

Nechadim Corp. v 500 Putnam St. Realty, LLC
2022 NY Slip Op 31607(U)
May 13, 2022
Supreme Court, Kings County
Docket Number: Index No. 522430/21
Judge: Lawrence Knipel
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At an IAS Term, Commercial Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 13th day of May, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.
-----X

NECHADIM CORP.,
Plaintiff,

-against-

500 PUTNAM STREET REALTY, LLC,
500 PUTNAM LLC,
VALLEY NATIONAL BANK,
BANKUNITED, N.A., et al.,
Defendants.
-----X

DECISION AND ORDER

Index No. 522430/21

Mot. Seq. No. 2

The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion, Affirmation, Memorandum of Law, and Exhibits Annexed _____	<u>17-29</u>
Affirmation in Opposition and Exhibits Annexed _____	<u>85-87</u>
Reply Affirmation and Memorandum of Law _____	<u>88-89</u>

In this action to foreclose a mortgage which is allegedly encumbering certain commercial real property located at 500 Putnam Avenue in Brooklyn, New York (Block 1830, Lot 39) (the "Putnam property"), defendant BankUnited, N.A. ("BankUnited") moves, pre-answer, in Seq. No. 2 for an order, pursuant to CPLR 3211 (a), dismissing the complaint of plaintiff Nechadim Corp. ("Nechadim") as against it.

Background

On August 8, 2008, Nechadim loaned the principal sum of \$290,000 to defendant 500 Putnam LLC ("Putnam-S") and a nonparty co-obligor (the "co-obligor") jointly, with such loan secured (in addition to other commercial properties) by the Putnam property (the "Nechadim mortgage"). On April 26, 2012, Nechadim received, as part of the settlement

in the co-obligor's bankruptcy case, the sum of \$405,000 on account of its mortgage. Because the co-obligor's settlement agreement with Nechadim did not explicitly encompass Putnam-S and/or the Putnam property, however, Nechadim refused to release its mortgage as against the Putnam property.

Approximately two months later on July 6, 2012, Putnam-S conveyed the Putnam property to defendant 500 Putnam Street Realty LLC ("Putnam-B"). At closing, Sutton Land Title Agency, a Division of Sutton Alliance, LLC ("Sutton"), acting as the agent for Fidelity Insurance Company ("Fidelity"), escrowed the sum of \$184,399.25 from the sale proceeds pending the satisfaction (or, in the alternative, the determination of the enforceability) of the Nechadim mortgage as against the Putnam property (the "escrowed sum"). On January 10, 2014, Putnam-S commenced an action against Nechadim to determine that it (rather than Nechadim) owned the escrowed sum (*see 500 Putnam LLC v Nechadim Corp. and Sutton Land Title Agency, a Division of Sutton Alliance, LLC*, Index No. 500211/14 [Sup Ct, Kings County] [the "prior action"]). In the course of the prior action, Putnam-S moved for a declaration that the entire escrowed sum belonged to it; conversely, Nechadim cross-moved for a declaration that it was owed a portion of the escrowed sum in the amount of \$162,276.55 to satisfy the outstanding balance of the Nechadim mortgage. By decision and order, dated April 15, 2015, Justice Partnow denied both the motion and cross motion, finding triable issues of fact in each instance. On Putnam-S's appeal from the denial of its motion (Nechadim did not cross-appeal from the denial of the latter's cross motion), the Second Judicial Department, in a decision and order, dated May 10, 2017, affirmed Justice Partnow's determination that Putnam-S had failed to make a prima facie showing that the co-obligor's payment to Nechadim fully

satisfied and discharged the Nechadim mortgage as against the Putnam property (*see 500 Putnam, LLC v Nechadim Corp.*, 150 AD3d 796 [2d Dept 2017], *affg* 2015 WL 1688655 [Sup Ct, Kings County 2015]).

Thereafter, Putnam-S and Nechadim stipulated to have a court attorney referee in the prior action (the “referee”) “hear and determine” the outstanding balance, if any, of the Nechadim mortgage as against the Putnam property. By decision and order, dated October 23, 2017 (the “referee’s determination”), the referee determined that Nechadim was owed (from the escrowed sum) the outstanding balance of \$151,114.60 under the Nechadim mortgage (the “outstanding balance”). The referee’s determination was silent as to the date of the computation of the outstanding balance. There were additional issues to be encountered with the implementation of the referee’s determination. In particular, the referee directed that Sutton pay the outstanding balance to Nechadim’s counsel upon satisfaction of only one condition: Sutton was to pay the outstanding balance within thirty days after it was served with the referee’s determination, together with notice of entry (NYSCEF Doc. No. 29). Two practical obstacles (unbeknownst to the referee) stood in the way of implementing the referee’s determination. First, Sutton (though named in the caption as a “relief defendant”) had not been served with process (nor had it participated, nor had it retained counsel to represent it) in the prior action. Second, Sutton held the escrowed sum as a disclosed agent for Fidelity (rather than for its own account), and thus needed to receive from Nechadim’s counsel an executed satisfaction of (or release of the Putnam property from) the Nechadim mortgage *before* it could pay the outstanding balance

