

Beauregard v Emigrant Bank

2022 NY Slip Op 33917(U)

November 21, 2022

Supreme Court, New York County

Docket Number: Index No. 158048/2021

Judge: Laurence L. Love

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART 63M

Justice

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ROBERT KEVIN BEAUREGARD, LETITIA S
BEAUREGARD,

Plaintiff,

- v -

EMIGRANT BANK, GRAMERCY 222 RESIDENTS CORP.,
KARAN GAREWAL

Defendant.

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INDEX NO. 158048/2021

MOTION DATE N/A, 11/14/2022

MOTION SEQ. NO. 002 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 32, 33, 34, 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, 71, 72, 75, 76, 79, 80

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, plaintiff’s motion, seeking an order pursuant to CPLR 6301 enjoining Defendant, Gramercy 222 Residents Corp (“Co-op”) from approving the transfer of the shares allocated to apartment 8E located at 222 Park Avenue South, New York, NY 10003-1507 (the “Apartment”) to defendant, Karan Garewal (“Garewal”), the winning bidder of same at auction, defendant, Emigrant Bank’s (“Emigrant”) cross-motion seeking dismissal of this action in its entirety and plaintiff’s motion seeking a default judgment against Co-op and Garewal are decided as follows:

As described in plaintiffs’ amended complaint, Plaintiffs seek to rescind the sale of cooperative shares of stock they own allocated to their Manhattan apartment and the corresponding proprietary lease at a public auction held on August 31, 2021. Plaintiffs allege that Emigrant “failed

to provide sufficient notice of the auction to Plaintiffs for at least six reasons provided for in the Uniform Commercial Code ("UCC"), the Real Property Actions and Proceedings Law ("RPAPL"), the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (the "COVID-19 Foreclosure Prevention Act") and/or the Security Agreement that the Bank required Plaintiffs to sign when it issued the loan." On or about June 6, 2002, Plaintiffs purchased 413 shares of stock of the Co-op, representing the Apartment. On or about May 21, 2019, Plaintiffs, as borrowers, executed and delivered to Emigrant Mortgage Company a Balloon Note by which Plaintiffs borrowed \$1,224,000 from Emigrant Mortgage Company, the maturity date of which was June 1, 2020, secured by the Apartment. Said loan was thereafter transferred to Emigrant. By a letter dated January 29, 2021, entitled "90-Day Notice" stating in block letters "THIS NOTICE IS REQUIRED PURSUANT TO SECTION 1304 OF THE NEW YORK REAL PROPERTY ACTIONS AND PROCEEDINGS LAW" plaintiffs were notified that "As of January 29, 2020, your home loan is 181 days, and \$1,273,829.30 dollars in default." Plaintiffs allege that all of the notices were defective. By an attorney letter dated May 19, 2021, entitled "Notice of Our Plan to Sell Property" plaintiffs were informed that the Shares representing the Apartment would be sold on July 7, 2021 at a public auction. By an attorney letter dated July 2, 2021, Robert Kevin Beauregard was offered a reinstatement of the loan, which required the payment of \$83,029.55 to Emigrant, together with legal fees and proof that all maintenance charges are current by 3:00 that day. Plaintiffs allege that same constituted a written reinstatement contract which Emigrant later breached as detailed in an e-mail, dated July 6, 2021 from Emigrant's counsel to plaintiffs informing plaintiffs that "I just spoke to my client and they advised that their system should not have generated the reinstatement quote since the loan has matured. They cannot accept the reinstatement only payoff. Since the quote should not have been generated they have agreed to postpone the sale scheduled for

tomorrow to allow you additional time to payoff the loan. Please confirm receipt.” (It is undisputed that the subject loan matured on June 1, 2020.) By a letter dated July 8, 2021, the auction was rescheduled for July 28, 2021. By a letter dated July 26, 2021, plaintiffs’ counsel informed Emigrant requesting an extension of time to pay off the full loan amount. Said extension was granted via a stipulation dated July 27, 2021, pursuant to which the sale was adjourned for thirty days, plaintiffs agreed that they would not seek any further adjournments of the sale and plaintiffs further stipulated that “Borrower further acknowledges the debt owed to Emigrant, proper service of the notice of sale and notice of plan to sell, and Borrower hereby waives any other claims against Emigrant.” Plaintiffs allege that they were not properly informed of the August 31, 2021 auction. The Shares representing the Apartment were sold on August 31, 2021 to Karan Garewal, resulting in the instant action, pleading causes of action alleging 1. Failure to comply with UCC §9-611(b) by failing to provide notice of the auction; 2. Failure to comply with UCC §9-611(f) by failing to provide a 90-day notice; 3. Breach of the Security Agreement by failing to provide five days notice of the August 31, 2021 auction; 4. Violations of the COVID-19 Foreclosure Prevention Act, which requires notice compliant with RPAPL §1304; 5. Breach of the July 2, 2021 reinstatement contract; 6. Breach of UCC §9-613(a)(4); and further seeking 7. A permanent injunction. By an interim Order dated January 12, 2022, transfer of the shares was enjoined pending a final decision on the instant motions.

Dismissal under CPLR §3211(a)(1) is warranted where the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Fortis Financial Services, LLC v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept. 2002]; see *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431 [1st Dept. 2014]). When assessing the adequacy of a pleading in the context of a motion to dismiss

under CPLR §3211(a)(7), the court's role is “to determine whether [the] pleadings state a cause of action” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]). To determine whether a claim adequately states a cause of action, the court must “liberally construe” it, accept the facts alleged in it as true, accord it “the benefit of every possible favorable inference” (*id.* at 152; see *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881 [2013]; *Simkin v Blank*, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory (see *Hurrell-Harring v State of New York*, 15 NY3d 8 [2010]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept. 2004]; CPLR §3026).

