

Linker Notes, LLC v Kallman

2023 NY Slip Op 34103(U)

November 13, 2023

Supreme Court, New York County

Docket Number: Index No. 850273/2019

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

Kallman acquired the property by deed from non-party eMercado Holding LLC ("eMercado"), dated June 30, 2006. At transfer of title, the property was encumbered by a mortgage, dated July 22, 2005, which was given by eMercado to secure a loan of \$2,770,000.00 it received from non-party Bridge Funding, LLC ("Bridge"). The Bridge mortgage was recorded on December 8, 2005. Bridge supposedly assigned its note and mortgage to American Brokers Conduit ("ABC") by document dated June 29, 2006. On July 7, 2006, Kallman gave a mortgage to ABC to secure a loan of \$230,000.00. On the same day, the eMercado and ABC mortgages were consolidated into a single mortgage securing a total indebtedness of Kallman to ABC of \$3,000,000.00. Curiously, the Kallman deed, the assignment from Bridge to ABC and the ABC mortgages were not recorded until December 28, 2006. Thereafter, ABC allegedly assigned the consolidated note and mortgage to Defendant Citibank, N.A. as Trustee for American Home Mortgage Assets Trust 2006-3 Mortgage-Backed Passthrough Certificates, Series 2006-3 ("Citibank") on April 24, 2009. A correction assignment of the consolidated mortgage and underlying mortgages, dated August 5, 2010, was recorded on August 25, 2010.

In 2010, Citibank commenced an action to foreclose on the consolidated mortgage in Supreme Court, New York County (*see Citibank N.A. as Trustee for American Home Mortgage assets Trust 2006-3 Mortgage-Backed Pass-Through Certificates, Series 2006-3 v Marc Scott Kallman, et al.*, Index No. 810107/2010). Neither Plaintiff herein nor any of the prior assignors of the mortgage at issue were joined as defendants in the Citibank action. After a long litigation, a final judgment of foreclosure and sale was entered on September 27, 2017, and an appeal therefrom was denied (*see Citibank, N.A. v Kallman*, 172 AD3d 489 [1st Dept 2019]). Citibank was the successful bidder (\$1,000.00) at the foreclosure sale which left an alleged deficiency of \$5,542,283.11.

After the sale, Plaintiff commenced this action to foreclose on its mortgage and alleged in its complaint that Citibank's mortgage is subordinate to its mortgage. Citibank joined issue and, in an amended answer, pled ten affirmative defenses, including standing and statute of limitations. Citibank also pled counterclaims for discharge of Plaintiff's mortgage pursuant to RPAPL §1501[4] claiming the statute of limitations to foreclose has expired, for equitable subordination and subrogation and for a declaration of priority of the eMercado mortgage as well as for imposition of constructive trusts. In the alternative, Citibank asserted a crossclaim against Kallman for unjust enrichment. Plaintiff served a reply to the counterclaims. Defendant Board of Managers of 52 East End Avenue Condominium answered and pled sixteen affirmative defenses. Defendant Kallman failed to answer and, by order dated March 22, 2022, this Court granted a default judgment against him.

Now, Defendant Citibank moves for summary judgment on its second¹, fourth² and fifth³ counterclaims regarding priority of the subject liens. Plaintiff opposes the motion and cross-moves for summary judgment against Defendant Citibank, to strike Defendants' answers, for a default judgment against the non-appearing Defendants, for an order of reference. Defendant Citibank opposes the cross-motion.

In moving for summary judgment, each party was required to establish *prima facie* entitlement to judgment as a matter of law (*see generally U.S. Bank, N.A., v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment

¹ "For a Declaratory Judgment Pursuant to RPAPL Article 15 – Equitable Subordination".

² "For a Constructive Trust on the Basis of Equitable Subrogation".

³ "For a Declaratory Judgment Pursuant to RPAPL Article 15 – Priority of eMercado Mortgage".

must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]).