to Nechadim's counsel.¹ As a result, Sutton, following receipt of the referee's determination, was unable to remit the outstanding balance to Nechadim's counsel because of the latter's refusal to provide Sutton with a satisfaction of (or a release of the Putnam property from) the Nechadim mortgage.² Broadly viewed, Nechadim's demand for the outstanding balance, in accordance with the referee's directive, presented somewhat of a "chicken-and-egg problem" for Sutton – it could not pay the outstanding balance to Nechadim's counsel unless and until it (Sutton) received from the former (and provided to Fidelity for review and acceptance) a satisfaction of (or a release of the Putnam property from) the Nechadim mortgage.

Having reached an impasse with Nechadim's counsel, Sutton moved to dismiss the prior action as against it on the basis of (among other reasons) lack of personal jurisdiction. By short-form order, dated October 9, 2018, Justice Partnow granted Sutton's motion to

¹ See Affidavit of Howard J. Kopel (then the Managing Member and President of Sutton Alliance LLC and its related entities), dated May 7, 2018, summarizing the course of his negotiations with Nechadim's counsel following service of the referee's determination on Sutton with notice of entry (NYSCEF Doc. No. 123 which was e-filed by Sutton in the prior action). There, Mr. Koppel averred that:

(1) *"the Court [Justice Partnow] should be aware that Sutton only took the escrow as agent for Fidelity, i.e., Sutton holds nothing"* (¶ 15 [emphasis added]);

(2) Nechadim's counsel "knew, even before seeking an order directing Sutton to turn over funds in an escrow account, that Sutton held no escrow. . . ; that was because at all times Sutton acted as an agent for Fidelity" (¶ 16);

(3) *the referee "was clearly under the impression that Sutton was represented by counsel, which also means, [she] was under the impression that Sutton had been served and had appeared in this action. None of these impressions were accurate"* (¶ 27 [emphasis added]);

(4) *"Further, the parties never advised the Court that Sutton had not been served, and had not appeared when they signed the stipulation – to which Sutton never agreed – to be bound by (the referee determination)"* (¶ 28 [emphasis added]); and

(5) "Sutton was never served with process in (the prior action)" (¶ 9).

² See Mr. Kopel's Affirmation, dated April 12, 2022, ¶¶ 7-11 (NYSCEF Doc. No. 106 e-filed by nonparty Sutton in this action).

the extent of dismissing it from the prior action (its ancillary request for the imposition of sanctions on Nechadim and the latter's counsel was summarily denied in the same short-form order). Nothing further transpired in the prior action thereafter. The referee's determination has not been reduced to a judgment.

On September 1, 2021, Nechadim (by newly retained counsel) commenced the instant action against BankUnited (among others)³ to collect the sum of at least \$441,552.13 (*i.e.*, the outstanding balance of \$151,114.60 which Nechadim claims was due and owing to it as of July 6, 2012 – rather than as of October 23, 2017 which was the date of the referee's determination – together with the accrued (and still-accruing) interest, as well as to foreclose on the Nechadim mortgage.⁴ BankUnited (which, according to Nechadim's complaint currently holds at least one mortgage secured by the Putnam property) has moved, in lieu of an answer, to dismiss the instant action insofar as asserted against it as barred by the statute of limitations (among other grounds).

Discussion

CPLR 213 (4) prescribes a six-year statute of limitations period for “an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein.” “Further, it is well established that the six-year period begins to run when the lender first has the right to foreclose on the mortgage, that is, the day after the maturity date of the underlying debt unless the mortgage debt is accelerated in which case the entire

³ The other named defendants are Putnam-B, Putnam-S, and Valley National Bank (a mortgage lender which financed the conveyance of the Putnam property to Putnam-B from Putnam-S).

⁴ According to the electronic court docket for this action, Nechadim did not file a notice of pendency against the Putnam property.

amount is due and the statute of limitations begins to run on the entire mortgage debt” (*CDR Creances S.A. v Euro-Am. Lodging Corp.*, 43 AD3d 45, 51 [1st Dept 2007] [internal quotation marks omitted]).

