

BNH Milf LLC v Milford St. Props., LLC
2022 NY Slip Op 32355(U)
July 14, 2022
Supreme Court, Kings County
Docket Number: Index No. 505821/14
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 14th day of July, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

BNH MILF LLC,

Plaintiff,

-against-

MILFORD ST. PROPERTIES, LLC,

BRIEN MINGO,

ABRAHAM SLOCHOWSKY,

MICHAEL SLOCHOWSKY, et al.,

Defendants.

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DECISION AND ORDER

Index No. 505821/14

Mot. Seq. No. 19

The following e-filed papers read herein:

NYSECF Doc. No.:

Notice of Motion, Supporting Affirmation
with Exhibits Annexed _____

478-493

Affirmation in Opposition with Exhibits Annexed _____

496-501

Reply Affirmation with Exhibit Annexed _____

503-504

In this action to foreclose a mortgage on commercial real property located at 177 and 179-181 Milford Street in Brooklyn, New York (the "property"), plaintiff BNH Milf LLC ("plaintiff") moves (in Seq. No. 19) to restore this action to active status, and, upon restoration, for an order, pursuant to CPLR 3124, compelling defendants Milford St. Properties, LLC, Abraham Slochowsky, and Michael Slochowsky to comply with "Plaintiff's First Notice for Discovery and Inspection," dated June 1, 2021 (the "D&I"), and, in the event of the aforementioned defendants' failure to comply, for an order, pursuant to CPLR 3126 (3), striking their answer and entering a default judgment against

them. Defendants Milford St. Properties, LLC and Michael Slochowsky (collectively, “defendants”) object.

Background

On June 24, 2014, plaintiff commenced this action against the defendants, among others, to foreclose on the consolidated note and mortgage which, prior to the inception of this action, had been held by nonparty Capital One, N.A. (“Capital One”) and which, at the inception of this action, were held by plaintiff as the final assignee. After issue had been joined, plaintiff moved, *inter alia*, for summary judgment on the complaint as against defendants and to strike their joint answer, as well as for an order of reference. In an order, dated May 9, 2017, the Court (Vaughan, J.) granted, among other things, the aforementioned branches of plaintiff’s motion (the “May 9th order”). Thereafter, plaintiff moved for a judgment of foreclosure and sale, as well as to confirm the referee’s report. In an order and judgment of foreclosure and sale, dated December 20, 2018 (the “December 20th order”), the Court (Vaughan, J.), *inter alia*, granted plaintiff’s motion and directed the sale of the property. Defendants separately appealed both the May 9th order and the December 20th order to the Second Judicial Department. While defendants’ appeals (as subsequently consolidated into a single appeal) were pending, a foreclosure auction for the property was held, with the winning bidder having been selected by the referee. Before the auction sale could close, each side (*i.e.*, defendants-appellants and plaintiff-respondent in the consolidated appeal) moved before the Appellate Division “to stay the closing and transfer of title with respect to the subject premises.” By decision and order, dated May 23, 2019, the Second Judicial Department, as relevant herein, denied both parties’ respective requests for a stay of the sale pending resolution of the appeal (*see BNH*

Milf, LLC v Milford St. Props., LLC, 2019 NY Slip Op 71062[U]). Thereafter, the property was conveyed to a third party by a referee's deed. With the sale of the underlying property having been consummated, this action was administratively marked off on September 25, 2019.

Approximately 1½ years later, on March 24, 2021, the Second Judicial Department issued its decision on the merits of the consolidated appeal of the two orders. More particularly, the Second Judicial Department *reversed* the December 20th order (*i.e.*, the judgment of foreclosure and sale) and *modified* the May 9th order (*i.e.*, the order of reference), in each instance without regard to the sufficiency of defendants' opposition, on the narrow ground that plaintiff had failed to demonstrate *prima facie*, by way of Capital One's records (and subject to a proper foundation for their admissibility), that defendants defaulted in payment under the consolidated note and mortgage (*see BNH Milf, LLC v Milford St. Props., LLC*, 192 AD3d 960).

Following remand, plaintiff served its D&I on defendants (as well as on codefendant Abraham Slochowsky, even though the latter had not participated in the consolidated appeal in any capacity). When defendants failed to respond, plaintiff moved (in Seq. No. 17) to compel their response to its D&I, whereas defendants cross-moved (in Seq. No. 18) for an extension of their time to respond to plaintiff's motion. By short-form order, dated October 13, 2021, the Court (Knipel, J.) denied both plaintiff's motion and defendants' cross motion, in each instance, "with permission to renew upon proper papers that include specific demand to restore this case to active status." On November 16, 2021, plaintiff renewed its motion to compel defendants to respond to its D&I and for ancillary relief. As relevant herein, plaintiff's motion, as renewed, includes a "specific demand to

restore this case to active status” and is supported by two separate “good faith” demands on defendants to respond to its D&I. Plaintiff’s motion, as renewed, was fully submitted on February 23, 2022, with the Court reserving decision.

Discussion

As a threshold matter, plaintiff is entitled to the restoration of this action to active status following the Second Judicial Department’s remand. As noted, the Second Judicial Department, in reversing and modifying the December 20th order and the May 9th order, respectively, remanded for this Court’s determination (on the basis of non-conclusory, factual, and admissible evidence) the discrete and narrow issue of defendants’ alleged default under the consolidated note and mortgage.

Turning to the merits, plaintiff is entitled, pursuant to CPLR 3124, to have defendants respond to plaintiff’s D&I, with a caveat that each defendant “may not be compelled to produce or sanctioned for failing to produce information that does not exist or is not in [such defendant’s] possession or control” (*Cap Rents Supply, LLC v Durante*, 167 AD3d 700, 702 [2d Dept 2018]). Defendants’ contentions to the contrary have been considered and found to be unavailing. Of note, defendants’ subsequently commenced action against, among others, plaintiff and its former counsel to vacate the foreclosure sale and for monetary relief was dismissed as against them by order, dated February 16, 2022 (Wade, J.) (*see Milford St. Properties, LLC and Michael Slochowsky v BNH Milf, LLC, et al.*, Index No. 517326/21 [Sup Ct, Kings County]).

Conclusion

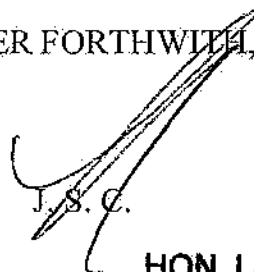
Accordingly, it is

ORDERED that plaintiff's motion (in Seq. No. 19) is *granted to the extent* that this action is restored to active status and, upon restoration, defendants Milford St. Properties, LLC and Michael Slochowsky are each directed to respond to "Plaintiff's First Notice for Discovery and Inspection," dated June 1, 2021, with each such defendant's response being due (unless otherwise agreed to by the parties) within 45 days after electronic service of this decision and order with notice of entry on defendants' counsel by plaintiff's counsel; and further subject (in the event of an untimely and/or incomplete response by either defendant) to plaintiff's separate motion for an order precluding admissibility at trial of any of defendants' evidence *disputing the existence of a payment default under the consolidated note and mortgage*; and it is further

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

This constitutes the decision and order of the Court.

ENTER FORTHWITH,



J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE