

Coaxum v Granville

2022 NY Slip Op 31935(U)

June 14, 2022

Supreme Court, New York County

Docket Number: Index No. 850150/2021

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. FRANCIS KAHN, III PART 32

Justice

-----X
DONALD COAXUM, INDEX NO. 850150/2021
Plaintiff, MOTION DATE _____
MOTION SEQ. NO. 001

- v -

MARIA GRANVILLE, NEW YORK CITY PARKING
VIOLATIONS BUREAU, CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD, JOHN DOE, JOHN
DOE, AND/OR PERSONS OR PARTIES HAVING OR
CLAIMING AN INTEREST IN OR A LIEN UPON THE
MORTGAGED PREMISES

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14,
15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL

Upon the foregoing documents, the motion is determined as follows:

This is an action to foreclose on a mortgage encumbering real property located at 246 Lennox Avenue, New York, New York. The mortgage note, dated August 13, 2018, evidences a loan Plaintiff made to Defendant Maria Granville (“Granville”) of \$250,000.00. The note provided for interest only installment payments for two-years, on the thirteenth of every month, and that the entire principal, plus accrued interest, would mature on August 13, 2020.

Plaintiff commenced an action titled *Donald Coaxum v Maria Granville, et al.*, NY Cty Index No. 850149/2019, wherein he alleged Granville defaulted on two installments which were due in January and June 2019 and expressly elected to make “the whole of said principal sum . . . due and payable”. Defendant Granville answered and asserted three affirmative defenses as well as a counterclaim. Plaintiff’s motion for summary judgment therein was denied by order of Justice Arlene Bluth, dated March 6, 2020, who held that an issue of fact existed as to whether Granville failed to make the alleged installment payments. That decision was affirmed by the Appellate Division, First Department (*see Coaxum v Granville*, 190 AD3d 476 [1st Dept 2021]).

Thereafter, Plaintiff commenced this action alleging Granville defaulted when the mortgage note matured on August 13, 2020. Granville answered herein and pled two affirmative defenses as well as a counterclaim. Plaintiff moved to consolidate the earlier foreclosure action with the present action, for summary judgment against the Mortgagor, dismissal of the counterclaim and for an order of reference. By stipulation filed December 3, 2021, the parties consented to the branch of the motion for consolidation and the Court issued an order dated January 4, 2022, granting that relief. The balance of the motion is now before the Court.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Padilhas' default in repayment (*see U.S. Bank, N.A., v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see CPLR §3212[b]*; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]).

Plaintiff's motion was supported with an affidavit of facts from Plaintiff and Doryne Coaxum. The affidavits established the mortgage, note, and evidence of mortgagor's default and was sufficiently supported by appropriate documentary evidence (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

In opposition, Granville proffers only an affirmation from her counsel which is insufficient to raise an issue of fact excusing her maturity default (*see generally Rue v Stokes*, 191 AD2d 245, 246 [1st Dept 1993]). Even if supported by an affidavit, Granville's assertion that Plaintiff's false allegation of her default caused a "lost financial opportunity" that would have been used to "satisfy the subject mortgage at maturity" is entirely conclusory.

Granville's affirmative defense of mitigation is unavailing in a foreclosure action (*see Marine Midland Bank, N. A. v. Virginia Woods Ltd.*, 201 AD2d 625 [2d Dept 1994]) as the amount due is not a defense to summary judgment (*see eg Excel Capital Group Corp. v 225 Ross St. Realty, Inc.*, 165 AD3d 1233 [2d Dept 2018]). The affirmative defense that this action is duplicative of the 2019 action is mooted by the consolidation of same. The claims that Plaintiff acted in a frivolous and malicious manner as well as in bad faith are cognizable opposition to a motion for summary judgment in a foreclosure action (*see eg Mahopac Nat'l Bank v Baisley*, 244 AD2d 466 [2d Dept 1997]). However, the existence of a triable issue of fact as to whether Granville defaulted in the interest installment payments is no longer an impediment to foreclosure since the maturity date has past and it is undisputed repayment has not been made. Further, the argument Plaintiff's conduct in commencing the 2019 action resulted in Granville's inability to repay upon maturity is unsubstantiated by "evidentiary proof in admissible form sufficient to require a trial of [her] defenses" (*see U.S. Bank Trust N.A. Trustee v Butti*, 16 AD3d 408 [2d Dept 2005]).

As to Granville's counterclaim for, *inter alia*, pecuniary damages resulting from Plaintiff's alleged bad faith, frivolous or malicious conduct in commencing the 2019 action, Plaintiff failed to establish its *prima facie* entitlement to summary judgment. Neither Donald nor Doryne Coaxum address this issue in their affidavits, much less proffer facts to demonstrate that commencing the 2019 was not the result of bad faith, frivolous or malicious conduct. No evidence whatsoever is offered in the moving papers to explain the dispute over whether the January and June 2019 payments were made. Unlike the lack of a link between this dispute and the maturity default, it is eminently conceivable that Granville may have sustained monetary damages if these counterclaims are proven. Plaintiff's attempt to rectify this deficiency in their reply papers is ineffective (*see eg Starr Indem. & Liab. Co. v. U.S. Adjustment Corp.*, 198 AD3d 551 [1st Dept 2021]). Nevertheless, the counterclaims are severed as they seek money damages only and do not affect the validity of the mortgage (*see Tri-Land Props. v. 115 W. 28th St. Corp.*, 238 AD2d 206 [1st Dept 1997]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment and other relief is granted, except as to the counterclaim; and it is further

ORDERED that the affirmative defenses pled by Defendant Maria Granville are dismissed; and it is further

ORDERED that Defendant Maria Granville's counterclaim is severed from the main action; and it is further

ORDERED that **Jeffery R. Miller, Esq, 32 Broadway, 13th Floor, New York, New York 10004, 212-227-4200** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the property identified in the notice of pendency can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

ORDERED that Plaintiff shall forward all necessary documents to the Referee and to Defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if Defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED that failure to submit objections to the referee may be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that Plaintiff must bring a motion for a judgment of foreclosure and sale within 45 days of receipt of the referee's report; and it is further

ORDERED that if Plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct Plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to Plaintiff's failure to move this litigation forward; and it further

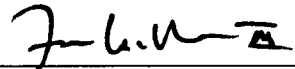
ORDERED that counsel for Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of 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)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **October 5, 2022, at 10:20 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

6/14/2022
DATE



FRANCIS KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
NON-FINAL DISPOSITION

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER J.S.C.

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE