

DOF NPL III LLC v Joshua Mgt. LLC

2024 NY Slip Op 30179(U)

January 11, 2024

Supreme Court, New York County

Docket Number: Index No. 850019/2022

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

DOF NPL III LLC and MAXIM CREDIT GROUP, LLC,

Plaintiffs,

INDEX NO. 850019/2022

MOTION DATE 12/05/2022

MOTION SEQ. NO. 002

- v -

JOSHUA MANAGEMENT LLC, EMMANUEL KU,
MARYANNE KU, DEXTER FINANCIAL SERVICES, INC.,
CASTLE OIL CORPORATION, CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD, BUREAU OF
HIGHWAY OPERATIONS, and JOHN DOE 1-10 AND JANE
DOE 1-10,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, and 125

were read on this motion for

SUMMARY JUDGMENT

LOUIS L. NOCK, J.

Plaintiffs commenced this mortgage foreclosure action by summons and complaint filed January 2022. By notice of motion filed March 2022 (motion seq. no. 001), defendants Joshua Management LLC and Emmanuel Ku moved to dismiss the complaint. By decision and order filed October 28, 2022 (the "Decision & Order") (NYSCEF Doc. No. 71), this court found that an issue of fact existed at that time as to which one of the plaintiffs actually possessed standing as the foreclosing mortgagee in light of the fact that plaintiff DOF NPL III LLC ("DOF") – an assignee of the underlying note and mortgage – gave plaintiff Maxim Credit Group, LLC ("Maxim"), a security interest in the underlying note and mortgage and, by collateral assignment, gave Maxim alone the right to enforce the note. The Decision & Order stated as follows:

Here, the parties have submitted a Memorandum of Collateral Assignment of Note, Mortgage and Other Loan Documents, which references a separate Collateral Assignment

but does not provide its terms (NYSCEF Doc. No. 34). This gives rise to a factual question regarding standing, as what was actually transferred or assigned between the plaintiffs determines which one of them actually has standing. Plaintiffs seem to suggest that because DOF retained the physical note they retain standing to foreclose on it, but that Maxim has standing due to the collateral assignment. However, “[e]ither a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” (*Collymore*, 68 AD3d at 754). Thus, if the terms of the underlying collateral assignment indicate not merely the granting of a security interest but a transfer of the documents themselves as in *Reich*, then Maxim would be the only plaintiff with standing. Conversely, if only a security interest was granted, which, the Court notes, is certainly possible given that DOF’s counsel retained the physical note itself, then DOF would be the party with standing (*Taylor*, 25 NY3d at 361; *Sachar*, 95 AD3d at 696). Without knowing the terms of the Collateral Assignment it is not possible to resolve the issue. On a motion to dismiss for lack of standing, it is the movant’s burden “to establish prima facie that plaintiffs have no standing to sue” (*Brunner v Estate of Lax*, 137 AD3d 553, 553 [1st Dept 2016]), and based on the above the moving defendants have not satisfied their burden[.]

(Decision & Order at 3.) The Decision & Order then proceeded to schedule the case for responsive pleading and discovery purposes (*id.*, at 4).

DOF now moves for summary judgment (motion seq. no. 002) based on the clarification that:

DOF is the current owner of the Loan Documents subject to the security interest held by Maxim. DOF is in possession of the original Note.

DOF never assigned the Loan Documents to Maxim but instead granted Maxim a security interest in the Loan Documents, which security interest would result in an assignment of the Loan Documents if, and only if DOF defaulted under its payment obligations to Maxim which never occurred.

(Affidavit of Steve Hackel, sworn to November 29, 2022 [NYSCEF Doc. No. 88] ¶¶ 7-8; Affidavit of Adam Glick, sworn to November 29, 2022 [NYSCEF Doc. No. 89] ¶¶ 7-8.) Indeed, a proper reading of the Memorandum of Collateral Assignment (NYSCEF Doc. No. 91) confirms that DOF did nothing more than grant Maxim a security interest in the note and mortgage. Accordingly, DOF posits, and the court agrees, that there no longer exists an issue as

to the proper party plaintiff to whom judgment of foreclosure may issue – and that is DOF (and not Maxim).

In opposition, counsel for defendants Joshua Management LLC and Emmanuel and Maryanne Ku (“Defendants”) resists the aforementioned affidavit clarifications and insists on “production of the terms of the Collateral Assignment . . . in order to determine the issues of fact relating to which Plaintiff actually has standing” (NYSCEF Doc. No. 109 at 16). But the court disagrees, as CPLR 3212 (b) finds affidavit evidence to be sufficient to support a motion for summary judgment.

Seeing as the sole pre-existing factual issue – which plaintiff has standing? – has now been resolved, no other impediments exist in the record, or at law, to withhold a grant of summary judgment of foreclosure to DOF.

Counsel for Defendants offers the following point:

If this Court were to find that Plaintiff DOF NPL III LLC has standing, then Defendants request that this Court dismiss Plaintiff MAXIM CREDIT GROUP, LLC pursuant to CPLR 3211(a)(3), because then they would not have standing. Both, Plaintiff DOF NPL III LLC and Plaintiff MAXIM CREDIT GROUP, LLC cannot have simultaneous standing.

