

Toorak Capital Partners, LLC v XYZ 1535 Pac. LLC

2022 NY Slip Op 31212(U)

April 29, 2022

Supreme Court, Kings County

Docket Number: Index No. 526656/21

Judge: Lawrence 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 29th day of March, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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TOORAK CAPITAL PARTNERS, LLC,

Plaintiff,

- against -

Index No. 526656/21

XYZ 1535 PACIFIC LLC; AARON JOHNSON; WALKER RIDGE CONSTRUCTION NEW YORK LLC; THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; and JOHN DOE NO 1 through JOHN DOE NO XXX, inclusive, the last thirty names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, 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) _____
Memorandum of Law in Opposition _____
Reply Memorandum of Law _____

16, 18-23
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Upon the foregoing papers in this action to foreclose a commercial mortgage encumbering the property at 1535 Pacific Street in Brooklyn (Block 1204, Lot 63) (Property), defendant XYZ 1535 Pacific LLC (Pacific or borrower) moves (in motion sequence [mot, seq.] one) for an order dismissing the complaint, pursuant to CPLR 3211

(a) (3), (a) (4) and (a) (7), or, alternatively, staying this action, pursuant to CPLR 2201, pending resolution of the first-filed and still pending action in New York County.

Background

On October 19, 2021, plaintiff Toorak Capital Partners, LLC (Toorak) commenced this foreclosure action by filing a summons, a verified complaint and a notice of pendency against the Property. The complaint alleges that on or about April 9, 2009, Pacific borrowed \$1,920,000.00 from Sharestates Investments DACL, LLC (Sharestates) which was secured by a Consolidation, Extension and Modification Agreement (CEMA), which consolidated: (1) a first mortgage in the principal amount of \$1,176,000.00 executed by Pacific on January 31, 2018, in favor of Loan Funder LLC (Loan Funder); (2) a second mortgage in the principal amount of \$495,000.00 executed by Pacific on January 31, 2018, in favor of Loan Funder; and (3) a third mortgage in the principal amount of \$249,000.00 executed by Pacific on April 9, 2019, in favor of Sharestates (complaint at ¶¶ 9 and 11). The complaint alleges that defendant Aaron Johnson (Johnson) guaranteed the consolidated loan (*id.* at ¶ 10). Regarding Toorak's standing to foreclose, the complaint alleges that:

“On April 26, 2019, Plaintiff purchased the Loan and Loan Documents from Original Lender. Accordingly, Plaintiff is the owner and holder of the Note, CEMA and Security Instruments. Prior to the commencement of this action, Plaintiff has been in exclusive possession of the original Note and has not transferred the same to any other person or entity. A true and correct copy of the recorded Assignment of Mortgage executed by Original Lender in favor of Plaintiff is attached hereto as **Exhibit E**. A copy of the Allonge making

the Note payable to Plaintiff is attached to the Note and part of Exhibit B.”

The complaint generally alleges that “Borrower defaulted under the Loan Documents by failing to make monthly payments of principal and interest required under the Loan Documents” without providing a payment default date (*id.* at ¶ 16). Notably, the complaint alleges that “[n]o other action has been brought to recover any part of the debt under the Note, Security Instruments, or other Loan Documents.”

Pacific’s Dismissal Motion

On December 3, 2021, Pacific filed a pre-answer motion to dismiss the complaint or, alternatively, to stay this action. Defense counsel submits copies of: (1) the October 18, 2019 complaint and the first amended complaint in *Cassaforte Limited, et al. v Babak Pourtavoosi, et al.*, Nassau County index No. 614558/19 (New York County Action);¹ (2) the second amended complaint in the New York County Action and the July 8, 2021 court order in the New York County Action granting plaintiff leave to amend the complaint and impleading Toorak as a defendant;² (3) the July 9, 2021 proof of service of the second

¹ In 2019, the New York County Action was originally filed in Nassau County Supreme Court under index No. 614558/19, and subsequently, on March 10, 2020, it was transferred to New York Supreme Court under index No. 451426/20 and consolidated with another pending action against the guarantor, *Cassaforte Limited, et al v Johnson*, New York County index No. 653387/19 (Johnson Action).

² Toorak was impleaded as a defendant in the New York County Action once Cassaforte and Pacific learned that Sharestates assigned the Pacific Mortgage to Toorak.

amended complaint in the New York County Action; and (4) the court's unpublished opinion in *Sharestates Invs. DACL LLC v XYZ Dev. II LLC*, index No. 526262/19.³

Pacific submits a memorandum of law arguing that “[t]he mortgage loan that serves as the basis for this foreclosure action is already the subject of litigation in New York County, in which the validity and enforceability of the mortgage loan is directly at issue.” Pacific argues that “[t]his matter should be dismissed in favor of the New York County action, which involves legal issues that would retroactively invalidate Plaintiff’s legal right to file this foreclosure action” and “[a]t a minimum and in the interest of judicial economy, this action should be stayed pending final resolution of the New York County action.”

The second amended complaint in the New York Action alleges that on or about July 2017, Johnson and his entity, XYZ Group LLC (XYZ Group), approached Cassaforte Limited (Cassaforte) with a proposal to acquire and develop properties, including the Property at issue here. Senior lenders allegedly agreed that XYZ Group would establish a special purpose entity (XYZ Holdings) to hold all of the membership interests in owner entities, like Pacific, and another special purpose entity (Partners) to hold 90% of the membership interests in XYZ Holdings. Pacific explains that Cassaforte agreed to advance loans to Partners to fund the purchase of membership interests in Holdings which, in turn, would fund Holdings’ purchase of membership interests in Pacific, the entity that owns the Property.

³ In that case, the court stayed the foreclosure action pending the outcome of the New York County Action.

The second amended complaint in the New York County Action alleges that, under the loan agreement applicable to Pacific and the subject Property (Pacific Loan Agreement), Cassaforte loaned money to Partners and, according to the Pacific Loan Agreement, it would be an “Event of Default” if Partners unilaterally refinanced the senior debt on the Property. Under Partner’s Operating Agreement, Partners and Johnson could not make “Major Decisions,” including entering into any agreements with lenders, without Cassaforte’s prior written consent. Likewise, under Holdings’ Operating Agreement, Partners could not modify any senior debt or otherwise enter into any financing, refinancing or securitization of the Property without Cassaforte’s consent.

The second amended complaint in the New York County Action alleges that on or about April 9, 2019, Pacific, with the assistance of Sharestates, unilaterally and illegitimately refinanced the senior debt on the Property (Pacific Mortgage).

Consequently, on October 18, 2019, the New York Action (originally filed in Nassau County) was commenced seeking a declaration that the Pacific Mortgage (the same mortgage at issue here) is unenforceable, null and void and does not constitute an encumbrance on the property because Sharestates knew or should have known that Johnson had no actual or apparent authority to refinance and execute the Pacific Mortgage on behalf of Pacific without Cassaforte’s express consent. On July 8, 2021, Toorak was impleaded into the New York County Action, but, to date, has not answered the second amended complaint. Instead, on October 19, 2021, Toorak commenced this foreclosure action.

Pacific argues that dismissal is warranted under CPLR 3211 (a) (4) because “it is undisputed that the legal issue of the enforceability of the Pacific Mortgage is central to both this action and the New York Action” and Toorak and Pacific are both parties to both this action and the New York County Action, so all necessary elements for a dismissal pursuant to CPLR 3211 (a) (4) have been met. Pacific also argues that dismissal is warranted, pursuant to CPLR 3211 (a) (3), because Toorak lacks legal capacity to sue. Pacific reasons that “[s]ince it is undisputed that Cassaforte never provide consent, the Pacific Mortgage is a nullity and Plaintiff lacks standing under an enforceable mortgage to bring this foreclosure.” Alternatively, Pacific seeks a stay of this action pending the resolution of the New York County Action, pursuant to CPLR 2201, to “curtail the risk of inconsistent results and wasteful duplication of judicial resources.”

Toorak's Opposition

Toorak, in opposition, submits a six-page memorandum of law asserting that “[w]hile Lender concedes that Lender and Borrower are parties to an action pending in New York County, that action does not involve the same cause of action as the instant case.” Although Toorak has failed to appear and assert any defenses in the New York County Action, it argues that “the claims in the Cassaforte Action that relate to the validity of the CEMA were improperly filed in New York County because they affect real property and CPLR 507 dictates that such claims be raised in Kings county.”

Discussion

CPLR 2201 provides that “[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.” To prevent inconsistent rulings regarding the enforceability of the Pacific Mortgage, a stay of this foreclosure action is warranted pending the outcome of the New York County Action. Accordingly, it is hereby

ORDERED that Pacific’s motion (mot. seq. one) is only granted to the extent that this foreclosure action is stayed until there is a final determination in the New York County Action regarding the enforceability of the subject Pacific Mortgage, and the parties shall promptly notify this court once such a final determination is reached.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE