BACM 2005-6 Carle Place Off., LLC v HLP Old Country TIC LLC
2014 NY Slip Op 33208(U)
June 20, 2014
Sup Ct, Nassau County
Docket Number: 600710-12
Judge: Timothy S. Driscoll

[* 1]

ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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BACM 2005-6 CARLE PLACE OFFICE, LLC,

Plaintiff,

-against-

HLP OLD COUNTRY TIC LLC, CLK/HP ONE OLD COUNTRY ROAD LLC, THE PEOPLE OF THE STATE OF NEW YORK, THE COUNTY OF NASSAU, NEW YORK, THE TOWN OF NORTH HEMPSTEAD, NEW YORK, JOHN DOES NOS. 1-100, JOHN DOE CORPORATION NOS. 1-100 and JOHN DOE COMPANY NOS. 1-1--,

Defendants.

The names of the "John Doe" Defendants Being Fictitious and Unknown to Plaintiff, the Persons and Firms Intended Being Those Who may be in Possession of, or May have Possessory, Lien or Other Interests in, the Premises Herein Described.

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TRIAL/IAS PART: 15
NASSAU COUNTY

Index No: 600710-12
Motion Seq. No: 3 & 4
Submission Date: 5/6/14

The following papers have been read on these motions:

Notice of Motion, Affidavit in Support,
Affirmation of Regularity in Support and Exhibits.....x
Statement of Material Facts with Respect to Plaintiff's Motion.....x
Plaintiff's Memorandum of Law in Support.....x
Plaintiff's Compendium of Unreported Cases.....x
Notice of Cross Motion, Affirmation in Opposition/Support,
Defendants' Response to Plaintiff's Statement of Material Facts
and Exhibits.....x
Borrower Defendants' Memorandum of Law in Opposition/Support.....x
Supplemental Affirmation and Exhibit.....x

Papers Read (cont.)

Supplemental Affidavit and Exhibit.....x
Plaintiff's Memorandum of Law in Further Support.....x
Plaintiff's Supplemental Compendium of Unreported Cases.....x

This matter is before the Court for decision on 1) the motion filed by Plaintiff BACM 2005-6 Carle Place Office, LLC ("Plaintiff") on October 22, 2013, and 2) the cross motion filed by Defendants HLP Old Country TIC LLC and CLK/HP One Old Country Road LLC ("Defendants" or "Borrower"), both of which were submitted on May 6, 2014, following oral argument before the Court. For the reasons set forth below, the Court 1) grants the motion; and 2) denies the cross motion. The Court directs Plaintiff to submit the appropriate order(s) and/or judgment(s), on ten (10) days notice, to effectuate the relief granted herein. Counsel for the parties and the Receiver are not required to appear before the Court on July 16, 2014 as previously directed.

BACKGROUND

A. Relief Sought

Plaintiff moves, pursuant to CPLR § 3211(b) and 3212, for an Order striking out the answer of Defendants, directing the entry of summary judgment in favor of Plaintiff and against Defendants for the relief demanded in the complaint on the ground that there is no defense to the cause of action alleged in the complaint, appointing a referee to compute, and amending the caption of the action to strike therefrom the name "John Doe Nos. 1-100," "John Doe Corporation Nos. 1-100," and "John Doe Company Nos. 1-100."

Defendants cross move for an Order, pursuant to CPLR §§ 3211(a)(7) and 3212, dismissing, with prejudice, the claims asserted by Plaintiff in the Complaint and granting summary judgment on Defendants' First Affirmative Defense.

B. The Parties' History

The parties' history is outlined in detail in a prior decision ("Prior Decision") of the Court dated August 7, 2012, in which the Court granted Plaintiff's prior motion for an Order appointing a receiver for the Mortgaged Premises. The Court incorporates the Prior Decision by reference as if set forth in full herein.

By prior Order ("Prior Order") dated January 10, 2014, the Court directed that the motion

and cross motion now before the Court would be the subject of oral argument to address the question whether Plaintiff has standing to pursue this action. In the Prior Order, the Court noted that it appeared to be undisputed that Defendants are obligated to make payments under a loan for some $53,280,000.00 that was originally made to Defendants' predecessor in interest, and that it further appeared undisputed that Defendants have not made payments, as required, under the loan. Pursuant to the Prior Order, the Court conducted that oral argument and the motion and cross motion were submitted for decision.

As noted in the Prior Decision, the Complaint alleges as follows:

Plaintiff is the lawful holder of the Consolidated Mortgage. Defendants HLP Old Country TIC LLC and CLK/HP One Old Country Road LLC , referred to collectively as the "Borrower," are the owners of record of the Mortgaged Premises. Defendants People of the State of New York ("State"), County of Nassau, New York ("County") and Town of North Hempstead, New York ("Town"), *inter alia*, assess and collect taxes on real property situated in the State, County and Town. The "John Doe" Defendants constitute persons and/or corporations or firms that may be in possession of, or have other interests in, the Mortgaged Premises.

On or about June 2, 2005, Treeline 1 OCR LLC ("Treeline") and Bank of America, N.A. ("BOA") (together with its successors and assigns, "Lender") entered into a loan agreement dated June 2, 2005 ("Loan Agreement") pursuant to which BOA made a loan to Treeline in the principal amount of $53,280,000, evidenced by the Consolidated, Amended and Restated Promissory Note ("Consolidated Note") and secured by the Consolidated Mortgage. The Consolidated Mortgage was recorded in the Nassau County Clerk's Office ("Clerk's Office) and the mortgage recording tax was paid.

On or about June 2, 2005, Treeline, for the purpose of evidencing the payment to Lender of the sum of $53,280,000 plus interest, executed and delivered to Lender the Consolidated Note pursuant to which Treeline was bound and promised to pay to Lender same sum, plus interest at the rate provided in the Consolidated Note. As collateral security for the payment of said indebtedness, on or about June 3, 2005, Treeline executed, acknowledged and delivered the Consolidated Mortgage to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for BOA, pursuant to which Treeline mortgaged to BOA the Mortgaged Premises.

On or about May 8, 2008, Treeline transferred the Mortgaged Premises to Borrower by a

deed ("Deed") that was recorded in the Clerk's Office. In connection with this transfer, and as provided in a Loan Assumption and Substitution Agreement dated May 8, 2008 ("Assumption Agreement"), Borrower assumed the Debt as defined in the Loan Agreement and all other obligations of Treeline as set forth in the related Loan Documents, including the Consolidated Note and Consolidated Mortgage. The Assumption Agreement was recorded in the Clerk's Office.

On or about April 4, 2011, by assignment ("Assignment") recorded in the Clerk's Office on May 3, 2011, MERS assigned the Consolidated Mortgage to Plaintiff. The Consolidated Note, Consolidated Mortgage and Loan Agreement set forth Plaintiff's remedies upon Borrower's failure to pay any portion of the sums due to Lender, which include but are not limited to Lender's right to 1) declare to be immediately due and payable the entire unpaid principal sum, interest and all other sums due under the Consolidated Note and Consolidated Mortgage; and 2) apply for the appointment of a receiver for the Mortgaged Premises, without notice and without regard for the adequacy of the security.

Borrower defaulted under the Consolidated Note and Consolidated Mortgage by failing to make the monthly debt service payments in accordance with the Consolidated Note and other Loan Documents, and thereafter failing to make any additional monthly payments due. By letter dated November 16, 2010 ("Notice of Default"), Lender notified Borrower of its failure to make required payments under the Consolidated Note and Consolidated Mortgage, and declared to be immediately due and payable the entire unpaid principal sum due under the Consolidated Note and Consolidated Mortgage, together with accrued and unpaid interest, late charges, costs and expenses including attorney's fees and all other indebtedness due under the Loan Documents. There is now due and payable to Plaintiff, under the Consolidated Note and Consolidated Mortgage, the principal sum of $53,280,000, together with all accrued and unpaid contract and default interest thereon, real estate tax escrows, late charges, costs and expenses including attorney's fees, and all other indebtedness due under the Consolidated Note and Consolidated Mortgage. Plaintiff seeks relief including a judgment of foreclosure and appointment of a receiver of the Mortgaged Premises during the pendency of this action.

In support of Plaintiff's motion, Richard Le ("Le") affirms that he is an asset manager of LNR Partners, LLC, the non-member manager of Plaintiff, a Delaware limited liability company

and the Special Servicer for the Loan at issue. Le affirms the truth of the allegations in the Complaint and provides copies of the Loan Agreement, Consolidated Note, Consolidated Mortgage, Deed, Assumption Agreement, Assignment and Notice of Default (Exs. A-G to Le Aff. in Supp.). Le also provides copies of the Summons and Complaint (*id.* at Ex. H) and Notice of Pendency (*id.* at Ex. I), as well as a copy of Defendants' Verified Answer to Complaint ("Answer") (Ex. J to Le Aff. in Supp.).

Le affirms that the Loan Documents required, *inter alia*, that Defendants make monthly debt service payments of $297,522.82 during the term of the Loan. Defendants, however, failed to pay Lender the regular monthly installment on the Loan due on October 1, 2010. Defendants' failure to remit the October 1, 2010 debt service payment triggered an Event of Default under the Loan Documents. Plaintiff provided Defendants with the November 16, 2010 Notice of Default which notified Defendants of their failure to make the debt service payment due and, to date, the Loan remains in default.

In their Answer, Defendants deny certain allegations in the Complaint, including the allegation in paragraph 19 that Borrower defaulted under the Consolidated Note and Consolidated Mortgage by failing to make the monthly debt service payments in accordance with the Consolidated Note and other Loan Documents, and thereafter failing to make any additional monthly payments due. Defendants also assert three (3) affirmative defenses: 1) the Complaint fails to state a cause of action on which relief may be granted; 2) Plaintiff's claim for relief is barred in whole or in part because Defendants fully discharged their obligations to Plaintiff, and Defendants performed all material obligations under any applicable agreements; and 3) Plaintiff is barred from maintaining this action based on the doctrines of unclean hands, laches, waiver, estoppel and/or ratification.

In further support of Plaintiff's motion, counsel for Plaintiff affirms that all defendants were served with process, as reflected by the affidavits of service provided (Ex. 2 to Rogovin Aff. in Supp.). Defendants State, County and Town have not appeared in this action and their time to do so has not been extended. Plaintiff's counsel affirms, further, that the defendants captioned as "John Doe Nos. 1-100," "John Doe Corporation Nos. 1-100," and "John Doe Company Nos. 1-100" were not served with copies of the Summons and Complaint and are not necessary party defendants. Plaintiff requests that those defendants be excised from the caption

of this action.

In opposition to Plaintiff's motion and support of Defendants' motion, counsel for Defendants submits that, while Plaintiff has alleged that the debt obligation owed under the Consolidated Note was assigned by Treeline to Defendants pursuant to the Assumption Agreement, Plaintiff has failed to allege that the Consolidated Note was ever assigned to MERS or Plaintiff, or that Plaintiff is the holder of the Consolidated Note. Moreover, Defendants contend, in Plaintiff's Responses and Objections to First Set of Interrogatories (Ex. 7 to Schoenberg Aff. in Opp./Supp.), Plaintiff concedes that it is not the holder of the Consolidated Note. Defendants contend that, in the absence of an assignment of the Consolidated Note to Plaintiff, the Consolidated Mortgage "is a nullity" (Schoenberg Aff. in Opp./Supp. at ¶ 10) and, therefore, Plaintiff has failed to establish the requisite standing to maintain this foreclosure action.

In his Supplemental Affidavit, Le affirms that, during document discovery in this action, Plaintiff produced to Defendants a copy of an allonge ("Allonge") dated April 4, 2011 (Ex. K to Le Supp. Aff.) which contains a without recourse indorsement of the Consolidated Note from Lender made payable to the order of Plaintiff. Moreover, Le affirms, Plaintiff has had possession, custody or control of the original Consolidated Note and Consolidated Mortgage since April 4, 2011 and has entrusted physical possession of the signed original versions of the Note and Mortgage to its attorneys. Le affirms that Plaintiff's counsel will present these original documents to the Court on the hearing of the motion and cross motion now before the Court.