(NYSCEF Doc. No. 109 at 16.) The court agrees with that point, and its order, hereinbelow, will reflect it.

Thus, the state of the record at this juncture warrants a grant of summary judgment of foreclosure to DOF. DOF submits the original note and mortgage (NYSCEF Doc. Nos. 78-79), the allonge assigning the note to DOF (NYSCEF Doc. No. 85), the assignment of mortgage to DOF (NYSCEF Doc. No. 86), the assignment of loan documents to DOF (NYSCEF Doc. No. 87), and the notice to Defendants of said assignment, sale and transfer of loan and servicing rights to DOF (NYSCEF Doc. No. 92). DOF’s verified complaint sets forth the details of

Defendants' defaults and DOF's acceleration of the outstanding indebtedness, notice of which was sent to Defendants per said verified complaint (NYSCEF Doc. No. 1). Moreover, Defendants present nothing by way of evidence to rebut any of the verified allegations of their defaults, the acceleration of the debt, and the notice thereof. Accordingly, DOF has established *prima facie* entitlement to summary judgment (*CitiMortgage, Inc. v Moran*, 188 AD3d 407, 408 [1st Dept 2020] ["Plaintiff demonstrated its prima facie entitlement to foreclosure by producing the notes, mortgages, and evidence of defendant's default"]).

Apart from the issue of standing, resolved hereinabove in DOF's favor, Defendants offer no meaningful opposition to the motion. They assert ten affirmative defenses in their verified answer, yet their opposition to the motion is almost exclusively, and overwhelmingly, predicated on the now-disproven theory of lack of standing, disposed of hereinabove. Putting aside the non-standing-related boilerplate affirmative defenses in the verified answer as to failure to state a claim, lack of jurisdiction, unclean hands, breach of the duty of good faith, and failure to mitigate, which remain without any substantive support, Defendants' opposition asserts that the tenants of the mortgaged property are indispensable parties, yet have not been named (*see*, NYSCEF Doc. No. 109 at 17). That is simply incorrect. The non-naming of tenants merely results in the fact that their leasehold interests will remain unaffected by the foreclosure (*see*, *Balt v J.S. Funding Corp.*, 230 AD2d 699 [2d Dept 1996]; *John Hancock Mutual Life Ins. Co. v 491-499 Seventh Ave. Assocs.*, 220 AD2d 208 [1st Dept 1995]; *Nationwide Assocs. v Brunne*, 216 AD2d 547 [2d Dept 1995]).

As for the remaining defendants in this action, none of them have appeared, except for defendant Dexter Financial Services, Inc., which filed a Notice of Appearance and Waiver (NYSCEF Doc. No. 6). Here, DOF submits the affidavits of service upon the non-appearing

defendants (NYSCEF Doc. Nos. 8, 12-13, 18-19, 21). Accordingly, plaintiff has established its entitlement to a default judgment as against the remaining defendants.

The successor in interest to defendant Castle Oil Corporation (“Castle”), Sprague Energy Solutions Inc. (“Sprague”), has been served with copies of the summons and complaint (*see*, NYSCEF Doc. No. 19). As with the other remaining defendants, it has not appeared. The amended caption, hereinbelow, will reflect the substitution of Sprague for Castle.

Defendants captioned “JOHN DOE 1-10 and JANE DOE 1-10,” not having been served with copies of the summons and complaint, are not necessary parties defendant and should be excised from the caption, as well as plaintiff MAXIM CREDIT GROUP, LLC, which, as explained hereinabove, lacks standing to sue herein, and the caption is amended to read as follows, without prejudice to any of the proceedings heretofore had herein:

“-----X
DOF NPL III LLC, :
:
Plaintiff, :
:
-against- :
:
JOSHUA MANAGEMENT LLC, :
EMMANUEL KU, MARYANNE KU, :
DEXTER FINANCIAL SERVICES, INC., :
SPRAGUE ENERGY SOLUTIONS INC., :
CITY OF NEW YORK :
ENVIRONMENTAL CONTROL BOARD, :
and BUREAU OF HIGHWAY :
OPERATIONS, :
:
Defendants. :
-----X”; and it is further

ORDERED that the motion of plaintiff DOF NPL III LLC for summary judgment of foreclosure, and for the striking of the answer and affirmative defenses of defendants Joshua

Management LLC, Emmanuel Ku, and Maryanne Ku is granted and, thus, said answer and affirmative defenses are hereby stricken; and it is further

ORDERED that plaintiff is granted summary judgment of foreclosure as against remaining defendants Dexter Financial Services, Inc., Sprague Energy Solutions Inc., City of New York Environmental Control Board, and Bureau of Highway Operations by virtue of their non-participation in the action in defense thereof; and it is further

ORDERED that Lawrence B. Goodman, Esq., with an office at 419 Park Avenue South, Suite 1007, New York, New York 10016, is hereby appointed Referee to ascertain and compute the amount due upon the note and mortgage which this action was brought to foreclose, and to examine and report whether the mortgaged premises can be sold in one parcel; and it is further

ORDERED that upon the issuance of the Referee's report and confirmation of same, plaintiff DOF NPL III LLC may seek a final judgment of foreclosure and sale.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

LOUIS L. NOCK, J.S.C.

1/11/2024
DATE

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