

Bank of America, N.A. v Oliver, LLC

2012 NY Slip Op 30335(U)

February 7, 2012

Supreme Court, New York County

Docket Number: 602513/09

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

BANK OF AMERICA, N.A., as Lender and
Plaintiff,

Plaintiff,

- v -

OLIVER, LLC, 951 LLC, SIMON ELIAS, IZAK
SENBHAR, STEVEN ELGHANAYAN, BANK OF
AMERICA, N.A., GATEWAY DEMOLITION CORP.,
FCV SEWER & WATER, INC., EDDINGTON
SECURITY, INC., MAYRICH CONSTRUCTION
COMPANY, TWIN COUNTY SHEET METAL, INC.,
LOUIS L. BUTTERMARK & SONS, INC., RC DOLNER
LLC, SEN CONSULTING CORP., POLO ELECTRIC
CORP, DFC STRUCTURES, LLC, BW
REPROGRAPHICS LLC, ACTIVE FIRE SPRINKLER
CORP., ENVIRONMENTAL CONTROL BOARD, CITY OF
NEW YORK DEPARTMENT OF FINANCE, STATE OF
NEW YORK, and "JOHN DOE" NOS. 1-25,
Defendants.

Index No.: 602513/09

Motion Date: 09/13/11

Motion Seq. No.: 4

Motion Cal. No.: _____

FILED

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The following papers, numbered 1 to 10 were read on this motion to renew.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED
1, 2
3 - 9
10

Cross-Motion: Yes No

Upon the foregoing papers,

Defendants Oliver, LLC, 951 LLC, Simon Elias and Izak
Sembahar and Steven Elghanayan move pursuant to CPLR 2221 (e)
seeking leave to renew this court's Order dated April 27, 2011,
and upon renewal deny plaintiff's motion for summary judgment and

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

otherwise stay this foreclosure proceeding. Plaintiff cross-moves to substitute Nine Fifty-Five Development Associates LLC in its place and stead as plaintiff. For the reasons that follow, the court shall grant the motion to renew and upon renewal adhere to its prior determination granting summary judgment to plaintiff and shall grant the cross-motion for substitution.

Movants seek renewal based upon the assignment of the "Acquisition Mortgage" that incorporated prior mortgages securing approximately \$9.2 million in indebtedness and the "Gap Mortgage" that secured \$19.1 million in borrowings. Those mortgages are the subject of this foreclosure action. It is undisputed that both mortgages were assigned by the plaintiff Bank of America (BOA) to proposed plaintiff Nine Fifty-Five Development Associates LLC (Nine Fifty-Five) by assignment agreements dated October 13, 2010, which were duly recorded on in the City Register on October 27, 2010. Movants correctly assert that the assignments occurred after the prior motion for summary judgment was submitted on July 30, 2010 and that they therefore could not have placed that fact before the court or made legal arguments based upon that fact. "A motion to renew should be granted upon a showing of new facts where the moving party sets forth a justifiable excuse for not presenting the facts to the court. [Movants] ha[ve] satisfied [the] burden on the motion to renew. .

. The existing material facts relating to . . . were not available . . . at the time of the motion. . . Leave to renew is the appropriate remedy under such circumstances." Seifts v Markle, 211 AD2d 848, 849 (3d Dept 1995) (citations omitted).

Movants argue that the assignments divested plaintiff from standing to bring this action as it no longer had any legal or equitable interest in the mortgages. See Katz v East-Ville Realty Co., 249 AD2d 243 (1st Dept 1998) ("Plaintiff's attempt to foreclose upon a mortgage in which he had no legal or equitable interest was without foundation in law or fact, and the IAS Court's dismissal of the foreclosure action pursuant to CPLR 3211 (a) (1) was, accordingly, appropriate"). As cited by the movants, the Court in Katz further held that "[d]ismissal was also warranted by reason of plaintiff's failure to join the party to whom he assigned the mortgage and who, he concedes, possesses a security interest in the property." Id.

The movants' reliance upon Katz however is misplaced. There is no dispute that at the time this action was commenced BOA was the mortgagor and had the right to foreclose upon the property unlike Katz where the assignment occurred prior to the action being commenced. Thus citing Katz, the Court has held

In order to commence a foreclosure action, the plaintiff must have a legal or equitable interest in the mortgage. Where the plaintiff is the assignee of the mortgage and the underlying note at the time the foreclosure action was commenced, the plaintiff has standing to maintain the action. Here, [plaintiff] lacked standing to bring this

[* 4]

foreclosure action because it was not the assignee of the mortgage on . . . the day the action was commenced. A foreclosure of a mortgage may not be brought by one who has no title to it.

* * *

In sum, inasmuch as the assignment was not made until after the summons was filed, Wells Fargo had no standing to bring this action.

Wells Fargo Bank, N.A. v Marchione, 69 AD3d 204, 207-211 (2d Dept 2009) (citations and internal quotations omitted). Therefore, BOA had the right to commence this foreclosure action as it had not assigned the mortgages at the time the action was commenced.

The movants curiously argue that Central Federal Sav., F.S.B. v 405 W. 45th St., Inc. (242 AD2d 512 [1st Dept 1997]) supports their position because the Court therein stated "[s]ince defendant does not challenge the substantive validity of the assignment of the subject mortgage to [the assignee], and since an assignee of a mortgage can continue an action in the name of the original mortgagee, even in the absence of a formal substitution (CPLR 1018), there is no merit to defendant's claim that the action should be dismissed on the ground that the named plaintiff 'owns no rights in this matter.'" Movants assert that Central Federal supports their position because unlike that case here they challenge BOA's ability to assign the mortgages under Section 8.13 of the "Fee Acquisition Loan Agreement" (Fee Loan) dated October 12, 2007.

Movants' arguments are inapposite. Based upon the Court's holding in Central Federal, if BOA's assignment of the mortgages

is valid then proposed plaintiff Nine Fifty-Five is permitted to continue this action in BOA's stead. But even if this court were to hold that the assignments were void, the movants would not be entitled to a reversal of summary judgment against them since BOA would continue to be the holder of the mortgages and the movants' argument as to BOA's standing would fail as a result. Therefore, based upon Central Federal the court shall adhere to its prior grant of summary judgment to the plaintiff.

The court shall also grant plaintiff's cross-motion to substitute Nine Fifty-Five as plaintiff pursuant to CPLR 1018.

Movants argue that this court should deny the cross-motion because the Fee Loan bars the assignment of the loan to any entity other than a "bank" or "financial institution." ¹ Section 8.13 of the Fee Loan entitled "Assignment; Participation" provides in pertinent part that the "Lender may at any time assign to any bank or other institution with the consent of the Administrative Agent and notice to Borrower, which consent shall not be unreasonably withheld or delayed . . . all or a proportionate part of all of its rights and obligations, pursuant to an Assignment and Assumption Agreement executed by such Assignee and the assigning Lender. . ." Movants argue that

¹ Mayrich Construction Company also opposes the cross-motion in connection with its separate motion to renew and the court shall consider its opposition to the cross-motion in connection with its motion to renew.

* 6]

assignee Nine Fifty-Five is not a bank or financial institution and therefore BOA has breached its obligations under the Fee Loan so as to constitute a fraud which is a defense to the mortgage foreclosure action.

Movants' argument lacks merit. First, the cited section of the Fee Loan contains no prohibition against the type of assignment that was executed here. The provision relied upon by movants merely proscribes the requirements that must be fulfilled if BOA were to assign its rights under the mortgage to a bank or financial institution. As stated by the Second Circuit analyzing a similar contractual provision

The claim that the assignment from [the original lender] to [the assignee] is invalid can be disposed of quickly. Under New York law, only express limitations on assignability are enforceable.

