Short Form Order

Supreme Court of the County of Suffolk
State of New York - Part XL

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

x----------x

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE STRUCTURED ASSET INVESTMENT LOAN TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-3,

Plaintiff,

-against-

KIM BARRA, MICHAEL BARRA, ARROW FINANCIAL SERVICES, LLC, TEACHERS FEDERAL CREDIT UNION, L.I. ANESTHESIOLOGIST, PLLC, MICHAEL J. MACCO - CHAPTER 13 TRUSTEE,

Defendants.

x----------x

INDEX NO.:01320/2013

MOT. SEQ. NO.:002-MG; CASEDISP 003-MD

SHELDON MAY & ASSOC., P.C.
Attorneys for the Plaintiff
255 Merrick Road
Rockville Centre, NY 11570

ADAM C. GOMERMAN, ESQ.
Attorney for Defendants Kim Barra and Michael Barra
807 Jericho Turnpike
Huntington Station, NY 11746

PATRICK A. SWEENEY, ESQ.
Referee
17 Green Knoll Court
Fort Salonga, NY 11768-1257

CHRISTOPHER THOMPSON, ESQ,
Attorney for Proposed Intervenor Eastern Region Real Property Corp.
33 Davison Lane East
West Islip, NY 11795

Upon the following papers numbered 1 to 46 read on this Motion/Order to Show Cause to Confirm the Referee's Report; Notice of Motion/ Order to Show Cause and supporting papers 1-28 (002); Notice of Cross Motion and supporting papers for Leave to Intervene (003) 29-46;~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (seq. no.:003) of Proposed Intervenor Eastern Region Real Property Corp. ("Eastern", "Intervenor") requesting leave to intervene pursuant to

CPLR §§1012, 1013, vacating the March 13th, 2015 Order of Reference, or in the alternative, adjourning Plaintiff's motion for judgment and sale to permit the proposed Intervenor time to respond, and dismissing Plaintiff's complaint pursuant to CPLR Rule 3211(a)(1),(7) is denied in its entirety and it is further

ORDERED that the motion (seq. no.:002) of Plaintiff, requesting confirmation of the Referee's report pursuant to RPAPL §1321, granting a judgment of foreclosure and sale pursuant to RPAPL §1351, and directing the distribution of the sale proceeds pursuant to RPAPL §1354 is granted in its entirety. The Parties will note that summary judgment has been awarded to Plaintiff against Defendants Kim Barra and Michael Barra ("Defendants") by the March 13th, 2015 Order of Judge Martin. Defendants have failed to appeal that summary judgment order. This case, as to Defendants Kim Barra and Michael Barra and those who claim to have acquired right, title and interest in the subject real property through them, is *res judicata.*

Intervenor's Motion - Motion Sequence No.:003

CPLR §6501. Notice of pendency; constructive notice states, in pertinent part:

> "A notice of pendency may be filed in any action in a court of the state...in which the judgment demanded would affect the title to,...real property...The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from...any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated...A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party." McKinney's CPLR §6501 [2018].

A notice of pendency is authorized to be filed in an action seeking a judgment that would affect the title to, or possession, use, or enjoyment of, real property (***Natasi v. Natasi***, 26 AD3d 32, 805 NYS2d 585 [2d Dept 2005]). Where a foreclosure action is commenced and the notice of pendency is filed before the deed is recorded, the purchaser is on constructive notice of the foreclosure action and his interest is effectively foreclosed upon the entry of the judgment of foreclosure (***NYCTL 1998-1 Trust and the Bank of New York v. Ibraheim***, 15 Misc3d 294, 832 NYS2d 767 [Kings Cty Sup Ct 2007]; *citing* ***Novastar Mtge., Inc. v. Mendoza***, 26 AD3d 479, 811 NYS2d 411 [2d Dept 2006]).

Purpose of *lis pendens* is to afford "constructive notice from time of filing so that any person who records a conveyance or encumbrance after that time becomes bound by all of the proceedings taken in the action" (***Morrocoy Marina, Inc. v. Altengarten***, 120 Ad2d 500, 501, 501 NYS2d 701 [2d Dept 1986]; *quoting* ***Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Solow Bldg. Corp.***, 52 AD2d 533, 381 NYS2d 887 [1st Dept 1976]). A *"lis pendens"* is a notice, as the name implies, and it is not an injunction and does not restrain the conveyance of land, and may be ignored at the peril that a decision adverse to grantor may be rendered, in which event grantee's title will be affected by judgment to the same extent as if he was a party to the action (***Fiddler's Green Ass'n., Inc. v. Construction Corp. of Long Island, Inc.***, 20 Misc3d 473, 190 NYS2d 17, *reversed on other grounds* ***12 AD2d 501, 207 NYS2d 81***, *appeal granted* ***12 AD2d 651, 210 NYS2d 797*** [2d Dept 1960]).