In his Supplemental Affirmation, counsel for Plaintiff reaffirms the truth of Le's affirmation that Plaintiff produced to Defendants a copy of the allonge, as evidenced by the correspondence provided (Ex. 3 to Rogovin Supp. Aff.). Counsel for Plaintiff also reaffirms the truth of Le's affirmation that Plaintiff's counsel has been entrusted to maintain on behalf of Plaintiff physical custody of the original signed Consolidated Note and Consolidated Mortgage. Plaintiff contends that, under these circumstances, Defendants cannot dispute Plaintiff's standing to foreclose as the holder of the Consolidated Note.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment by producing copies of the governing Loan Documents, including the Consolidated Note and Mortgage, and submitting an

affidavit from a representative of the Special Servicer attesting to Defendants' default in their payment obligations. Plaintiff contends, further, that Defendant's affirmative defenses, which consists of bald, conclusory statements, are insufficient as a matter of law to defeat Plaintiff's right to summary judgment.

In opposition to Plaintiff's motion, Defendants submit that Plaintiff has failed to establish, and cannot establish, that Plaintiff is in possession of, or was assigned, the Consolidated Note and, therefore, Plaintiff has not established that it has standing to commence this foreclosure action. Thus, Defendants have established the meritorious nature of their affirmative defense that Plaintiff has failed to state a cause of action on which relief may be granted. Defendants submit that Plaintiff has not alleged that the Consolidated Note was assigned with the Consolidated Mortgage, and ask the Court to reject any contention by Plaintiff that MERS' assignment of the Consolidated Mortgage encompassed an assignment of the Consolidated Note in light of the fact that 1) the MERS Assignment makes no reference to the Consolidated Note; and 2) the Consolidated Mortgage does not specifically give MERS, as nominee for BOA, the authority to assign the Consolidate Note and Plaintiff has not submitted evidence that MERS was in possession of the Consolidated Note at the time of the assignment of the Consolidated Mortgage. Thus, Defendants argue, the MERS Assignment, at most, resulted in an assignment of the Consolidated Mortgage without the underlying Consolidated Note.

In reply, Plaintiff notes that Defendants have not raised any issues with respect to their non-payment on the Loan, and submits that Defendants are attempting to capitalize on recent judicial decisions dealing with residential mortgage foreclosures involving "questionable loan documentation by the lenders" (P's Memo. of Law in Further Supp. at p. 2). Plaintiff notes that the instant action is one to foreclose on a commercial mortgage loan, and submits that Plaintiff has provided conclusive evidence of its right to pursue this action which includes 1) the signed, notarized April 4, 2011 assignment instrument (Ex. F to Lee Aff. in Supp.) which assigned the Consolidated Mortgage to Plaintiff "together with...any and all promissory note(s) and the obligations described therein, the debt and claims secured thereby, and all sums of money due and to become due thereon, with interest as provided for therein," and 2) the April 4, 2011 Allonge (Ex. K to Le Supp. Aff.) signed the the Lender, indorsing the Consolidated Note to Plaintiff.

Plaintiff also addresses Defendants' claims regarding Plaintiff's purported failure to submit evidence that the note was physically delivered. Plaintiff submits that it has established,

through the Le Supplemental Affidavit and the Supplemental Affirmation of Plaintiff's counsel, that Plaintiff has possession of the original Consolidated Note and Consolidated Mortgage, and has maintained possession, custody or control of these original documents since they were assigned on April 4, 2011. Thus, in addition to establishing its standing through the assignment instrument and Allonge, Plaintiff submits that it has also established its standing by virtue of its possession of the Consolidated Note. Plaintiff also disputes Defendants' contention that Plaintiff's response to Defendants' Interrogatory constituted an admission by Plaintiff that it is not the holder of the Note. Plaintiff contends that the information provided by Plaintiff in its response pertained only to the date of the response, and represents to the Court that it does possess the original Consolidated Note and Consolidated Mortgage.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a prima facie showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Dismissal Standards

On a motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction, accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Nouveau Elevator Industries, Inc. v. Glendale Condominium Town and Tower Corp.*, 107 A.D.3d 965, 966 (2d Dept. 2013), quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

C. Standing in Mortgage Foreclosure Action

In an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note and evidence of default. *MLCFC 2007-9 Mixed Astoria, LLC v. 36-02 35th Ave. Development, LLC*, 116 A.D.3d 745, 746 (2d Dept. 2014). Where the issue of standing is raised by a defendant, a plaintiff must prove its standing to be entitled to relief. *Id.* citing, *inter alia, Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279 (2d Dept. 2011). In a mortgage foreclosure action, a plaintiff has standing where it is both the holder of the subject mortgage and of the underlying note at the time the action is commenced. *MLCFC 2007-9 Mixed Astoria, LLC v. 36-02 35th Ave. Development, LLC*, 116 A.D.3d at 746 citing, *inter alia*, *Bank of N.Y. v. Silverberg*, 86 A.D.3d at 279. Where a note is transferred, a mortgage securing the debt passes as an incident to the note. *MLCFC 2007-9 Mixed Astoria, LLC v. 36-02 35th Ave. Development, LLC*, 116 A.D.3d at 746, citing *Bank of N.Y. v. Silverberg*, 86 A.D.3d at 280. By contrast, an assignment of a mortgage without assignment of the underlying note or bond is a nullity. *MLCFC 2007-9 Mixed Astoria, LLC v. 36-02 35th Ave. Development, LLC*, 116 A.D.3d at 746 citing, *inter alia, Bank of N.Y. v. Silverberg*, 86 A.D.3d at 280. Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation. *MLCFC 2007-9 Mixed Astoria, LLC v. 36-02 35th Ave. Development, LLC*, 116 A.D.3d at 746-747, quoting *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 754 (2d Dept. 2009).

In *Deutsche Bank Trust Company Americas v. Codio*, 94 A.D.3d 1040 (2d Dept. 2012), the Second Department held that by producing a document designated as an "allonge to note," which established that the plaintiff was the transferee of the subject mortgage note, the plaintiff had made a showing sufficient to warrant denial of defendant's motion to dismiss the complaint as asserted against him based on plaintiff's alleged lack of standing. *Id.* at 1041. The Second Department cited case law holding that a written assignment of the underlying note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident. *Id.*, citing *Bank of N.Y. v. Silverberg*, 86 A.D.3d at 281, quoting *U.S. Bank N.A. v. Madero*, 80 A.D.3d 751, 753 (2d Dept. 2011) (internal quotation marks omitted). The Second Department held that the trial court should have denied those branches of defendant's motion pursuant to CPLR § 3211(a)(3) to dismiss the complaint as asserted against him and pursuant to CPLR § 6514 to vacate a notice of pendency filed by the plaintiff in connection with the mortgaged real property. *Deutsche Bank Trust Company*

Americas v. Codio, 94 A.D.3d at 1041.

D. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion, and denies Defendants' cross motion, based on the Court's conclusion that Plaintiff has demonstrated its right to judgment against Defendants by producing copies of the governing Loan Documents, including the Consolidated Note and Mortgage, and establishing Defendants' default in their payment obligations. Plaintiff has established its standing to pursue this foreclosure action both by submitting documentation including the April 4, 2011 assignment instrument and the April 4, 2011 Allonge, and by demonstrating that it is in possession of the original Consolidated Note and Consolidated Mortgage. The Court concludes, further, that Defendants' affirmative defenses do not defeat Plaintiff's right to judgment and, accordingly, grants Plaintiff's application to strike the Answer.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs Plaintiff to submit the appropriate order(s) and/or judgment(s), on ten (10) days notice, to effectuate the relief granted herein.

Counsel for the parties and the Receiver are not required to appear before the Court on July 16, 2014 as previously directed.

ENTER

DATED: Mineola, NY
June 20, 2014

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JUN 30 2014
NASSAU COUNTY
COUNTY CLERK'S OFFICE