In support of Emigrant’s motion to dismiss, Emigrant submits the affidavit of Greg Williamson, an Assistant Treasurer of Emigrant, together with supporting documentation, which establishes as follows: On May 21, 2019, Plaintiffs duly executed and delivered to Emigrant Mortgage Company, Inc. a Balloon Note (the "Note") bearing that date, wherein and whereby Plaintiffs promised to repay to Emigrant Mortgage Company, Inc., its successors or assigns, the principal sum of \$1,224,000.00. Said Note was secured by the Premises, a cooperative apartment and as additional collateral, Plaintiffs gave Emigrant a mortgage on property also owned by Plaintiffs located at 121 Baldwin Avenue, Point Lookout, New York. Said Note was a short-term temporary loan with a maturity date of June 1, 2020. Plaintiffs failed to pay said loan by the maturity date. In accordance with the N.Y. U.C.C. § 9-611(f), on November 18, 2020 and January 29, 2021, Emigrant mailed a ninety (90) day notice to Plaintiffs by certified and first-class mail to the Premises and the Point Lookout Property. The notice was in fourteen-point type and the heading was in bold twenty-point type, in compliance with UCC § 9-611(f). Pursuant to the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, Emigrant mailed another

90-day notice to Plaintiffs by first-class and certified mail, pursuant to both UCC § 9- 611(f) and RPAPL § 1304 with the hardship declaration, which was never executed and delivered to Emigrant. Said notices complied with the provisions enumerated under UCC § 9-611(f). Emigrant submitted an Affidavit of Service establishing the proper mailing of all required documents on January 29, 2021 to plaintiffs at both the Apartment address, the Point Lookout address and at plaintiffs' counsel's office. Based upon same, Emigrant is entitled to dismissal of plaintiffs' second and fourth causes of action. Additionally, as discussed *supra* the parties stipulated that "Borrower further acknowledges the debt owed to Emigrant, proper service of the notice of sale and notice of plan to sell, and Borrower hereby waives any other claims against Emigrant."

Plaintiffs' fifth cause of action is premised upon the concept that the underlying loan could be reinstated. However, the reinstatement offer was clearly generated in error as it was generated a year after the subject Note matured. As such, it is a nullity incapable of being breached and plaintiff's fifth cause of action must be dismissed.

Plaintiff's first and third causes of action allege insufficient notice of the auction and the related sixth cause of action alleges that said notice is defective as "Subpart (a)(4) of UCC §9-613, entitled "Content and Form of Notification Before Disposition of Collateral: General" provides that "The contents of a notification of disposition are sufficient if the notification ... states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting." Specifically plaintiffs argue that Emigrant did not notify Plaintiffs what the charge for an accounting would be. Emigrant submits an affidavit of service establishing that on July 29, 2021, Emigrant mailed copies of the Notice of Intent to Sell Property scheduling the final sale on August 31, 2021, satisfying both the notice requirements under UCC §§ 9-610(b), 9-611(b), 9-612(a) as well as the five-day notice requirement under the terms of the Security Agreement. Five

copies of the letter were mailed to the same addresses relevant to the 90-day Notice. As to plaintiff's sixth cause of action, the Notice clearly advised them of their right to an accounting and the lack of a charge for same can only be interpreted to mean that there is no charge. As such, Emigrant has established an entitlement to dismissal of plaintiffs' first, third, and sixth causes of action.

In opposition, plaintiffs submit affidavits alleging non-receipt of the letter scheduling the auction and further argue that Emigrant was required under the July 28, 2021 agreement to agree with plaintiff on the final auction date. Plaintiff's argument about the meaning of "Emigrant Bank will agree to reschedule the UCC Sale on or after August 28, 2021" contending that it means that plaintiffs have any input into the date of the sale other than that it must be after August 28, 2021 is an intentional misreading of the stipulation. Further, plaintiffs' allegations that they did not receive notice of the August 31st auction is insufficient to default Emigrant's motion, *See Dougherty v. 425 Dev. Assocs.*, 93 A.D.2d 438, 442, (1st Dep't 1983) ("under the general provisions of the [UCC], it is clear that the requirement of 'giving' or 'sending' notice is satisfied even though the notice is not actually received, as long as reasonable steps were taken to notify the other party") Here, Emigrant published notice of the sale to plaintiffs five separate times and published the notice in the New York Post weekly for three consecutive weeks. It would appear that Plaintiffs, having received two extensions of the sale in order to secure funds to prevent same, have attempted every method to delay and/or prevent that sale short of actually paying the Note. Plaintiffs received actual notice of the sale via e-mail prior to the sale. Had they secured funding, they could have appeared and bid. They did not.

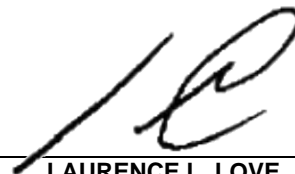
ORDERED that defendant, Emigrant bank's motion is GRANTED in its entirety and this action is DISMISSED; and it is further

ORDERED that plaintiffs' motion seeking an Order enjoining the Co-op from selling the Shares is DENIED in its entirety; and it is further

ORDERED that this Court's Interim Order, entered January 14, 2022 is vacated in its entirety; and it is further

ORDERED that plaintiff's motion seeking a default judgment is DENIED as moot.

11/21/2022
DATE


LAURENCE L. LOVE, 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