936 Coogans Bluff, Inc. v 936-938 Cliffcrest Hous. Deve. Fund Corp.
2017 NY Slip Op 32736(U)
December 19, 2017
Supreme Court, New York County
Docket Number: 850011/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----------X **Decision and Order**

936 COOGANS BLUFF, INC.

Plaintiff,

-against- Index No. 850011/13

936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION, THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, AND JOHN AND JANE DOES\ 1-10, ABC LLC 1-10, XYZ CORP. 1-10,

Defendants.

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936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION,

Third-Party Plaintiff

-against-

THE WAVECREST MANAGEMENT TEAM LTD., COMMUNITY CAPITAL BANK n/k/a CARVER FEDERAL SAVINGS BANK, LEE WARSHAVSKY, SHUHAB HOUSING DEVELOPMENT FUND CORPORATION, JOHN AND JANE DOES 11-20, the identity of such persons being unknown to the Third-Party Plaintiff, but intended to describe those persons who corruptly influenced their employer, THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK to look away from their defalcations of the Third-Party Plaintiff's funds,

Third-Party Defendants.

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JOAN A. MADDEN, J.

In this foreclosure action, plaintiff moves for summary judgment on its complaint.

Defendant/third-party plaintiff 936-938 Cliffcrest Housing Development Fund Corp ("Cliffcrest") opposes the motion.

Background

Cliffcrest is tenant owned development company and the owner of the property located at 938 St. Nicholas Avenue, New York, New York ("the Building"). Cliffcrest became the owner of the Building through third-party defendant Department of Housing Preservation and Development of the City of New York's (HPD's) Third-Party Transfer Program ("TPT"), established by Local Law 37 of 1996, which provides an alternative to in-rem foreclosure. The goal of the program is to transfer tax-delinquent buildings in poor condition to new owners capable of rehabilitating the buildings and managing them as low income housing.

Pursuant to the TPT, residential properties, on which the City holds tax liens, are transferred, first, to a private not-for-profit entity and, then, to a sponsor which agrees to provide construction or permanent financing, typically, in conjunction with partial funding by HPD, in accordance with HPD guidelines. In this case, the Building was originally taken by the City in rem and transferred to a not-for-profit Neighborhood Restore Housing Development Fund Corporation ("Neighborhood Restore") on May 17, 2001. On December 19, 2002, Neighborhood Restore transferred the Building to third-party defendant Shuhab Housing Development Fund Corp ("Shuhab"), a sponsor selected by HPD through a Request for Proposal process. Shuhab appointed third-party defendant Wavecrest Management Team, Ltd. ("Wavecrest") as the managing agent for the Building, and it is alleged that Wavecrest acted in that capacity from December 2002 until September 2010. Third-party defendant Lee Warshavsky is Shuhab's principal and acted as Secretary and Treasurer of Cliffcrest.

HPD holds two mortgages on the Building which were initially provided as part of a joint construction loan, originated in 2002, with Fleet National Bank ("Fleet"), to provide construction financing to rehabilitate the Building (hereinafter "the HPD mortgages").[1] In connection with this financing, on December 19, 2002, HPD and Fleet executed a Construction Loan Participation Agreement ("Participation Agreement") with respect to the funding of the construction loan. In its third-party action, Cliffcrest alleges that substantial portions of the funds from the loan were not used to rehabilitate the Building.

The rehabilitation of the Building was purportedly completed in September 2006. On or about January 27, 2007, title to the Building was transferred to Cliffcrest and the conversion closed. The individual units in the Building were sold to the current unit owners as low-income cooperative apartments at prices below market value. As part of the transfer, Cliffcrest assumed the obligations under all the mortgages on the Building, including the HPD and Fleet mortgages, and the construction loan was converted to a permanent loan.

At issue in this foreclosure action is a $1.65 million loan made to Cliffcrest by to Community Capital Bank ("CCB"), which was assigned to Peny & Co. (Peny), the original plaintiff in this action. The proceeds of the loan was used to repay the construction loan from

[1]According to HPD, on September 29, 2006, three mortgages originally made and dated December 19, 2002, in the principal amount of $2,512,103, were consolidated into one mortgage under which Cliffcrest was required to pay interest at a rate of .62% per annum starting on November 1, 2006, in monthly installments through November 1, 2036. Also, on September 29, 2006, two mortgages originally made and dated December 19, 2002 in the principal amount of $947,500, were consolidated into a second HPD mortgage, which is "a standing loan" with no interest or payments required with the debt to be forgiven barring a default. Cliffcrest paid the interest under the first HPD mortgage until April 2012 but has not made any payments since that time.

