

JPMorgan Chase Bank, N.A. v 476 Broadway Realty Corp.

2022 NY Slip Op 33008(U)

September 9, 2022

Supreme Court, New York County

Docket Number: Index No. 150737/2022

Judge: Erika Edwards

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

PRESENT: HON. ERIKA EDWARDS

PART 10M

Justice

-----X

JPMORGAN CHASE BANK, N.A.,

Petitioner,

- v -

476 BROADWAY REALTY CORP. and BOARD OF
MANAGERS OF 476 BROADWAY REALTY CORP.,

Respondents.

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INDEX NO. 150737/2022

MOTION DATE 01/28/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents and oral arguments held before this court on June 23, 2022 and July 15, 2022, the court denies Petitioner JPMorgan Chase Bank, N.A.’s (“Chase”) Petition and motion by order to show cause to determine that Chase’s lien has priority over Respondents 476 Broadway Realty Corp.’s (“476 Broadway”) and Board of Managers of 476 Broadway Realty Corp.’s (“Board of Managers”) (collectively, “Respondents”) claim for attorney’s fees and costs owed under the terms of the Proprietary Lease. The court grants in part Respondents’ cross-motion to the extent that the court converts this proceeding into an action for declaratory judgment and injunctive relief, enters a declaratory judgment and determines that 476 Broadway has a first priority lien upon the sale proceeds and that it is entitled to recover its reasonable attorney’s fees and costs as set forth herein.

This action involves the court’s determination of whether Chase has a first priority lien for money owed to Chase from a defaulted mortgage or whether Respondents’ have a first priority lien to recover their reasonable attorney’s fees and costs incurred from the proceeds of

the sale of 690 shares of capital stock of 476 Broadway Realty Corp. and the Proprietary Lease associated with the cooperative apartment located at 476 Broadway, Apartment 10R, New York, New York, also known as 38 Crosby Street, Apt. 10R, New York, New York (“apartment”).

Martina Gordon and Anthony Gordon (“Gordons”) moved into the subject apartment in or about October 2000. On October 12, 2005, 476 Broadway issued the Gordons a new Proprietary Lease for the capital stock associated with the apartment. On April 25, 2007, Anthony Gordon, “as attorney in fact” for Martina Gordon, executed a Note for a loan from Washington Mutual Bank, FA (“Lender”) in the amount of \$3,000,000. In conjunction with the loan, Martina Gordon indicated that she owned 690 shares of capital stock of 476 Broadway on a Loan Security Agreement. The Gordons executed the Lender’s Recognition Agreement, which was agreed to by 476 Broadway. At some point, the mortgage was assigned to Chase.

After an on-going dispute with the Gordons involving water damage to their apartment and the Gordons’ repeated failure to permit access into their apartment for 476 Broadway’s contractors to conduct testing after repairs were made to the exterior, 476 Broadway terminated the Proprietary Lease on October 8, 2012 for the Gordons’ objectionable conduct. 476 Broadway notified Chase’s counsel of the termination by correspondence with a copy of the termination notice on October 25, 2012, along with an arrears report advising Chase that the Gordons owed \$85,977.44 for unpaid maintenance and assessments. Chase paid the arrears. The termination notice included the nature of the objectionable conduct, but the cover letter did not include information regarding a non-monetary default. The Gordons filed suit (Index No. 103951/2012) challenging the termination, which caused Respondents to incur legal fees and costs. A referee subsequently determined the amount owed to be \$827,834. As of the time that the cross-motion

was filed, Respondents alleged that they are owed \$1,098,241.59, plus interest, for additional fees and costs.

On February 29, 2016, Martina Gordon executed a Loan Modification Agreement with Chase, the terms of which became effective as of February 1, 2016. Martina Gordon defaulted on the Note by failing to make payments on the loan beginning on August 1, 2016. 476 Broadway and Chase had a long-standing dispute regarding the details of the sale of the apartment and the payment of the outstanding maintenance. Chase foreclosed on the property and purchased the shares at a public auction on January 24, 2018.

The Gordons filed suit against Chase (Index No. 150675/2018) to declare the auction for the sale of the property null and void. In a decision and order dated September 29, 2021, the court granted the Gordons' motion to void the sale of the stock and Lease since Chase consented to rescind the sale of the apartment and granted Chase's motion to dismiss the Gordons' amended complaint. The court determined in substance that Chase had no duty to notify the Gordons of the Gordons' alleged breach or 476 Broadway's default. The court stated in substance that Chase was not obligated to take any action to protect the Gordons' interests to allow the Gordons the opportunity to cure the alleged default, particularly since it appeared that 476 Broadway did not notify Chase of the Gordons' objectionable conduct and default, as required by the Recognition Agreement. It is important to note that the court's decision was limited by the papers submitted in that matter and since 476 Broadway was not a party to the action, it did not file papers or dispute this claim.

On October 28, 2021, Chase and 476 Broadway entered into an escrow agreement and on October 29, 2021, 476 Broadway sold the property. Chase held \$3,651,916.35 in escrow. Chase

alleges that as of October 22, 2021, it was owed \$3,759,233.02, which is over \$100,000 less than the loan amount owed to Chase.

In the instant matter, Chase moved by order to show cause under motion sequence 001 for an order pursuant to CPLR 5239 to determine the priority of its lien, for a declaration that its lien maintains priority over Respondents' claim for attorney's fees owed under the Proprietary Lease and any other judgment liens recorded after the lien was recorded and for a declaration that Respondents must reimburse Chase for the deficiency owed under its loan.

Respondents oppose Chase's order to show cause and cross-move to convert the action to an action for declaratory judgment and injunctive relief, for an order awarding declaratory and injunctive relief to Respondents and determining that Chase's order to show cause and petition are deemed to be a summons and complaint, respectively, and that Respondents' opposition is deemed to be their answer. Respondents also seek a declaratory judgment that 476 Broadway has a first priority lien upon the sale proceeds and that it should be reimbursed for its attorney's fees and costs in the total amount of \$1,098,241.59 based on the terms of the Proprietary Lease.

Chase opposes Respondents' cross-motion and argues in substance that Respondents are not entitled to receive their attorney's fees and costs based on the Recognition Agreement and Note and Loan Security Agreement because Chase has a short fall and Respondents failed to give Chase timely notice of the Gordons' default and an opportunity to cure such default. Chase argues in substance that the Recognition Agreement requires 476 Broadway to provide the Lender with notice of 476 Broadway's intention to terminate the Gordons' Proprietary Lease and if it is a monetary default involving an amount equal to or exceeding three months maintenance payments, then 476 Broadway is prohibited from taking any action to terminate the Lease or cancel the shares if the default is cured by the Lender or the Lessee within fifteen (15) days after

such notice of default or intention to terminate (Recognition Agreement at ¶2[c][1]).

Additionally, the Recognition Agreement provides that if the default cannot be so cured, then 476 Broadway cannot institute any action to terminate the Lease or cancel the shares until the Lender had reasonable notice and opportunity to induce the Lessee to cure the default for no less than the time provided in the Lease for the Lessee to cure (*id.* at ¶2[c][2]). The Recognition Agreement also provides that if 476 Broadway terminates the Lease and cancels the shares because of a non-monetary default, then if the Lender pays the amounts due under the Lease when due, 476 Broadway is precluded from selling or subletting the apartment without the Lender's approval, unless the net proceeds of such sale or sublet equal or exceed the amount owed to the Lender by the Lessee (*id.* at ¶2[c][3]).

Chase further argues that in the Lease termination litigation between 476 Broadway and the Gordons, 476 Broadway admitted in substance that it failed to provide Chase with notice of its intention to terminate the Lease based on the Gordons' objectionable conduct prior to the termination of the Proprietary Lease because it did not have a copy of the Recognition Agreement. However, 476 Broadway failed to notify Washington Mutual either, so Chase disputes this argument.

Chase further argues in substance that 476 Broadway's purported notice of the Lease termination on October 25, 2012, which was sent to Chase's address listed on a different Recognition Agreement was untimely and insufficient. Chase argues that this notice was provided after the termination and that it deprived Chase of the opportunity to cure the Gordons' monetary and non-monetary defaults or mitigate the dispute with the Gordons, which could have prevented 476 Broadway from incurring its alleged legal fees and costs. Therefore, Chase argues

that it is entitled to recover the balance due and owing on its loan before 476 Broadway recovers its legal fees and costs.

Respondents argue in substance that 476 Broadway's security interest has priority over Chase's lien pursuant to the Proprietary Lease, Recognition Agreement, ByLaws and UCC. Respondents argue in substance that the Proprietary Lease requires the Gordons to reimburse 476 Broadway for its attorney's fees, costs and expenses incurred in their litigation, fees and expenses associated with the sale of the apartment and unpaid maintenance. They argue that the ByLaws also provide 476 Broadway with a first priority lien upon the Gordons' shares and Lease to secure the debt.

Additionally, Respondents argue that the Recognition Agreement absolves 476 Broadway of liability and provides 476 Broadway with a priority lien. It provides that if "through oversight or negligence" 476 Broadway fails to deliver notice to the Lender of the Gordons' default prior to the termination of the Proprietary Lease, the Lender will not hold 476 Broadway liable so long as the Lender is paid the net proceeds of any sale of the apartment after 476 Broadway reimburses itself for all sums due to it (Recognition Agreement § 3[c][2]).

Respondents further argue that the UCC provides that a cooperative organization's security interest in all amounts secured has priority over all other security interests in a cooperative interest (UCC § 9-322[h][1]). Respondents further argue that such cooperative's lien "becomes perfected when the cooperative interest first comes into existence and remains perfected so long as the cooperative interest exists" (UCC § 9-308[h]).

Here, the court grants in part Respondents' cross-motion to the extent that the court converts this action into an action for declaratory judgment and injunctive relief and grants judgment in Respondents' favor, determines that 476 Broadway has a first priority lien for

Respondents' reasonable attorney's fees and costs of the litigation with the Gordons and their fees and costs associated with the sale of the apartment. The court denies Chase's order to show cause, except that the court determines the priority of the liens in favor of Respondents as set forth herein.

The court agrees with Respondents' arguments regarding their lien priority and conversion of the action and finds that Respondents demonstrated that 476 Broadway has a first priority lien on the recovery of their reasonable attorney's fees and costs based on the applicable provisions of the Proprietary Lease, the Recognition Agreement and UCC as set forth in their arguments. The court finds that § 3(c)(2) of the Recognition Agreement addresses this type of situation where Respondents alleged that Chase did not provide them with their address when Chase took over the loan from Washington Mutual and that Respondents' notice of the Gordons' default was within a reasonable time after the Proprietary Lease was terminated. The Recognition Agreement provides that Chase will not hold 476 Broadway liable as long as 476 Broadway promptly notifies Chase of the default after discovering its failure to do so prior to the termination. Therefore, the court finds that Chase is entitled to be paid the remainder of the net proceeds of the sale after 476 Broadway is reimbursed for the money that it is owed.

Since Respondents provided the notice of termination to Chase on October 25, 2012, just 2 ½ weeks after the termination, such notice is deemed prompt under the terms of the Recognition Agreement and Chase should have been on notice that 476 Broadway was also terminating the Proprietary Lease because of the Gordons' non-monetary default for their objectionable conduct by denying access into the apartment. Therefore, the notice was sufficient and Respondents have lien priority. Therefore, Respondents are entitled to their reasonable attorney's fees and costs and Chase is entitled to the remainder of the net proceeds of the sale.

The court finds that Chase's arguments in favor of its lien priority, particularly those related to the Recognition Agreement and cases cited are unpersuasive. Therefore, the court denies Chase's motion by order to show cause, except that the court determines the priority of the lien, although such determination is in favor of Respondents.

The court also finds that Respondents demonstrated that Chase's Petition pursuant to CPLR 5239 is improper and inapplicable to these proceedings. Therefore, the court exercises its discretion in the interest of judgment and converts this action to an action for a declaratory judgment and injunctive relief. The court deems Chase's order to show cause to be a summons, Chase's petition to be a complaint and Respondents' opposition papers to be an answer.

Additionally, the court enters a declaratory judgment in favor of Respondents and finds that Respondents have a first priority lien on the proceeds of the sale of the apartment for the recovery of their reasonable attorney's fees in connection with the Gordons' law suit filed under New York County Index No. 103951/2012, the costs related to the sale of the apartment and outstanding maintenance and that Chase is entitled to receive the net proceeds of the sale once those fees and costs are paid to Respondents.

However, although Respondents allege that they are entitled to \$1,098,241.59, Chase disputes a portion of the fees. The court finds that Respondents are entitled to recover \$827,834 for their reasonable attorney's fees related to the litigation with the Gordons, which was previously determined by the special referee, \$66,800 for the flip tax or transfer fee, \$90,545.15 and \$27,300.05 for unpaid maintenance, repairs and to get the apartment in a condition to show it for sale, for a total of \$1,012,479.20, plus statutory interest. However, since Chase is also disputing the \$85,762.39 for 476 Broadway's reasonable attorney's fees and expenses in connection to the sale, the court schedules a settlement conference to attempt to resolve the

amount owed to Respondents for these legal fees and expenses and orders a fee hearing, if necessary, to determine the reasonableness of such fees as set forth below.