Here, Nechadim’s right to foreclose under its mortgage accrued, *at the earliest*, when the underlying debt matured on February 8, 2009; or, alternatively, *at the latest*, when the Putnam property was sold on July 6, 2012.⁵ Thus, Nechadim’s right to foreclose under its mortgage expired, *at the latest*, on July 6, 2018. Because Nechadim commenced this action for foreclosure (among other relief) approximately three years later on September 1, 2021, BankUnited has made a prima facie showing that Nechadim’s claims as against it are time-barred.⁶

In opposition, Nechadim has failed to raise a triable issue of fact. Contrary to Nechadim’s contention, BankUnited possesses the requisite standing, by virtue of its current lien on the Putnam property, to challenge the untimeliness of Nechadim’s lien against the same property (*see Gurecki v Gurecki*, 189 AD3d 1729, 1730 [3d Dept 2020]; *Stewart Tit. Ins. Co. v Wingate, Kearney & Cullen*, 134 AD3d 924, 925 [2d Dept 2015], *lv dismissed* 27 NY3d 950 [2016]; *Matter of Rosevele Frocks, Inc. v Sommers*, 191 Misc 614, 616 [App Term, 1st Dept 1948]; *accord Bank of New York Cent. Region v Cain*, 78 AD2d 963 [4th Dept 1980]).

⁵ See NYSCEF Doc. No. 8 (the maturity-date clause on page 1 of Nechadim mortgage, and the due-on-sale clause in ¶ 4 of Rider to Nechadim mortgage).

⁶ The prior action (either by way of Putnam-S’s complaint or by way of Nechadim’s counterclaims) focused on the determination of title to the escrowed sum, with no request for a foreclosure (or a preclusion of foreclosure) of the Nechadim mortgage.

Nechadim's further contention that its mortgage foreclosure of the Putnam property is timely because its right to foreclose accrued (or was tolled) as of the date of the referee's determination (*i.e.*, October 23, 2017), fundamentally misconstrues the narrow scope of the referee's directive that summarized and implemented her determination. Five points highlight the limited import (and effect) of the referee's directive. First, although the referee's directive quantified the outstanding balance payable to Nechadim, the directive was imprecise regarding its calculation date (*i.e.*, whether the outstanding balance was calculated as of October 23, 2017 as the referee's directive implies or, in the alternative, whether the outstanding balance has remained frozen as of July 6, 2012 which what Nechadim alleges in its complaint here). Second, the referee's directive effectively confined (and limited) Nechadim's recovery of the outstanding balance to the escrowed sum (that is, to the exclusion of the underlying collateral which is the Putnam property). Third, the referee's directive effectively confined (and limited) Nechadim's recovery of the outstanding balance to the escrowed sum held by Sutton as Fidelity's agent (that is, to the exclusion of the obligor which is Putnam-S). Fourth, the referee's directive was (and still is) unenforceable as against Sutton which, as noted, was not a party to the prior action; indeed, as the ensuing motion practice made it clear, Sutton was dismissed from the prior action for lack of personal jurisdiction. Fifth and finally, the referee's directive (as well as the entire referee's determination incorporating it) carries no *res judicata/collateral estoppel* weight because the referee's determination was never reduced to a judgment.⁷

⁷ See *Ott v Barash*, 109 AD2d 254, 262 (2d Dept 1985) (“[A] general prerequisite to [the] invocation of either *res judicata* or *collateral estoppel* is the existence of a final *judgment*, *i.e.*, a final judicial determination which necessarily decided the very cause of action or issue that a party now seeks to litigate in a subsequent action or proceeding.”) (emphasis added); *see also* (footnote continued)

Conclusion

Accordingly, it is

ORDERED that in Seq. No. 2, BankUnited, N.A.'s pre-answer motion to dismiss the complaint as against it is *granted to the extent* that the complaint is dismissed as against it as time-barred, pursuant to CPLR 3211 (a) (5); and the remainder of its motion is denied as academic; and it is further

ORDERED that the action is severed and continued as against the remaining defendants, *with the caption to be amended to delete BankUnited, N.A.*, as a defendant; and it is further

ORDERED that BankUnited's counsel is directed to electronically serve a copy of this decision and order with notice of entry on the other parties' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

The parties are reminded of their next scheduled virtual appearance (via Microsoft Teams) in Commercial Part 6 on May 31, 2022 at 11:00 a.m., which is the return date of 500 Putnam Street Realty LLC's order to show cause, dated March 28, 2022, in Seq. No. 4 (*see* Stipulation, so-ordered May 9, 2022 [NYSCEF Doc. No. 112]).

This constitutes the decision and order of the Court.

ENTER FORTHWITH,



J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**

Begelman v Begelman, 170 AD2d 562, 563 (2d Dept 1991) (“A decision or verdict upon which no formal *judgment* has been entered has no conclusive character and is ineffective as a bar to subsequent proceedings.”) (internal quotation marks omitted; emphasis added).