As to the branches of Citibank's motion for summary judgment on its counterclaims for equitable subordination and subrogation, an overarching principle in disputes over the priority of encumbrances, including successive mortgages on the same property, is that such liens are prioritized in the order in which they have attached to the property (*see* RPL §291; *Varon v Annino*, 170 AD2d 445 [2d Dept 1991]; *see also Empire Trust Co. v Park-Lexington Corp.*, 243 AD 315 [1st Dept 1934]). However, that precept is modified in New York by its "race-notice" recording act (RPL §290, *et seq*) which "protects a good faith purchaser for value from a prior unrecorded interest in real property provided, inter alia, that the subsequent purchaser's interest is the first to be duly recorded" (*80P2L LLC v United States Bank Trust, N.A.*, 194 AD3d 593, 600 [2d Dept 2021]). "In other words, in order to cut off a prior lien, such as a mortgage, the purchaser must have no knowledge of the outstanding lien and win the race to the recording office" (*71-21 Loubet, LLC v Bank of Am., N.A.*, 208 AD3d 736, 742 [2d Dept 2022], *citing Goldstein v Gold*, 106 AD2d 100, 101 [2d Dept 1984]). "The status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property, or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such" (*see eg Yen-Te Hsueh Chen v Geranium Dev. Corp.*, 243 AD2d 708, 709 [2d Dept 1997]).

It is also well established that a senior mortgagee can agree with the mortgagor to modify the terms of the underlying note or mortgage, including by execution of a CEMA, as occurred here, and retain its priority (*see Bank of Am., N.A. v Schwartz*, 199 AD3d 975, 978 [2d Dept 2021]). This right is subject to the limitations that any junior lienors are notified and their consent obtained to the change or the modification neither prejudices any junior lienors' rights nor impairs their security (*see Shultis v Woodstock Land Dev. Assoc.*, 188 AD2d 234, 236 [3d Dept 1993]). "If the senior lienor enters into such an agreement without obtaining that consent, and the agreement substantially impairs the security interest of the junior lienors or effectively destroys their equity, courts have divested the senior lienor of its priority and elevated the junior lienors to a position of superiority" (*Fleet Bank v County of Monroe Indus. Dev. Agency*, 224 AD2d 964, 965 [4th Dept 1996]). "Where, however, the actions of the senior lienor prejudice the junior lienors but do not substantially impair their security interest or destroy their equity, the senior lienor will be required to relinquish to the junior lienors its priority with respect to the modified terms only" (*id.*). These principles are the essence of equitable subordination (*see* 3 Bergman on New York Mortgage Foreclosures §24.12 [2023]).

The doctrine of equitable subrogation applies "where the funds of a mortgagee are used to satisfy the lien of an existing, known encumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance" (*King v Pelkofski*, 20 NY2d 326, 333-334 [1967] [citations omitted]). "The doctrine operates to 'erase[] the lender's mistake in failing to discover intervening liens, and grants him the benefit of having obtained an assignment of the senior lien that he caused to be discharged'" (*Arbor Commercial Mtge., LLC v Associates at the Palm, LLC*, 95 AD3d 1147, 1149 [2d Dept 2012], *quoting United States v Baran*, 996 F2d 25, 29 [2d Cir 1993]). Actual notice of an intervening interest by a mortgagee "bars application of the doctrine" (*see Green Tree Servicing, LLC v Feller*, 159 AD3d 1246, 1249 [3rd Dept 2018]).

Prior to foreclosing on its mortgage, Citibank, as the assignee of the earliest recorded mortgage, stood in the same position as eMercado as to the amount encumbered, to wit \$2,770,000.00 (*see Benson v Deutsche Bank Natl. Trust, Inc.*, 109 AD3d 495, 498 [2d Dept 2013]; *see generally Matter of International Ribbon Mills [Arjan Ribbons]*, 36 NY2d 121, 126 [1975]; *TPZ Corp. v Dabbs*, 25 AD3d 787, 789 [2d Dept 2006]), subject to any claims of prejudice by junior lien holders like Plaintiff (*see Commodore Factors Corp. v Deutsche Bank Natl. Trust Co.*, 189 AD3d 766, 769 [2d Dept 2020]; *71-21 Loubet, LLC v Bank of Am., N.A.*, supra). Moreover, by not joining Plaintiff or its assignors in its foreclosure action, Citibank's judgment left Plaintiff's interest unaffected by the judgment (*see Polish Nat. Alliance of Brooklyn, USA v White Eagle Hall Co., Inc.*, 98 AD2d 400, 406 [2d Dept 1983]; *see also 517-525 W. 45 LLC v Avrahami*, 202 AD3d 611, 612 [1st Dept 2022]).

