Charlev, LLC v 128 W. 95th St., LLC
2018 NY Slip Op 31083(U)
May 22, 2018
Supreme Court, New York County
Docket Number: 850255/2015
Judge: Judith N. McMahon
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At the Foreclosure Motion Part of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York on the 22 of May, 2018

PRESENT: HONORABLE JUDITH N. McMAHON
JUSTICE

CHARLEV, LLC,

Plaintiff,

INDEX No. 850255/2015

- against -

ORDER

128 WEST 95th STREET, LLC, KENNETH L. COHEN, GABRIELLA D. ROWE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, BANK OF AMERICA, N.A., SUCCESSOR TO FIRST REPUBLIC BANK,

Defendant.

Proposed Intervenor's, Columbus School, LLC ("Columbus"), Order to Show Cause, seeking to intervene and to dismiss is hereby granted to the extent that Columbus is granted leave to intervene, but denied as to dismissal. Plaintiff's Cross-Motion is denied.

This is an action to foreclose on a property located at 91-101 North Tower Hill Road, Millbrook, NY 12545 (the "Millbrook Property") and another property located at 128 West 95th Street, New York, New York 10025 (the "95th Street Property").

Plaintiff seeks to foreclose on a Consolidation Extension and Modification Agreement,

dated November 14, 2007 ("Plaintiff's 95th Street Loan"). Plaintiff's 95th Street Loan was originally executed between First Republic Bank ("FRB"), as lender, and 128 West 95th Street, LLC, as borrower, in the principal amount of $5,740,000.00. The collateral for Plaintiff's 95th Street Loan was the 95th Street Property ("Plaintiff's 95th Street Mortgage").

Additionally, Plaintiff seeks to foreclose on a Modification Agreement of Collateral Mortgage, dated November 14, 2007 ("Plaintiff's Millbrook Loan"). Plaintiff's Millbrook Loan was originally executed between FRB, as lender, and Defendants Gabriella D. Rowe ("ROWE") and Kenneth L. Cohen ("COHEN"), as borrowers, in the principal amount of $5,740,000.00. The collateral for Plaintiff's Millbrook Loan was the Millbrook Property ("Plaintiff's Millbrook Mortgage").

On or about November 8, 2012, Columbus lent $750,000.00 to the Mandell School, LLC ("Mandell"), whose principals were ROWE and COHEN. The purpose of the loan was to meet the financial obligations of Mandell. On or about January 8, 2013, the principal amount of the loan was increased to $1,490,000.00 (the "Columbus School Loan"). ROWE and COHEN guaranteed the loan jointly and severably. As additional security for the loan, ROWE and COHEN entered into a mortgage in favor of FRB against the Millbrook Property (the "Columbus School Mortgage") . In conjunction with the Columbus School Loan and the Columbus School Mortgage, Columbus was given the right to cause FRB to foreclose the Columbus School Mortgage and Columbus would be entitled to collect one half of all amounts recovered pursuant to a Columbus School Mortgage foreclosure, subject to certain restrictions, most notably that the Columbus School Loan is the only existing and unsatisfied

mortgage on the Millbrook Property.

On or about January 8, 2013, FRB, Columbus, Mandell, ROWE, and COHEN executed a side agreement in conjunction with the Columbus School Loan and Columbus School Mortgage (the "Side Agreement") which delineated additional rights and obligations of the parties pursuant to the Columbus School Loan and Columbus School Mortgage.

The Side Agreement granted Columbus the right(s) to: request that FRB demand ROWE and COHEN to retain a broker to market and sell the Millbrook Property, and request that FRB enforce the Columbus School Mortgage. FRB's enforcement of the Columbus School Mortgage was curtailed such that FRB agreed that it would not take action without the prior written consent of Columbus. The Side Agreement also stated that no party may assign, delegate or transfer any of the respective rights without prior written consent of all parties.