Fleet,[2] and for various charges related to the formation of Cliffcrest.

Specifically, on September 28, 2006, Cliffcrest executed and delivered to CCB a Mortgage Note ("the Note") evidencing a loan made to Cliffcrest in the principal amount of $1,650,000, plus interest as set forth in the Note. Simultaneously with the execution of the Note, Cliffcrest executed and delivered to CCB a Mortgage, Assignment of Leases and Rents and Security Agreement, which provided partial security for the money due and owing CCB under the Note. That same day, CCB assigned to Peny & Co. (Peny), the original plaintiff in this action, the Note and the Mortgage along with the Leases and Rents (together "the Loan Documents"). There is evidence in the record that Peny paid CCB $1,650,000 for the assignment of the Loan Documents. Pursuant to a subordination agreement HPD and CCB entered into on September 29, 2006, HPD agreed that the HPD mortgages, would be subject to and subordinate in time and payment to the liens, terms and covenants in the Loan Documents. From 2006 until 2012, Cliffcrest made payments to Peny as agreed to under the Note and Mortgage without objection or reservation. However, it is alleged that beginning in March 2012, Cliffcrest ceased making monthly payments of principal and interest due under the Loan Documents, did not make payments for real estate taxes assessed against the Building, and failed to provide proof of insurance covering the Building. Based on these alleged defaults, Peny served Cliffcrest with a written Notice of Default dated November 13, 2012, and when Cliffcrest failed to cure the defaults, Peny commenced this foreclosure action. Peny also filed an application for the

[2]Plaintiff submits evidence showing that the majority of the loan was used to pay off $1,269,681.65, of the loan from Fleet, to Fleet's successor, Bank of America.

appointment of a temporary receiver, which the court granted by order dated March 17, 2015.[3]

This action has an extensive and torturous procedural history, which has been set forth previously by this court in various decisions and will not be repeated in full in connection with this motion. Of relevance here, by decision and order dated March 30, 2016 ("March 30 amend order") the court, *inter alia*, denied Cliffcrest's motion for leave to amend to assert affirmative defenses and counterclaims against Peny. In connection with a prior motion by Peny for summary judgment on its foreclosure complaint (motion seq no. 008), the court granted the motion based, in part, on the court's finding in connection with the March 30 amend order (motion seq no 010) that Cliffcrest had failed to establish that the proposed affirmative defenses and counterclaims had prima facie merit as against Peny. Cliffcrest subsequently sought to vacate those parts of the decision and orders granting Peny summary judgment for foreclosure on the grounds that the court had previously indicated that Cliffcrest would be given an opportunity to more fully oppose the summary judgment motion. The court granted Cliffcrest's vacatur request to the extent of vacating that part of its March 30 amend order, which granted Peny summary judgment on its foreclosure cause of action, and deleting its finding that Peny was a holder in due course of the Note and the Mortgage. The court also vacated the decision and order filed under motion seq no. 008 granting Peny summary judgment, and provided a briefing schedule for Cliffcrest's opposition to the motion and Peny's reply.[4]

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[3]While the application was made *ex parte*, this court required that Peny give notice of the application.

[4]Despite the court's order, Cliffcrest efiled a cross motion in response to the summary judgment motion. After a conference call with the parties, Cliffcrest withdrew the unauthorized cross motion and by order dated May 11, 2016, the court provided a new briefing schedule.

At issue on this motion is whether plaintiff has established entitlement to summary judgment. It must be noted that Cliffcrest has in a number of motions attempted to assert various affirmative defenses. Most recently, after the court had provided the above briefing schedule, on April 19, 2016, Cliffcrest efiled a Second Amended Verified Answer Counterclaim, Cross-Claim and Third-Party Complaint ("the Second Amended Pleading"), which included eight affirmative defenses against Peny. Cliffcrest included the affirmative defenses notwithstanding the March 30 amend order which denied Cliffcrest's motion to add these defenses. Plaintiff filed a Notice of Rejection of Second Amended Pleading, and moved to strike the affirmative defenses asserted against it in Cliffcrest's Second Amended Verified Answer (motion seq no. 017). Cliffcrest opposed the motion, arguing, *inter alia*, that the Second Amended Pleading was submitted in accordance with the court's vacatur of that part of the March 30 amend order granting summary judgment on the complaint.

In its decision and order dated May 12, 2017, the court granted plaintiff's motion to strike the affirmative defenses writing, that:

> With respect to Cliffcrest's argument that the court, in vacating the summary judgment determination, ... also vacated that part of the decision denying Cliffcrest leave to assert affirmative defenses, this argument is without legal or factual basis. Specifically, while the court found that whether plaintiff was a holder in due course remained at issue, this finding does not alter the court's determination rejecting Cliffcrest's proposed affirmative defenses.

During the pendency of this action there have been three assignments of the Loan Documents and rights. The first assignment was from Peny to State of New York Mortgage Agency (SONYMA) and, by order dated March 30, 2016, this court substituted SONYMA as plaintiff. The next assignment was from SONYMA to 936 Coogans Bluff, LLC ("Coogans

Bluff"), and by order dated September 26, 2016, this court substituted Coogans Bluff as plaintiff. Coogans Bluff subsequently assigned the Loan Documents and its rights in this action to 938 St. Nicholas Avenue Lender LLC, and Coogans Bluff has moved to substitute 938 St. Nicholas Avenue Lender LLC as plaintiff, which motion was granted by decision and order dated December 18, 2017.

Plaintiff's Summary Judgment Motion[5]

Plaintiff argues that summary judgment is warranted in its favor as it has made a prima facie showing based on the Loan Documents, including the Note, Mortgage and assignments, and undisputed evidence of Cliffcrest's default in payment beginning in April 2012, and Cliffcrest has not controverted this showing.

Cliffcrest counters that plaintiff is not entitled to summary judgment as (1) it lacks standing, based on a "break in the chain of custody of the loan,"(2) the loan money never became due as the conditions of the loan as set forth in the Loan Commitment Letter between Cliffcrest and CCB dated August 18, 2006 ("the commitment letter") were not met, (3) plaintiff's summary judgment motion is moot since Peny is not the holder of the Note, Mortgage and Loan Documents, which were assigned to other entities after the motion was made, (4) plaintiff has not met its burden of establishing that it is a holder in due course, and (5) plaintiff did not comply with the notice requirements of RPAPL §§1303 and 1304.[6]

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[5]The court notes that since the submission of this motion and throughout this litigation, the court has conducted extensive settlement discussions with the parties and has referred the matter to Justice Charles Ramos in furtherance of these settlement efforts. As such settlement efforts have been unsuccessful, the decision on this motion is now being issued.

[6]In its opposition, Cliffcrest refers to Peny and its subsequent assignees collectively as "NYC Lenders," apparently based on its unsubstantiated argument that Peny is an arm of the City

With respect to the chain of title, Cliffcrest argues that issues of fact exist as to whether there is a break in the chain of title as the Allonge, amending the interest rate of the Note, is dated November 1, 2006, which is a month after the assignment of the Loan Documents from CCB to Peny,[7] and the Subordination Agreement, subordinating HPD's loan to Cliffcrest, is dated September 29, 2006, or one day after the September 28, 2006 date of the Note and Mortgage assigned to Peny.

This argument is without merit. As for the Allonge, since this document simply modifies the Note by amending the interest rate,[8] and does not transfer or otherwise affect the ownership of the Loan Documents, that the Allonge is dated after the assignment of the Loan Documents to Peny does not affect the chain of title. With regard to the Subordination Agreement, such agreement, which subordinates that HPD loans to the $1,650,000 loan made by CCB to Cliffcrest, has no relevance to the chain of title.[9]

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of New York. See Transcript, Oral Argument on Summary Judgment Motion, dated July 7, 2016, at 38-39.

[7]Cliffcrest also argues that the chain of title was broken since the assignment was from CCB to Peny, and Carver, not CCB, signed the Allonge. This argument is without merit since Carver is CCB's successor-in-interest.

[8]Cliffcrest executed the Allonge and there is no dispute that it agreed to the amended interest rate, and made the monthly mortgage payments at this interest rate until the default.

[9]Cliffcrest also argues that the Mortgage was not properly notarized as the notary stamp indicates that the notary was qualified in Westchester County, the Mortgage was notarized in Kings County, and the property is located in New York County. Notably, Cliffcrest provides no legal basis for its argument. In fact, a New York notary is authorized by statute to administer oaths including with respect to mortgages throughout the state. See N.Y. Executive Law § 135 (providing, *inter alia*, that "[e]very notary public duly qualified is hereby authorized and empowered within and throughout the state to administer oaths and affirmations, to take affidavits and depositions, to receive and certify acknowledgments or proof of deeds, mortgages...)(emphasis added); 1 NYJur2d Acknowledgments § 73 (Nov 2017).

Cliffcrest's next argument, that the loan did not become due as the conditions of the commitment letter issued by CCB were not satisfied, is also unavailing. In this regard, Cliffcrest argues that plaintiff is not allowed to collect on the loan until certain permit and approvals are properly obtained as provided by the commitment letter. Furthermore, Cliffcrest argues that the Mortgage requires such conditions to be met since the commitment letter is a "Loan Document," as that term is defined under the Mortgage as it is a document "relating to the Loan" (Mortgage at 4), and that as a successor of CCB, plaintiff is bound by the obligations contained in the commitment letter under section 4.4 of the Mortgage which states, *inter alia*, that the assignee of the Mortgage "shall be a party to this agreement and shall have all the rights and obligations of the mortgage and under any and all other guarantees, documents, instruments and agreements executed in connection herewith to the extent of the rights and obligations have been assigned by the mortgage."

These arguments are unavailing. Contrary to Cliffcrest's argument, the commitment letter does not impose any obligations or conditions on the Lender (i.e. CCB) prior to its providing the loan moneys; instead the only obligations imposed are upon Cliffcrest, as the borrower, to meet certain conditions in order to obtain the loan. Specifically, under the heading "Loan Conditions Precedent" the letter states, "[t]he Lender's obligation (i.e. CCB's obligation) to make the loan shall be subject to, and conditioned upon, receipt by the Lender...of the following, which must be satisfactory in form and substance and acceptable to the Lender, its consultants and counsel in their sole discretion, all of which are conditions precedents to closing of the Loan." It then lists various conditions to the loan, that the borrower must satisfy including, inter alia, Authorization, Collateral, Appraisal, No Liens, Insurance, Due Diligence, Certified

Rent Roll and Certificate of Occupancy. Accordingly, there is no basis for finding that CCB had an obligation to comply with any conditions prior to loaning the money to Cliffcrest.

The provisions of Mortgage also do not provide a basis for Cliffcrest's position, as such provisions simply require an assignee to comply with the terms of the Loan Documents, none of which, including the commitment letter, impose any obligation on the lender or its assignees to ensure the borrower's compliance with the conditions set forth in such documents.

It should be noted that the court has previously considered and rejected Cliffcrest's arguments in this regard in the March 30 amend order and its May 17, 2017 decision and order. In the March 30 amend order, in rejecting Cliffcrest's affirmative defenses alleging plaintiff's failure to satisfy various condition precedents, the court found that the Loan Documents do not provide any conditions precedent or prerequisites before payment is due, nor can conditions be implied into the Loan Documents, citing Camaiore v. Farance, 50 AD3d 471, 471-472 (1st Dept 2008)(courts may not "imply a condition which the parties chose not to insert in their contract")(internal citations and quotations omitted); Ashkenazi v. Kent South Associates, LLC, 51 AD3d 611, 611 (2d Dept 2008)("it must clearly appear from the agreement itself that the parties intended a provision to operate as a condition precedent")(internal citations and quotations omitted).

For these reasons, the court finds that payment under the Loan Documents is not conditioned on the terms of the commitment letter being satisfied, and therefore Cliffcrest's argument to the contrary is without merit.

To the extent that Cliffcrest argues that CCB and, by extension, Peny, and its assignees are not holders in due course, the court notes that pursuant to UCC 3–302[1], a holder in due

course is (1) a holder, (2) who takes a negotiable instrument (3) for value, (4) in good faith, and (5) without notice that the instrument is overdue or has been dishonored, or of any defense or claim against it on the part of another. Regent Corp USA v. Azmat Bangladesh Ltd, 253 AD2d 134, 142 (1st Dept 1999). "The inquiry into 'good faith' as defined by UCC 3–302 is what, in fact, the holder actually knew" Id. Likewise, the notice requires a showing of "actual knowledge" Id. Significantly, the Court of Appeals has held that a bank, as the purchaser of negotiable papers, "owes no obligation to investigate the financial position of its transferor nor is it bound to be alert for circumstances which might possibly excite the suspicions of wary vigilance." Chemical Bank of Rochester v. Haskell, 51 NY2d 85, 93 (1980)(internal citations and quotations omitted).

