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 18, 2024

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #3 & #4

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the lawsuit. The plaintiff has cross-moved seeking to voluntarily discontinue the action. 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.

As recorded in a prior order 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 commenced this lawsuit seeking a foreclosure of the mortgage. The above noted motions have now been filed.

Conclusions of Law

It is well settled that "proper service of an RPAPL 1303 notice is a condition precedent to commencing a foreclosure action, and the 'foreclosing party has the burden of showing compliance therewith'" (see, Federal National Mortgage Association v. Raja, 211 AD3d 692, 181 NYS3d 103 [2d Dept., 2022]). If the burden demonstrating compliance with RPAPL §1303 has not been shown the the complaint must be dismissed (21st Mortgage Corporation v. Nodumehlezi, 211 AD3d 893, 180 NYS3d 568 [2d Dept., 2022]).

The plaintiff has not demonstrated it has complied with the requirements of RPAPL §1303 at all. There is no merit to the argument the defendants waived any such defenses. The plaintiff bears the burden to demonstrate compliance and absent such compliance the complaint must be dismissed (see, Bank of New York

Mellon v. Mitchell, 51 Misc3d 1220(A), 41 NYS3d 448 [Supreme Court Kings County 2016]). Rather, the plaintiff argues the lawsuit should be voluntarily discontinued.

It is well settled that the court maintains discretion whether to grant a voluntary discontinuance of a litigation pursuant to CPLR §3217(b) (Tucker v. Tucker, 55 NY2d 378, 449 NYS2d 683 [1982]). That discretion includes the determination whether such discontinuance is granted 'without prejudice' (Valladares v. Valladares, 80 AD2d 244, 438 NYS2d 810 [2d Dept., 1981]). Generally, such discontinuance should be granted unless valid reasons, such as prejudice to the defendant, warrant denial (id). Prejudice means the discontinuance would prejudice a substantial right of a party, circumvent an order of the court, avoid the consequences of a potentially adverse determination or produce some other improper result (Marinelli v. Wimmer, 139 AD3d 914, 30 NYS3d 571 [2d Dept., 2016]). Thus, in Catherine Commons LLC v. Town of Orangetown, 157 AD3d 785, 69 NYS3d 662 [2d Dept., 2018] the court denied the request for voluntary discontinuance since such discontinuance would prejudice a party's ability to challenge an assessment. Again in Baez v. Parkway Mobile Homes Inc., 125 AD3d 905, 5 NYS3d 154 [2d Dept., 2015] the court held discontinuance was improper where it was only pursued to avoid the consequences of failing to respond to a 90 notice and an adverse determination of a summary judgement motion filed. Thus,

a discontinuance should not be granted where to do so would permit a party to avoid the consequences of its own actions (Citibank N.A. v. Bravo, 168 AD3d 1161, 90 NYS3d 673 [3rd Dept., 2019]). In this case the discontinuance is only being sought to avoid a dismissal based upon the failure to serve a notice pursuant to RPAPL §1303. That is an improper basis upon which to seek a voluntary discontinuance.

Therefore, based on the foregoing the motion seeking a discontinuance is denied. The motion seeking dismissal of the complaint is granted.

So ordered.

ENTER:

DATED: June 18, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC