

DLJ Mtge. Capital, Inc. v Cunningham

2025 NY Slip Op 31645(U)

April 14, 2025

Supreme Court, Kings County

Docket Number: Index No. 518911/19

Judge: Cenceria P. Edwards

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of May, 2022.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

-----X
DLJ MORTGAGE CAPITAL, INC.,

Plaintiff,

- against -

Index No. 518911/19

CHERYL A. CUNNINGHAM a/k/a CHERYL CUNNINGHAM, ROBERT W. CUNNINGHAM a/k/a ROBERT CUNNINGHAM, CRIMINAL COURT OF THE CITY OF NEW YORK, MATTHEW GERSHON, JEAN GERSHON, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATIONS BUREAU, THE CITY OF NEW YORK and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/Cross Motion and Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

45-49 59-63
59-63 73
73 74

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 123 87th Street in Brooklyn (Block 6042, Lot 67) (Property), plaintiff DLJ Mortgage Capital, Inc. (DLJ or Plaintiff) moves (in motion sequence [mot. seq.] one)

for an order: (1) appointing a referee to compute the amount due to Plaintiff and ascertain whether the Property can be sold in parcels, pursuant to RPAPL § 1321; (2) amending the caption by adding the names of tenant(s) residing at the Property in place of the John Doe defendants, pursuant to RPAPL § 1311; and (3) granting Plaintiff a default judgment against all non-appearing and non-answering defendants, pursuant to CPLR 3215 (NYSCEF Doc No. 45).

Defendant City of New York Environmental Control Board (ECB) cross-moves (in mot. seq. two) for an order: (1) dismissing the complaint as against it, pursuant to CPLR 3211 (a) (7) and RPAPL § 202-a; or, alternatively, (2) granting it leave to file a late answer with cross-claims and compelling DLJ to accept service of same, pursuant to CPLR 3012 (d); and (3) vacating ECB's appearance default and permitting it to defend this action (NYSCEF Doc No. 59).

Background

On August 27, 2019, DLJ commenced this action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1-2). The complaint alleges that in or about June 3, 2002, Cheryl and Robert Cunningham (Borrower Defendants) executed a \$400,000.00 promissory note, which was secured by a mortgage on the Property (NYSCEF Doc No. 1 at ¶¶ 2-3). The complaint alleges that the Borrower Defendants "failed to comply with the terms, covenants and conditions of said note and mortgage by failing and omitting to pay, to the plaintiff, payments due on November 01, 2016 . . ." (*id.* at ¶ 9).

Notably, regarding junior lien holders, the complaint alleges that:

“[u]pon information and belief all the defendants herein have or claim to have some interest in or lien upon said mortgaged premises or some part thereof which interest or lien, if any, has accrued subsequent to the lien of plaintiff’s mortgage, or has been paid or equitably subordinated to plaintiff’s mortgage, or been duly subordinated thereto. The reason for naming said defendants is set forth in ‘Schedule A’ that is attached to this complaint” (*id.* at ¶ 14).

Schedule A to the complaint lists the ECB as a party defendant and states that it is “Holder of Judgment(s) against the property being foreclosed herein” and “[s]aid lien is more particularly described in **Exhibit ‘B’** annexed hereto” (*id.* at 10). Exhibit B appears to be a computerized title search showing various judgment docket entries for the lienholder defendants, including ECB (*id.* at 10-29).

The record reflects that ECB was served with process on September 6, 2019, by delivery of the summons and complaint to ECB’s authorized agent (NYSCEF Doc No. 5). ECB failed to answer or otherwise respond to the complaint.

DLJ’s Instant Motion for an Order of Reference

On September 21, 2020, DLJ moved for an order of reference, a default judgment against the non-appearing defendants, including defendant ECB, and to amend the caption (NYSCEF Doc No. 45). DLJ submits an attorney affirmation with exhibits, including the pleadings with exhibits, the note, mortgage, various mortgage assignments, a notice of default and 90-day pre-foreclosure notices addressed to the Cunninghams at the Property (NYSCEF Doc Nos. 48 and 49). DLJ’s exhibits include a June 24, 2020 affidavit from

Dawn Horne (Horne), a Document Execution Specialist with Selene Finance LP (Selene), servicer of the Cunninghams' mortgage, who attests to the Defendant Borrowers' payment default based on her review of business records and the records of "a prior servicer" (NYSCEF Doc No. 49 at 212 [see ¶¶ 9-10]). Horne's affidavit annexes a "Customer Account Activity Statement" from PHH Mortgage Services reflecting the amounts owed (*id.* at 218-219).

ECB's Cross-Motion

On November 12, 2020, ECB opposed DLJ's motion and cross-moved to dismiss the complaint for DLJ's failure to comply with RPAPL § 202-a's heightened pleading requirements, or, alternatively, for an order granting it leave to file a late answer with cross-claims, compelling DLJ to accept its late answer, pursuant to CPLR 3012 (d), and vacating its default (NYSCEF Doc No. 59).

Collectively e-filed (as NYSCEF Doc No. 59) with ECB's notice of motion, defense counsel submits an attorney affirmation asserting that there are "liens arising from [ECB] judgments in an amount exceeding \$240,000.00, exclusive of interest . . ." which "resulted from notices of violation issued by the by the Department of Buildings, docketed as early as September 30, 2016" (*id.* at ¶ 2). At the time of this cross-motion, defense counsel asserts that there are 24 ECB judgments docketed against Cheryl A. Cunningham as owner of the Property (*id.* at ¶¶ 9 and 11). Defense counsel explains that "[o]nce becoming aware of the City's particular interest in this action, the City reached out to counsel to request that

Plaintiff consent to an extension of the City’s time to answer the Complaint” and DLJ “declined to consent” (*id.* at ¶ 12).

Defense counsel argues that dismissal is warranted for failure to comply with the heightened pleading requirements of RPAPL § 202-a based on a general allegation in the complaint and a “20 page title report extract” annexed to the complaint, “which *may* only list as many as five (5) docketed Judgment liens, of the City’s 24 docketed Judgment liens” (*id.* at ¶ 17).

Alternatively, defense counsel asserts that leave for the ECB to answer with a cross-claim for foreclosure of a judgment lien should be granted, pursuant to CPLR 3012 (d) and CPLR 2004 (*id.* at ¶ 22). Defense counsel argues that the ECB has a reasonable excuse for its default because “the body of the Complaint” fails to mention ECB or any claim against it (*id.* at ¶ 24). Defense counsel further explains that:

“[s]ubsequent, to the commence of the action the City investigated possible claims that could be brought by Plaintiff, and concluded that the City’s interests needed to be represented and requested that Plaintiff consent to an extension of the City’s time to answer the Complaint. Plaintiff declined to consent, as such, the instant application ensued” (*id.* at ¶ 25).

Defense counsel asserts that the default was “not willful” since it sought an extension of time to answer as soon as it became aware of this foreclosure action (*id.* at ¶ 26).

DLJ’s Opposition and Reply

DLJ, in opposition and in reply, submits an attorney affirmation asserting that Exhibit B to the complaint details at least eleven (11) of the ECB’s nineteen (19) Judgments

docketed at the time this action was commenced “thereby providing the ECB with notice that it holds at least \$110,400.00 in liens that are subordinate to the Plaintiff’s mortgage and remain outstanding against the subject property” and “include[ed] the name of the judgment debtor, the address of the subject property, the order date, notice date, docket date, and balance due with respect to said liens” (NYSCEF Doc No. 73 at ¶¶ 7-8).¹ DLJ’s counsel argues that, under the law, title search documents have been held to be sufficient to satisfy the pleading requirements of RPAPL § 202-a (1) (*id.* at ¶ 9).

DLJ’s counsel argues that ECB’s alternative relief sought should be denied because “ECB has failed to demonstrate a reasonable excuse for its default and a meritorious defense to the Plaintiff’s Complaint, as required by CPLR 5015 (a) (1)” (*id.* at ¶ 11). Counsel further argues that granting a default judgment against defendants with nominal interests is appropriate and “despite the significant amount of ECB’s judgments, the agency’s interest in the property is ‘nominal’ because its liens are subordinate to the Plaintiff’s first lien mortgage and, therefore, only have value to the extent that the foreclosure sale yields a surplus . . .” (*id.* at ¶ 17).

¹ DLJ cites to NYSCEF Doc No. 1 at page 28.

Discussion

(1)

ECB's Dismissal Cross-Motion

RPAPL § 202-a (1) provides that where a city agency is named as a defendant, heightened pleading requirements apply and the complaint must set forth “[d]etailed facts showing the particular nature of the interest in or lien on the real property and the reason for making such city a party-defendant.” Federal courts that have held that production of title search documents, like those annexed to the complaint here, showing amounts owed to city agencies is sufficient to meet plaintiff’s obligations under RPAPL § 202-a (1) (*see Windward Bora LLC v Thomas*, No. 20-CV-5320, 2022 WL 14731628, at *8 [EDNY 2022]; *Windward Bora LLC v Baez*, No. 19-CV-5698, 2020 WL 4261130, at *4 [EDNY 2020]).

Here, DLJ’s production of a computerized title search annexed to the complaint showing at least \$100,000.000 of the judgments docketed by ECB as a junior lienholder defendant, satisfied the heightened pleading requirements of RPAPL § 202-a. Consequently, that branch of ECB’s motion seeking to dismiss the complaint is denied.

(2)

ECB's Motion to File a Late Answer

Alternatively, ECB seeks an order granting it leave to file a late answer and compelling DLJ to accept same, pursuant to CPLR 2004 and 3012 (d). CPLR 3012 (d) provides that:

7

“(d) Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.”

“In light of the public policy favoring the resolution of cases on their merits, the Supreme Court may compel a plaintiff to accept an untimely answer (*see* CPLR 2004, 3012 [d]) where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendant, that there would be no prejudice to the plaintiff and that a potentially meritorious defense exists” (*Yongjie Xu v JJW Enterprises, Inc.*, 149 AD3d 1146, 1147 [2017]).

Under the circumstances here, where the case is in its early stages and there is a lack of any discernable prejudice to Plaintiffs or any other party, ECB’s motion to excuse its delay and compel Plaintiffs to accept their late answer to the complaint is granted (*Leogrande v Glass*, 106 AD2d 431, 432 [1984] [holding that order compelling plaintiff to accept late answer was properly granted by the court as a matter of discretion]).

(3)

DLJ’s Motion for an Order of Reference

“When seeking an order of reference to determine the amount that is due on an encumbered property, a plaintiff must show its entitlement to a judgment [which] may be shown . . . by the plaintiff showing entitlement to summary judgment . . .” (*U.S. Bank N.A. v Miller*, 49 Misc 3d 1205 (A), * 5 [Sup Ct, Kings County 2015] [citing RPAPL § 1321;

1-2 Bruce J. Bergman, Bergman on New York Mortgage Foreclosures § 2.01 (4) (k) (note: online edition)).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and evidence of the borrower’s payment default (*see Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2d Dept 2020]; *Christiana Trust v Moneta*, 186 AD3d

1604, 1605 [2d Dept 2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2d Dept 2017]).

DLJ, in support of its motion for an order of reference, a default judgment and to amend the caption has demonstrated its prima facie entitlement to foreclose the mortgage by submitting the note, the mortgage encumbering the Property and evidence of the Defendant Borrowers' payment default (*see Bank of New York Mellon v Genova*, 159 AD3d 1009, 1010 [2018]). DLJ is also entitled to a default judgment against the non-appearing and non-answering defendants, with the exception of the City of New York ECB. Accordingly, it is


ORDERED that DLJ's motion (mot. seq. one) is only granted to the extent that: (1) DLJ is entitled to an order of reference, pursuant to RPAPL § 1321, and DLJ shall settle such order on notice; (2) the caption is amended to substitute the tenants at the Property for the John Doe defendants such that John Doe #1-#8 shall be replaced with "John Doe (Refused Name)" and Igor Kosoy, Kash Capital and Reginal Capital DBA J.C. Management Arby's shall be substituted for the remaining John Doe defendants; and (3) DLJ is granted a default judgment against the non-appearing and non-answering defendants, Cheryl Cunningham, Robert Cunningham, the Criminal Court of the City of New York, New York State Department of Taxation and Finance, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, "John Doe (Refused Name)," Igor Kosoy, Kash Capital and Reginal Capital DBA J.C. Management Arby's; the motion is otherwise denied; and it is further

ORDERED that ECB's cross-motion (mot. seq. two) seeking leave to file a late answer and to compel Plaintiffs to accept their late answer is granted, ECB's answer to the complaint e-filed on November 12, 2020 (*see* NYSCEF Doc No. 60) shall be executed and e-filed within 30 days after service of this decision and order with notice of entry thereof; ECB's cross-motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

April 14, 2025



Hon. Cenceria P. Edwards, CPA J. S. C.