Under this standard, it cannot be said that in order to qualify as a holder in due course, CCB, Peny or its assignees, were obligated to ensure that Cliffcrest complied with the conditions of the loan as set forth in the commitment letter.[10] Moreover, the record is devoid of any evidence that CCB, Peny or its assignees knew of any defense or claim with respect to the Notes, including the allegedly wrongful conduct that provides the basis for third party claims against the Sponsor and HPD, i.e. the failure to use the funds for renovation of the Building, such that would

[10]At oral argument, counsel for Cliffcrest argued that Peny (and its assignees) were obligated to review the loan documents, including the commitment letter, to ensure the conditions of the loan were met, and implied that the failure to do so precluded Peny (and its assignees) from being considered holders in due course. Counsel's argument is based on section 4.22 of Mortgage entitled, Loan Assignment, which states, *inter alia*, that the assignee of the Mortgage "shall be a party to this agreement and shall have all the rights and obligations of the mortgage and under any and all other guarantees, documents, instruments and agreements executed in connection herewith to the extent of the rights and obligations have been assigned by the mortgage." See Transcript, Oral Argument on Summary Judgment Motion, dated July 7, 2016, at 35-36. However, as stated above, this provision does not impose an obligation to ensure the borrower's compliance with the terms of the Loan Documents. Likewise, the Lender has no obligation to review the documents for the borrower.

raise an issue of fact as to the status of Peny or its assignees as holders in due course. In addition, contrary to Cliffcrest's position, neither CCB nor Peny or its assignees had an obligation to ensure that the money from the prior loan was properly used.

As for Cliffcrest's alternative argument that Peny's summary judgment motion is moot as Peny is no longer is the holder of the Loan Documents which were assigned after the motion was submitted, such argument is unavailing as under CPLR 1018, prior to substitution an assignee of a mortgage can proceed in the name of the original plaintiff. See Central Federal Sav., F.S.B. v. 405 W. 45th St., Inc., 242 AD2d 512, 512 (1st Dept 1997) ("an assignee of a mortgage can continue an action in the name of the original mortgagee, even in the absence of formal substitution").

Accordingly, plaintiff has established a prima facie right to foreclose by producing the mortgage, the assignment, if any, the unpaid note and evidence of default (CitiFinancial Co. (DE) v. McKinney, 27 AD3d 224 [1st Dept 2006]) and Cliffcrest has failed to come forward with evidence sufficient to raise a triable issue of fact as to a bona fide defense. See Nassau Trust Co. v. Concrete Products Corp., 56 NY2d 175, reargument denied 57 NY2d 674 (1984).

Therefore the only remaining issues concern whether plaintiff has adequately demonstrated compliance with RPAPL §§1303 and 1304, which contain notice requirements of the Home Equity Theft Prevention Act ('HETPA"). As for RPAPL §1304, which requires a lender to serve a borrower with notice of a mortgage foreclosure action at least 90 days before commencing the action, compliance with this statute was not a prerequisite to commencement of this action as the subject loan is not a "home loan" within the meaning of the section 1304.

A home loan is defined under RPAPL §1304(6) as "a loan ...in which: (i) The borrower is a natural person, (ii) The debt is incurred by the borrower primarily for personal , family or

household purposes; (iii) The loan is secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or a condominium unit, in either case, used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling; and (iv) the property is located within this state. Here, as the subject loan was made to Cliffcrest, a corporate entity and not a natural person and was not made for personal, family or household purposes, RPAPL§ 1304 are inapplicable. See Fairmont Capital LLC v. Laniado, 116 AD3d 998 (2d Dept 2014)(plaintiff is foreclosure action was properly granted summary judgment "where notice requirements of RPAPL 1304 were inapplicable..., since the subject loan did not satisfy the statutory definition of a 'home loan,' as that term was defined when [the] action was commenced")(internal citations omitted).

Furthermore, Cliffcrest's argument that Aries Financial LLC v. 12005 142nd Street LLC, 127 AD3d 900 (2d Dept), lv dismissed 26 NY3d 939 (2015) warrants a contrary finding is unavailing. In Aries Financial the court held that Banking Law § 6-l, which regulates high-cost home loans, made to a borrower who is "a natural person," applied even though the loan at issue was made to a limited liability company (LLC). Significantly, this holding was based on evidence that a representative of lender attempted, in bad faith, to avoid the application of the statute "by subterfuge" (within the meaning of Banking Law § 6-l[3]) by having the individual residential property owners transfer ownership of their property to the LLC. Here, as no similar circumstances exist which would provide a basis for concluding that Cliffcrest is not the actual borrower, the holding in Aries Financial is inapposite.

Next, as for Cliffcrest's argument that plaintiff failed to comply with RPAPL § 1306, which requires, *inter alia*, that foreclosing lenders to file a form with the superintendent of

financial services, as Cliffcrest first raised this issue in its July 20, 2017 letter, submitted after oral argument on the motion, this argument is not properly before the court and should not be considered. In any event, the argument is without merit as the statute is not applicable here. RPAPL § 1306 (1), provides that "[e]ach lender, assignee or mortgage loan servicer shall file with the superintendent of financial services (superintendent) within three business days of the mailing of the notice required by subdivision one of section thirteen hundred four of this article or subsection (f) of section 9-611 of the uniform commercial code the information required by subdivision two of this section." As to the requirement that those providing notice under RPAPL § 1304 must also file a notice with the superintendent of financial services, such filing requirement does not apply here for same reasons discussed above; specifically, the notice provisions of RPAPL § 1304 are inapplicable to this action.

As for New York's UCC § 9-611 (f), this section provides for notice to be given by "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." A cooperative interest is defined, in relevant part, under Article 9 of the UCC as "an ownership interest in a cooperative organization, which interest, when created is coupled with possessory rights of a proprietary nature in identified physical space belonging to the cooperative organization." Here, plaintiff's collateral is the entire building and is not coupled with any possessory rights of a cooperative nature.

Moreover, this section is of no relevance to this judicial foreclosure action, as it pertains only to the non-judicial disposition of collateral under UCC 9-610. See UCC§ 9-611(b)

(referring to notification before non-judicial disposition of collateral under UCC 9-610); Di Lorenzo, N.Y. Condo & Coop. Law § 9:11 (Nov. 2017 update)(additional notification requirement in UCC § 9-611(f) "affects sales without judicial proceedings of cooperative apartments pursuant to Article 9 of the Uniform Commercial Code"); see Arthur v. Carver Federal Savings Bank, 150 AD3d 447 (1st Dept 2017)(in proceeding challenging non-judicial foreclosure sale defendant's proof insufficient to show it complied with notice requirement of UCC 9-611(f)); Stern-Obstfedl v. Bank of America, 30 Misc3d 901 (Sup Ct NY Co. 2011)(noting that the non-judicial sale of collateral is required to comply with notice provisions under UCC 9-611(f) prior to the disposition of collateral shares).

As for RPAPL §1303, there is no dispute that the notice requirements of this provision apply to this foreclosure action involving residential property. At issue is whether plaintiff complied with these requirements, which compliance is a condition precedent to commencement of this action. See First Bank of Chicago v. Silver, 73 AD3d 162, 166 (2d Dept 2010).

RPAPL §1303(4) requires that within 10 days of service of the summons and complaint, the foreclosing party provide an additional notice to any tenant of a residential property. The notice must be in bold, fourteen-point type, printed on colored paper other than the color of the summons and complaint, and the title of the notice must be in bold, twenty-point type, and must be on its own page (see RPAPL 1303(4)). With regard to delivery of the notice, since the Building has more than five dwelling units, "a legible copy of the notice shall be posted on the outside of each entrance and exit of the building.[11]" Id.

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[11]Contrary to Cliffcrest's position, delivery of the notice to each tenant is not required as such requirement applies only to buildings with fewer than five dwelling units. See RPAPL § 1303 (4)("For buildings with fewer than five dwelling units, the notice shall be delivered to the tenant, by certified mail, return receipt requested, and by first-class mail to the tenant's address at the property if the identity of the tenant is known to the plaintiff, and by first-class mail delivered

Here, the record shows that on February 6, 2013, plaintiff efiled an amended affidavit of service stating that on January 30, 2013 at approximately 1:05 pm, (the same date that service of the summons and complaint and notice of pendency were served), the process server "served a true copy of the Notice to Tenants of Buildings in Foreclosure pursuant to Section 1303 of the [RPAPL] in Yellow by affixing same to the outside of all of the entrances and exits of the building located at 938 St. Nicholas Avenue, New York, New York." In addition, in his supplemental affirmation,[12] counsel for plaintiff submits a copy of the § 1303 Notice served, and states that the original, which he "personally prepared...was specifically printed on yellow colored paper before it was delivered to the process server with instructions to serve the Summons, Complaint, and Notice of Pendency[13] and to post or affix the § 1303 Notice in accordance with statute." He further states that "I believe our instructions were followed based on contemporaneous conversations with the process server and his reports to me concerning his success in completing service and affixing the § 1303 Notice at the Mortgaged Property."

Based on the foregoing, plaintiff has met its burden of demonstrating compliance with the notice requirements of RPAPL § 1303. See Aurora v. Loan Serv. LLC, 85 AD3d 95, 103 (2d Dept 2011)(holding that plaintiff satisfied its burden with respect to proper service of RPAPL 1303 notice with " affidavits of service establishing proper service on [the borrowers] of the

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to 'occupant'if the identity of the tenant is not known to the plaintiff").

[12]After oral argument, Cliffcrest efiled a letter dated July 20, 2016, and attached affidavits from 30 shareholders and tenants of the Building with respect to the Notice, and on September 20, 2016, plaintiff efiled a supplemental affirmation and exhibits. After a telephone conference with the parties, by interim order dated September 21, 2016, the court accepted both submissions.

[13]The record shows that an affidavit of service was filed stating that the summons and complaint and notice of pendency were served on a representative of Cliffcrest at its designated place for acceptance of service of process, i.e. Apartment 1B at the Building.

[notice] with the statutorily-required content, printed in the required type size on colored paper"). Thus, the burden shifts to Cliffcrest to "to rebut the presumption of proper service." Id.

In its supplemental opposition, Cliffcrest attaches affidavits of 30 shareholders/tenants of the Building. Of relevance to the issue of plaintiff's compliance with notice requirements of RPAPL § 1303, each aver that:

> I have never seen, nor I have I ever received any notification whatsoever, either by mail, positing or otherwise, from the Lender or any representative, or other entities, regarding the foreclosure in the above-captioned matter. I have never seen any postings at any times on the entrances or exits of my building, including but not limited to, in or around January 2013. Nor did I receive any notice or posting anywhere else that a foreclosure has been commenced.[14]

To rebut the presumption of service, a defendant must provide an affidavit containing "detailed and specific contradiction of the allegations in the process server's affidavit." Bankers Trust Co. Of California, N.A. v Tsoukas, 303 AD2d 343, 344 (2d Dept 2003). However, "the bare and unsubstantiated denial of receipt is insufficient to rebut the presumption of service created by affidavits of service." Aurora , 85 AD3d at 103; see also, Deutsche Bank Nat'l Trust Co. v. Hussain, 78 AD3d 989 (2d Dept 2010); H.C. Black Realty Co. v. State Div. of Housing and Community Renewal, 201 AD2d 432 (1st Dept 1994).

Here, the court finds that the affidavits of 30 shareholders/ tenants that they did not observe any posting of the notice are sufficient to raise issues of fact so as to require a hearing. See generally, Wells Fargo Bank v. Moza, 129 AD3d 946, 948 (2d Dept 2015)(hearing held based on defendant's affidavit in support of her motion to vacate judgment of foreclosure that she

[14]Certain of the affiants also state that their family members did not see the notice; however, these statements are hearsay to the extent they are intended to prove that the notice was not posted. See generally, Nucci v. Proper, 95 NY2d 597 (2001).

did not receive notices required by RPAPL §§ 1303 and 1304). Accordingly, a hearing regarding the issue of whether the RPAPL § 1303 notice was posted in compliance with the statute shall be held as directed below.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion for summary judgment is granted to the extent that the only remaining issue concerns whether the RPAPL § 1303 notice was served in accordance with the statute, and the determination of the motion is held in abeyance pending that outcome of such hearing; and it is further

ORDERED that a hearing shall be held on January 8, 2018, at 10:30 am, in Part 11. room 351, 60 Centre Street, New York, NY regarding the issue of whether the RPAPL § 1303 notice was posted in compliance with the statute, and the parties shall be prepared to go forward on that date, including by having all witnesses available to testify.

DATED: December 19 2017

J.S.C.
HON. JOAN A. MADDEN
J.S.C.