Mandell was unable to meet its payment obligations under the Columbus School Loan. On or about September 12, 2013, Columbus received a letter from FRB that Mandell was restructuring its liabilities. As part of such restructuring, Mandell would be assigning its obligations pursuant to the Columbus School Loan to ROWE and COHEN, and ROWE and COHEN would be assuming all of Mandell's obligations pursuant to the Columbus School Loan.

On or about September 25, 2013 the parties executed the necessary documents for ROWE and COHEN to assume all of Mandell's obligations under the Columbus School Loan

(the "Consent Agreement"), thus releasing Mandell from liability.

Contemporaneously, the parties executed an agreement, whereby COHEN was also released from liability under the Consent Agreement/Columbus School Loan in exchange for $50,000.00. This left ROWE as the only remaining obligor under the Consent Agreement/Columbus School Loan.

On or about May 1, 2014, ROWE filed for Chapter 7 bankruptcy. Although an automatic stay usually accompanies a bankruptcy filing, the length of such a stay associated with ROWE's filing is unclear to this Court, despite the Court requesting clarification from the parties on at least two appearances.

Plaintiff was formed as a domestic limited liability company on or about February 12, 2015.

On or about February 18, 2015, Bank of America, N.A., ("BOA") successor in interest to FRB, assigned its rights and interests in Plaintiff's 95th Street Loan and Plaintiff's Millbrook Loan to Plaintiff (the "Charlev Assignment").

Columbus asserts that neither BOA, nor FRB ever contacted Columbus or sought permission from Columbus concerning the Charlev Assignment.

Pursuant to ROWE's ongoing bankruptcy filing, on or about August 12, 2015, Columbus and ROWE executed a Settlement Agreement which was So Ordered by the Bankruptcy Court (the "Bankruptcy Settlement").

The Bankruptcy Settlement restructured ROWE's payments to Columbus under the Columbus School Loan. The Bankruptcy Settlement stipulated that ROWE would execute a quitclaim deed to Columbus for the Millbrook Property. The Bankruptcy Settlement also required ROWE to cause Defendant 128 West 95th Street, LLC to execute a quitclaim deed to Columbus for the 95th Street Property.

Eight days after Columbus and Rowe signed the Bankruptcy Settlement, on or about August 20, 2015, Plaintiff filed the instant foreclosure action. Columbus was not a named party to the action.

On October 29, 2015, the Bankruptcy Court So Ordered the Bankruptcy Settlement.

In or about October 2015, the quitclaim deeds were delivered to Columbus for the Millbrook Property and the 95th Street Property.

In an Order, dated July 26, 2017, the Honorable Shlomo Hagler granted Plaintiff's motion seeking an Order of Reference.

Columbus now seeks leave to intervene, seeks to vacate the Order of Reference, and to

dismiss the action.

Plaintiff has cross-moved, seeking costs and expenses for alleged unnecessary, frivolous motion practice by Columbus.

"Upon timely motion, any person shall be permitted to intervene in any action...when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment." *CPLR 1012.*

RPAPL 1311 provides that, "Each of the following persons, whose interest is claimed to be subject and subordinate to the plaintiff's lien, shall be made a party defendant to [a foreclosure] action: every person having an estate or interest in possession, or otherwise, in the property...every person having any lien or incumbrance upon the real property which is claimed to be subject and subordinate to the lien of the plaintiff." *RPAPL 1311.*

"The statute is a codification of the equitable principle that persons holding title to the premises or acquiring any right to or lien on the property subsequent to the mortgage should be made parties in the foreclosure action." *New Falls Corp. v. Bd. of Managers of Parkchester N. Condo., Inc., 10 A.D.3d 574, 782 N.Y.S.2d 425 (N.Y.A.D. 1st Dept. 2004).*

A point of contention between the parties is whether, at time Plaintiff commenced action, it had notice of Columbus' ownership interest. *Id.*

Charles Alpert ("Alpert") is the sole managing member of Plaintiff Charlev, LLC. Alpert testified that BOA emailed him documents relating to the Millbrook Mortgage prior to the Charlev Assignment, but that he never read any of them. *Alpert EBT page 31.*