However, upon consummation of the foreclosure sale in the prior action, Citibank's mortgage was extinguished (*see eg Industrial & General Trust v Tod*, 170 NY 233, 270 [1901]). When it took a deed to the premises, Citibank "voluntarily converted the debt into the property and [did] so by taking the property in satisfaction of the debt" (*Whitestone Sav. & Loan Asso. v Allstate Ins. Co.*, 28 NY2d 332, 335 [1971]). Since Citibank secured title to the premises with a nominal bid, its lien was initially only satisfied to the extent of the sale price (*id.* at 336). The deficiency between the sale price and the amount due under the judgment, though recoverable from the mortgagor (*see* RPAPL §1371) is not an inalienable right. If "the mortgagee fails to procure a deficiency judgment, the proceeds of the sale, regardless of amount, are deemed to be in full satisfaction of the mortgage debt" (*Bellusci v Citibank N.A.*, 204 AD2d 843, 844 [3d Dept 1994]; *see also Option One Mtge. Corp. v J.P. Morgan Chase & Co.*, 93 AD3d 480 [1st Dept 2012]; *Polish Nat'l Alliance v White Eagle Hall Co.*, supra at 407). In this case, neither the moving papers nor the Court file of Citibank's foreclosure action reveal that a deficiency judgment was ever entered.

The upshot of the foregoing is that Citibank is no longer a mortgagee or lienholder on the premises and, ergo, at the time the counterclaims were asserted, nothing existed to which Plaintiff's lien could be subordinated or subrogated. In addition, as to the latter doctrine, the claimed intervening lien which Plaintiff succeeded to, did not exist when ABC mortgages and CEMA were given, and the Bridge lien satisfied. It only ostensibly became an intervening lien when Citibank's assignor lost the race to the recording office. "Because the debt [was] extinguished it is not necessary or useful to refer to 'attenuated traditional concepts to the effect that when the mortgagee acquires the title to the property there is a merger of the mortgage interest into that of the fee'" (*Kessler v Government Employees Ins. Co.*, 179 AD2d 492, 493 [1st Dept 1992][citations omitted]). To the extent Citibank raises the specter of strict foreclosure or re-foreclosure as analogous support for its counterclaims, those causes of action were not pled. Even if raised, the viability of these claims would be questionable. "To prevail in a reforeclosure action, the plaintiff must demonstrate that the defect in the original foreclosure action 'was not due to fraud or willful neglect of the plaintiff and that the defendant or the person under whom he claims was not actually prejudiced thereby'" (*see U.S. Bank N.A. v Lomuto*, 198 AD3d 707 [2d Dept 2021]; *see also* RPAPL §1352 and §1503). Citibank claiming it was absent willful neglect when it prosecuted its action without joining a party with a lien that was given subsequent its lien is tenuous, at best.

Accordingly, Defendant Citibank's motion for summary judgment on its second, fourth and fifth causes of action is denied.

As to Plaintiff's cross-motion, in moving for summary judgment it was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and

evidence of Defendants' default in repayment (*see U.S. Bank, N.A. v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Based upon Defendants' affirmative defense, Plaintiff was also required to demonstrate it had standing when this action was commenced (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see CPLR §3212[b]*; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). In support of the motion, a plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2^d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2^d Dept 2017]).

Plaintiff's motion was supported with the affidavits from Eran Linker ("Linker"), a Managing Member of Plaintiff. Linker's affidavit laid a proper foundation for the admission of the records of Plaintiff into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2^d Dept 2019]). The records of other entities were also admissible since Linker sufficiently established that those records were received from their makers and incorporated into the records Plaintiff kept and it routinely relied upon such documents in its business (*see U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2^d Dept 2021]). The records referenced by Linker were referenced in the affidavits and annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

The affidavits and referenced documents sufficiently evidenced the note and mortgage. As to the Mortgagor's default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2^d Dept 2020]). Here, Linker's review of the attached account records demonstrated that the Mortgagor defaulted in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]).

