foreclosure entered herein should provide that all City liens upon the Premises, which have priority over the foreclosed lien, including but not limited to City liens for taxes, assessments, water and sewer charges, are deemed expenses of sale." Similarly, defense counsel argues that any order or judgment should note that the Properties are sold subject to open HPD violations.

Notably, defense counsel specifically states that “[t]he City takes no position as to the portion of Plaintiff’s motion which seeks an order granting summary judgment or a default judgment against the other defendants and appointing a Referee to compute the sum due under Plaintiff’s mortgage.”

Zebra’s Reply

Zebra, in reply, submits an attorney affirmation asserting that “the parties agree that the Regulatory Agreement is not cut off simply by the filing of this action, or the entry of an order or reference, but rather is cut off through a foreclosure sale and [the City] is named for that purpose.” Zebra’s counsel further asserts that:

“Plaintiff agrees that pursuant to the Subordination Agreement, the Regulatory Agreement ceases to run with the land . . . upon a foreclosure sale and has therefore named the City and HPD in this action as a holder of an interest that will be cut off at the foreclosure sale. Accordingly, it does not appear that there is a dispute or opposition to the Plaintiff’s Motion, however it is clear that a judgment should reflect that the Regulatory Agreement will be cut off through a foreclosure sale to alert potential purchasers at a sale.”

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of*

New York, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and admissible evidence of the borrower’s default (see *Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2017]).

Here, Zebra has demonstrated its prima facie right to foreclose on the mortgages encumbering the Properties by submitting the note with the allonges, the mortgages, the mortgage assignments and the Senderovits affirmation regarding the borrower’s default. The City and HPD do not oppose Zebra’s motion, but merely assert that the Regulatory Agreement encumbers the Properties until the Properties are sold at a foreclosure sale, pursuant to the Subordination Agreement. The parties and this court agree that a judgment of foreclosure and sale should reflect that the Regulatory Agreement encumbers the Properties until the Properties are sold at a foreclosure sale, as provided in the Subordination Agreement. Accordingly, it is

ORDERED that Zebra's motion (in mot. seq. four) is only granted to the extent that: (1) Zebra is granted summary judgment on its first cause of action to foreclose on the Properties, subject to the City's Regulatory Agreement that encumbers the Properties until they are sold at a foreclosure sale as set forth in the Subordination Agreement; (2) Zebra is granted an order of reference without opposition, which shall be settled on notice; (3) Zebra is granted a default judgment against the non-answering and non-appearing defendants, City of New York Environmental Control Board, City of New York Transit Authority, New York City Department of Finance, New York Department of Taxation and Finance, Alexandra Perdomo, Park Avenue Building & Roofing Supplies, Inc. and Park Avenue Building & Roofing Supplies, LLC; and (4) the caption is amended to remove the "John Doe" defendants.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE