

**Wilmington Sav. Fund Socy., FSB v East Fork
Capital Equities, LLC**

2022 NY Slip Op 32331(U)

July 15, 2022

Supreme Court, New York County

Docket Number: Index No. 850236/2021

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

INDEX NO. 850236/2021

MOTION DATE

MOTION SEQ. NO. 001

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST,

Plaintiff,

- v -

EAST FORK CAPITAL EQUITIES, LLC, BOARD OF MANAGERS OF STRIVERS GARDENS CONDOMINIUM, CITY OF NEW YORK, A MUNICIPAL CORPORATION ACTING BY AND THROUGH ITS DEPARTMNT OF PRESERVATION AND DEVELOPMENT, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE #1 THROUGH JOHN DOE #12,

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for DISMISS

Upon the foregoing documents, the motion and cross-motion are determined as follows:

The within matter is an action to foreclose on a restated mortgage, dated June 2, 2005, encumbering a premises located at 300 West 135th Street, New York, New York. The mortgage originally secured an indebtedness of \$352,000.00 memorialized by a note of the same date. The note and mortgage were executed by non-party Martin Peters ("Peters"). Defendant East Fork Capital Equities, LLC ("East Fork") is the present owner of the property. It took title to the premises via a referee's deed dated January 20, 2016. The referee was appointed by a judgment and foreclosure and sale, dated November 5, 2015, issued in an action brought by Board of Managers of Strivers Gardens Condominium, a Defendant in this action, to foreclose on a lien for common charges (New York Cty Index No 153717/2013). Plaintiff commenced this action on October 12, 2021, seeking foreclosure and an award of attorney's fees.

Now, Defendant East Fork moves, pre-answer, to, inter alia, dismiss pursuant to CPLR §3211[a][2], [7] and [8], to cancel the notice of pendency pursuant to CPLR §6512[a] and for an award of attorney's fees. Plaintiff opposes the motion and cross-moves for leave to amend its complaint pursuant to CPLR §3025[a] and for an order "[d]eeming Subpart B, Sections 3 and 4 of the COVID-19

Emergency Eviction and Foreclosure Prevention Act of 2020 (“CEEFPA”) to be unconstitutionally vague and unenforceable. Defendant East Fork opposes the cross-motion.

Movant’s reliance on the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (L. 2020, c. 381) (“CEEFPA” or “Act”) and its motion, conveniently filed one-day before the legislation expired, are, to put it mildly, cheeky. East Fork’s arguments, and the faux tone of outrage with which they are delivered, are based on an overly literal reading of the Act and a complete ignorance its intended purpose. The Court is mindful that, when interpreting CEEFPA, “remedial statutes are liberally construed to carry out the reforms intended and to promote justice” (McKinney’s Statutes §321). Nevertheless, the Court must also ensure that “[a]ll parts of [the] statute [are] harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof” (McKinney’s Statutes §98).

By its terms CEEFPA only applies when the “owner or mortgagor of such property is a natural person”. Here, it is undisputed that the owner is a limited liability company which is not a natural person. However, East Fork posits since the mortgagor was a natural person, it can seize on this circumstance and cloak itself in legislation despite not being an intended beneficiary. Section 3 of CEEFPA provided that its intent was to avoid as many evictions and foreclosures as possible for “*people* experiencing financial hardship during the COVID-19 pandemic” (emphasis added). Moreover, the Legislature declared that based on the pandemic “it is necessary to temporarily allow *people* impacted by COVID-19 to remain in their homes” (emphasis added).

Here, Movant acknowledges the mortgagor has been incarcerated in a correctional facility since November 2006 on a 40-year-to-life sentence. Indeed, any other relations of the mortgagor were almost certainly removed when East Fork obtained a writ of assistance in the common charge lien foreclosure action over five years ago which directed the Sheriff of New York County to put East Fork in possession (see New York Cty Index No 153717/2013, Doc No 62). Further, as East Fork is not the mortgagor nor a party to the loan transaction, it cannot utilize CEEFPA. By analogy, RPAPL §1304, a statute also designed to protect the interests of “borrowers”, a/k/a mortgagors, in their homes, cannot be utilized by “a stranger to the note and mortgage” (see *Bank of Am., N.A. v Lestrade*, 189 AD3d 969 [2d Dept 2020]; *HSBC Bank USA, N.A. v Shah*, 185 AD3d 794 [2d Dept 2020]).

Movant’s reliance on the language “regardless of how title is held” immediately following the above quoted text is unavailing. Were the Court to read “regardless of how title is held” to include the members of limited liability company, that interpretation would entirely negate the requirement that a “natural person” be the owner or mortgagor. The Legislature has similarly limited other foreclosure protections to “natural persons” and courts have given effect to those limitations when a limited liability company is the owner/mortgagor/borrower (see CPLR §3408; Banking Law § 6-1; RPAPL §1304[6][a][1][i]; *HSBC Bank USA, N.A. v Tigani*, supra; *Independence Bank v Valentine*, 113 AD3d 62 [2d Dept 2013]). Moreover, CEEFPA refers to “how” title is held, not “who” holds title. In custom and practice, the term “how title is held” refers to the type of estate involved (ie, tenancy in common, joint tenancy, tenancy by the entirety).

Even if CEEFPA were applicable, Movant’s argument that dismissal is mandated for failure to comply with Sections 3 and 4 of part B, subpart A of the Act is incorrect. Section 3 requires, in part, that the “foreclosing party shall include a ‘Hardship Declaration’ in 14-point type, with every notice provided to a mortgagor pursuant to sections 1303 and 1304 of the real property actions and proceedings

law”. Section 4 states that “[n]o court shall accept for filing any action to foreclose a mortgage unless the foreclosing party or an agent of the foreclosing party files an affidavit” attesting to service of a hardship declaration and that the lender did not receive same from the mortgagor. There is no dispute that Plaintiff did not comply with the sections.

Concerning a remedy for the above non-compliance, it is important to note that CEEFPA does not mandate dismissal for non-compliance. Other statutes using mandatory terms like “shall” (*see eg* RPAPL §§1303, 1304; RPL §§232-a, 735[1]; VTL §313; GML §50-e) and with remedial purposes have been interpreted to be conditions precedent with a consequence of dismissal of the action for non-compliance (*see First Natl. Bank of Chicago v Silver*, 73 AD3d 162 [2d Dept 2010]). Unlike those statutes, CEEFPA appears to contain a cure provision in Section 3[b] when a mortgagor has not received a hardship declaration which states:

If the court determines a mortgagor has not received a hardship declaration, then the court shall stay the proceeding for a reasonable period of time, which shall be no less than ten business days or any longer period provided by law, to ensure the mortgagor received and fully considered whether to submit the hardship declaration.

Having the foregoing as a remedy as opposed to mandatory dismissal would seem consistent with the intended “limited” and “temporary” nature of the legislation (*see* CEEFPA section 3 [“As such, it is necessary to temporarily people impacted by COVID-19 to remain in their home. A limited, temporary stay is necessary to protect the public health, safety and morals of the people the Legislature represents from the dangers of the COVID-19 emergency pandemic] [emphasis added]). That legislative intent differs from above cited statutes enacted as more permanent solutions to perceived ills. For example, the Home Equity Theft Prevention Act (RPL §265-a) and its statutory progeny were enacted to serve enduring social policies (RPL §265-a[1][b][“it is the express policy of the state to preserve and guard the precious asset of home equity, and the social as well as the economic value of homeownership”]).

Accordingly, the branch of the motion to dismiss for failure to comply with Sections 3 and 3 of part B, subpart A of CEEFPA is denied.

To the extent East Fork seeks dismissal based upon Plaintiff’s failure to comply with RPAPL §1304 is denied as it is a stranger to the note and mortgage (*see Bank of Am., N.A. v Lestrade*, *supra*; *HSBC Bank USA, N.A. v Shah*, *supra*).

Movant’s reliance on RPAPL §1301[2] as a basis for dismissal also misplaced. As there has been no demonstration or allegation of prejudice incurred by East Fork based upon Plaintiff’s failure to comply with this section, it is a mere irregularity that may be ignored (*see Marton Assocs. v Vitale*, 172 AD2d 501 [2d Dept 1991]).

The branch of East Fork’s motion to dismiss pursuant to CPLR §3211[a][8] is denied. Plaintiff filed an affidavit of service wherein the proceed server avers service was made on East Fork by delivering the summons and complaint, as well as other papers, by delivering it to “COLLEEN BANAHAN, authorized agent in the office of the Secretary of State of New York” pursuant to section 303 of the Limited Liability Company Law. Ordinarily, “[a] process server’s affidavit of service constitutes *prima facie* evidence of proper service and, therefore, gives rise to a presumption of proper

service” (*Bethpage Fed. Credit Union v Grant*, 178 AD3d 997, 997 [2d Dept 2019]). A conclusory denial of service is insufficient to rebut the presumption and a hearing is mandated only when the defendant submits an affidavit substantiated by specific, detailed facts denying the process server’s allegations (*id.*; *see also Wells Fargo Bank, NA v Spaulding*, 177 AD3d 817, 819 [2d Dept 2019]; *NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]). Here, East Fork’s assertion that the process server was unlicensed at the time service was made is conclusory and unsupported by any evidence whatsoever. Similarly, the claim that Colleen Banahan was not authorized to accept service on behalf of the New York Secretary of State is naked speculation.

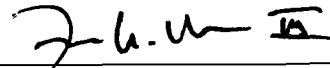
As to the Plaintiff’s cross-motion, the branch seeking leave to amend the complaint to pled compliance with RPAPL §1031[2] is denied as unnecessary based on the foregoing determination. The branch of the motion to declare portions of CEEFPA unconstitutional is denied as there is no proof that the cross-motion was served on the New York State Attorney General’s Office as required (*see Executive Law 71; McGee v. Korman*, 70 NY2d 225, 231 [1987]).

Accordingly, it is

ORDERED that the Defendant’s motion and Plaintiff’s cross-motion are denied in their entirety.

7/15/2022

DATE



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

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE