

<b>Bexin Realty Corp. v Barcov Holding Corp.</b>
2012 NY Slip Op 32025(U)
July 16, 2012
Sup Ct, NY County
Docket Number: 109208/07
Judge: Paul Wooten
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

BEXIN REALTY CORPORATION,

Plaintiff,

- against-

INDEX NO. 109208/07

MOTION SEQ. NO. 001

BARCOV HOLDING CORPORATION and  
FANNIE MAE,

Defendants.

The following papers, numbered were read on this motion by defendant for summary judgment pursuant to Section 3212 of the Civil Practice Law and Rules.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

**FILED**

AUG 02 2012

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERK'S OFFICE

This is an action brought by Bexin Realty Corporation (Bexin) against defendants Barcov Holding Corporation (Barcov) and Fannie Mae for unjust enrichment, conversion, and seeking a declaratory judgment that all outstanding mortgages have been satisfied. Before the Court is a motion brought by Fannie Mae for summary judgment, pursuant to CPLR 3212, dismissing the complaint as against it. Fannie Mae also seeks summary judgment on its counterclaim, adjudging Bexin liable to Fannie Mae for its costs, expenses and attorneys' fees incurred in defending this action. Bexin opposes Fannie Mae's motion, and brings a cross-motion seeking leave to serve an amended complaint, pursuant to CPLR 3025(b). Barcov has not appeared in connection with this action.

**BACKGROUND**

Bexin's primary contention is that it made certain payments to Barcov with respect to a mortgage formerly held by Barcov, and that Barcov then failed to satisfy the underlying mortgages. These underlying mortgages are now allegedly held by Fannie Mae.

On December 11, 1995, Bexin became the owner of property located at 28 West 125<sup>th</sup>

Street, New York, New York (the property). Bexin obtained a mortgage on the property in the amount of \$170,000.00 from Barcov ("Barcov Mortgage").<sup>1</sup> The Barcov Mortgage was wrapped around two underlying mortgages on the property in the amounts of \$130,000.00 and \$70,000.00, respectively ("underlying mortgages"). Essentially, Bexin would make payments to Barcov on the Barcov Mortgage, and Barcov was required to use a portion of those payments to satisfy the underlying mortgages directly.

Thereafter, pursuant to a court judgment, Bexin satisfied the Barcov Mortgage (see *Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282, 283 [1st Dept 2005]). Bexin now argues that because it satisfied the Barcov Mortgage, Barcov should have used its mortgage payments to satisfy the underlying mortgages. Nevertheless, Bexin maintains the underlying mortgages remain outstanding.

Bexin further maintains that as a result of numerous assignments and consolidations, the underlying mortgages were ultimately consolidated into a new mortgage obtained by Bexin from Fannie Mae's assignor, Washington Mutual Bank ("WaMu"), dated February 22, 2005 in the principal sum of \$8.4 million ("\$8.4M Mortgage").<sup>2</sup> Bexin states that Fannie Mae is currently listed as the holder of the underlying mortgages despite the fact that the underlying mortgages should have been satisfied (Complaint ¶ 24). Bexin alleges that it has been forced to pay attorneys' fees and interest on the underlying mortgages as a result of Barcov's failure to satisfy the underlying mortgages.

---

<sup>1</sup> The origination of the Barcov Mortgage is very complicated and summarized as follows: On December 9, 1981, 24 West 125<sup>th</sup> Street Corp ("125<sup>th</sup> Street Corp"), a prior owner of the property, obtained a mortgage for Amian Corporation ("Amian") for \$170,000.00 plus interest. This mortgage was recorded in the New York County Registrar's Office on December 17, 1981. On February 24, 1983, Amian assigned the mortgage to Barcov. On December 11, 1995, Bexin became the owner of the property and became liable to Barcov for the mortgage now referred to as the Barcov Mortgage.

<sup>2</sup> Specifically, Bexin alleges in its proposed amended complaint that the underlying mortgages were consolidated into one of two mortgages obtained by Bexin from Flushing Savings Bank dated August 4, 2000 in the amounts of \$1,500,000.00 and \$150,000.00, respectively ("Flushing Mortgages"). The Flushing Mortgages were then consolidated into a new mortgage obtained by Bexin from Fannie Mae's assignor, Washington Mutual Bank, dated February 22, 2005 in the principal sum of \$8,400,000.00.

Bexin commenced the instant action by the filing of a summons and Verified Complaint dated May 16, 2007 against Barcov and Fannie Mae asserting causes of action sounding in unjust enrichment, conversion, and also a declaratory judgment declaring that all outstanding mortgages on the property have been satisfied.<sup>3</sup> Fannie Mae submitted an answer. Barcov has not appeared in connection with this action.

Before the Court is Fannie Mae's motion for summary judgment pursuant to CPLR 3212 dismissing the complaint as asserted against it. Fannie Mae argues that the documentary evidence indisputably proves that there is no merit to Bexin's claims against Fannie Mae. Specifically, Fannie Mae asserts that despite the fact that Fannie Mae has mortgages totaling \$9,350,000.00 of indebtedness ("Fannie Mae Mortgages"),<sup>4</sup> those mortgages have no relationship to the Barcov Mortgage or the underlying mortgages. Thus, any payments made to Barcov could not have satisfied the Fannie Mae Mortgages. Moreover, at the time that Bexin executed and delivered the \$8.4M Mortgage to WaMu, Bexin specifically covenanted and warranted that "there are no offsets, counterclaims or defenses against the indebtedness now unpaid or against the Consolidated Note or the Consolidated Mortgage." (Notice of Motion, Exhibit 2 at page 2, ¶ 4). According to Fannie Mae, Bexin's claim that the Fannie Mae Mortgages have been satisfied is further undermined by the fact that Bexin has continued to make timely monthly payments under the Fannie Mae Mortgages, well after Bexin's payments to Barcov which supposedly satisfied the Fannie Mae Mortgages.

Fannie Mae also moves for summary judgment on its counterclaim against Bexin for

---

<sup>3</sup> It was unclear from the original complaint which causes of action were asserted as against Barcov and which causes of action were asserted against Fannie Mae, if any, because the causes of action do not specify against whom they are being asserted and merely say "defendant." However, it appears from the face of the complaint that the first and second causes of action are asserted only against Barcov and not Fannie Mae. The third cause of action, seeking a declaratory judgment declaring that all outstanding mortgages are satisfied, appears to be asserted against both defendants.

<sup>4</sup> Fannie Mae is the holder, by assignment, of two mortgages obtained by Bexin from Fannie Mae's assignor, WaMu: The \$8.4M Mortgage, and a mortgage dated September 5, 2006 in the principal sum of \$950,000.

costs, expenses and attorneys' fees incurred by Fannie Mae in litigating this action. Fannie Mae argues that each of the Fannie Mae Mortgages expressly provide that Bexin is obligated to pay Fannie Mae's costs and expenses, including attorney's fees, incurred in defending any action purporting to affect Fannie Mae's security under those mortgages. In moving for this relief, Fannie Mae relies on Section 12 of the \$8.4M Mortgage, which states, in pertinent part:

(a) "if any action or proceeding is commenced which purports to affect the Mortgaged Property, Lender's security or Lender's rights under this Instrument . . . then Lender at Lender's option may make such appearances, disburse such sums and take such actions as Lender reasonably deems necessary to perform such obligations of Borrower and to protect Lender's interest, including (1) payment of fees and out-of-pocket expenses of attorneys . . . (b) any amounts disbursed by Lender under this Section 12, or under any other provision of this Instrument that treats such disbursements as being made under this Section 12, shall be added to, and become part of, the principal component of the Indebtedness, shall be immediately due and payable and shall bear interest from the date of disbursement until paid at the 'Default Rate', as defined in the Note."

In support of its motion, Fannie Mae submits, *inter alia*, an affirmation of counsel, a copy of the summons and complaint, and the Consolidation, Extension and Modification Agreement for the \$8.4M Mortgage.

In opposition to Fannie Mae's motion for summary judgment, Bexin contends that Fannie Mae's motion is premature if the Court grants its cross-motion for leave to amend its complaint, because issue would not be joined yet with respect to the amended complaint. Also, Bexin contends that questions of fact exist as to whether Fannie Mae holds the underlying mortgages and whether those mortgages have been satisfied.

In its cross-motion, Bexin seeks leave to serve an amended complaint pursuant to CPLR 3025(b). Bexin is seeking to amend its complaint "so the actions of the Defendants, the role of the Defendants in this litigation, and the [causes of action] are more precisely spelled out and clarified" (Bexin's Attorney Affirmation at ¶ 15). In support of its motion, Bexin asserts that

although most of its claims involve only Barcov, Fannie Mae is a necessary party to the litigation because it holds the underlying mortgages. Specifically, Bexin asserts that Fannie Mae's lien will be affected if the Court were to award damages to Bexin or grant the declaratory and injunctive relief sought in the proposed amended complaint.

Bexin maintains that there is no prejudice to either defendant because the preliminary conference and discovery have not yet taken place. Moreover, Fannie Mae is not prejudiced because the amended complaint defines Fannie Mae as a nominal defendant and Fannie Mae stands to benefit if the Court were to grant Bexin's proposed cause of action for declaratory and injunctive relief, since they would receive from Barcov the wrongfully withheld money.

Regarding Barcov, Bexin claims Barcov is not entitled to assert prejudice or surprise in opposition to its cross-motion, since it has not answered or appeared in this action. In support of its opposition papers and cross-motion, Bexin submits, *inter alia*, an affirmation of counsel and a proposed amended verified complaint.

#### STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*,

100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

### DISCUSSION

#### Fannie Mae's Motion for Summary Judgment Dismissing the Complaint:

The Court finds that Fannie Mae has met its initial burden demonstrating its *prima facie* entitlement to judgment as a matter of law, based on the documentary evidence before the Court. In opposition, Bexin has failed to raise a triable issue of fact as to whether all or part of the Fannie Mae Mortgages should be satisfied based on Bexin's prior payments to Barcov. Bexin argues that Fannie Mae is a "nominal Defendant" and "is a necessary and benefitting party since its lien will be effected [sic] if the court were to award damages to the Plaintiff or grant the declaratory and injunctive relief sought" (Bexin's Attorney Affirmation at ¶ 8). However, Bexin covenanted that there were no offsets against the Fannie Mae Mortgages, and as such, the issue of Barcov's liability to Bexin will not have any effect on Fannie Mae's liens (see Notice of Motion, Exhibit 2 at page 2, ¶ 4).

Additionally, the issue of whether Fannie Mae is the current holder of the underlying mortgages does not affect Bexin's obligation to continue to pay Fannie Mae, pursuant to the terms of the Consolidation, Extension and Modification Agreement. Assuming *arguendo* that the underlying mortgages were not consolidated into the Fannie Mae Mortgages, as Fannie

Mae alleges, then it has no connection to the within action and is entitled to judgment as a matter of law. Similarly, assuming *arguendo* that the underlying mortgages were ultimately consolidated into the Fannie Mae Mortgages, as Bexin alleges, the terms of the Consolidation, Extension and Modification Agreement executed by Bexin on February 22, 2005, establish that Bexin's prior payments to Barcov did not satisfy the Fannie Mae Mortgages. Thus, regardless of whether Barcov failed to properly satisfy the underlying mortgages, Bexin is still bound by the terms of its Consolidation, Extension and Modification Agreement related to the Fannie Mae Mortgages, and must continue to pay Fannie Mae (*Federal Land Bank of Springfield v Saunders*, 108 AD2d 838, 839 [2d Dept 1985] [enforcing borrower's agreement to pay indebtedness without offset, defense or counterclaim]). Accordingly, this Court grants that portion of Fannie Mae's motion seeking summary judgment pursuant to CPLR 3212 dismissing Bexin's complaint as alleged against it.

Fannie Mae's Motion for Summary Judgment on its Counterclaim:

Fannie Mae has also met its burden of demonstrating its entitlement to costs, expenses and attorney's fees incurred in defending this action. Each of the Fannie Mae Mortgages expressly provides that the sums Fannie Mae disburses "to protect Lender's interest" in "any action or proceeding . . . which purports to affect the Mortgaged Property, Lender's security or Lender's rights" shall be "added to, and become part of, the principal component of the Indebtedness, shall be immediately due and payable and shall bear interest from the date of disbursement until paid" (Notice of Motion, Exhibit 2 at p.13, ¶ 12; Exhibit 5 at p.7, ¶ 12; *Brenner v Aloy*, 171 AD2d 589, 590 [1st Dept 1991] [awarding fees to mortgagee based on contract which expressly provided for recovery of counsel fees]). This Court is satisfied that based on the express terms of the Fannie Mae Mortgage Agreements, Fannie Mae is entitled to recover its costs, expenses and attorney's fees incurred in defending this action from Bexin.

Bexin's Cross-Motion Seeking Leave to Amend its Complaint:

The Court denies that portion of Bexin's cross-motion seeking leave to serve an amended complaint as to Fannie Mae and grants that portion seeking leave to serve an amended complaint as to Barcov. CPLR 3025(b) provides that "[a] party may amend his or her pleading . . . at any time by leave of court" and that "[l]eave shall be freely given upon such terms as may be just." It is well settled that such leave shall be freely granted absent prejudice or surprise resulting from the delay (*see Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989] ["Leave to amend pleadings should, of course, be freely given"]). The First Department has "consistently held, however, that in an effort to conserve judicial resources, an examination of the proposed amendment is warranted . . ." (*Ancrum*, 301 AD2d at 475; *Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept. 2005]). Moreover, "[l]eave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*Thompson*, 24 AD3d at 205; *see Ancrum*, 301 AD2d at 475; *Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

The Court finds that the proposed pleading fails to state a cause of action as it relates to Fannie Mae. "If a decision rendered by the court in a declaratory judgment action might ultimately prove to have no effect on the substantial rights of either party, the complaint should be dismissed (*Initiative for Competitive Energy v. Long Island Power Auth.*, 178 Misc. 2d 979, 683 N.Y.S.2d 391 [Sup Ct, Suffolk County 1998]; *see also Employers' Fire Ins. Co. v Klemons*, 229 AD2d 513, 514 [2d Dept 1996]). In its proposed amended complaint, as it relates to Fannie Mae, Bexin merely seeks a declaration that Fannie Mae is the current holder of the underlying mortgages. However, as previously discussed, the issue of whether Fannie Mae is the current holder of the underlying mortgages is irrelevant as Bexin covenanted that the Fannie Mae Mortgages were free from offsets. Bexin will be bound to the terms of its contract with Fannie

Mae and required to pay the full amount of the Fannie Mae Mortgages regardless of Barcov's liability to Bexin. Accordingly, any declaratory judgment regarding Fannie Mae's ownership of the underlying mortgages will not affect the substantial rights of either party. Therefore, the Court denies that portion of Bexin's cross-motion seeking leave to amend its complaint with respect to Fannie Mae.

As to Bexin's cross-motion seeking leave to serve an amended complaint with respect to Barcov, the Court finds that there will be no prejudice or surprise to Barcov. A court abuses its discretion in denying a motion to amend a pleading where the opposing party cannot claim prejudice or surprise (*see Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). Bexin, in its proposed amended complaint, seeks to add 4 new causes of action against Barcov alleging, *inter alia*, breach of fiduciary duties, fraud and breach of contract. The Court is satisfied that Barcov will suffer no prejudice or surprise because Barcov has not yet appeared in this action. Therefore, the Court grants that portion of Bexin's cross-motion seeking leave to amend its complaint as to Barcov.

### CONCLUSION

For the foregoing reasons it is,

ORDERED that Fannie Mae's motion for summary judgment dismissing the complaint as asserted against it, as well as judgment on its counterclaims for its costs, expenses and attorneys' fees is granted in its entirety, and the complaint is dismissed as against Fannie Mae, with costs and disbursements to Fannie Mae as taxed by the Clerk upon submission of an appropriate bill of costs; it is further,

ORDERED that the issue of the amount of reasonable attorneys' fees to which Fannie Mae is entitled, pursuant to the terms of the Fannie Mae Mortgages, is referred to a Special Referee to hear and determine; it is further,

ORDERED that a copy of this Order with Notice of Entry shall be served on the Special

Referee Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a Special Referee; it is further,

ORDERED that Bexin Realty Corporation's cross-motion seeking leave to serve an supplemental summons and an amended verified complaint, pursuant to CPLR 3025(b), is denied as to defendant Fannie Mae and granted as to defendant Barcov Holding Corporation; and it is further,

ORDERED that Bexin Realty Corporation is directed to serve an Amended Verified Complaint in accordance with the terms of this Order upon Barcov Holding Corporation within 30 days of entry of this Order; it is further,

ORDERED that the defendant Barcov Holding Corporation shall serve an Amended Answer to the Amended Verified Complaint, or otherwise respond thereto, within 30 days from the date of receipt of the Amended Verified Complaint; and it is further,

ORDERED Fannie Mae is directed to serve a copy of this Order with Notice of Entry upon all parties and the Clerk of the Court who is directed to enter judgment according; it is further,

ORDERED that the remaining parties are directed to appear on for a Preliminary Conference at 2:30 p.m. on October 17, 2012 at 60 Centre Street, Room 341, Part 7.

This constitutes the Decision and Order of the Court.

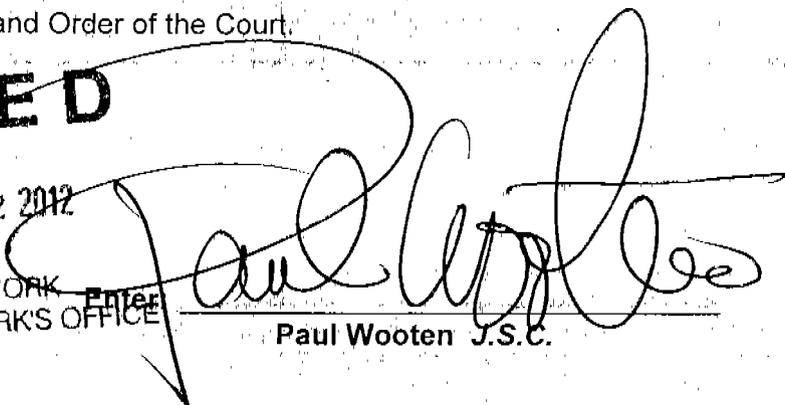
**FILED**

AUG 02 2012

Dated:

7/16/12

NEW YORK COUNTY CLERK'S OFFICE



Paul Wooten J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: :  DO NOT POST  REFERENCE