The court has considered all additional arguments raised by the parties but not specifically discussed herein, and the court denies all additional requests for relief, not specifically granted herein.

As such, it is hereby

ORDERED that the court denies Petitioner JPMorgan Chase Bank, N.A.'s Petition and motion by order to show cause and after conversion, as set forth below, the court dismisses Petitioner JPMorgan Chase Bank, N.A.'s claims asserted in the converted complaint as against Respondents 476 Broadway Realty Corp. and Board of Managers of 476 Broadway Realty Corp.; and it is further

ORDERED that the court grants in part Respondents 476 Broadway Realty Corp.'s and Board of Managers of 476 Broadway Realty Corp.'s cross-motion to the extent that:

- 1) the court converts this proceeding into an action for declaratory judgment and injunctive relief and deems Petitioner JPMorgan Chase Bank, N.A.'s order to show cause to be a summons, its petition to be a complaint and Respondents 476 Broadway Realty Corp.'s and Board of Managers of 476 Broadway Realty Corp.'s opposition papers to be their answer; and
- 2) the court enters a declaratory judgment in favor of Respondents 476 Broadway Realty Corp. and Board of Managers of 476 Broadway Realty Corp. and determines that they have a first priority lien over Petitioner JPMorgan Chase Bank, N.A.'s lien on the sale of the subject apartment; and it is further

ADJUDGED and DECLARED that Respondent 476 Broadway Realty Corp. has a first priority lien upon the sale proceeds of the cooperative unit 10R located at 476 Broadway, also known as 38 Crosby Street, New York, New York, currently held in escrow by Petitioner JPMorgan Chase Bank, N.A., for the recovery of Respondents 476 Broadway Realty Corp.'s and Board of Managers of 476 Broadway Realty Corp.'s reasonable attorney's fees in connection with the litigation involving Anthony Gordon and Martina Gordon filed under New York County Index No. 103951/2012, in the amount of \$827,834; the flip tax or transfer fee in the amount of \$66,800, unpaid maintenance, repairs and costs related to the showing and sale of the apartment in the amount of \$90,545.15 and \$27,300.05, respectively, plus statutory interest; and reasonable attorney's fees and costs related to the sale, in an amount to be determined after a conference and possible hearing to determine the reasonableness of such fees and costs; and it is further

ORDERED that Petitioner JPMorgan Chase Bank, N.A. is directed to pay Respondents 476 Broadway Realty Corp. and Board of Managers of 476 Broadway Realty Corp. the full amount owed to Respondents as set forth herein and as determined by the above-mentioned fee hearing and that after such amount is paid, then Petitioner JPMorgan Chase Bank, N.A. is entitled to receive the net proceeds of the sale of said apartment; and it is further

ORDERED that the court directs the parties to appear for a settlement conference to attempt to determine that amount of the reasonable attorney's fees and costs related to the sale of said apartment, which Respondents 476 Broadway Realty Corp. and Board of Managers of 476 Broadway Realty Corp. allege to be in the amount of \$85,762.39 on September 21, 2022, at 9:30 a.m., or a date agreed upon by the court; and it is further

ORDERED that, if this matter is not resolved and a fee hearing is necessary, then the court directs the parties to appear for a fee hearing to determine the reasonableness of attorney's

fees and costs related to the sale of said apartment, which Respondents 476 Broadway Realty Corp. and Board of Managers of 476 Broadway Realty Corp. allege to be in the amount of \$85,762.39 on October 20, 2022, at 9:30 a.m. in Part 10, located in room #412, at 60 Centre Street, New York, New York; and it is further

ORDERED that Respondents are directed to serve and file any affirmations in support of its application, along with any billing, time and expense records and any additional material they intend to introduce into evidence at said hearing on or before September 30, 2022, Petitioner’s opposition, if any, shall be filed on or before October 14, 2022, Respondents’ reply, if any, is due on or before October 18, 2022.

This constitutes the decision and order of the court.

Erika M. Edwards
20220909125111 ERIKA EDWARDS 35EF76A14098460A38828A2963ALB0B

9/9/2022
DATE

ERIKA EDWARDS, 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