Mariners PAC Ventures, LLC v Khanam
2024 NY Slip Op 30714(U)
March 5, 2024
Supreme Court, New York County
Docket Number: Index No. 850002/2020
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** 32

Justice

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MARINERS PAC VENTURES, LLC,

Plaintiff,

- v -

KHADIZA KHANAM, MOHAMMAD M KHAN, CHRIS KARANASOS, MNP, INC, JEFFERSON & SONS, LLC,NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, 179-181 ESSEX, LLC,CRIMINAL COURT OF THE CITY OF NEW YORK (NEW YORK), AMERICAN EXPRESS BANK, FSB, FIVES 160TH LLC,DIVISION OF LIENS AND RECOVERY, OLIPHANT FINANCIAL LLC,PEOPLE OF THE STATE OF NEW YORK, NEW YORK SUPREME COURT, UNITED STATES OF AMERICA (SOUTHERN DISTRICT), UNITED GENERAL TITLE INSURANCE CO, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK COUNTY CLERK'S OFFICE, JOHN DOE AND JANE DOE

Defendant.

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INDEX NO. 850002/2020

MOTION DATE

MOTION SEQ. NO. 003

AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 201, 202, 203, 204, 205, 208, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225

were read on this motion to/for JUDGMENT - SUMMARY.

The court *sua sponte* vacates its decision and order on motion dated March 1, 2024, and as amended by the Clerk on December 8, 2023, and substitutes the following in its place and stead:

Upon the foregoing documents, motion and cross-motion are determined as follows:

Plaintiff commenced this action to foreclose on a consolidated, extended and modified mortgage ("CEMA") encumbering real property located at 408 East 120th Street, New York, New York. The CEMA was given by Defendant Mohammad M. Khan ("Khan") and Christoforos Karanasos a/k/a Chris Karanasos ("Karanasos") to non-party Mortgage Electronic Registration Systems ("MERS") as nominee for Fairmont Funding, Ltd. ("Fairmont"), the lender. The CEMA, dated June 29, 2009, secures a loan with an original principal amount of $841,472.00 which is memorialized by a note of the same date executed solely by Defendant Khan. The CEMA consolidated an alleged first mortgage, dated

September 29, 2008, as well as a subordinate second mortgage given the same date as the CEMA. Both the first and second mortgages were given by Khan and Karanasos to MERS and secured loans with original principal amounts of $801,900.00 and $43,818.87 respectively.

The first mortgage was given when Khan and Karanasos acquired the property from the Secretary of Housing and Urban Development ("HUD"). The first mortgage was recorded on November 10, 2008, but neither the second mortgage nor the CEMA were ever recorded. The same day Khan and Karanasos took title from HUD and executed the first mortgage, Khan deeded his entire interest in the premises to Karanasos, which was some nine months before the CEMA was executed by Khan and Karanasos. However, the deed memorializing the transfer of the property to Karanasos was not recorded until October 28, 2009, four months after the CEMA was given. On June 1, 2011, Khan and MERS executed a loan modification agreement wherein, *inter alia*, Khan acknowledged the debt secured by the CEMA and promised to pay same.

Defendants Jefferson & Sons, LLC ("Jefferson") and MNP, Inc. ("MNP") executed an alleged "partnership agreement" concerning the mortgaged property dated September 10, 2013. This agreement states that the "principal purpose" of the partnership was "to enter into a Real Estate joint venture in regard to a specific property known as 408 East 120th Street, Manhattan, NY 10035" whereby "MNP . . . contribute[d] the property to the partnership and Jefferson . . . contribute[d] the financial ability to perform the agreed upon construction and rehabilitation of the property". Curiously, neither party was the record owner of any interest in the mortgaged premises at the time this agreement was reached.

Jefferson obtained title to the premises two days after execution of the partnership agreement when Defendant Karanasos purportedly transferred the entire premises by deed dated September 12, 2013.[1] MNP, the party which was to "contribute" the property to the above partnership, did not obtain its alleged title until 29 months later when Jefferson allegedly transferred the premises to MNP by deed dated February 20, 2016.[2] This instrument purports on its face to have been executed by Defendant Khan as "member" of Jefferson.

On December 17, 2018, Jefferson commenced an action, by filing a summons and complaint, along with a notice of pendency, and named MNP and Khan as defendants (NY Cty Index No 161776/2018). In the complaint Jefferson pled, *inter alia*, an action pursuant to Article 15 of the Real Property Actions and Proceedings Law whereby it sought to void the February 20, 2016, deed of the premises from Jefferson to MNP on the basis that the deed was fraudulently executed by Khan. Defendants MNP and Khan answered and pled six affirmative defenses and a counterclaim. Other than filing successive notices of pendency, the action has laid entirely dormant for some eighteen months.

On June 27, 2019, Defendant Khadiza Khanam ("Khanam") recorded a purported "correction" deed transferring ownership from Jefferson to him. This deed was voided by a stipulation between Jefferson and Khanam, dated April 6, 2022, which resolved Jefferson's quiet title action against Khanam (*see Jefferson v Khanam*, NY Cty Index No 150186/2022).

Plaintiff commenced this action to foreclose on the 2009 CEMA on January 8, 2020, alleging Defendants defaulted in repayment of the indebtedness. Plaintiff also sought a declaration that its mortgage "is in first lien position". Defendant Khanam answered and pled thirty affirmative defenses as

[1] This deed was not recorded until April 1, 2014.
[2] This conveyance was not recorded until October 11, 2018.

well as two counterclaims. Defendant Jefferson answered separately, but via the same attorney as Khanam, and pled twenty-eight affirmative defenses and two counterclaims. By their counterclaims, both Khanam and Jefferson seek declarations that each is the sole owner of the premises free of all encumbrances. Defendant Karanasos answered, *pro se*, and pled twenty-seven affirmative defenses and, seemingly, two counterclaims. By order dated May 27, 2022, a motion by Karanasos and MNP to amend was granted only to the extent that Karanasos was given leave to serve an amended answer including a crossclaim for unjust enrichment against Defendant Jefferson.

Now, Plaintiff moves for summary judgment against the appearing Defendants, a default judgment the non-appearing Defendants, striking and dismissing the affirmative defenses of Jefferson, Khadzia and Karanasos, and appointing a referee to compute. Defendant Jefferson opposes the motion and cross-moves for summary judgment declaring the 2009 CEMA to be void and the second mortgage to be subordinate to Jefferson's interest, dismissing Plaintiff's complaint, or in the alternative, dismissing the second, third, fourth, and fifth causes of action. Jefferson also seeks summary judgment on its counterclaim declaring certain installment payments are barred by expiration of the statute of limitations. Plaintiff 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 must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). Since the validity of the mortgage subject to foreclosure has been challenged, that issue must be resolved first.

An overarching principle in disputes over the validity and 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" (*Yen-Te Hsueh Chen v Geranium Dev. Corp.*, 243 AD2d 708, 709 [2d Dept 1997]).

Jefferson's assertion that failure to record the CEMA and the second mortgage, as well as its acquisition of title as an alleged good faith purchaser, renders the first mortgage void is entirely misplaced. "'Where, as here, balances of first mortgage loans are increased with second mortgage loans and CEMAs are executed to consolidate the mortgages into single liens, the first notes and mortgages still exist'" (*Wells Fargo Bank, N.A. v Douglas*, 186 AD3d 532, 534 [2d Dept 2020], *quoting Benson v Deutsche Bank Natl. Trust, Inc.*, 109 AD3d 495, 498 [2d Dept 2013]). Therefore, the most Jefferson can

attempt to establish is that its title is not subject to the second mortgage and the CEMA. This would account for only about 5% of the total principal alleged due.

To demonstrate its status as good faith purchaser, Jefferson was required to proffer admissible evidence that it gave valuable consideration for its title and that it did not have actual knowledge of Plaintiff's alleged mortgage or knowledge of facts that would have put it on "inquiry notice" of that mortgage (*see eg Deutsche Bank Natl. Trust Co. v. Rose*, 197 AD3d 1097, 1100 [2d Dept 2021]; *see also Emigrant Bank v Drimmer*, 171 AD3d 1132 [2d Dept 2019]; *Lend-Mor Mtge. Bankers Corp. v Nicholas*, 69 AD3d 680 [2d Dept 2010]). Here, Jefferson's proof of valuable consideration is wanting as none of the corroborating documents were in admissible form. The checks and other financial records were not authenticated and no foundation for admission of the records under CPLR §4518 was established. On the issue of notice, the conflicting affidavits submitted by Mohammod M. Islam, Evangelos Pollatos and Rosa Pollatos- Karanasos did nothing more than raise fact issues as to Jefferson's actual or inquiry notice of the unrecorded encumbrances.

On its cause of action for foreclosure, Plaintiff 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 eg 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]). But, since Jefferson pled a claim that its title has priority over the CEMA, Plaintiff was also required to demonstrate, in the first instance, that Jefferson's claim fails as a matter of law (*see eg JP Morgan Chase Bank v Munoz*, 85 AD3d 1124 [2d Dept 2011]). As determined supra, presently issues of fact exist as to the validity of Jefferson's claims. Further, since Plaintiff's complaint does not plead, in the alternative, a cause of action to foreclose only the first mortgage, a *prima facia* case for foreclosure is lacking.

As to the branch the cross-motion for an order "declaring time-barred any installment payments due more than six years prior to the acceleration of the alleged debt herein", the movant bears the initial burden of showing *prima facie* that the time to sue has expired (*see Wilmington Sav. Fund Socy., FSB v Alam*, 186 AD3d 1464 [2d Dept 2020]; *Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). An action to foreclose on a mortgage is governed by a six-year statute of limitations (CPLR §214[6]; *Citimortgage, Inc. v Dalal*, 187 AD3d 567 [2d Dept 2020]). To meet its burden, "the Defendant must establish, *inter alia*, when the Plaintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], *quoting Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). "Where a mortgage is payable in installments, separate causes of action accrue for each installment that is not paid, and the statute of limitations begins to run on the date each installment becomes due" (*see Deutsche Bank Natl. Trust Co. v Limtcher*, 193 AD3d 686, 688 [2d Dept 2021]). However, "once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]). The commencement of an action to foreclose on a mortgage can constitute an unequivocal act of accelerating the mortgage note (*see Freedom Mortgage Corp. v Engel*, 37 NY3d 1 [2021]). When a movant demonstrates that a claim is barred by the statute of limitations, a plaintiff must establish that a toll or stay is applicable or that an issue of fact exists (*see Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]).

It is undisputed that the consolidated note secured by the CEMA provided the indebtedness was repayable in monthly installments over 30 years. Plaintiff pled in the complaint that the mortgagor initially defaulted in repayment on July 1, 2011, and that no payment has been made since that time. Given this action was commenced on January 8, 2020, Jefferson established that installment payments and interest due before July 1, 2014, are time barred (*see eg Deutsche Bank Natl. Trust Co. v Limtcher*,

193 AD3d 686 [2d Dept 2021]; *U.S. Bank N.A. v Singer,* 192 AD3d 1182 [2d Dept 2021]). In opposition, Plaintiff did not establish that an intervening acceleration occurred. Indeed, Plaintiff's only argument, correctly made, was that the statute of limitations affirmative defense/counterclaim does not preclude summary judgment as it only relates to the amount due and owing (*see 1855 E. Tremont Corp. v Collado Holdings LLC,* 102 AD3d 567, 568 [1st Dept 2013]).

Concerning the branch of Plaintiff's motion to dismiss Jefferson's affirmative defenses, CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov,* 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

Plaintiff demonstrated that virtually all the affirmative defenses, except the tenth, are entirely conclusory and unsupported by any facts in the answer or by the papers submitted in opposition. As such, these affirmative defenses are nothing more than an 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, specific legal arguments were proffered only in support of the statute of limitations defense and the counterclaims, all the other affirmative 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]).

Accordingly, it is

ORDERED that Plaintiff's motion is granted only to the extent that all Defendant Jefferson's affirmative defenses, except the tenth, are dismissed, otherwise the motion is denied, and it is

ORDERED that Defendant Jefferson's cross-motion is granted only to the extent that upon any calculation of the amount due Plaintiff on its foreclosure action, shall not include any installment payments and interest due before July 1, 2014, otherwise the cross-motion is denied, and it is

ORDERED that this matter is set down for a status conference on **April 10, 2024 @ 11:20 am** via Microsoft Teams.

3/5/2024
DATE

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

CHECK ONE:		CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
		GRANTED		DENIED	[X]	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

850002/2020 MARINERS PAC VENTURES, LLC vs. KHANAM, KHADIZA
Motion No. 003