SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------x

PATMOS FIFTH REAL ESTATE INC. and PATMOS WESTBURY, LLC,

Plaintiffs,

-against-

MAZL BUILDING LLC, RABA HAIM ABRAMOV, NYA BUILDING CONSTRUCTION CORP., SHIMON WOLKOWICKI, and HIGH LINE HOLDINGS, LLC.

Defendants.

----------x

MAZL BUILDING LLC and HIGH LINE HOLDINGS, LLC,

Third-party plaintiffs,

-against-

AUGUSTO REITANO, A.T.A. CONSTRUCTION CORP., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, and JOHN DOE #1-50, said John Doe defendants being fictitious, it being intended to name all other parties who may have some interest in or lien upon the premises sought to be foreclosed,

Third-party defendants.

----------x

Index No. 108421/11

Motion seq. no. 004

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiffs:
Eduardo Fajardo, Esq.
De Lotto & Fajardo LLP
44 Wall Street
New York, NY 10005
212-404-7069

For movants:
Ira Brad Matetsky, Esq.
Ganfer & Shore, LLP
360 Lexington Ave.
New York, NY 10017
212-922-9250

By notice of motion, defendants/third-party plaintiffs Mazl Building LLC and High Line

Holdings (movants) move pursuant to CPLR 3212 for partial summary judgment on their counterclaim/third-party claim to foreclose against plaintiffs' interest in property located in Manhattan and for an order of reference to compute the amount of the debt. Plaintiffs oppose.

I. BACKGROUND

The pertinent background of this case is set forth in my decisions dated July 29, 2013 and May 20, 2015. Briefly, in 2006, plaintiff Patmos Fifth Real Estate Inc. (Patmos Fifth) purchased from Mazl a condominium building in Manhattan with a loan issued by Mazl and secured by a mortgage on the building. Following a series of additional financing transactions, assignments, and payment extensions, on January 21, 2008, the parties agreed to consolidate all existing mortgages into a single $16,000,000 mortgage, due to be paid in full by December 31, 2008 (consolidated mortgage). (NYSCEF 107).

Plaintiffs defaulted on the consolidated mortgage, and on February 27, 2009, they executed with Mazl an agreement providing, in pertinent part, that:

> WHEREAS, the lender has agreed to an extension of time to repay the [consolidated] mortgage in accordance with the terms and provisions set forth herein;
> NOW THEREFORE, it is hereby agreed as follows:
> . . . .
>
> 9. Delivery of Deed. Simultaneous with the execution of this agreement, borrower shall deliver an executed deed to the [condominium] to lender conveying the premises to [High Line's assignor], as to 62.5% interest and Mazl . . . as to a 37.5% interest. Said deed shall be delivered to lenders [sic] counsel [ ] to be held in escrow by [him] and not be released for filing and until the borrower shall fail to make any of the payments required hereunder on October 1, 2009 or [if borrower pays the sum of $2.5 million, on] June 30, 2010.
>
> 10. Proceeds of Sale. In the event the deed is released from escrow and the premises or the balance of the remaining unsold condominium units are sold, lender agrees that all amounts received from such sale in excess of the amounts due to lender under the consolidated mortgage shall be paid over to borrower.

(*Id.*).

On October 1, 2009, plaintiffs defaulted again on the consolidated mortgage. Shortly thereafter, Mazl's counsel released the deed from escrow, and on December 23, 2009, recorded it. (*Id.*).

II. PROCEDURAL HISTORY

On or about July 21, 2011, plaintiffs commenced this action, asserting, as pertinent here, a claim based on a violation of Real Property Law (RPL) § 320, maintaining that the February 2009 agreement operates as a security on which defendants were obliged to foreclose. They now seek a rescission of the consolidated mortgage and the recorded deed, a judgment declaring these instruments null and void, an injunction directing defendants to file a cancellation and/or satisfaction of the consolidated mortgage, and an injunction prohibiting defendants from foreclosing. They also advance a cause of action for unjust enrichment. (NYSCEF 2).

