

U.S. Bank N.A. v Lam
2013 NY Slip Op 33227(U)
December 17, 2013
Supreme Court, New York County
Docket Number: 115035/09
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Alice Schlesinger
Justice

IA PART 16
PART 16

BANK OF AMERICA NATIONAL ASSOCIATION
- v -
CHRYSLER LAM

INDEX NO. 115035/09
MOTION DATE _____
MOTION SEQ. NO. 9
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the memorandum decision accompanying motion sequence 010.

FILED

DEC 20 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: DEC 17 2013.

Alice Schlesinger
ALICE SCHLESINGER S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X
U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE, SUCCESSOR IN INTEREST TO
BANK OF AMERICA, NATIONAL ASSOCIATION,
AS TRUSTEE, SUCCESSOR BY MERGER TO
LASALLE BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR MORGAN STANLEY
LOAN TRUST 2006-2,

Plaintiff,

- against -

Index No. 115035/09
Mot Seq. Nos. 009 & 010

CHAU T. LAM, YAH RONG TING, ALAN CHI-
LUNG WONG A/K/A ALAN CHI LUNG WONG,
ADAMAR OF NEW JERSEY INC., BOARD OF
MANAGERS OF EIGHT EAST TWELFTH
CONDOMINIUM, HSBC BANK USA, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY PARKING VIOLATIONS BUREAU,
and NEW YORK CITY TRANSIT ADJUDICATION
BUREAU,

Defendants.¹

FILED

DEC 20 2013

COUNTY CLERK'S OFFICE
NEW YORK

-----X
SCHLESINGER, J.:

This mortgage foreclosure action has been intensely litigated by the parties for more than four years, with this Court having heard ten separate motions, as well as countless conferences. Additionally, one of the decisions by this Court was appealed, and the Appellate Division rendered its opinion on certain limited issues on January 8, 2013. *Bank of America, N.A. v Lam, et al.*, 102 AD3d 439. In the most recent decision, rendered on December 6, 2013, this Court denied plaintiff's motion for summary judgment in foreclosure based on plaintiff's failure to establish its entitlement to the requested relief as a matter of law, and also denied the cross-motion by defendants Lam and Wong to dismiss the foreclosure proceeding for lack of standing.

¹ This caption is an amended caption pursuant to this Court's December 6, 2013 decision. The original caption was *Bank of America, et al., v Chau T. Lam, et al.*

Before the Court at this time are two motions that were made by Order to Show Cause while plaintiff's summary judgment motion was pending. The first motion was made by defendant Board of Managers of Eight East Twelfth Condominium, and the second was made by defendant Yah Rong Ting, who co-owns the subject condominium apartment with defendants Chau T. Lam and Alan Chi Lung Wong. Both motions seek to compel compliance with a Stipulation entered into by all the co-owners on December 1, 2010, when this case was barely a year old. Defendant Ting opposes both motions.

It would be an understatement to say that the relationship between the co-owners has broken down; Lam and Wong very much wish to stay in their portion of the apartment, while Ting has relocated abroad and very much wishes to sell the apartment and reap the profits from the greatly enhanced value of the apartment. The Board of Managers, for its part, wants a sale to people who will reliably pay their common charges, which Ting has not done for years. The plaintiff lender, of course, wants its mortgage paid.

While the torturous history of this litigation need not be recounted in full, some context is needed for this decision. When this foreclosure proceeding was commenced in the fall of 2009, substantial arrears had accrued on both the mortgage and the condominium's common charges. Although the lender did not initially pursue its remedies, the Board of Managers moved early on for summary judgment and related relief on its cross-claims to collect the outstanding common charges. Ting cross-moved for various forms of relief.

The motion and cross-motion were resolved by two separate Stipulations entered into by the parties contemporaneously in open court on December 1, 2010 at the conclusion of extensive negotiations. Regarding the motion by the Board of

Managers, the parties agreed that the Board would accept \$32,200 in full settlement of all common charges and late fees through December 31, 2010, with Lam and Wong responsible for half and the co-owner Ting responsible for the second half, along with \$900 monthly from each going forward. The issue of legal fees was referred to a referee. Other than claims of noncompliance by Ting with payment obligations, that Stipulation presented no issues.

In contrast, the Stipulation resolving the cross-motion by Ting has led to much litigation.² In the Stipulation, the plaintiff and the co-owners agreed that the co-owners “shall work together to select a broker to list the apartment for sale ... [and] complete the sale as expeditiously as possible.” As to price, the parties agreed that the “asking price to be listed is \$2.5 million [and the] apartment shall be sold for no less than \$2.25 million, unless the parties agree otherwise.” The Stipulation further provided that: “If a ready, willing and able buyer offers \$2.25 million, the parties shall accept it as the purchase price.”

The December 1, 2010 Stipulation is a handwritten document drafted for the most part by the Court at the conclusion of the negotiations. Two deadlines were added in handwriting that appears to be that of counsel for the lender, who was most anxious to have a sale proceed so that the mortgage would be paid off without further delay. The first deadline for selecting a broker was set as “on or before 2/15/10.” The second deadline, and the one that has generated the most litigation, including the motions here, stated that: “The parties agree that the closing shall take place no later than 5/31/11.”

² Although of no consequence, the reference order states that the cross-motion was made by Lam and Wong, while the Stipulation indicates that the cross-motion was made by Ting. It appears that the latter is correct.

Unfortunately, the parties were unable to move forward and returned to court in June of 2011 on a motion by Ting for contempt, treated by the Court as one to compel compliance with the Stipulation. As of that time, no broker satisfactory to all the co-owners was willing to list the apartment at the stipulated price, which apparently was well above market and unlikely to lead to a sale. As a result, Ting wanted to sell at a lower price, but Lam and Wong did not. As particularly relevant here, the Court stated in a June 8, 2011 order determining the motion that:

The decision of the Court is as follows. First of all the stipulation will remain in effect.

The Court then established a procedure whereby each side would suggest brokers and the Court would select one in an attempt to have the sale move forward. That selection was made in an order dated June 28, 2011, but no buyer was found at the stipulated price.

Ting then moved to modify the Stipulation by reducing the price for the apartment to reflect the actual market. By decision dated April 2, 2012, the Court granted the motion to the extent of reducing the listing price for the apartment to \$1.8 million and the sales price to \$1.6-\$1.75 million. Lam and Wong for the first time appealed to the Appellate Division. By order dated January 8, 2013, with a citation to *Hallock v State of New York*, 102 AD3d 439, but little, if any, discussion, the First Department reversed, simply stating that: "Ting did not establish that she should be relieved from the consequences of the stipulation due to fraud, collusion, mistake or accident."

The parties returned to Court, and a new broker was selected by decision dated June 26, 2013. By now, the market for the apartment at 8 East 12th Street was quite

hot, and buyers were expressing interest at a price well above the minimum price in the Stipulation. But rather than sell, Lam and Wong moved to declare the parties' December 1, 2010 Stipulation unenforceable on the ground that the specified closing date of May 31, 2011 had come and gone, resulting in the expiration of the Stipulation.

This Court disagreed and denied the motion by decision dated August 8, 2013, finding that the deadline which had been inserted by counsel served only to reinforce the phrase written by the Court that the matter proceed "as expeditiously as possible" but did not serve as an expiration date for the Stipulation. The Court noted that Lam and Wong had never before argued that the Stipulation had expired. Nor did they appeal the Court's June 8, 2011 order stating that "the stipulation will remain in effect." When they did appeal the order reducing the purchase price, they received a decision from the Appellate Division reaffirming the terms of the Stipulation as originally drafted.

Despite all this litigation, despite repeated efforts by this Court to move this case forward, and despite that various buyers have by now offered significant all-cash sums to purchase the apartment, the matter remains stalled because apparently Lam and Wong, for whatever reason, no longer wish to sell the apartment. Which brings us finally to the two pending motions.