"To reveal the intent necessary to preclude the power to assign, or cause an assignment violative of contractual provisions to be wholly void, [a contractual] clause must contain express provisions that any assignment shall be void or invalid if not made in a certain specified way."

The Letter Agreement at issue provides: "This letter agreement shall be binding upon you [borrower], your successors and assigns, and shall inure to the benefit of us [the original lender], our successors, transferees and assigns. We [the original lender] may assign all or any part of our interest in this letter agreement to any financial institution." This language fails to restrict the assignment expressly in any way. While it explicitly permits assignments to financial institutions, it does not limit assignments only to these entities. The assignment was therefore valid at the time it was made. Since we hold that as a matter of New York law, the debt was assignable to [the assignee], whether or not it is a

financial institution, there is no need to consider appellants' claim that factual issues exist as to whether [the assignee] is a financial institution.

Pravin Banker Associates, Ltd. v Banco Popular Del Peru, 109 F3d 850, 856 (2d Cir 1997) (citations and footnote omitted). Similar to the provision considered by the Court in Pravin, the assignment provision in the Fee Loan does not by its terms bar the assignment of the mortgages to Nine Fifty-Five. See Allhusen v Caristo Const. Corporation, 303 NY 446, 452 (1952) (assignment of loans prohibited only "[w]hen 'clear language' is used, and the 'plainest words have been chosen'").

Furthermore, Section 8.15 of the Fee Loan "Successors and Assigns" provides in pertinent part that "[e]xcept as herein provided, this Agreement shall be binding upon and inure to the benefit of Borrower, Administrative Agent and Lenders and their respective heirs, personal representatives, successors and assigns. Notwithstanding the foregoing, Borrower may not assign, transfer or set over to another, in whole or in part, all or any part of its benefits, rights, duties and obligations hereunder. . . ." Thus contrary to movants' argument, when the parties intended to prohibit assignments by the borrowers, such restriction was made explicit in the text of the Fee Loan. There is no similar provision applicable to the plaintiff, which thus evinces the parties' intent that the plaintiff be able to freely assign the loan and mortgage appurtenant thereto.

Accordingly, it is

ORDERED that the motion to renew this court's Order of April 27, 2011, by defendants OLIVER, LLC, 951 LLC, SIMON ELIAS, IZAK SENBAHAR and STEVEN ELGHANAYAN is DENIED; and it is further

ORDERED that plaintiff's cross-motion to substitute NINE FIFTY-FIVE DEVELOPMENT ASSOCIATES LLC as plaintiff in this action is GRANTED and that the caption of this action shall read as follows:

NINE FIFTY-FIVE DEVELOPMENT ASSOCIATES LLC,

Plaintiff,

- v -

OLIVER, LLC, 951 LLC, SIMON ELIAS, IZAK SENBAHAR, STEVEN ELGHANAYAN, BANK OF AMERICA, N.A., GATEWAY DEMOLITION CORP., FCV SEWER & WATER, INC., EDDINGTON SECURITY, INC., MAYRICH CONSTRUCTION COMPANY, TWIN COUNTY SHEET METAL, INC., LOUIS L. BUTTERMARK & SONS, INC., RC DOLNER LLC, SEN CONSULTING CORP., POLO ELECTRIC CORP, DFC STRUCTURES, LLC, BW REPROGRAPHICS LLC, ACTIVE FIRE SPRINKLER CORP., ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK DEPARTMENT of FINANCE, STATE of NEW YORK, and "JOHN DOE" NOS. 1-25,

Defendants.

and it is further,

ORDERED that upon service of a copy of this Order with notice of entry upon all parties the caption of this action shall be deemed amended and NINE FIFTY-FIVE DEVELOPMENT ASSOCIATES LLC shall be the plaintiff in this action; and it is further

ORDERED that cross-movant shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the Clerk's records to reflect the change in the caption herein.

This is the decision and order of the court.

Dated: February 7, 2012

ENTER:

Debra A. James

J.S.C.

DEBRA A. JAMES

FILED

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