

Heracles Acquisition Fund XIV LLC v 527 Myrtle LLC
2022 NY Slip Op 30604(U)
February 23, 2022
Supreme Court, Kings County
Docket Number: Index No. 526228/20
Judge: Lawrence Knipel
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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 23rd day of February, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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HERACLES ACQUISITION FUND XIV LLC,

Plaintiff,

- against -

Index No. 526228/20

527MYRTLE LLC, JASON LEE, YOON SUN CHOI, 527MYRTLEVC LLC, JS EQUITY HOLDINGS 1 LLC, NEW YORK INSULATION, INC., JERICO BLUE LLC, KINAM HAN, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU and "JOHN/JANE DOE NO. 1" through "JOHN/JANE DOE NO. 5", the last five names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons, corporations or other entities, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

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

66-84, 86
88-101, 103
104-112

Upon the foregoing papers in this action to foreclose a commercial mortgage on the property at 527 Myrtle Avenue in Brooklyn (Block 1893), Lot 57) (Property), plaintiff Heracles Acquisition Fund XIV LLC (Heracles) moves (in motion sequence [mot. seq.] four) for an order: (1) granting it summary judgment on its cause of action to foreclose the Property, striking the answers and affirmative defenses collectively interposed by defendants 527Myrtle LLC (527Myrtle or borrower), Jason Lee (Lee or guarantor), Yoon Sun Choi (Choi or guarantor), Jerico Blue LLC (Jerico Blue) and 527MyrtleVC LLC (527MyrtleVC) (collectively, Borrower Defendants) and defendant JS Equity Holdings I LLC (JS Equity), pursuant to CPLR 3212; (2) appointing a referee to hear and compute the amounts due under the note, mortgage and other loan documents, pursuant to RPAPL § 1321; and (3) amending the caption to delete the John Doe defendants.

Background

On December 30, 2020, Heracles commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property. The complaint alleges that on or about December 18, 2019, defendant 527Myrtle executed, acknowledged and delivered to Titan Capital ID, LLC (Titan), the original lender, an \$850,000.00 promissory note secured by a mortgage on the Property (complaint at ¶¶ 17 and 18). The complaint alleges that individual defendants Lee and Choi guaranteed repayment of all sums due under the loan (*id.* at ¶¶ 20-21). The complaint alleges that

527Myrtle “has defaulted . . . as detailed in the Notice of Default and Acceleration dated October 11, 2020” which states that:

“On or about August 25, 2020, a Mechanic’s Lien in the sum of \$41,264.00 was filed against the Premises by New York Insulation Inc. (the ‘ML’). To date, the ML has not been paid or bonded, either in whole or in part, and remains a lien encumbering the Premises. Pursuant to the Mortgage, Section 1.07,¹ Borrower was required to pay or bond the ML on or before September 25, 2020. Borrower’s failure to do so constitutes a default under the Mortgage and the Note . . .” (*see* complaint, Exhibit I [NYSCEF Doc No. 11]).

The complaint further alleges that “[b]y letter dated December 23, 2020, Plaintiff notified Myrtle that the loan and all sums due thereon were accelerated due to its failure to timely cure the default referenced in the Notice of Default . . .” (*id.* at ¶ 35 and Exhibit K [NYSCEF Doc No. 13]).

On March 12, 2021, the Borrower Defendants moved for an order dismissing the complaint, pursuant to CPLR 3211 (a) (1) and (a) (7), on the ground that foreclosure actions were stayed, and could not be commenced, during the COVID-19 pandemic moratorium. By a June 9, 2021 decision and order, this court denied the Borrower Defendants’ dismissal motion.

¹ Section 1.07 of the mortgage provides, in part, that “[w]ithin thirty (30) days after the filing of any such lien, Mortgagor shall release or discharge the same of record, by payment, bonding or otherwise. In the event that Mortgagor fails to make payment of or bond such claims and demands, Mortgagee may, but shall not be obligated to, make payment thereof, and Mortgagor shall, on demand, reimburse Mortgagee for all sums so expended, together with interest thereon at the Delinquency Rate, from the date such sums are expended until the same are paid to the Mortgagee

On May 20, 2021, defendant JS Equity answered the complaint and denied the material allegations therein and Heracles rejected it as untimely (*see* NYSCEF Doc Nos. 38 and 39). On May 28, 2021, JS Equity moved for an order directing Heracles to accept its late answer, pursuant to CPLR 3012 (d), and by an August 4, 2021 decision and order, this court granted JS Equity's motion.

Meanwhile, on June 18, 2021, 527Myrtle, Lee, Choi, Blue and 527MyrtleVC answered the complaint, denied the material allegations therein and asserted affirmative defenses, including that the requisite notices were not properly served.

Heracles' Instant Summary Judgment Motion

On October 29, 2021, prior to any discovery, Heracles filed the instant motion for summary judgment on its first cause of action to foreclose on the Property, an order of reference and to amend the caption.

Heracles submits an affidavit from its manager, Linda Salamon (Salamon), who attests that her affidavit is based on the loan records, which are maintained in the regular course of Heracles' business. Salamon attests that "Plaintiff maintains a computer database of the Loan Records of acts, transactions, payments, communications, escrow account activity, disbursements, events, and analyses with respect to the mortgage loan which Plaintiff is the owner and holder." Salamon further attests that "[i]n the event these loan records were created by a prior servicers or owners of the loan, those records have been integrated into Plaintiff's business records and verified according to Plaintiff's policies and

procedures and are kept and relied upon as a regular business practice and in the ordinary course of business by Plaintiff.”

Salamon reiterates the allegations in the complaint regarding the borrower’s execution of the note and mortgage. Salamon attests that there was an event of default under the mortgage because “[o]n or about August 25, 2020, a mechanic’s lien in the sum of \$41,264.00 was filed by New York Insulation, Inc. against the subject premises in violation of section 1.07 of the Mortgage . . .” Heracles’ motion annexes both the mortgage and a printout from the Kings County Clerk’s office detailing the mechanic’s lien filed against the Property. Salamon attests that Titan sent an October 11, 2020 default notice and collectively annexes (as Exhibit I) a copy of the default letter and an affirmation of service of the default letter from Titan’s counsel, Roy C. Justice. Salamon also attests that “the original maturity date of the loan, December 18, 2021, has since expired” so “had the Borrower not defaulted as detailed herein, the loan would have since matured and the loan balance remaining unpaid.”

Salamon attests that “[b]y letter dated December 23, 2020, Plaintiff notified Borrower that the loan and all sums due thereon were accelerated due to its failure to timely cure the default referenced in the Notice of Default . . .” While Salamon collectively annexes the December 23, 2020 acceleration letter and copies of the federal express labels as Exhibit J to his affidavit, the letter is actually written by Michael Camporeale, Esq., plaintiff’s counsel from The Camporeale Law Group.

Borrower Defendants' Opposition

The Borrower Defendants, in opposition, submit an affidavit from defendant Choi, the sole member of Jerico Blue, who claims that Heracles “has prematurely moved to foreclosure . . .” Choi argues that “documentary evidence shows that: (i) there are outstanding material issues of fact; (ii) the alleged default is based upon an improper mechanics lien; (iii) Plaintiff has failed to name certain necessary parties herein . . .; and (iv) the Motion should be denied pursuant to CPLR 3212 (f).”

Choi argues that the October 11, 2020 default letter allegedly sent by Titan does not include a “proof of service or mailings . . .” Choi further asserts that “the subject mechanics lien [upon which the alleged default is based] expired as of as of August 25, 2021 pursuant to the Kings County Mechanics Lien Book Inquiry annexed as Exhibit H” and “was improperly filed by New York Insulation as the underlying amounts are not due and owing by Defendants . . .” Choi explains that defendants hired Honest and Quality Corp. as general contractors, which, in turn, hired New York Insulation as a subcontractor to remove asbestos at the Property. Choi attests that “it is indisputable that Defendants made payments to Honest and Quality Corp. in the sum of \$100,000.00 for its general contractor services, which included the amounts being sought in the [New York Insulation] mechanics lien.” Choi claims that Heracles’ allegations of default based on the New York Insulation mechanic’s lien are demonstrably false and submits copies of New York Insulation’s subcontractor proposal, a December 18, 2019 invoice from Honest and Quality Corp. and

527 Myrtle's proof of payment of \$100,000.00 to Honest and quality Corp. (*see* NYSCEF Doc Nos. 97-100).

The Borrower Defendants also submit a memorandum of law arguing that "there remain significant factual disputes that must be resolved through discovery and trial as to the materiality of the alleged defaults on which Lender bases its request for relief." The Borrower Defendants contend that they "have raised valid defenses that warrant discovery in this case, including discovery that will establish that even the subject default and mechanics lien was not properly placed on the Property and do not warrant the drastic remedy of acceleration and foreclosure . . ."

JS Holdings joins in the Borrower Defendants' opposition.

Heracles' Reply

Heracles, in reply, submits an attorney affirmation arguing that "[t]he Defendant defaulted on the subject loan when it failed to discharge the mechanics lien filed against the subject premises after notice of default as required by the mortgage" and "the mechanics lien was a material default that precluded the funding of the construction loan and the project from progressing . . ." Plaintiff's counsel explains that mechanics liens are good for one year unless extended, and an action must be commenced to foreclose the lien within the one year time period pursuant to Lien Law § 17. Plaintiff's counsel asserts that "Defendant's allegations concerning the mechanics lien lapsing is untrue" because "[t]he

mechanic lienor has filed a foreclosure action [on August 18, 2021] to foreclose the mechanics lien and the Defendant has defaulted in that action.”²

Plaintiff’s counsel also affirms that there are other defaults, including that “[t]he loan matured on December 18, 2021 (when construction was intended to be completed), and the Defendant has still not yet obtained a work permit for the construction of the planned seven (7) story building” and “the Defendant has . . . defaulted on the payment of real estate taxes dating back to April 1, 2020, totaling \$19,632.37, which the Plaintiff has recently paid to cover delinquent tax arrears.”

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

² *See New York Insulation, Inc. v Honest & Quality Corp., 527 Myrtle et al.*, Kings County index No. 52115421.

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 evidence of 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, Heracles has satisfied its prima facie burden by submitting copies of the note, the mortgage and evidence of 527Myrtle’s default under the terms of the mortgage by failing to release or discharge the \$41,264.00 mechanic’s lien that New York Insulation, Inc. filed against the Property on August 25, 2020 within thirty days (or by September 24, 2020), as required under section 1.07 of the mortgage. When the Borrower Defendants failed to cure the default within the required 30-day period, Titan served the October 11, 2020 default letter, as evidenced by the affirmation of service annexed to Heracles’ moving papers (*see* NYSCEF Doc No. 76). The Borrower Defendants failed to raise an issue of fact regarding 527Myrtle’s alleged default. Their submission of a December 20, 2019 “Checking Withdrawal” and “Checking Deposit” of \$100,000.00 from “Jerico Project Management LLC” to “Honest & Quality Corp.” (*see* NYSCEF Doc No. 99) does not

prove that 527 Myrtle timely cured its default under the mortgage by discharging the August 25, 2020 mechanic's lien filed by New York Insulation, Inc., which is now the subject of another action. Furthermore, the Borrower Defendants fail to identify any particular discovery that they require in order to oppose Heracles' instant motion for summary judgment and an order of reference, pursuant to CPLR 3212 (f). Accordingly, it is hereby

ORDERED that Heracles' motion (mot. seq. four) is granted to the extent that Heracles is granted summary judgment on its first cause of action to foreclose on the Property, Heracles is entitled to an order of reference, which shall be settled on notice, and the caption is hereby amended to delete 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**