First, the Board moved to compel compliance with the December 1, 2010 Stipulation and for sanctions. When Lam and Wong opposed the motion on the ground that the Board lacked standing to enforce a Stipulation to which it was not a party, the Court adjourned the motion to give Ting an opportunity to make a similar motion, which has now been done. Needless to say, Lam and Wong opposed. Also, while they did not file a motion or cross-motion, they requested in their opposition that the Court vacate

both the June 26, 2013 order appointing a new broker and the August 8, 2013 order rejecting their challenge to the Stipulation based on its alleged expiration. To the best of this Court's knowledge, neither of those orders has been appealed.³

Significantly — and understandably in light of the law of the case — Lam and Wong state (at n 1) that they “do not dispute the validity of the Stipulation. Rather, they are arguing that the Stipulation, although a valid agreement, has expired, and is no longer enforceable.” They claim that the Court erred in “modifying” the Stipulation by discounting the specific May 31, 2011 deadline in favor of the more general requirement that the closing proceed “as expeditiously as possible”; interpreting it to mean within a reasonable time. What is more, they challenge the Court's statement that they have sought in the past to enforce the Stipulation, insisting that instead they were merely opposing Ting's efforts to reduce the purchase price.

Be that as it may, Lam and Wong did appeal to the Appellate Division when this Court lowered the purchase price in the Stipulation, and regardless of what they argued there, they received a decision declaring the Stipulation enforceable. They never appealed this Court's June 8, 2011 decision declaring that “the stipulation will remain in effect.” And while they complain now about this Court's August 8, 2013 decision denying their motion to deem the Stipulation expired and unenforceable, they did not appeal or move to reargue that decision. Instead, they are simply re-asserting here in their opposition papers several of the arguments made there and rejected.

³ Counsel refers to the June 26, 2013 order as a “Sua Sponte Order” made in violation of due process of law, yet he cannot seriously dispute that all parties were given a full and fair opportunity to be heard at each and every stage of this proceeding on each and every issue raised before any order was written. In a similar vein, he refers to the August 8, 2013 order as a “Modification Order” to emphasize his opinion that the Court modified the Stipulation when interpreting it. The Court rejects both characterizations as unsupported by the record.

To the extent Lam and Wong suggest that the Stipulation cannot be enforced because of an unreasonable delay in performance, the cited cases are readily distinguishable. For example, in *Savasta v 470 Newport Assoc.*, 82 NY2d 763 (1993), the agreement called for written notice to terminate a partnership, but it did not specify a deadline. The court held that in the absence of a deadline, a reasonable time for performance was required. Based on the particular facts of that case, which involved various transactions that affected the parties' positions after notice arguably should have been given, the court found the delay unreasonable.

Lam and Wong here argue that circumstances have changed in the real estate market since the Stipulation was signed. While that is true, the change inures to the benefit of all parties, as now the minimum price in the Stipulation can easily be exceeded, leading to greater profits for all involved. While the passage of time may have caused Lam and Wong to change their minds about whether they want to sell, the delay has not caused them prejudice in the legal sense of the word so as to bar enforcement.

The Court further rejects the claim that by compelling compliance with the Stipulation, the Court will be improperly inserting itself to select buyers and draft contracts. Clearly, the Court has no desire to be involved in those matters. The Court trusts the broker to obtain the best possible price, and there is a financial incentive to do so for all involved, and the Court trusts the extremely able counsel involved in this case to negotiate a contract. Nevertheless, it is the Court's domain to compel compliance with the Stipulation's requirements that the apartment be listed and sold for the minimum stated price and that the closing thereafter proceed "as expeditiously as

possible," and it is doing so here by granting Ting's motion. In light of that relief, the standing issue related to the Board's motion need not be determined.

Accordingly, it is hereby

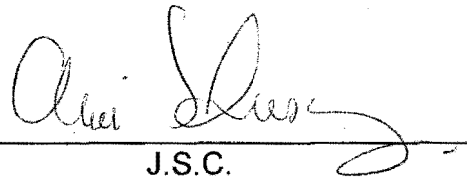
ORDERED that the motion by defendant Chau T. Lam to compel compliance with the December 1, 2010 Stipulation (seq 010) is granted; and it is further

ORDERED that the motion by Board of Managers of Eight East Twelfth Condominium is moot, and sanctions are denied; and it is further

ORDERED that counsel for all parties shall appear on Wednesday, February 5, 2014 at 3:30 p.m. prepared to select a trial date on the foreclosure action and any outstanding cross-claims.

Dated: December 17, 2013

DEC 17 2013


J.S.C.

ALICE SCHLESINGER

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DEC 20 2013

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