

Emigrant Bank v Materre
2015 NY Slip Op 30532(U)
March 24, 2015
Supreme Court, Kings County
Docket Number: 505007/14
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

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EMIGRANT BANK,

Plaintiff,

-against-

MICHELLE MATERRE; JOHN DOE; JANE DOE,

Defendants.

-----X

DECISION/ORDER

Index No. 505007/14

Submitted 1/29/15

Mot. Seq. # 1

HON. DEBRA SILBER, A.J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for a judgment and an order declaring possession in favor of plaintiff and instructing defendant to vacate a cooperative apartment unit and related relief.

Papers	Numbered
Notice of Motion, Affirmations, Affidavits and Exhibits.....	<u>1-12</u>

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Plaintiff has moved for an order pursuant to CPLR § 3215 granting the following relief: 1) a declaratory judgment in favor of the plaintiff instructing the defendant to vacate the subject cooperative apartment unit, 2) a judgment and order awarding plaintiff possession of the subject unit, 3) a judgment and order authorizing the Kings County Sheriff to evict and eject the defendant from the subject unit, 4) a money judgment for use and occupancy for the period of defendant's unlawful possession of the unit, 5) damages and costs, including attorney fees, "attributable to defendant's unlawful holder" of the subject unit, and attendant relief.

The instant motion was not opposed and was submitted on default on January

29, 2015, with the court's instruction to plaintiff to settle an order on notice. It is noted that defendant did not answer the complaint either. Plaintiff e-filed a proposed order the next day, although the court did not receive a working copy of it until well into March of 2015. Now, upon reviewing the proposed order and plaintiff's moving papers, the court finds it cannot grant the motion, which is denied for the reasons set forth herein and the complaint is dismissed.

The underlying action is one for breach of contract, ejectment, replevin, a declaratory judgment and a money judgment. The complaint alleges that defendant borrower "executed, acknowledged and delivered to plaintiff's predecessor in interest, Emigrant Mortgage Company, Inc., a Collateral Note ("Note") and Security Agreement ("Agreement") in the sum of \$200,000 (collectively the "Loan") granting Emigrant a security interest in the premises known as 185 Hall Street, Unit #1712, Brooklyn, New York 11205 (the "Unit")." A UCC-1 was recorded to reflect plaintiff's security interest, a copy of which is Exhibit F to the motion.

Defendant subsequently defaulted on the subject note and security agreement and plaintiff, pursuant to the terms of the parties' agreement, commenced a non-judicial foreclosure. Plaintiff sent a notice of default to defendant dated November 16, 2012. The default was not cured, and plaintiff thereafter scheduled a non-judicial foreclosure sale for March 22, 2013. Plaintiff was the high bidder at the sale and avers it is now the rightful owner of the proprietary lease and the 216.10 shares of stock allocable to the unit.

Plaintiff avers that the cooperative corporation, Willoughby Walk Cooperative Apartment, Inc., has refused to transfer the stock, which is defendant's collateral for the loan, into the plaintiff's name. Defendant was served with a Notice to Vacate on

February 28, 2014, informing the occupants of the subject apartment of the sale and directing that they vacate the subject unit on or before June 1, 2014, but the named defendant borrower was directed to vacate by March 13, 2014, less than 30 days after the notice. Plaintiff also avers it has not received any sums for use and occupancy from defendant, although there is no indication as to who has been paying the coop maintenance.

The exhibits plaintiff has submitted in support of the motion include the note and security agreement and a UCC-1 Financing Statement. The note and security agreement include a provision in which defendant grants a "lien and security agreement in the following (all of which are sometimes called the "Collateral" in this agreement): (i) the Stock, (ii) the Lease and (iii) the proceeds thereof. The collateral note and security agreement also provide "If an event of default occurs and is continuing, you may request the co-op to terminate my rights in the collateral and to issue a new lease and stock to you or anyone acting on your behalf and you may sell the collateral either at a public sale or privately through a broker who regularly acts as a broker in connection with the purchase or sale of cooperative apartments." The papers do not include any recognition agreement executed by Willoughby Walk Cooperative Apartment, Inc., as is ordinarily included in coop loan transactions.

Bergman's on New York Mortgage Foreclosures devotes an entire chapter (Chapter 37) to co-op foreclosures. Therein, he indicates that lenders have the option of proceeding with either a judicial or a non-judicial foreclosure as regards cooperative apartment loans. UCC Article 9 governs non-judicial foreclosure sales in New York State. *LI Equity Network, LLC v Village in the Woods Owners Corp.*, 79 AD3d 26 [2nd Dept 2010]. As the sale herein was a non-judicial foreclosure, the procedures

employed by Emigrant and its predecessor in interest must be analyzed through the lens of Article 9 of the Uniform Commercial Code to determine whether plaintiff has made a prima facie case for the relief requested. It is noted that even if a motion is unopposed, the moving party must make out a prima facie case.

