938 Nicholas Ave. Lender. LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.
2018 NY Slip Op 30628(U)
April 4, 2018
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**

938 NICHOLAS AVENUE LENDER. LLC,

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, defendant/third-party plaintiff 936-938 Cliffcrest Housing

Development Fund Corp ("Cliffcrest") moves for reargument of the court's decision and order dated December 19, 2017 ("the original decision"), and, upon reargument, vacating the original decision which granting summary judgment, except to the extent of finding that there were issues of fact as to whether plaintiff complied with the notice requirements of RPAPL § 1303 and set the issue down for a hearing.[1] Plaintiff opposes the motion and cross moves for sanctions.

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.

[1]The hearing has been completed, and the matter is *sub judice*.

("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").[2] 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

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[2]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.

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 Fleet,[3] 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, 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 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

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

application for the appointment of a temporary receiver, which the court granted by order dated March 17, 2015.[4]

During the pendency of this action there have been three assignments of the Loan Documents and rights thereunder. 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 the current plaintiff, 938 St. Nicholas Avenue Lender LLC.[5]

As noted in the original decision, 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 connection with this motion.[6] 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, and Cliffcrest subsequent attempts to assert affirmative defenses against Peny and its successors-in-interest have been denied by this court.

In the original decision, the court found that plaintiff had made a prima facie showing

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

[5]Coogans Bluff moved to substitute 938 St. Nicholas Avenue Lender LLC as plaintiff, which motion was granted by decision and order dated December 18, 2017.

[6]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.

entitling it to summary judgment 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. Moreover, the court rejected Cliffcrest's arguments in opposition that: (1) plaintiff 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 original summary judgment motion was made, (4) plaintiff has not met its burden of establishing that it is a holder in due course, and (5) plaintiff failed to comply with the notice requirements of RPAPL §§1304 and 1306. With respect to the issue of whether plaintiff complied with RPAPL § 1303, which requires the service of an additional notice of a foreclosure action involving residential property, as noted above, the court set the matter down for a hearing which has been completed and the matter is *sub judice.*

On this motion to reargue, Cliffcrest argues that the (a) the original decision misconstrued the applicability of RPAPL 1306 filing requirements and UCC 9-611 Notice requirements in light of plaintiff's failure to join necessary parties, (b) the court overlooked controlling principles of law and fact in finding that plaintiff is a holder in due course, as a matter of law, and (c) the court overlooked issues of fact of a bona fide defenses regarding fraud and standing.[7]

Plaintiff opposes the motion arguing, *inter alia*, that Cliffcrest's arguments are without

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[7]In its papers in response to plaintiff's cross motion for sanctions, Cliffcrest withdrew its argument, raised for the first time, that plaintiff did not obtain personal jurisdiction over defendant. At oral argument of the reargument motion, as the hearing was underway, Cliffcrest also withdrew, as moot, its argument that the hearing should address all jurisdictional defects, and not be limited to compliance with RPAPL § 1303.

merit and were previously addressed and rejected in the original decision and in prior decisions and orders. Plaintiff argues that under these circumstances, sanctions are appropriately imposed against Cliffcrest.

Discussion

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992).[8]

Under this standard, reargument is denied. With respect to the court's finding that plaintiff was not required to comply with RPAPL § 1306, as noted in the original decision, this section requires 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 [RPAPL 1304 (1)] 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, the court properly found that plaintiff was not required to comply with the notice requirements of RPAPL §1304, as the loan at issue is not a "home loan"[9]

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[8]Contrary to plaintiff's argument, as this action is e-filed, Cliffcrest's failure to submit all the underlying moving papers in support of its reargument motion is not a fatal defect. See Studio A Showroom LLC v. Yoon, 99 AD3d 632,632 (1st Dept 2012).

[9]Section 1304(6) defines a home loan subject to the provisions of the statute 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

since it was made to Cliffcrest, a corporate entity and not a natural person and as the loan was not made for personal, family or household purposes. See Fairmont Capital LLC v. Laniado, 116 AD3d 998 (2d Dept 2014)(plaintiff in 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).

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." The section does not govern the circumstances here, since, as stated in the original decision, the collateral in this case is the entire building and not a residential cooperative interest, which interest is defined under Article 9 of the UCC as an interest coupled with a possessory right of a proprietary nature.[10] The court further found that § 9-611 (f) was irrelevant in any event as the section pertains only to the non-judicial disposition of collateral under UCC§ 9-610, citing ,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-

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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.

[10]A cooperative interest is defined 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."

611(f) "affects sales without judicial proceedings of cooperative apartments pursuant to Article 9 of the Uniform Commercial Code").

As for Cliffcrest's argument that even though the collateral in this case is the entire building and not a residential cooperative interest loan, the requirements of RPAPL § 1306 and UCC § 9-611 are nonetheless applicable as the Building is occupied by tenant shareholders who hold proprietary leases and appurtenant stock certificates and was converted pursuant an HDFC non-profit housing entity for low-income tenants, such argument is without any legal basis.[11] In addition, Cliffcrest's position wholly ignores that the notice requirements of UCC § 9-611 apply only to nonjudicial proceedings. See UCC § 9-611(b) (referring to notification before non-judicial disposition of collateral under UCC § 9-610).

And, to the extent that Cliffcrest argues that the court should require that notice be provided in accordance with UCC § 9-610, as the legislative intent in enacting the additional notice requirements in foreclosure action was to protect the Building's tenants, such argument is unavailing as it is unsupported by the language the relevant statutes, from which court derives their meaning. See Majewski v. Broadalbin-Perth Central School, 91 NY2d 577, 583 (1998)(noting that "it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or

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[11]The cases relied on by Cliffcrest in support of its position are inapposite, as they do not address RPAPL 1306 or UCC § 9-611, and, in any event, involve issues regarding the nature of an interest in a cooperative apartment as opposed, to a building consisting of such interests. See Matter of State Tax Commissioner v. Shor, 43 NY2d 151 (1977)(involving judgment debtor's security interest in an individual cooperative owner's stock certificate and proprietary lease); Matter of Cramer, 71 NY2d 781 (1988)(addressing the nature of an interest in a cooperative apartment, in the context of a decedent's specific bequest of her shares in the apartment in her will); United Housing Foundation, Inc. v Forman, 421 US 837 (2002)(shares of stock in individual tenants' apartments did not constitute purchases of stock for the purposes of the Securities Act of 1933 and the Securities Exchange Act of 1934).

contradiction, there is no room for construction and courts have no right to add to or take away from that meaning") (internal citations and quotations omitted).

With regard to Cliffcrest's argument that since the shareholder tenants of Building are necessary parties to the foreclosure proceeding they are entitled to individual notice as provided by UCC § 9-610, such argument is without merit. While RPAPL § 1311 provides for the joinder of tenants since they "have an interest...in the property," it has been held that tenants are "'necessary' parties only in the sense that there subordinate interests could be adversely affected only if they were joined, and not in the sense of being indispensable." John Hancock Mut. Life Ins. Co. v. 491-499 Seventh Ave. Associates, 220 AD2d 208, 208 (1st Dept 1995).

Moreover, Davis v. Cole, 193 Misc2d 380 (Sup Ct NY Co. 2002), on which Cliffcrest relies, is not to the contrary. Davis, like the instant case, involved a foreclosure of a cooperative building, in which the tenant shareholders (and rent stabilized tenants) were not joined as parties. Following the foreclosure and sale, the building was purchased by the plaintiff/landlord. At issue in Davis were the rights of the tenant defendants after the building was purchased. Notably, however, and of relevance here, the court did not find that the foreclosure proceeding was defective based on the failure to provide notice to the tenant-defendants, or to join them as parties to the foreclosure proceedings. Instead, the court found that:

> Because of the failure to join these proprietary tenants as parties in the mortgage foreclosure proceeding... each tenant not named in the foreclosure proceeding continued to hold unextinguished interests, including a possessory right and a right of redemption .... To terminate such rights, the purchaser at a foreclosure sale may bring either a reforeclosure proceeding or a strict foreclosure proceeding.

Id at 382.

Next, as for Cliffcrest's argument that plaintiff is not a holder in due course, such

argument does not provide a basis for granting reargument. As noted in the original decision, pursuant toUCC 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).

As the court found in the original decision, 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.[12]

Furthermore, contrary to Cliffcrest's position, in finding that plaintiff was a holder in due

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[12]At oral argument of the summary judgment motion, 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 noted in the original decision, 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.

course, the court did not overlook a principle of controlling law as set forth in Miller-Francis v. Smith-Jackson , 113 AD3d 28 (1st Dept 2013), since that case is factually distinguishable from the instant one. Miller-Francis was an action to quiet title brought by a home owner who alleged she was a victim of a foreclosure rescue scam.[13] Defendant mortgagee, a lender and its nominee for recording purposes moved for summary judgment dismissing the complaint. The Appellate Division, First Department affirmed the trial court's denial of defendants' summary judgment motion finding that plaintiff provided evidence sufficient to raise a triable issue of fact as to whether the defendant mortgagee had actual or constructive notice of the underlying fraud scheme, including that a "straw buyer" signed the application for the loan for the first time at the closing. Moreover, the First Department noted that there was no evidence that the mortgagee examined the straw buyer's credit history or ability to pay prior to the closing, and that the appraisal, which overstated the value of the property, would have lead a reasonably prudent investor to investigate.

In contrast, here, as noted in the original decision, 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 or fraudulent 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 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.

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[13]As noted in Miller-Francis, 113 AD3d at 31, n. 1, "[f]oreclosure rescue scams... are often perpetrated by self-described 'experts' who prey upon vulnerable homeowners as foreclosure looms. The 'expert,' who offers to assist the homeowner in refinancing to avert foreclosure, instead dupes the owner into transferring to the expert the deed to his or her home. Eventually, the 'expert' sells the property to a 'straw buyer' in order to reap a profit."

Finally, Cliffcrest's argument that there is an issue of fact as to St Nicholas' standing is without merit. It is well established that "[e]ither 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, and the mortgage passes with the debt as an inseparable incident." See U.S. Bank, N.A. v. Collymore, 68 AD3d 752 (2d Dept 2009). Here, in connection with its decision and order dated December 17, 2018, which granted plaintiff's motion to substitute St. Nicholas as plaintiff in this action, the court found that there was sufficient evidence that St. Nicholas was in possession of the Note, and since Cliffcrest provides no evidence to the contrary, there is no basis for granting reargument on the ground of lack of standing.

That said, however, sanctions are not warranted and plaintiff's cross motion is denied.

Conclusion

In view of the above, it is

ORDERED that Cliffcrest's motion for reargument is denied; and it is further

ORDERED that plaintiff's cross motion for sanctions is denied.

DATED: April 4, 2018

ENTER:

J.S.C.

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