Honeedew Inv. LLC v JP Morgan Chase Bank, N.A.
2022 NY Slip Op 32474(U)
July 22, 2022
Supreme Court, New York County
Docket Number: Index No. 155466/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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HONEEDEW INVESTING LLC,

Petitioner,

- v -

JP MORGAN CHASE BANK, N.A., 900 FIFTH AVENUE CORPORATION, CARLOS ABADI, and BARBARA ABADI,

Respondents.

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INDEX NO. 155466/2020

MOTION DATE 01/31/2022

MOTION SEQ. NO. 001

DECISION, ORDER + JUDGMENTON MOTION

HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 16, 19, 21, 22, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 73, 74, 76, 78, 79, 80, 104, 105, 106, 108, 109, 110, 113, 114, 116, 120, 121, 124, 125, 129, 131, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 202

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

I. INTRODUCTION

On July 23, 2020, the petitioner, Honeedew Investing, LLC (Honeedew), commenced this enforcement proceeding pursuant to article 52 of the CPLR seeking, *inter alia*, the appointment of a receiver to sell a cooperative apartment owned by the respondents Carlos Abadi and Barbara Abadi (together, the Abadis) at 900 Fifth Avenue in Manhattan (the Fifth Avenue Apartment) and partially satisfy a $4,603,408.23 judgment Honeedew previously obtained against the Abadis on May 17, 2017 (the judgment). By order dated September 25, 2020, following numerous conferences with the parties, the court permitted the Abadis to proceed with the contemplated sale of the Fifth Avenue Apartment to an interested buyer, provided that the

Abadis comply with certain conditions delineated in the order, and adjourned the petition. The parties notified the court on December 11, 2020, that the Fifth Avenue Apartment had been sold. The proceeds of the sale, approximately $2.4 million, were placed in escrow with counsel for the Abadis.

In light of the sale, the branch of the petition seeking to place the Fifth Avenue Apartment into receivership is moot. The only issue remaining in this proceeding is whether Honeedew is entitled to immediate turnover of all escrowed proceeds. The respondent JP Morgan Chase Bank, N.A. (Chase), opposes turnover to Honeedew on the ground that nonparty U.S. Bank National Association, as Trustee, successor in interest to Wachovia Bank, N.A., as Trustee, successor by merger to First Union National Bank, as Trustee for Structured Asset Securities Corporation Mortgage Pass-Through Certificates Series 2001-1 (U.S. Bank), has a prior perfected security interest in the Fifth Avenue Apartment. The court has reviewed the parties' submissions on the matter, including loan documents, UCC filing statements, and supplemental submissions on the issue of priority, and has considered the arguments the parties raised at oral argument on January 31, 2022. The court finds, *inter alia*, that U.S. Bank's perfected, secured interest in the Fifth Avenue Apartment has priority over Honeedew's unsecured money judgment.

II. BACKGROUND

On October 6, 2000, the Abadis, by and through their attorney-in-fact, John L. Van Horne (Van Horne), executed a promissory note (the note) in favor of Lehman Brothers Bank, F.S.B (Lehman Brothers). Pursuant to the note, the Abadis acknowledged accepting a loan in the sum of $1,693,200.00 from Lehman Brothers (the loan) and agreed to repay such sum, plus interest, in monthly installments beginning on December 1, 2000. On the same date the note was

executed, the Abadis, by and through Van Horne, executed a loan security agreement and pledge and security agreement pledging as collateral for the loan 840 shares in respondent 900 Fifth Avenue Corporation (900 Fifth) (the stock) and the proprietary lease for the Fifth Avenue Apartment (the lease). Lehman Brothers recorded its security interest in the Fifth Avenue Apartment by filing a UCC-1 Financing Statement on August 17, 2000, and a UCC-3 Continuation Financing Statement with Cooperative Addendum on July 18, 2006. On December 10, 2013, Chase became the recorded holder of the security interest in the Fifth Avenue Apartment by filing a UCC-1 Financing Statement.

In 2017, Honeedew obtained the judgment against the Abadis by confession in a separate proceeding, captioned Honeedew Investing Limited v Carlos Abadi and Barbara Abadi, filed in the New York Supreme Court, New York County, Index No. 652654/2017. The judgment by confession was memorialized in a separate settlement agreement entered into on November 9, 2016 (the settlement agreement). Annexed to the Settlement Agreement as Schedule B thereto is a list entitled "Existing Liens and Encumbrances on the Premises [the Fifth Avenue Apartment]," consisting of the December 10, 2013, UCC-1 filed by Chase.

On August 8, 2019, Chase filed a UCC-3 Assignment Financing Statement Amendment assigning the security interest to U.S. Bank. Chase services the loan on behalf of U.S. Bank pursuant to a written servicing agreement submitted by Chase. On May 1, 2019, the Abadis defaulted on the loan by failing to make the payment due May 1, 2019, and all payments thereafter, leaving an outstanding principal balance of $1,206,493.07 due and owing. On March 18, 2020, Chase notified the Abadis of their default and noticed the sale of the collateral. The sale was subsequently cancelled due to the COVID-19 pandemic. Honeedew, objecting to the sale, commenced this proceeding by filing of the petition on July 23, 2020.

III. DISCUSSION

Where the security pledged as collateral in a transaction consists of "shares constituting ownership of a cooperative apartment, and its proprietary lease," such security represents chattel real, i.e., personalty, not realty, and is governed by the procedure for enforcement of a security interest (UCC art 9), rather than the procedure for summary recovery of a real property (RPAPL art 7)." Fundex Capital Corp. v Reichard, 172 AD2d 420, 421 (1st Dept. 1991) (citations omitted); see Chase v Wells Fargo Bank, N.A., 135 AD3d 751, 753-54 (2nd Dept. 2016). UCC Article 9 provides, in relevant part, that "[a] security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral." UCC § 9-203(a). A security interest becomes enforceable against the debtor and third parties with respect to the collateral if (1) value has been given, (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party, and (3) the debtor has authenticated a security agreement providing a description of the collateral. UCC § 9-203(b).

Here, the evidence submitted by Chase establishes that the Abadis received value insofar as they received the loan from Lehman Brothers in the sum of $1,693,200.00. Moreover, the Abadis, as owners of the stock and holders of the lease, signed a security agreement describing the collateral through their attorney-in-fact, Van Horne, who has submitted an affirmation in this action. The Abadis' possession of the stock and occupancy of the Fifth Avenue Apartment demonstrates "clearly identifiable rights in the collateral." Fundex Capital Corp. v Reichard, supra at 421.

Nonetheless, Honeedew contends that no security interest in the collateral attached because the Abadis did not have the power to unilaterally transfer the stock or the lease to Lehman Brothers. Honeedew's argument is based on certain non-assignment clauses in the lease

and the bylaws of 900 Fifth (the bylaws). Specifically, the lease provides that "the Lessee shall not assign this lease, or any interest therein, and no such assignment shall take effect as against the Lessor for any purpose" unless approved by the Board of 900 Fifth. The bylaws provide that "[n]o transfer of stock shall be valid as against the corporation, its stockholders and creditors for any purpose except to render the transferee liable for the debts of the corporation…"

With regard to contractual prohibitions of assignments without the consent of a contracting party generally, "it has been consistently held that assignments made in contravention of a prohibition clause in a contract are void if the contract contains clear, definite and appropriate language declaring the invalidity of such assignments." Macklowe v 42nd St. Dev. Corp., 170 AD2d 388, 389 (1st Dept. 1991) (citations and quotation marks omitted); see Singer Asset Finance Co., L.LC. v Bachus, 294 AD2d 818, 820 (4th Dept. 2002). "On the other hand, where the language employed constitutes merely a personal covenant against assignments, an assignment made in violation of such covenant gives rise only to a claim for damages against the assignor for violation of the covenant." Macklowe v 42nd St. Dev. Corp., supra at 389. "Whether a non-assignment clause renders a subsequent assignment void or the breach of a personal covenant not to assign depends upon the expressed intent of the parties, namely whether the language is sufficiently express to bar the assignment." C.U. Annuity Service Corp. v Young, 281 AD2d 292, 292 (1st Dept. 2001).

Here, even assuming that the language of the lease and bylaws is sufficient to render assignments made without the consent of 900 Fifth invalid, both of the provisions cited by Honeedew expressly state that assignments of the lease and stock are ineffective "as against" 900 Fifth and, in the case of the stock, "its stockholders and creditors." Thus, the lease and bylaws, by their terms, limit the right to any legal objection to assignment to those entities. 900 Fifth, a

named respondent, has appeared in this proceeding but has not sought to invalidate the loan documents. Indeed, on July 14, 2020, 900 Fifth accepted $123,818.15 from Chase in payment of the Abadis' overdue co-op dues so that Chase could preserve its lien position. In any event, Honeedew, an unsecured judgment creditor of the Abadis, is a stranger to the subject agreements and cannot assert objections on behalf of 900 Fifth. Freeford Ltd. v Pendleton, 53 AD3d 32, 38 (1st Dept. 2008) ("[G]enerally[,] only parties in privity of contract may enforce terms of the contract."); see LI Equity Network, LLC v Village in the Woods Owners Corp., 79 AD3d 26, 35-36 (2nd Dept. 2010).

Further, neither the lease nor the bylaws contain any prohibition on the pledging as collateral, as opposed to the "assignment" or "transfer," of the lease or stock. To be sure, restrictions on the creation of a security interest in a lease are prohibited under UCC § 9-407, as under former UCC § 2-A-303(3). Cf. Plotch v 435 East 85th Street Tenants Corp., 187 AD3d 614, 616 (1st Dept. 2022). Additionally, courts have long recognized that while a cooperative can impose restraints on occupancy, it cannot prevent the transfer of monetary interests in a co-op apartment by operation of law. See House v Lalor, 119 Misc 2d 193, 196-98 (Sup Ct, NY County 1983); In the Matter of Carniol, 20 Misc 3d 887, 891 (Surr Ct, Nassau County 2008) In the Matter of Will of Katz, 142 Misc 2d 1073, 1076-77 (Surr Ct, NY County 1989); see also LI Equity Network, LLC v Village in the Woods Owners Corp., supra at 30-31 (discussing cases holding that "cooperatives may not interfere with a judgment creditor's levy of execution on the shares allocated to the unit of a defaulting cooperative tenant," but recognizing that the rights of prospective tenant can be modified by lease or by-laws). Nor is approval from a cooperative of a pledge of stock as collateral for a loan by signing a recognition agreement required to transfer such interests under any authority cited by Honeedew. Since the mere attachment of a security

interest in the lease and stock does not contravene the lease provisions and bylaws here, the Abadis' execution of the security agreement was a permissible assignment of their rights in the subject collateral.

In light of the foregoing, the court concludes that Lehman Brothers obtained a valid and enforceable security interest in the collateral. Lehman Brothers perfected its interest against present and future creditors by filing a UCC-1 financing statement and UCC-3 continuation financing statement. Subsequently, U.S. Bank perfected a security interest in the Fifth Avenue Apartment by filing its own UCC-1 financing statement as of December 2013. As discussed above, contrary to Honeedew's contentions, the filing of the UCC-1 statements were authorized under UCC §§ 9-509 and 9-510 because the Abadis authorized the filing by authenticating and becoming bound by the security agreement describing the collateral. Thus, U.S. Bank is the current secured party of record. U.S. Bank's perfected, secured interest in the Fifth Avenue Apartment has priority over Honeedew's unsecured money judgment. See Kuruwa v 130 E. 18 Owners Corp., 121 AD3d 472, 472 (1st Dept. 2014).

Honeedew's argument that Chase does not demonstrate U.S. Bank's priority because neither Chase nor U.S. Bank is a holder of the note is unavailing. First, Honeedew erroneously invokes standing requirements applicable to mortgage foreclosure actions under the RPAPL. As Chase correctly points out, this is not a foreclosure action. The enforceability of U.S. Bank's security interest in the Fifth Avenue Apartment turns on the requirements of Article 9 of the UCC. As explained above, under Article 9, Chase has established U.S. Bank's perfected, secured interest in the Fifth Avenue Apartment.

Moreover, even if Chase were the plaintiff in a mortgage foreclosure action, it would have adequately demonstrated standing to enforce the note by its submissions. While the

absence of an endorsement, or an endorsement in blank, on a promissory note can be evidence of a plaintiff's lack of standing in a foreclosure action, it is not dispositive. If a plaintiff can demonstrate that it is an assignee or transferee by delivery or written assignment of the underlying debt prior to commencement of the foreclosure action, the plaintiff may enforce the note. See, e.g., U.S. Bank N.A. v Askew, 138 AD3d 402 (1st Dept. 2016); Carlin v Jemal, 68 AD3d 655 (1st Dept. 2009). The note submitted by Chase lacks an endorsement and an allonge. However, Chase has submitted admissible evidence of a proper assignment. Specifically, Chase has submitted the affidavit of Albert Smith, its Mediation Corporate Representative, with 30 authenticated exhibits attached thereto, attesting to physical delivery of the note through a series of transfers and assignments of trust assets. This permits the reasonable inference that physical delivery of the note was made to Chase. See Aurora Loan Services, LLC v Taylor, 25 NY3d 355, 361 (2015); OneWest Bank FSB v Carey, 104 AD3d 444, 445 (1st Dept. 2013).

The court has considered Honeedew's remaining objections to U.S. Bank's priority and finds them to the be without merit. Likewise, the court has considered Honeedew's request for damages for a purported fraud upon the court and denies such request for failure to demonstrate entitlement to the relief sought.

The Abadis' request to distribute the escrowed proceeds to pay the commission of their real estate broker first is denied. The Abadis cite to no decisional or statutory authority supporting their request.

Finally, the Abadis invoke CPLR 5206 to exempt certain proceeds from the sale of the Fifth Avenue Apartment from being used to satisfy Honeedew's judgment. The Abadis' submissions in support of their request consist of affidavits in which they claim that the Fifth Avenue Apartment was their primary residence "at all times up until [they] sold it." Chase does

not oppose the Abadis' claim to an exemption. Further, Honeedew has not opposed or otherwise addressed such claim. Thus, the Abadis are each permitted to claim the statutory exemption in the sum of $165,550.00, the amount fixed by the Superintendent of Financial Services as of the date of the judgment, without opposition.

IV. CONCLUSION

Accordingly, it is

ORDERED and ADJUDGED that the petition of Honeedew Investing, LLC, is granted to the extent that the court determines the priority of the parties in interest as follows, and the petition is otherwise denied; and it is further

ORDERED that the proceeds of the sale of the Fifth Avenue Apartment shall first be distributed to satisfy the existing security interest of U.S. Bank National Association, as Trustee, successor in interest to Wachovia Bank, N.A., as Trustee, successor by merger to First Union National Bank, as Trustee for Structured Asset Securities Corporation Mortgage Pass-Through Certificates Series 2001-1, then, excepting the total sum of $331,100.00 as and for the statutory exemption set forth in CPLR 5206, to satisfy the judgment of Honeedew Investing, LLC, against Carlos Abadi and Barbara Abadi, and all remaining proceeds thereof, if any, shall be paid to Carlo Abadi and Barbara Abadi.

This constitutes the Decision, Order and Judgment of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

DATED: July 22, 2022