The court finds that the notice of default sent by plaintiff's attorneys, a notice dated November 16, 2012 entitled "Notice Required by the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq" did not conform to the ninety-day notice requirement set forth in UCC 9-611(f)(1), which provides that:

In addition to such other notification as may be required pursuant to subsection (b) of this section and section 9-613 of this article, a secured party whose collateral consists of a residential cooperative interest used by the debtor and whose security interest in such collateral secures an obligation incurred in connection with financing or refinancing of the acquisition of such cooperative interest and who proposes to dispose of such collateral after a default with respect to such obligation, shall send to the debtor, not less than ninety days prior to the date of the disposition of the cooperative interest, an additional pre-disposition notice as provided herein.

The purpose of the ninety-day notice is to afford owners of cooperative shares protections similar to those provided to the owners of real property under RPAPL 1303, *Stern-Obstfeld v Bank of Am.*, 30 Misc 3d 901, 905 [Sup Ct NY County 2011].

The statute clearly states that the required notice is in addition to any other notices required in the UCC or in the agreement between the parties. UCC 9-611(f)(1). The 90 day notice is designed to warn owners that they could be in danger of losing their homes and must contain very specific information about counseling services and other resources available to assist cooperative apartment homeowners in obtaining help. In particular UCC 9-611 (f)(2) requires that the notice:

"shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the notice required by subsection (b) of this section, and

the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page.”

UCC 9-611(f)(3) provides:

The notice required by this subsection shall appear as follows:

Help for Homeowners at Risk of Foreclosure

New York State Law requires that we send you this information about the foreclosure process. Please read it carefully.

Notice

You are in danger of losing your home. You are in default of your obligations under the loan secured by your rights to your cooperative apartment. It is important that you take action, if you wish to avoid losing your home.

Sources of Information and Assistance

The State encourages you to become informed about your options, by seeking assistance from an attorney, a legal aid office, or a government agency or non-profit organization that provides counseling with respect to home foreclosures. To locate a housing counselor near you, . . .”

It is noted that this language parallels the language in RPAPL §1303. However, the 1303 notice is required to be delivered to the homeowner along with the summons and complaint, while the UCC 9-611(f) notice is required to be sent to the homeowner of a cooperative apartment 90 days prior to the auction of the apartment.¹

RPAPL §1304 provides for a 90 day notice in mortgage foreclosure actions,

¹ As is noted in Justice Schmidt’s decision in *Waithe v Citigroup, Inc.*, 42 Misc 3d 1205(A) [Sup Ct, Kings Co 2013], “curiously, UCC 9-611(f) has no analogous subsection concerning manner and mode of service of the required notice. Considering that cooperative apartment owners will not get a CPLR 3408 conference in a non-judicial sale, this notice becomes more important to them than a 1304 notice is to a real property owner. Therefore, the court hopes that the legislature will review and remedy this oversight”.

which requires different language, the gist of which is that if the homeowner does not “resolve the matter” within 90 days, the lender “may commence legal action.” The cases that discuss RPAPL 1304 have been interpreted as applicable to the 90 day notice required by UCC 9-611(f). It must also be noted that the UCC has no provision for the manner of service of the notice required by UCC 9-611(f).

The notice sent to plaintiff herein was simply a default and acceleration notice, with notice that if she did not cure her default in 30 days, the lender would accelerate the loan and be entitled to the full balance due. This notice is required prior to an auction of a coop under the UCC and the security agreement, but it is clearly not the notice contemplated by the amendment to the UCC, which became effective on January 14, 2010, and thus applies to this matter, which was commenced four years after the law changed. See, *Newman v Federal National Mortgage Association*, 46 Misc 3d 1204(A) [Sup Ct Kings Co 2014]; *Stern-Obstfeld v Bank of Am.*, 30 Misc 3d at 905, 906 [Sup Ct NY Co 2011]. In *Stern-Obstfeld*, the court notes at page 915 that “In late 2009, Governor Paterson signed a bill into law requiring certain notice[s] to residential homeowners of cooperative apartments, intended for the homeowner’s protection, prior to disposition of collateral shares (L. 2009, Ch. 507). The purpose of the notice is to afford protection to homeowners similar to that provided to the owners of real property under the Home Equity Theft Prevention Act.”

Plaintiff’s attorney does not allege in his motion papers that either plaintiff or its predecessor in interest complied with the 90-day notice requirement contained in UCC 9-611(f), nor that the firm that represented plaintiff prior to its current firm did so.

Turning to the effect of the lender’s failure to comply with the notice requirement, the court notes that *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]

held that the notice requirement under RPAPL 1304 is a condition precedent to filing a foreclosure action. *Newman v Federal National Mortgage Association*, 46 Misc 3d 1204(A); *Stern-Obstfeld*, *supra* and *Millien v Citigroup Inc.*, 37 Misc3d 1229A, [Sup Ct Kings Co 2012], found that the notice requirement of UCC 9-611 (f) is a condition precedent to a non-judicial foreclosure of a cooperative apartment since the notice required by these statutes were "enacted for the purpose of avoiding similar evils and affording similar remedies [and therefore] should have uniformity of application and construction." *Matthews v Matthews*, 240 NY 28, 35 [1925]; *Newman v Federal National Mortgage Association*, 46 Misc 3d 1204(A).

Bergman instructs "It may be expected that the mandate to send the ninety-day notice for a coop default will be strictly constructed [sic] based upon case law interpreting the requirement for the notice in a home loan case," citing *Stern-Obstfeld*, *supra*. See also, *Newman v Federal National Mortgage Association*, 46 Misc 3d 1204(A); *Bergman*, *supra*, at 37.03 [1A].

The court in *Aurora Loan Services*, *supra*, held "Aurora's substantial failure to comply with RPAPL 1304 [90 day notice requirement in a mortgage foreclosure action] cannot be deemed a minor irregularity which can be overlooked." Subsequent to the *Aurora* decision, the appellate divisions have stated unequivocally that the notice required by RPAPL 1304 is a condition precedent to a judicial foreclosure. See also *Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909 [2d Dept 2013]; *TD Bank, N.A. v Leroy*, 121 AD3d 1256 [3d Dept 2014]; *Newman v Federal National Mortgage Association*, 46 Misc 3d 1204(A). Based on the legislative intent, plaintiff's failure to comply with UCC 9-611(f) — thereby failing to comply with the mandatory condition precedent — "cannot be deemed a minor irregularity which can be overlooked" See,

Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95, 108). *TD Bank, N.A. v Leroy*, 121 AD3d 1256. Inasmuch as plaintiff admits that it failed to strictly comply with the condition precedent required by RPAPL 1306, and that failure is not excused, the complaint must be dismissed. See *TD Bank, N.A. v Leroy*, 121 AD3d 1256; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 103.

It is noted that in *Stern-Obstfeld*, the borrower was seeking a stay of the auction due to the lender's failure to serve the 90 day notice. The court therein granted the motion and stayed the auction, directing the lender to "comply with the provisions of UCC Article 9." See also, *Newman v Federal National Mortgage Association*, 46 Misc 3d 1204(A).

Therefore, UCC 9-611(f) required service of a 90-day notice as a condition precedent to holding the auction. As a statutory condition precedent, it is part of plaintiff's *prima facie* burden on a motion for possession post-auction.

It is also noted that plaintiff never filed an affidavit of service of the Summons and Complaint in this action on the John and Jane Doe defendants who they allege are occupying the premises. The court's records indicate that the action was commenced on June 2, 2014, that personal service on defendant was made on June 30, 2014 and the affidavit of service was filed July 8, 2014. If in fact there are additional occupants, as alleged in the caption and the complaint, an order directing the Sheriff to evict everyone cannot be granted.

To be clear, the traditional rule was that family members not named on a lease and whose right to occupancy derives solely from the tenant do not need to be named as respondents in a summary proceeding, where landlord has no notice of their occupancy [see eg *623 West 138th St. Realty Co. v Castillo* NYLJ Aug. 14, 1990

(brother in law of rent stabilized tenant not a necessary party to nonpayment proceeding where it was not shown that landlord had knowledge of his occupancy prior to commencement of proceeding and occupant asserted no independent right to possession)].

However this general rule is not applicable where the family member is known to the landlord and is claiming independent possessory right to the apartment [Scherer *Residential Landlord-Tenant Law in New York*, § 7.97; *Stanford Realty Assoc v Rollins* 161 Misc 2d 754, 615 NYS2d 229 (petition dismissed for failure to name respondent's wife); *ATM One v Garcia* NYLJ Apr. 24, 2002, p.22, col. 4 (tenant's sibling who lived in the apartment, paid rent and dealt with landlord had sufficient independent possessory interest to be a necessary party; *Linden Lefferts, LLC v Cox* 31 Misc 3d 84, 924 NYS2d 724 (spouse of tenant who had lived in apartment for years and whose rent check was accepted by landlord had a right to appear in eviction proceeding therefore, final judgment and warrant issued in his absence should be vacated; *800 Ocean Avenue, Inc. v Juarez* 39 Misc 3d 147[A], 972 NYS2d 143, 2013 NY Slip Op 50858[U] (occupant established that he was in possession of the subject apartment and that landlord was aware of his presence in the apartment and did not make him a party to the proceeding, as such landlord was not entitled to execute warrant against occupant) *ATM One v Garcia* NYLJ April 24, 2002, p.22, col. 4 (tenant's sister who paid rent, dealt with landlord directly and occupied premises had acquired an independent possessory interest in the apartment triggering due process rights); *Glen Cove Housing Authority v Hendricks* 2002 NY Slip Op 40483(U)(family member of tenant who was sole remaining occupant of apartment had a due process right not to be evicted unless she was made a party to the proceeding); *Rochdale Village, Inc. v Goode* 16 Misc 3d 49, 842 NYS2d

142 (*claim to possession gives occupant standing to raise defenses in nonpayment proceeding*); *Fults v Munro* 202 NY 34, 95 N.E. 23 (*eviction of a wife who was not named in a proceeding where landlord has knowledge that husband had assigned the tenancy to the wife was unlawful*)).

The law is clear that for a warrant to be effective against a subtenant or licensee, due process requires that he or she be made a party to the proceeding either by naming and serving him or her with the petition and notice of petition or by joining him as a party during the pendency of the proceeding [*170 West 85th Street Tenants Association v Cruz* 173 AD2d 338, 569 NYS2d 705; NYCCCA § 110(d)]. "Although RPAPL 749 authorizes removing all persons from an apartment once a warrant issues in a summary proceeding, these persons may not be removed unless they have had a chance to defend themselves [*Acquisition America v Diaz* 20 Misc. 3d 1127(A), 872 NYS2d 689 *citing* (3 Robert F. Dolan, *Rasch's Landlord and Tenant-Summary Proceedings* § 46:10 at 198 (4th ed. 1998))(*noting that persons who have claims to apartment may not be lawfully removed without being given their day in court or an opportunity to object to the proceeding*)]. "The *Diaz* court properly noted that a landlord who wishes to contest the continued right to occupancy of an individual who is not the named tenant can bring a holdover proceeding, but can not seek to deprive the occupant of his day in court by bringing a nonpayment proceeding against the tenants in which the occupant is not named." *115 Mulberry LLC v Giacobbe*, 2015 NY Slip Op 50343(U) [Civil Court NY County 2015].

Additionally, plaintiff has failed to set forth any evidence that the auction sale they held was conducted in a commercially reasonable manner. In particular, there is no evidence of publication of the notice of sale. Bergman instructs "Publishing the

notice on three separate occasions prior to the auction in a newspaper of appropriately wide circulation is standard and accepted practice. That notice must state the location of the sale, its date and time, information about the shares and other items. A claimed deficiency in the choice of a newspaper would not alone render the sale commercially unreasonable, particularly where the borrower could not show that any other supposed defect precluded bidders from attending the sale." It is noted that the Rules of the City of New York at §2-221, lists acceptable newspapers.

Further, plaintiff has not sought to confirm their non-judicial foreclosure and obtain a judgment. Their complaint merely asks for a declaratory judgment that they are entitled to possession of the unit. This is not the right way to seek judicial assistance in evicting occupants of a coop apartment. In fact, New York City Civil Court, Housing Part, has jurisdiction over evictions of persons occupying cooperative apartment.

In light of the lender's inability to demonstrate that a 90 day notice was sent to the borrower herein which complied with UCC 9-611(f), the court finds it appropriate to deny the motion and dismiss the action. In addition, as the proper notice was not given to defendant prior to the auction, the auction itself was invalid and therefore,

IT IS HEREBY ORDERED that the auction is hereby set aside, and the parties shall go forward as if said auction did not take place, and it is further.

ORDERED that pending the further order of this court or a court of appropriate jurisdiction, plaintiff shall not interfere with defendant's right to the use and quiet enjoyment of the apartment.

This constitutes the decision and order of this court.

Dated: Brooklyn, New York
March 24, 2015

db

Hon. Debra Silber, A.J.S.C.
Prof. Debra Silber
Justice Supreme Court

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KINGS COUNTY CLERK
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