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2^d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3^d Dept 2015]). Here, Plaintiff, demonstrated with the affidavit of Linker and the assignments of the mortgages dated September 3, 2010, October 2, 2017, and May 2, 2019, that it was the holder of the note when the action was commenced (*see PNC Bank, NA Salcedo*, 161 AD3d 571 [1st Dept 2018]). Although an assignment of a mortgage is ordinarily a nullity in this context, all the within assignments expressly stated that the mortgage was assigned together with the underlying "note" or "instruments . . . secured or intended to be secured thereby". This evidence sufficiently established conveyance of the notes (*see US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1st Dept 2018]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2^d Dept 2012]). As between original lender and PNC, the latter obtained ownership of the note pursuant to the merger of these two entities (*see Banking Law §602; Moxey v Payne*, 167 AD3d 594, 595-596 [2^d Dept 2018] *quoting Ladino v Bank of Am.*, 52 AD3d 571, 572 [2^d Dept 2008]; *see also Barclay's Bank of N.Y. v Smitty's Ranch*, 122 AD2d 323, 324 [3^d Dept 1986]).

In opposition, Defendant's arguments concerning alleged deficiencies in Plaintiff's proof concerning assignment of the note via allonge are unavailing based upon the written assignments referenced. The second, fourth and fifth counterclaims and the associated affirmative defenses fail for the reasons stated supra. Citibank's argument that its claim and defense based on the existence of a constructive trust fails to raise and issue of fact. "The elements needed to establish a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon and unjust enrichment" (*Enzien v Enzien*, 96 AD3d 1136, 1137 [3d Dept 2012]). Here, Citibank has not demonstrated the existence of any confidential relationship between the mortgagors and mortgagees or their assignors or assignees (*see Kain Dev., LLC v Krause Props., LLC*, 130 AD3d 1229, 1234 [3d Dept 2015]). On the contrary, the moving papers indicated that was an arm's length business transaction. Also absent is what promise concerning the property was made and relied on by Citibank (*see eg Mazzei v Kyriacou*, 139 AD3d 823, 825 [2d Dept 2016]).

Even considering that the rules of a constructive trust are not to be rigidly applied (*see Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939 [1980]), no issue of fact is proffered that a constructive trust should be imposed to prevent unjust enrichment. This is because the circumstances do not dictate "that in equity and good conscience" ought to retain a lien on the property superior to Plaintiff's lien (*see generally Miller v Schloss*, 218 NY 400, 407 [1916]). In this case, Citibank's predicament is virtually entirely of its own making. Citibank took assignment of the CEMA on April 24, 2009, well after ABC's loss of the race to the recording office was or should have been known. Further, despite the issue of lien superiority being patently apparent in the recorded documents, Citibank failed, either purposefully or out of neglect, to join the holder of Plaintiff's lien in its foreclosure action and voluntarily chose to obtain a judgment and acquire the property at the sale. These facts do not support that Citibank's retention of the property subject to Plaintiff's lien is not equitable.

All the other affirmative defenses are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]). Further, to the extent that specific legal arguments were not proffered in support of any affirmative defense, those defenses were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

Any assertion the motion must be denied because no discovery has been conducted is unavailing as Defendant offered nothing to demonstrate Plaintiff is in exclusive possession of facts which would establish a viable defense to summary judgment (*see Island Fed. Credit Union v I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted (*see CPLR §3215; SRMOF II 2012-1 Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Plaintiff is awarded summary judgment against the appearing parties and a default judgment against the non-appearing defendants; and it is further

ORDERED that that **Mark McKew, Esq., 1725 York Ave, Ste 29A, New York, New York, 212-876-6783** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing or is required to perform other significant services in issuing the report, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee and to defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

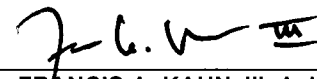
ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)); and it is further

All parties are to appear for a virtual conference via Microsoft Teams on **February 8, 2024, @ 11:40 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

11/13/2023

DATE



FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-CUM DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

HON. FRANCIS A. KAHN III
J.S.C.