

Wells Fargo Bank, N.A. v Wellington Park Villa, LLC
2012 NY Slip Op 30540(U)
February 28, 2012
Supreme Court, Suffolk County
Docket Number: 18908-2011
Judge: Emily Pines
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SHORT FORM ORDER

INDEX NUMBER: 18908-2011

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

COPY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 10-31-2011
Motion Submit Date: 12-13-2012
Motion Sequence No.: 001 MG

FINAL
 NON FINAL

_____ X

**WELLS FARGO BANK, N.A., successor by merger to
WACHOVIA BANK, N.A.,**

Plaintiff,

-against-

**WELLINGTON PARK VILLA, LLC, GARY PASSAVIA,
VINCENT PASSAVIA, WELLINGTON PARK VILLAS
CONDOMINIUM, NEW YORK VILLAS, LLC., NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE, "JOHN DOE 1-50", "MARY ROE 1-50",
"XYZ CORP, 1-50", AND "ABC LLC, 1-50",**

**The names of the "John Doe 1-50" "Mary Roe 1-50", "XYZ
Corp, 1-50", and "ABC LLC, 1-50", defendants being
fictitious, and unknown to the Plaintiff, the persons and the
entities being parties having an interest in or lien against
the premises sought to be foreclosed herein, as owner
tenant, licensee, occupant or otherwise.**

Defendants.

_____ X

Upon the following papers numbered 1 to _____ read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 45 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 46 - 49 ; Replying Affidavits and supporting papers 50 - 53 ; Other plaintiff's memoranda of law ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the plaintiff's motion (001) for an order granting summary judgment against

defendants Wellington Park Villas, LLC, Gary Passavia, and Vincent Passavia Wellington, a default judgment as against defendant New York State Department of Taxation and Finance pursuant to CPLR 3215 (a), the appointment of a referee to compute and report the amount due the plaintiff, and to amend the complaint by deleting the “John Does,” “Mary Roes,” “XYZ Corp.,” and “ABC, LLC” from the caption. is granted; and it is further

ORDERED that plaintiff’s counsel is directed to serve a copy of this Order with Notice of Entry upon counsel for defendants pursuant to CPLR 2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

In this action the plaintiff, Wells Fargo Bank, N.A., successor by merger to Wachovia Bank, N.A., seeks to foreclose three mortgages on a construction project for the premises located at 47 Wellington Place, Amityville, New York. The project was intended to be constructed as a sixty-one unit condominium community divided into five buildings. On December 26, 2007, defendant Wellington Park Villas, LLC (“Wellington”), as borrower, executed and delivered to Wachovia Bank, N.A. an acquisition note in the amount of \$2,625,000.00 and mortgage, security agreement and assignment of leases and rents, a building note in the principal amount of \$10,117,912.00 and building mortgage, and a project loan in the principal amount of \$524,088.00, and project mortgage. The documents were duly recorded on January 14, 2008, in the Suffolk County Clerk’s Office in Liber 21658 page 49 et seq. The plaintiff subsequently recorded a UCC-1 Financing Statement in the office of the Suffolk County Clerk on January 8, 2008 under No. 07-00093.

The record also reveals that defendants Gary Passavia and Vincent Passavia executed a personal guaranty for up to \$1,325,000.00, and a completion guaranty that the project would be completed by September 26, 2009 as further security for the loans. On or about March 20, 2010, Wachovia Bank, National Association, merged into and with plaintiff Wells Fargo Bank, National Association. Defendants converted the mortgaged property to a condominium project pursuant to Article 9-B of the Real Property Law of New York and pursuant to a Declaration Establishing the Condominium which was recorded on October 7, 2009. On March 11, 2011, the plaintiff served a notice of default upon the defendants for their failure to repay the loans to the plaintiff in full on the December 26, 2009 maturity date. The instant action was commenced by filing on June 11, 2011 with a notice of pendency.

The complaint alleges, among other things, that the defendants defaulted (1) by failing to timely pay the loans to the plaintiff in full on the December 26, 2009 maturity date, (2) failing to complete construction of the improvements on or before September 26, 2009, and permitting superior tax liens to be filed against the mortgaged premises by failing to pay real property taxes and assessments due and owing on the mortgaged property for several years. In addition, the amended complaint alleges, among other things, that subsequent to the filing of the Declaration of the Condominium Establishing the Condominium, the mortgaged premises were subdivided into 63 separate tax lots. A subdivision map was executed by defendant New York Villas as owner and sponsor of the mortgaged premises. The amended complaint also alleges that any rights that New York Villas may have acquired in and to the mortgaged premises is subject and subordinate to the liens of the plaintiff's mortgages.

Defendants served a verified answer denying the material allegations of the verified complaint and amended verified complaint and asserting eight affirmative defenses and two counterclaims alleging that the plaintiff failed to timely deliver a subordination agreement which subordinates the lien of the mortgagee to the Declaration Establishing the Condominium.

The plaintiff now moves for summary judgment against defendants Wellington, Gary Passavia, and Vincent Passavia, dismissing their affirmative defenses, and dismissing the counterclaims, (2) a default judgment against defendant New York State Department of Taxation and Finance pursuant to CPLR 3215 (a), (3) the appointment of a referee to compute and report the amount due the plaintiff, and (4) to amend the complaint by deleting the "John Does," "Mary Roes," "XYZ Corp.," and "ABC, LLC" from the caption.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*Stewart Title Ins. Co. v Equitable Land Servs.*, 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

It is well settled that, in moving for summary judgment in an action to foreclose a mortgage, the plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (*see Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2sd Dept 1993]). When the plaintiff has done so, it is incumbent upon the defendant to produce evidentiary proof in admissible form sufficient to require a trial of his defenses (*see Republic Natl. Bank of N.Y. v O'Kane*, *supra* at 482).

The plaintiff has made a prima facie showing of its entitlement to judgment as a matter of law by producing the notes and mortgages executed by the defendants, as well as evidence of nonpayment. In support of its motion, the plaintiff submits, among other things, an affidavit of Vanessa Rodriguez, President of Wells Fargo Bank, N.A., the pleadings, the notes, mortgages, guarantees, assignments of leases and rents, and default letter.

In her affidavit, Ms. Rodriguez recounts the history of the notes and mortgages and states, among other things, that defendants defaulted on the note by failing to timely pay the installment of principal and interest due on May 25, 2011. Rodriguez also states that it is beyond dispute that Wellington did not complete construction of the improvements on or before September 26, 2009, the loans matured on December 26, 2009. Rodriguez states that such maturity date has not been extended, no portion of the \$9,499,077.67 principal balance of the loans has been repaid since the maturity date of the loans and real estate taxes remained delinquent until the plaintiff paid them in July and August 2011 after the commencement of this action. Rodriguez further states that after the December 26, 2009 maturity date of the loans, the obligors admitted the defaults in the March 9, 2010 Pre-Negotiation Letter and the October 4, 2010 Supplement to Pre-Negotiation Letter. In addition, the record reveals that each mortgage contains a clause pursuant to Section 2.2 (j), entitled "Remedies" which provides: "the mortgagor hereby waives the right to a trial by jury, the right to claim any offset and the right to assert a counterclaim in any action or proceeding brought by the mortgagee to enforce any of its rights under the note or under this mortgage."

The plaintiff, having made a prima facie showing of its entitlement to summary judgment, the

burden then shifted to the defendants to respond with rebutting evidence demonstrating that an issue of fact exists (*see Republic Natl. Bank of N.Y. v O'Kane, supra*). In opposition, defendants have failed to raise an issue of fact. Defendants do not dispute the existence of the mortgages, and defendants Gary Passavia and Vincent Passavia do not dispute their agreement to guarantee the project's completion and their agreement to guarantee up to \$1,325,000.00. Defendants also do not actually claim to have paid the debt. In addition, defendants failed to raise triable issue of fact with regard to their counterclaims, inasmuch as defendants agreed to waive their right to assert a counterclaim in the event of default.

Turning to the branch of the motion requesting a default judgment as against defendant New York State Department of Taxation and Finance, the plaintiff has demonstrated that defendant has not appeared in the action. In addition, plaintiff has duly complied with the notice requirements of CPLR 3215 (f). Accordingly, the application for a default judgment is granted.

Finally, the branch of the motion to amend the pleadings to delete the "John Does," "Mary Roes," "XYZ Corp.," and "ABC, LLC" from the caption is granted.

Accordingly, the motion for summary judgment is granted.

Submit Order.

Dated: February 28, 2012
Riverhead, New York



 EMILY PINES
 J. S. C.

FINAL
 NON FINAL

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