Alpert testified that he did not perform any due diligence prior to the Charlev Assignment. *Id at page 38.* Alpert testified that no one else performed due diligence prior to the Charlev Assignment. *Id at page 39.* Alpert testified that no title search was performed prior to the Charlev Assignment. *Id at page 40.* Alpert testified that no due diligence was performed because he did not have time to perform any due diligence. *Id at page 41.*

Alpert testified that BOA sent him documents after the Charlev Assignment, that he never read such documents, but instructed his attorney to read them. *Id at page 45.*

Alpert testified that sometime after the Charlev Assignment he knew about ROWE's bankruptcy filing, but that he took no action whatsoever either to monitor or intervene in regards to ROWE's bankruptcy case. *Id at page 73.*

Alpert testified that at no time did he ever know who owned the Millbrook Property, either before or since the Charlev Assignment. *Id at page 99.*

Plaintiff deviated substantially from the due diligence it ordinarily performed when considering an opportunity to buy an interest in real estate, to the point of remaining blatantly ignorant of information provided by its predecessor in interest prior to and after the Charlev

Assignment, as well as information publically available pursuant to ROWE's bankruptcy filing. ***Id at page 40-41.***

As of at least October 2015, pursuant to the Bankruptcy Settlement, Columbus was the owner of the Millbrook Property and the 95th Street Property. Plaintiff's motion seeking an Order of Reference was filed on or about December 2015. The Order of Reference granted in this action on July 26, 2016, must be vacated pursuant to CPLR 5015 (a)(3). Columbus asserts that it was the owner of the Millbrook Property and the 95th Street Property pursuant to the Order of the Bankruptcy Court and therefore is a necessary party to the instant action.

Columbus' OSC also seeks to dismiss the action pursuant to CPLR 3211(a) (1) or (3). Subsection (1) is dismissal on the ground that a defense is founded upon documentary evidence and subsection (3) is that the party asserting the cause of action has not legal capacity to sue.

When considering, "a CPLR 3211(a)(1) motion to dismiss, [the Court] must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Dismissal is warranted only if the documentary evidence establishes a defense to the asserted claims as a matter of law. Thus, defendant bears the burden of demonstrating that the proffered correspondence conclusively refutes plaintiff's factual allegations." ***Kolchins v. Evolution Markets, Inc., 2018 WL 1524710 (2018).***

Plaintiff asserts that the documents Columbus relies upon are unrecorded. New York Real Property Law Section 291 holds that all transactions effecting the ownership of real property must be recorded in the office of the clerk of the county where such real property is situated, or such transactions shall be deemed, "void as against any person who subsequently [transacts effecting the ownership of said real property]." *N.Y. Real Prop. Law 291.* Therefore, it is not clear, as a matter of law, whether the documents relied upon by Columbus could have any effect on FRB's assignment to BOA and the subsequent Charlev Assignment since they have never been recorded.

Additionally, Columbus has made no showing that any of the restrictions and condition precedents to Columbus' rights pursuant to the Columbus School Loan, Columbus School Mortgage, and the Side Agreement have been satisfied. Without such a showing, it is not clear that Columbus is entitled to any of the relief sought, other than being a necessary part to the action owing to its ownership interest.

It is hereby

ORDERED that Proposed Intervenor's, Columbus School, LLC, Order to Show Cause, seeking to intervene is hereby granted, and it is further

ORDERED that Proposed Intervenor's, Columbus School, LLC, Order to Show Cause, seeking to vacate the Order of Reference granted on July 26, 2016 and entered on July 27, 2016 is hereby granted, and it is further

ORDERED that Proposed Intervenor's, Columbus School, LLC, Order to Show Cause, seeking to dismiss is hereby denied, and it is further

ORDERED that Plaintiff's Cross-Motion seeking costs in the form of reimbursement for actual expenses reasonably incurred and attorney's fees resulting from frivolous motion practice is denied.

ORDERED that all parties shall appear for a conference on this matter on July 17, 2018 at 60 Centre Street, room 422, at 2:15 P.M.

ENTER:

5/22/18

J.S.C.

Hon. Judith N. McMahon
J.S.C.