In my July 2013 decision, I denied defendants' pre-answer motion to dismiss the complaint as to plaintiffs' claims against all defendants but Abramov, based on their alleged violation of RPL § 320 and claim for unjust enrichment, and otherwise granted the motion. I indicated that the holder of a deed given as a security must proceed as would a mortgagee, by foreclosure and sale. (NYSCEF 20-21).

On or about October 23, 2013, defendants filed an answer with counterclaims and third-party claims, alleging that after plaintiffs had repeatedly defaulted in making payments on the mortgages, the parties agreed to a final extension and deadline, pursuant to which Patmos Fifth delivered to defendants a deed, intended to be in lieu of foreclosure. Plaintiffs thereafter defaulted again and, after giving plaintiffs two and half more months to pay and advising

plaintiffs' counsel of their intent to do so, defendants filed and recorded the deed, which they claim "was intended to resolve all rights and obligations of the parties and their privies with respect to the [condominium]." (NYSCEF 26).

Defendants allege that for the next 19 months, they managed the property as the "sole and unchallenged" owners with plaintiffs' full knowledge, and bore all of the obligations and expenses of ownership, and that plaintiffs acknowledged their ownership by offering to purchase or lease the property from them. They now advance against plaintiffs and third-party defendants, *inter alia*, a claim for foreclosure of the consolidated mortgage on the grounds that plaintiffs are in default for no less than $16,000,000 plus accrued interest and other amounts, and have failed to pay, that after the deed was recorded, they completed construction of the property and sold some units in the building, and paid and continue to pay all maintenance and operating expenses, and that as holders of the consolidated mortgage, they are entitled to foreclose and to the entry of a judgment of foreclosure. They also advance a counterclaim/third-party claim seeking a declaration that they are the "sole owners of the Property and have been at all relevant times since December 23, 2009." (*Id.*).

On the same day, defendants filed a third-party summons naming third-party defendants as parties who may have any interest in or lien on the mortgaged property. (NYSCEF 41).

On or about December 20, 2013, plaintiffs and third-party defendant Augusto Reitano interposed an answer/reply to the counterclaims and third-party claims. (NYSCEF 57).

On January 8, 2015, the Appellate Division, First Department, affirmed my July 2013 decision, finding that plaintiffs had sufficiently stated a cause of action for violation of their rights under RPL § 320 by alleging that the deed was given as security for their debt, which

defendants did not controvert, and that defendants failed to establish that the deed was in lieu of foreclosure notwithstanding their agreement permitting defendants to record the deed in the event of plaintiffs' breach. (124 AD3d 422 [1st Dept 2015]).

By decision and order dated May 20, 2015, I denied plaintiffs' motion for summary judgment on their claim pursuant to RPL § 320, finding that as the parties disputed whether the deed was intended to operate as security in the nature of a mortgage, the issue was not subject to a summary resolution. I also denied as premature that branch of plaintiffs' motion for an order summarily dismissing all counterclaims and third-party claims. (NYSCEF 107).

On June 16, 2016, the Appellate Division, First Department, modified my May 2015 decision to the extent of granting plaintiffs' motion for summary judgment on their RPL § 320 claim, and declaring that plaintiffs "have been the sole owners of the subject property since December 23, 2009." Given Mazl's concession that the deed was given as security and based on the agreement itself, the Court also concluded that the deed was a security and that defendants raised no triable issues, and that as pertinent here, plaintiffs were not entitled to summary dismissal of defendants' foreclosure counterclaim/third-party claim because there was no foreclosure, the deed not being in lieu thereof. (AD3d , 2016 NY Slip Op 04804 [1st Dept 2016]).

As of the date of this motion, no answer or notice of appearance has been filed by third-party defendants ATA Construction Corp., the New York State Department of Taxation and Finance, and the Environmental Control Board of the City of New York.

III. CONTENTIONS

I address the parties contentions in light of the recent Appellate Division decision.

