

Bates Holdings II LLC v 209 Taaffe Realty, LLC

2023 NY Slip Op 32271(U)

June 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 507458/2023

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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BATES HOLDINGS II LLC, acting by and through
its servicer Field Point Servicing, LLC,
Plaintiff,

Decision and order

Index No. 507458/2023

- against -

209 TAAFFE REALTY, LLC, ZALMEN
BIEDERMAN, CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD, NEW
YORK CITY DEPARTMENT OF FINANCE, NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE, U.S. SMALL BUSINESS
ADMINISTRATION, and "JOHN DOE #1" through
"JOHN DOE #12," the last twelve names being
fictitious and unknown to the Plaintiff, the
persons or parties, if any, having or claiming
an interest in or lien upon the premises,
described in the Complaint,

Defendants,

June 27, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1 & #2

The plaintiff seeks the appointment of a receiver pursuant to RPL §254(10). The defendants have cross-moved seeking to dismiss the complaint pursuant to CPLR §3211. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On January 19, 2017 the defendants executed a mortgage and accompanying agreements in the amount of \$3,200,000. The mortgage and note were assigned to the plaintiff on October 4, 2021. The mortgage and note concerned property located at 209 Taaffe Place in Kings County. The plaintiff alleges a default

occurred when the defendants failed to make any payments in October 2020. Although some payments were made after that date following an attempt to globally resolve the outstanding debts, as of the filing of the motion the defendants owed \$3,016,347.97 plus interest, late charges and other fees.

The plaintiff has moved seeking the appointment of a receiver both pursuant to statute and pursuant to the agreements between the parties. The plaintiff asserts the defendants are collecting rents and have failed to pay the mortgage as noted. The request for a receiver is opposed on the grounds the lawsuit must be dismissed because the plaintiff has no standing to commence the action and that in any event the complaint against defendant Zalmen Biederman fails to state any claim.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Ripa v. Petrosyants, 203 AD3d 768, 160 NYS3d 658 [2d Dept., 2022]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (BT Holdings, LLC v. Village of Chester, 189 AD3d 754, 137 NYS2d 458 [2d Dept., 2020]). Whether the complaint will later survive a motion for summary judgment, or whether the

plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Redwood Property Holdings, LLC v. Christopher, 211 AD3d 758, 177 NYS3d 895 [2d Dept., 2022]).

It is well settled that a mortgage may not be foreclosed unless the plaintiff maintains a legal or equitable interest in the mortgage (Wells Fargo Bank N.A., v. Marchione, 69 AD3d 204, 887 NYS2d 615 [2d Dept., 2009]). Thus, for a plaintiff to establish standing it must be demonstrated that the plaintiff was both (1) the holder or assignee of the subject mortgage and (2) the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint (see, U.S. Bank, N.A. v. Collymore, 68 AD3d 752, 890 NYS2d 578 [2d Dept., 2009]).

The plaintiff maintains that it has standing to proceed with the action since it was in actual physical possession of the note at the commencement of the action (see, Mortgage Electronic Registration Systems Inc., v. Coakley, 41 AD3d 674, 838 NYS2d 622 [2d Dept., 2007]). This is true argues plaintiff since it is the bearer of an endorsed instrument pursuant to §3-204(2) and § 3-301 of the Uniform Commercial Code. Moreover, the specific endorsement, an apparent allonge, is sufficiently connected to the note. UCC §3-202(2) states that "an indorsement must be

written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof" (id). Sean Barry the managing director of the servicer of the loan held by plaintiff submitted an affidavit which states that "the Note, which was assigned pursuant to Allonges dated October 4, 2021, which are affixed to the Note, is in possession of the Plaintiff" (see, Affidavit of Sean Barry, ¶24 [NYSCEF Doc. No. 21]). Where the endorsement is "affixed" to the note it is a valid negotiable instrument (see, HSBC Bank Usa National Association v. Svetlana Roumiantseva, 39 Misc3d 1239(A), 2013 WL 2500829 [Supreme Court Kings County 2013]). While there may be questions of fact concerning the method in which the allonge was affixed to the note, there is no basis to dismiss the complaint on the grounds the allonge was not affixed to the note and consequently plaintiff lacks standing. Therefore, that portion of the motion seeking to dismiss is denied.

Turning to the motion to dismiss the complaint against defendant Biederman individually, the verified complaint alleges that Zalmen Biederman "executed (i) a Guaranty of Non-Recourse Obligations to personally and unconditionally guaranty the payment of those obligations of Borrower for which it has personal liability pursuant to the Loan Agreement on the terms and conditions described therein (the "Non-Recourse Guaranty") and (ii) a Guaranty (Payment) to personally and unconditionally

guarantee payment of the entire Indebtedness under certain circumstances on the terms and conditions described therein (the "Personal Guaranty")" (see, Verified Complaint, ¶25 [NYSCEF Doc. No. 2]). The verified complaint includes those guarantees within all the loan documents that were executed in this case. Thus, the "Loan Documents" that are the subject of the cause of action seeking a foreclosure (see, Verified Complaint, ¶57 [NYSCEF Doc. No. 2]) and seeking to foreclose a security interest in personal property (see, Verified Complaint, ¶¶72, 73 [NYSCEF Doc. No. 2]) and for the appointment of a receiver (see, Verified Complaint, ¶81 [NYSCEF Doc. No. 2]) all necessarily include the guarantees which were executed by Biederman individually. Thus, the verified complaint adequately alleges causes of action against him in his personal capacity and the portion of the motion seeking to dismiss any causes of action against him is denied.

Next, concerning establishing any default, it is well settled that "a proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" (Citibank N.A. v. Cabrera, 130 AD3d 861, 14 NYS3d 420 [2d Dept., 2015]). Thus, where a party introduces evidence of the existence of loans, personal guarantees and the defendant's failure to make payments according to the terms of the instruments then summary judgement is proper (see, JPMorgan Chase Bank N.A., v. Bauer, 92 AD3d 641,

938 NYS2d 190 [2d Dept., 2012])). In this case, as noted, the plaintiff submitted the affidavit of Sean Barry who stated that he reviewed the plaintiff's records in connection with the loans extended in this case. He further stated that all the documents he reviewed were maintained in the regular course of business and all such records were made near their occurrence with someone who had knowledge at that time and that the plaintiff's standard practice is to keep such records in the ordinary course of business (see, Affidavit of Sean Barry, ¶4 [NYSCEF Doc. No. 21]). Thus, the plaintiff has established the admissibility of the records relied upon since Mr. Barry had knowledge and familiarity of the plaintiff's practices and procedures (see, Cadlerock Joint Venture L.P. v. Trombley, 150 AD3d 957, 54 NYS3d 127 [2d Dept., 2017])). Further, there is no merit to the argument the plaintiff failed to establish a prima facie case of default because there are no specific documents establishing non-payment. The mere fact there are no documents supporting non-payment does not mean the plaintiff based the proof of non-payment upon unidentified business records. The non-payment of an amount due is supported by the fact all the documents demonstrate a payment was due and there is no evidence any payment was made. A non-payment of a debt due, something that can properly be characterized as a non-action, may be proven by an examination of all the documents and testimony that no payment occurred. Indeed, the plaintiff's

evidence submitted does establish prima facie evidence of non-payment.

Therefore, the motion seeking to dismiss the complaint for the failure to state any cause of action is denied.

Turning to the motion seeking the appointment of a receiver, it is well settled that pursuant to RPL §254(10) where a mortgage specifically authorizes the appointment of a receiver upon any action to foreclose the mortgage then a receiver may be appointed without regard to the adequacy of the security (Essex v. Newman, 220 AD2d 639, 632 NYS2d 636 [2d Dept., 1995]). The purpose of appointing a receiver is to preserve the property for the owner's and mortgagee's benefit. Paragraph 3(e) of the Mortgage states that upon a default the mortgagee shall have the right to "apply to any court having jurisdiction for the appointment of a receiver for the Mortgaged Property to take any or all of the actions set forth in Section 3" (see, Multifamily Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing, dated January 19, 2017 [NYSCEF Doc. No. 24]). It is true that even where a mortgage authorizes the appointment of a receiver such appointment rests in the discretion of the court (Ridgewood Savings Bank v. New Line Realty VI Corp., 24 Misc3d 1227 (A), 897 NYS2d 672 [Supreme Court Bronx County 2009]) and a court in equity can vacate the appointment in appropriate circumstances (see, Naar v. I.J. Litwak & Co., Inc., 260 AD2d

613, 688 NYS2d 698 [2d Dept., 1999]). The 'appropriate circumstances' noted is difficult to quantify. In Home Title Insurance Company v. Isaac Scherman Holding Corp., 240 AD 851, 267 NYS 84 [2d Dept., 1933] one of the earliest cases finding the "possible exercise of discretion" denying a receiver or curtailing the receiver's rights, the court held such discretion could be exercised "in the case of hardship or the like" (id). Essentially, the court should exercise its discretion and deny a receiver where the receiver would serve no useful purpose. (Federal Home Loan Mortgage Corp., v. Jerwin Realty Associates, 1992 WL 390264 [E.D.N.Y. 1992]). For example, where the default was inadvertent the court denied the appointment of a receiver (Fairmont Associates v. Fairmont Estates, 99 AD2d 895, 472 NYS2d 208 [3rd Dept., 1984]).

Thus, other than the appropriate and unusual circumstances noted there is no analysis the court must engage in before appointing a receiver pursuant to RPL §254(10). There is no requirement that the mortgagee must demonstrate a risk of irreparable loss or present competent evidence the asset is being compromised or mismanaged or that harm will befall the property absent a receiver. Clearly, there is a difference when a receiver is appointed pursuant to RPL §254(10) where absent appropriate circumstances the request should be granted and a receiver appointed pursuant to CPLR §6401 which demands "clear

and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests" (Board of Managers of Nob Hill Condominium Section II v. Board of Managers of Nob Hill Condominium Section I, 100 AD3d 673, 954 NYS2d 145 [2d Dept., 2012]).

Thus, a review of the facts of this case clearly establish the defendants have failed to present any special circumstances why a receiver should not be appointed. Pursuant to RPL §254(10) a receiver may be appointed for "the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance" (id). Where there are substantial questions of fact or whether there are questions whether a default even occurred or there are questions regarding the validity of the note then a receiver is not warranted despite language pursuant to RPL §254(10) (Phoenix Grantor Trust v. Exclusive Hospitality LLC, 172 AD3d 926, 98 NYS3d 752 [2d Dept., 2018]).

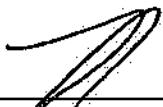
The defendant's opposition to the appointment of a receiver is based upon interests in equity and the fact there are questions whether the default is appropriate. However, those reasons are surely not special circumstances sufficient to warrant denial of the appointment of a receiver.

Consequently, the motion seeking to appoint a receiver is granted. The specific powers of the receiver will be outlined in a separate order.

So ordered.

ENTER:

DATED: June 27, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC