

**East West Bank v KND, LLC**

2013 NY Slip Op 32750(U)

September 3, 2013

Sup Ct, Queens County

Docket Number: 19530/2012

Judge: Augustus C. Agate

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This opinion is uncorrected and not selected for official publication.

## MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 24

EAST WEST BANK,

X

INDEX NO. 19530/2012

MOTION SEQ. NO. 1

- against -

BY: Agate, J.

KND, LLC, ET AL.,

X

MOTION DATE: 5/29/13

Plaintiff commenced this action seeking to foreclose the consolidated mortgage dated December 23, 2004 given by defendant KND, LLC (KND), the owner of the real property known as 47-01 Kissena Boulevard, Flushing, New York, and adjudicate defendants Khalid Haraj and Delilah Haraj s/h/a Deliliah Haraj to be liable under a guaranty in the event any deficiency remains after a foreclosure sale of the mortgaged premises. Plaintiff alleged that defendant KND entered into an agreement (the CME agreement) dated with the Chinese American Bank, consolidating, modifying and extending a first mortgage dated May 1, 2002 which secured an underlying note in the original principal amount of \$800,000.00, plus interest, and a “gap” mortgage dated December 23, 2004 on the same property which secured an underlying “gap” note in the principal amount of \$375,622.16, plus interest. The indebtedness under the two mortgages allegedly was consolidated into a single mortgage lien in the principal sum of \$1,120,000,000, plus interest, by virtue of the CME agreement, and was evidenced by a consolidated note, and secured by the consolidated mortgage. Defendants

Khalid Haraj and Delilah Haraj allegedly executed an unlimited guaranty with respect to the consolidated mortgage loan. In its complaint, plaintiff alleged that defendant KND defaulted under the terms of the consolidated note and mortgage by failing to pay the principal and interest due under the consolidated note by July 23, 2012, the loan's maturity date, as extended by plaintiff at the request of defendant KND. Plaintiff also alleged that it is the owner and holder of the CME agreement, and that the interests of defendant Great Bear Auto Center Inc. d/b/a Kissena Bear Auto Center (Great Bear), City of New York s/h/a NYC Department of Finance, Bank of New York Mellon Corp., as trustee, New York City Department of Transportation are subordinate to the subject mortgage lien. Plaintiff additionally alleged that the total sum due and owing it through August 31, 2012 was \$705,982.54.

Defendant City of New York s/h/a NYC Department of Finance served an answer asserting two defenses, including one based upon its claim that it no longer owns the tax lien and is not a proper party defendant.

Defendants KND, Khalid Haraj, Delilah Haraj and Great Bear served a combined answer, asserting affirmative defenses and counterclaims based upon alleged breaches of the escrow agreements dated May 1, 2002 and December 23, 2004 entered into between defendant KND and the Chinese American Bank in connection with the first mortgage loan transaction and the gap mortgage loan transaction respectively, and breach of the consolidated mortgage and the CME agreement.

Plaintiff served a reply, asserting three affirmative defenses to the counterclaims, including the expiration of the statute of limitations. Defendants Bank of New York Mellon Corp. and New York City Department of Transportation are in default in appearing or answering the complaint. Plaintiff did not cause any of the “John Doe” defendants to be served with process, since it discovered that there are no additional parties with an interest in the property.

Plaintiff moves pursuant to CPLR 3212 and RPAPL 1321 for summary judgment on its foreclosure claim against defendants KND, Khalid A. Haraj, Delilah Haraj and Great Bear, pursuant to CPLR 3211(b) and 3212 to dismiss their affirmative defenses and counterclaims, pursuant to CPLR 3215 and RPAPL 1321 for leave to enter a default judgment against defendants Bank of New York Mellon Corporation, as Trustee, and New York City Department of Transportation, to discontinue the claims asserted against defendant New York City Department of Finance, for leave to amend the caption deleting reference to defendants “John Doe #1-50” and New York City Department of Finance, for leave to appoint a referee to ascertain and compute the sums due plaintiff and to examine and report as to whether the parcel should be sold in one or more parcels, and for an award of counsel fees, costs and disbursements. Defendants KND and Khalid Haraj partially oppose the motion to the extent plaintiff seeks “immediate entry of judgment.”

Defendants KND and Khalid Haraj cross move for partial summary judgment in favor of defendant KND on the first and second counterclaims, and for leave to refer “the matter”

(apparently of the third counterclaim) for trial to a court referee to hear and report. Plaintiff opposes the cross motion, and the remaining defendants have not appeared in relation to the motion or cross motion.

With respect to that branch of the motion by plaintiff for leave to discontinue the claim asserted against defendant City of New York s/h/a New York City Department of Finance, a plaintiff ordinarily cannot be compelled to litigate and, absent special circumstances, leave to discontinue a cause of action should be granted in absence of a showing of prejudice to the defendant (*see St. James Plaza v Notey*, 166 AD2d 439, 439 [2d Dept 1990]). Since no opposition was filed by defendant City of New York, there has been no showing of “special circumstances” to warrant the denial of that branch of plaintiff’s motion to discontinue the cause of action asserted against defendant City of New York. That branch of the motion by plaintiff to discontinue the cause of action asserted against defendant City of New York is granted.

That branch of the motion for leave to amend the caption as proposed is granted.

It is well established that the proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). On a motion for summary judgment in a foreclosure action, a plaintiff must make a prima facie showing by producing the mortgage, the unpaid note, bond or obligation and the evidence of default and the assignment of the mortgage documents to

it (*see EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2d Dept 2002]; *IMC Mtge. Co. v Griggs*, 289 AD2d 294 [2d Dept 2001]; *Paterson v Rodney*, 285 AD2d 453 [2d Dept 2001]; *see also Bercy Investors, Inc. v Sun*, 239 AD2d 161 [1st Dept 1997]).

In support of its motion, plaintiff offers, among other things, a copy of the pleadings, consolidated note and mortgage, the CME agreement, the unlimited guaranty, an affirmation of regularity of its counsel, and an affidavits of Janny Cheung, its first vice president, and Dennis Lee, a senior vice president and senior deputy general counsel of plaintiff. Ms. Cheung attests to, among other things, defendant KND's default in failing to tender all the sums due and owing plaintiff as of July 23, 2012, the extended maturity date. She acknowledges plaintiff's receipt of KND's payment on December 21, 2012 of \$671,282.02, but indicates that such payment did not result in a halt in the prosecution of this action because it did not constitute full satisfaction of the amount due and owing under the subject consolidated mortgage. Dennis Lee, a senior vice president and senior deputy general counsel of plaintiff, attests to the merger of Chinese American Bank into United Commercial Bank, the failure of the United Commercial Bank, the transfer of United Commercial Bank's assets and loans, including the subject mortgage loan, into receivership under the Federal Deposit Insurance Corporation (FDIC), as receiver, and plaintiff's purchase of certain of the assets and loans from the FDIC, as receiver. These submissions establish plaintiff's prima facie case for summary judgment in its favor against defendants KND, Khalid A. Haraj,

Delilah Haraj and Great Bear (*see East New York Savings Bank v Carlinde Realty Corp.*, 54 AD2d 574 [2d Dept 1976], *affd* 42 NY2d 905 [1977]).

The burden shifts to defendants KND, Khalid A. Haraj, Delilah Haraj and Great Bear to raise a triable issue of fact as to this claim or demonstrate they have viable defenses to the foreclosure action (*see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 755 [2d Dept 2011]; *Zanfini v Chandler*, 79 AD3d 1031, 1031-1032 [2d Dept 2010]; *Ames Funding Corp. v Houston*, 46th Street property AD3d 692, 693 [2d Dept 2007]).

Defendants KND, Khalid A. Haraj, Delilah Haraj and Great Bear assert as affirmative defenses and counterclaims that defendant KND is entitled to a credit against the mortgage debt in an amount equal to the amount of the portions of the loan proceeds from the first and gap mortgages which remain in possession of plaintiff, interest on such funds, and the charges to the escrow account representing two years of insurance coverage which was duplicative of the insurance defendant KND purchased for the premises.

Defendants KND, Khalid A. Haraj, Delilah Haraj and Great Bear, however, do not claim that proper application of the amounts sought as credits would have resulted in full satisfaction of the consolidated mortgage by the time of the extended maturity. Nor do defendants KND, Khalid A. Haraj, Delilah Haraj and Great Bear assert that the claimed credits, when added to the amount paid to plaintiff post commencement of the action, results in full satisfaction of the mortgage debt. Defendants KND, Khalid A. Haraj, Delilah Haraj and Great Bear, furthermore, do not claim that the acceptance of the post commencement

payment constitutes a waiver of plaintiff's right to seek foreclosure, or serves as consideration for any forbearance agreement. Plaintiff's foreclosure claim is predicated upon nonpayment of the mortgage debt at maturity, and is not based upon any claim of default under the May 1, 2002 or December 24, 2004 escrow agreements, or the loan documents for alleged failure to maintain requisite insurance.

Under such circumstances, the affirmative defenses do not relate to the validity of plaintiff's mortgage or preclude foreclosure (*see Johnson v Gaughan*, 128 AD2d 756 [2d Dept 1987]). At best, their allegations challenge only the amount of the mortgage debt.

To the extent plaintiff asserts that it is a holder in due course of the note and therefore not subject to defendant KND's offset counterclaims, plaintiff is not seeking to recover under the consolidated note, but rather is seeking the equitable relief of foreclosure of the consolidated mortgage. It is well settled that an assignee of a mortgage takes subject to all defenses and counterclaims that can be asserted against the assignor (*see Hammelburger v Foursome Inn Corp.*, 54 NY2d 580, 586 [1981]; *TPZ Corp. v Dabbs*, 25 AD3d 787 [2d Dept 2006]; *Crispino v Greenpoint Mortg. Corp.*, 304 AD2d 608 [2d Dept 2003]; *State St. Bank & Trust Co. v Boayke*, 249 AD2d 535 [2d Dept 1998]).

In addition, to the extent plaintiff asserts any claim for an offset asserted in the first and second counterclaims is untimely interposed, "a ... counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed" (CPLR 203[d]), except that if the counterclaim arose from "the transactions, occurrences, or series of

transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed” (*id.*). Here, contrary to plaintiff’s contention, the claimed offsets related to the escrowed loan proceeds and sought-after interest are not barred by the statute of limitations, since they arise from the transactions and/or occurrences upon which plaintiff’s foreclosure claim depends, i.e., the making of the first mortgage loan and the gap mortgage loan and their consolidation into the subject mortgage loan and the creation of escrow accounts (*see NAB Const. Corp. v City of New York*, 276 AD2d 388 [1st Dept 2000]; *Coppola v Coppola*, 260 AD2d 774 [3d Dept 1999]; *Town of Amherst v County of Erie*, 247 AD2d 869 [4<sup>th</sup> Dept 1998]).

To the extent plaintiff asserts defendants KND, Khalid A. Haraj, Delilah Haraj and Great Bear have failed to state a claim to an offset with respect to insurance overcharges, they allege the United Commercial Bank, without notice to defendant KND, improperly used KND’s impound account to purchase insurance coverage which was duplicative of insurance KND had purchased in 2008 and 2009. Contrary to the assertion of plaintiff, this claimed offset is not based upon a theory of negligence, but rather on a theory of breach of contract. To the extent plaintiff asserts the claim is impermissibly vague as to which provision in the parties’ agreement was allegedly breached, it is sufficiently clear that defendant KND alleges United Commercial Bank improperly procured insurance and demanded payment of the premiums by the mortgagor in violation of the CME agreement. In addition, plaintiff has

failed to demonstrate the United Commercial Bank properly procured the insurance in 2008 and 2009 and charged the impound account in an amount equal to the premiums.

The proper remedy with respect to the claimed offsets, however, is for defendants KND, Khalid A. Haraj, Delilah Haraj and Great Bear to apply to the referee to credit towards the mortgage debt, any loan proceeds remaining in possession by plaintiff (which have not already been credited to KND), the interest which should have accrued on the loan proceeds held back by plaintiff's predecessors in interest, and the overcharges of insurance premiums (*see First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2d Dept 2000]).

Under such circumstances, the branches of the motion by plaintiff for summary judgment against KND, Khalid A. Haraj, Delilah Haraj and Great Bear, and to dismiss their affirmative defenses and counterclaims is granted (*see id.*). That branch of the motion by plaintiff for leave to enter a default judgment against defendants Bank of New York Mellon Corporation, as Trustee, and New York City Department of Transportation is granted. That branch of the motion for leave to appoint a referee is granted. That branch of the cross motion by defendants KND and Khalid A. Haraj for partial summary judgment in favor of defendant KND on the first and second counterclaims is denied.

Settle order.

Dated: September 3, 2013

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AUGUSTUS C. AGATE, J.S.C.