Movants contend that they are entitled to foreclose on the mortgage as plaintiffs' default is undisputed. They offer the affidavit of their joint principal attesting to the default, and partly rely on the indication in my July 2013 decision that they should proceed by foreclosure. They argue that plaintiffs may not assert ownership of the property and, at the same time, argue that the deed merged with the consolidated mortgage, thereby barring foreclosure. Movants also observe that plaintiffs advance no affirmative defenses to their foreclosure counterclaim. (NYSCEF 117-118)

In response, plaintiffs argue that movants may not assert ownership of the property and, at the same time, assert their right to foreclose on the property; they deny arguing that a merger would bar foreclosure and that movants provided sufficient notice of the amount of the debt owed, as they have since sold condominium units for which they were obligated under the agreement to credit against the debt. (NYSCEF 131).

In reply, movants contend that they are entitled to foreclose on the mortgage regardless of their possession of the property, and reiterate that the alleged invalidity of the deed is irreconcilable with plaintiffs' opposition to foreclosure. They observe that plaintiffs do not challenge the outstanding debt owed on the mortgage, and that in any event, they have no obligation to provide plaintiffs with a sum certain. They also maintain that any alleged breach of the agreement is not properly before the court, as all but the statutory and unjust enrichment claims were dismissed, and that plaintiffs otherwise raise no triable issues. (NYSCEF 134).

IV. ANALYSIS

A. Applicable standard

To prevail on a motion for summary judgment dismissing a cause of action, the proponent must establish, *prima facie*, its entitlement to summary judgment as a matter of law, providing

sufficient evidence to demonstrate the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 135 AD3d 211, 217 [1st Dept 2015]). If the moving party meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 [1991]; *McGinley v Mystic W. Realty Corp.*, 117 AD3d 504, 505 [1st Dept 2014]).

In a foreclosure action, *prima facie* entitlement to summary judgment is demonstrated by providing proof of the existence of the mortgage and a default. (*JP Morgan Chase Bank, N.A. v Shaprio*, 104 AD3d 411, 412 [1st Dept 2013]; *Endeavor Funding Corp. v Allen*, 102 AD3d 593, 593 [1st Dept 2013]). A dispute over the exact amount owed by the mortgagor does not preclude a judgment ordering the sale of the mortgaged property. (*Orchard Hotel, LLC v D.A.B. Group, LLC*, 106 AD3d 628, 630 [1st Dept 2013]; *Shufelt v Bulfamante*, 92 AD3d 936, 937 [2d Dept 2012]).

B. Judicial estoppel

"[A] party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding." (*Cobenas v Ginsburg Dev. Cos., LLC*, 133 AD3d 812, 813 [2d Dept 2015]; *Nestor v Britt*, 270 AD2d 192, 193 [1st Dept 2000]). Here, each party focuses on whether movants may foreclose on the consolidated mortgage in light of their assumption of ownership, which positions are not inconsistent with their earlier positions with respect to the deed. (*See Matter of Excelsior 57th Corp. [Kern]*, 218

AD2d 528, 529-530 [1st Dept 1995] [petitioner's new legal argument was "of a different character than an inconsistent framing of one's factual pleadings," and thus no basis for judicial estoppel] [internal quotation marks omitted]; *cf. Centech LLC v Yippie Holdings, LLC*, 138 AD3d 569, 2016 NY Slip Op 03072, *1 [1st Dept 2016] [defendant had previously argued that transfer of deed was null and void, contrary to current position contesting nullification]).

Although movants' counterclaims/third-party claims for foreclosure and for a declaratory judgment are inconsistent, inconsistent pleadings, as opposed to positions, are permissible. (CPLR 3017[a]; *see generally Mitchell v New York Hosp.*, 61 NY2d 208, 218 [1984] [well-settled rule that party entitled to advance inconsistent theories of recovery]). In any event, in light of the recent Appellate Division decision, their remaining counterclaims are not inconsistent.

C. Foreclosure of consolidated mortgage

A deed securing a debt "creates nothing more than a mortgage giving to the parties the relative rights of mortgagor and mortgagee" (*Vitvitsky v Heim*, 52 AD3d 1103, 1105 [3d Dept 2008] [internal citations omitted]), and its holder "must proceed in the same manner as any other mortgagee" by commencing an action in foreclosure (*Patmos Fifth Real Estate Inc. v Mazl Bldg., LLC*, 124 AD3d 422, 426 [1st Dept 2015]; *Leonia Bank v Kouri*, 3 AD3d 213, 217-218 [1st Dept 2004]).

Given the Appellate Division's determination that plaintiffs are the sole owners of the condominium and that the deed was given as a security (2016 NY Slip Op 04804, *2), movants must proceed by foreclosure (*see Bouffard*, 111 AD3d at 869 [lower court correctly determined that deed was given as mortgage security and thus defendant/mortgagee "could have obtained

good title only by foreclosing on the subject property in the same manner as any other mortgagee"]; *see also Centech LLC*, 2016 NY Slip Op 03072, *1 [affirming judgment of sum due on mortgage prior to foreclosure sale, as deed was given as security and mortgage remained valid notwithstanding transfer of deed]).

As the existence of the consolidated mortgage and plaintiffs' default are undisputed, movants establish, *prima facie*, their entitlement to a summary judgment of foreclosure. To the extent that plaintiffs dispute the amount owed, they fail to raise a triable issue. (*See Long Is. Sav. Bank of Centereach, F.S.B. v Denkensohn*, 222 AD2d 659, 660 [2d Dept 1995] [dispute over exact amount due under mortgage, as sum could be computed by reference pursuant to RPAPL 1321, did not preclude summary judgment]).

Movants' application that the "John Doe" third-party defendants be removed from the action is granted as without opposition.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that movants/third-party plaintiffs Mazl Building LLC's and High Line Holdings's motion for an order granting them partial summary judgment on their first counterclaim/third-party claim of foreclosure and for the appointment of a referee to compute the amounts due movants/third-party plaintiffs in this action is granted; it is further

ORDERED, that third-party defendants sued herein as "John Doe #1-50" are dismissed as third-party defendants in this action and deleted from the caption, which is amended all without prejudice to the proceedings heretofore had herein, with the caption hereinafter to read as follows:

----------x
PATMOS FIFTH REAL ESTATE INC. and PATMOS WESTBURY, LLC,

Plaintiffs,

-against-

MAZL BUILDING LLC, RABA HAIM ABRAMOV, NYA BUILDING CONSTRUCTION CORP., SHIMON WOLKOWICKI, and HIGH LINE HOLDINGS, LLC.

Defendants.
----------x
MAZL BUILDING LLC and HIGH LINE HOLDINGS, LLC,

Third-party plaintiffs,

-against-

AUGUSTO REITANO, A.T.A. CONSTRUCTION CORP., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE , and ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK,

Third-party defendants.
----------x

; it is further

ORDERED, that movants/third-party plaintiffs are entitled to a judgment for the relief demanded in its first counterclaim/third-party claim upon confirmation of the Referee's Report; it is further

ORDERED, that Mark S. Hamburgh, Esq., with an address of 450 Seventh Ave., Ste. 1308, New York, NY 10123-1308, Tel: 212-947-0565, is hereby appointed Referee to ascertain and compute the amount due to movants/third-party plaintiffs except for attorney fees upon the

consolidated mortgage being foreclosed in his action, and to determine whether the mortgaged premises can be sold in parcels, and the Referee is to report to the court with all convenient speed; it is further

ORDERED, that, if required, said Referee take testimony pursuant to RPAPL 1321; it is further

ORDERED, that by accepting this appointment, the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge of the State of New York (22 NYCRR Part 36), including but not limited to section 36.2 ("Disqualifications from appointment") and section 36.2(d) ("Limitations on appointments based upon compensation"); it is further

ORDERED, that the Referee's hearing be held in the County of New York; it is further

ORDERED, that the Referee is prohibited from accepting or retaining any funds for himself/herself or paying himself/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED, that counsel for movants/third-party plaintiffs serve a conformed copy of this order upon the County Clerk and the Trial Support Office for amendment of their records.

ENTER:

Barbara Jaffe, JSC

HON. BARBARA JAFFE

DATED: June 21, 2016
New York, New York