In the case at bar, Eastern Region Real Property Corp. ("Eastern"), Movant/proposed Intervenor (seq. no.:003), acquired title on February 12th, 2018 from Regional Real Estate Defect Specialists, Ltd. ("Regional") by Bargain & Sale Deed. Regional, immediate predecessor to Eastern, took title on October 7th, 2014 by Bargain & Sale Deed from Michael "J." Barra and Kim Barra, delinquent Mortgagors/Defendants herein. The January 7th, 2013 notice of pendency in the instant case was in full force and effect when regional acquired title.

Eastern, as proposed Intervenor filed its instant motion on April 24th, 2018, seeking, *inter alia*, leave to intervene in the case, and, if successful, to dismiss Plaintiff's complaint pursuant to CPLR Rule 3211(a)(1) and (7). On March 3rd, 2015, Judge Martin awarded Plaintiff summary judgment against Defendants Kim Barra and Michael Barra, mortgagors and predecessors in title. It is a matter of law that any potential remedies or recourse of Kim Barra and Michael Barra are extinguished. It is a matter of record that Regional, immediate predecessor in title to Intervenor, acquired *his* title in and to the subject real property from Defendants Barra. Regional took title subject to the filed notice of pendency. It is settled law that one cannot convey greater title than one has (***Smith v. Secor***, 11 E.H.Smith 402, 157 NY 402 [1898]; ***Sparrow v. Kingman***, How.App.Cas. 692, 1 NY 242 [1848]). Regional could not by law transfer to Eastern greater rights than those which Regional possessed. Eastern cannot intervene and in so doing, move to reargue that which has been foreclosed by the March 3, 2015 Order of this Court. Same Order has not been appealed by Defendants. The matter is *res judicata*. Eastern now moves (seq. no.:003) to intervene, citing to CPLR §§1012 and 1013 in support of his motion.

CPLR §1012. Intervention as of Right; Notice to Attorney-General, City, County, Town or Village Where Constitutionality in Issue, provides, in pertinent part:

> "**(a) Intervention as of right.** Upon timely motion, any person shall be permitted to intervene in any action:
> 1. When a statute of the state confers an absolute right to intervene; or
> 3. When the action involves the disposition or distribution of, or the title...to, property, and the person may be affected by the judgment." McKinney's CPLR §1012 [2018].

The principal guideposts in the evaluation of timeliness are whether disposition of the action will be unduly delayed and whether the original parties will be prejudiced (***Norstar Apartments, Inc. v. Town of Clay***, 112 AD3d 750, 751, 492 NYS2d 248, 249 [4th Dept 1985]; *Cf.* CPLR 1013, *see, e.g.*, ***Halstead v. Dolphy***, 70 AD3d 639, 892 NYS2d 897 [2d Dept 2010]). Another factor is the extent of the time lag between the motion and the Intervenor's acquisition of knowledge of the circumstances that make intervention appropriate (*see, e.g.* ***Stanford Associates v. Board of Assessors of Town of Niskayuna***, 39 AD2d 800, 332 NYS2d 286 [3d Dept 1972], *app den.*, 31 NY2d 643, 337 NYS2d 1027, 289 NE 567 [1972]).

CPLR §1013. Intervention by permission, provides, in pertinent part:

> "Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court...In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." McKinney's CPLR §1013 [2018].

One of the most important considerations for the Court is whether the proposed Intervenor has a "real and substantial interest in the outcome of the proceedings" (***Berkoski v. Board of Trustees of Incorporated Village of Southampton,*** 67 AD3d 840, 843, 889 NYS2d 623, 626 [2d Dept 2009]). CPLR §1013 specifies three (3) additional factors that are relevant to the Court's exercise of discretion: the potential for undue delay in the determination of the action, the potential for substantial prejudice to any of the original parties, and the timeliness of the motion to intervene (Practice Commentaries, Alexander, McKinney's CPLR §1013 [2015]).

In the case at bar, Eastern acquired title by Bargain & Sale Deed with notice of the *lis pendens* as well as the instant foreclosure matter. It is a matter of record that Regional paid five thousand ($5,000.00) dollars to the Barras as consideration for its deed to their home, the subject premises in this action. At the time Regional took its deed from Defendants/Barra, the filed notice of pendency was in full force and effect. Any purchaser or encumbrancer whose interest arises after the filing of the *lis pendens* is cut off by the foreclosure decree (***Westchester Fed. Sav. & Loan Assn. v. HEW Constr. Corp.***, 29 AD2d 670, 286 NYS2d 382 [2d Dept 1968]). The seller's obligation to deliver a deed "so as to convey to Purchaser fee simple title to the premises, free or all encumbrances, except as otherwise herein stated" connotes the seller's obligation to convey a marketable title free and clear of all encumbrances (***Vought v. Williams***, 120 NY 253 [1890]). A bad title will not be cured by a warranty Deed, nor good title impaired by a conveyance made by quitclaim (***Wilhelm v. Wilken***, 149 NY 447 [1896]; ***Wallach v. Riverside Bank***, 206 NY 434 [1912]). The initial 2005 purchase note was for $337,500.00. The filed Referee's report states that the Barras, after 2010 loan modification to $467,780.57, currently owe in excess of $500,000.00 to the Plaintiff. The Bargain & Sale Deed from Regional to Eastern states consideration of $52,500.00. Eastern is certainly not a good faith purchaser for value. Eastern cannot claim the protection afforded by RPL §290, The New York Recording Act. Eastern's interest is not the first to be recorded and Eastern is on notice of pendency. Under these circumstances a reasonably prudent purchaser would make inquiries (***Yen-Te Hsueh v. Geranium Dev. Corp.***, 243 AD2d 708, 709, 663 NYS2d 288 [2d Dept 1997]; *see* ***Barrett v. Littles***, 201 AD2d 444, 607 NYS2d 134 [2d Dept 1994]; ***United Matura Realty v. Reade Indus.***, 155 AD2d 660, 547 NYS2d 892 [2d Dept 1989]; ***Morrocoy Marina v. Altengarten***, 120 AD2d 500, 501 NYS2d 701 [2d Dept 1986]; ***Vitale v. Pinto***, 118 AD2d 774, 500 NYS2d 283 [2d Dept 1986]). Regardless of any potential recordation argument by Eastern, its failure to be a good faith purchaser for value precludes it intervention to deny Plaintiff being granted an order of judgment of foreclosure and sale (***Matura*** at 709, 662).

Eastern, in contravention to the facts extant in the cases to which it cites in support of its position, had no interest in the subject property at or prior to the commencement of the instant foreclosure action. Eastern, as correctly argued by Plaintiff, steps into the shoes of Defendants/Barra, whose answer was stricken and against whom this Court has ordered summary judgment in favor of Plaintiff. Eastern further contends, that, if permitted to intervene, it has meritorious defenses sufficient to dismiss the underlying complaint pursuant to CPLR 3211(a)(1) and (7). As further correctly argued by Plaintiff, Eastern as proposed Intervenor is without capacity to raise claims of the Defendants/mortgagors, as Eastern is not a "borrower" and lacks standing to challenge service of process pursuant to RPAPL §§1303, 1304 and 1306, as Eastern was not a party defendant and cannot raise such claims on its own behalf (*see* ***Wells Fargo Bank, N.A. v. Bowie***, 89 AD3d 931, 932 NYS2d 702 [2d Dept 2011]; ***NYCTL 1996-1 Trust v. King***, 13 AD3d 429, 787 NYS2d 61 [2d Dept 2004]). Same

default notice defenses were personal to the Defendants/Barra, who failed to raise those defenses in opposition to Plaintiff's summary judgment motion, and thereby waived those affirmative defenses (***New York Community Bank v. J. Realty F Rockaway, Ltd.***, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; *citing* ***HSBC Bank USA, N.A. v. Taher***, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]; ***Wells Fargo Bank Minn, N.A. v. Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]; ***First Nationwide Bank v. Brookhaven Realty Assoc.***, 223 AD2d 618, 637 NYS2d 418 [2d Dept 1996]).

Plaintiff has filed its motion (mot. seq. no.:002) seeking judgment of foreclosure and sale. Plaintiff has been awarded summary judgment against the Defendants/Mortgagors. Any further litigation will unduly delay the final determination of this action. Plaintiff's rights would be severely prejudiced by the requested intervention. Eastern effectively requests this Court to consider recision of its Order, and dismissal of instant foreclosure action.

Eastern's motion (mot. seq. no.:003) is brought nearly *four years* after summary judgment was granted. This is clearly an untimely request (*see* ***JP Morgan Chase Bank, N.A. v. Edelson***, 90 AD3d 996, 934 NYS2d 847 [2d Dept 2011]). The Court, in its discretion, declines to permit the intervention requested by movant Eastern (mot. seq. no.:003).

Summary Judgment

It has been established that a motion for summary judgment is an extreme request for relief; "summary judgment is a drastic remedy and should not be granted where there is any doubt of a triable issue" (***Moskowitz v. Garlock***, 23 AD2d 943, 259 NYS2d 1003 [3d Dept 1965]). The granting of a summary judgment motion is the "procedural equivalent of a trial" (***Crowley's Milk Co. v. Klein***, 24 AD2d 920, 264 NYS2d 680 [3d Dept 1965]). "...a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (***Red River Living Center, LLC v. ADL Data Systems, Inc.***, 98 AD3d 724, 725-26, 950 NYS3d 179, 181 [2d Dept 2012]). When a party seeks summary judgment it must affirmatively establish its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see* ***Voss v. Netherlands Insurance Co.***, 22 NY3d 728, 985 NYS2d 448, 8 NE3d 828 [2014]; ***Vega v. Restani Construction Corp.***, 18 NY3d 499, 942 NYS2d 13, 965 NE2d 240 [2012]; ***Yun Tung Chow v. Reckitt & Coleman, Inc.***, 17 NY3d 29, 926 NYS2d 377, 950 NE2d 113 [2011]). A plaintiff makes out a *prima facie* case for summary judgment by showing the existence of a contract, performance by plaintiff pursuant to the contract, and non-performance by the defendant (*see* ***Carltun on the Bay Kosher Caterers, Ltd. v. Makani***, 295 AD2d 464, 744 NYS2d 674 [2d

Dept 2002]). "When the contract in question consists of a note and guaranty,...a plaintiff must establish the existence of a note and guaranty and the defendants failure to make payments according to their terms" (***HSBC Bank USA, N.A. v. Carll***, 2018 N.Y. Slip Op. 30056[U] [Sup Ct Suffolk Cty 2018]; *quoting* ***JP Morgan Chase Bank, N.A. v. Galt Group, Inc.***, 84 AD3d 1028, 1029, 923 NYS2d 643 [2d Dept 2011]; ***Verela v. Citrus Lake Dev., Inc.***, 53 AD3d 574, 575, 862 NYS2d 96 [2d Dept 2008]). Clearly, substantial rights of the Plaintiff will be prejudiced if the Court permits the requested intervention by Eastern we reiterate Plaintiff has been awarded summary judgment. There exists no issue of fact for determination by this Court.

Counsel will note that the Court in considering the instant motion (seq. no.:003), has obtained and scrutinized the two (2) Bargain and Sale deeds in question: October 7th, 2014 deed from Kim and Michael J. Barra to Regional Real Estate Defect Specialists, Ltd., and the February 12th, 2018 deed from Regional Real Estate Defect Specialists, Ltd. to Eastern Region Real Property Corp.. The Court has also reviewed NYS Department of State corporation records of Regional and Eastern. The 2014 deed was recorded and returned to Intervenor's Counsel, affirmant in the instant motion (seq. no: 003). The party of the second part in the 2018 Deed, movant herein (Eastern), is, upon information and belief, a corporation of Intervenor's Counsel.

The Court has carefully considered and rejected the additional arguments of Eastern Region Real Property Corp. in its instant motion for intervention and dismissal (seq. no.:003). The relief requested by Eastern Region Real Property Corp. in its motion (seq. no.:003), leave to intervene pursuant to CPLR §§1012, 1013, vacating the March 13th, 2015 order of reference, or, in the alternative, adjourning Plaintiff's motion for judgment of foreclosure and sale to permit the proposed Intervenor time to respond, and dismissing Plaintiff's complaint pursuant to CPLR Rule 3211(a)(1),(7) is denied in its entirety.

Plaintiff's Motion - Motion Sequence No.:002

Plaintiff's motion for confirmation of the Referee's report and for judgment of foreclosure and sale and directing the distribution of sale proceeds is before the Court (seq. no.:002). Plaintiff's unopposed motion sufficiently demonstrates its entitlement to the relief requested (*see* ***Deutsche Bank Natl. Trust Co. v. Islar***, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; ***Plaza Equities, LLC v. Lamberti***, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; ***Jessabell Realty Corp. v. Gonzalez***, 116 AD3d 908, 985 NYS2d 897 [2d Dept 2014]). When a defendant fails to oppose a motion, there is, in effect, a concession that no question of fact exists and the facts as alleged in the moving papers may be deemed admitted (*see* ***Kuehne & Nagel v. Baiden***, 36 NY2d 539, 369 NYS2d 667, 330 ME2d 624 [1975]).

Plaintiff's motion (seq. no.:002) requesting confirmation of the Referee's report pursuant to RPAPL §1321, granting a judgment of foreclosure and sale pursuant to RPAPL §1351 and directing the distribution of the sale proceeds pursuant to RPAPL §1354 is granted in its entirety.

The proposed Order of Judgment of Foreclosure and Sale will be executed simultaneously with this decision.

The foregoing decision constitutes the Order of the Court.

DATED: DECEMBER 31ST, 2018
RIVERHEAD, NY

HON. JAMES HUDSON
Acting Justice of the Supreme Court