Progressive Credit Union v Gleizer
2018 NY Slip Op 33309(U)
December 6, 2018
Supreme Court, Kings County
Docket Number: 507805/2017
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM: COMMERCIAL PART 8

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PROGRESSIVE CREDIT UNION,

Plaintiff, Decision and order

- against - Index No. 507805/2017

mot # 3

RUDOLPH GLEIZER a/k/a RUDOLF GLEIZER; RAM REALTY CORP;IRINA GLEIZER,MAX GLEIZER; ESTATE OF MICHAEL GLEIZER; NEW YORK CITY DEPARTMENT OF FINANCE;THE CITY OF NEW YORK (Environmental Control Board); THE CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION; PARKING VIOLATIONS BUREAU; THE STATE OF NEW YORK;THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; R & M LAUNDRY, INC.; CJ LAUNDROMAT INC. a/k/a CJ LAUNDROMAT a/k/a KINGS LAUNDRY BASKET,

Defendants, December 6, 2018

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §§1018 and 1021 seeking substitution of parties, an amendment of the caption pursuant to CPLR §3025, and a substitution of the attorneys of record. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On January 31, 2005, Rudolph Gleizer signed a note borrowing $300,000 from Progressive Credit Union. Rudolph Gleizer also signed a guaranty, as the president and secretary of RAM Realty Corporation, on behalf of the company. The loan was secured by a mortgage concerning property located at 394 Kings Highway, Brooklyn, NY. Progressive instituted a foreclosure action due to

non-payment of the loan and sought summary judgment and an order of reference. The defendant, Max Gleizer, opposed the motion arguing that Rudolph Glazer did not have the authority to sign the guaranty at the time because he was not the president of RAM Realty at the time and that therefore the guaranty was invalid.

This Court granted summary judgment for Progressive Credit Union because it was undisputed that there was a loan between the parties, a default, and the proper parties had been sued. Defendant produced no evidence that Rudolph Glazer did not have authority to act as president of RAM Realty. Indeed, a statement submitted by the defendant seemed to dispute the defendant's attorney's statement that "RAM Realty was always owned and controlled by Michael Glazer" (father of Max, since deceased). Therefore, there was no dispute of material fact, and summary judgment was appropriate.

The primary issue at hand is the substitution of parties pursuant to CPLR §§1018 and 1021. Section 1018 states that "upon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action" (id). In the practice commentaries, there is the following further clarification "CPLR 1018 addresses the situation in which a party transfers her interest in the subject

matter of the action to another person while the action is pending, as, for example, by assignment of the claim . . . or conveyance of the relevant property" (id). In particular, in this case, Viand Hospitality LLC (hereinafter referred to as "Viand") moves seeking to substitute it for Progressive Credit Union (hereinafter referred to as "Progressive") as the plaintiff, to substitute Schlesinger LLP in place of Cullen and Dykman LLP as attorneys of record, and provide any other relief the Court deems appropriate. BOn or about July 31, 2018, Progressive sold the note and mortgage to Viand, and therefore Viand asserts that Progressive has no further interest in the action. The Plaintiff points out that there will be no delay in prosecution of this action or any prejudice to the parties as a result of the substitution.

The Defendant, Max Gleizer (hereinafter referred to as "Defendant or "Gleizer") opposed this motion on several grounds. Before addressing the primary issue of substitution on its face, the defendant raises various objections regarding his liability for the legal costs associated with the foreclosure and legal action. First, the defendant asserts that he received no notice before the assignment by Progressive. Secondly, the defendant insists that the assignment should not prevent the property from closing. He demands that the Court should either order the

issuance of a payoff later with only the principal and interest included and any reasonable legal fees. Defendant points to the fact that as of March 3, 2018, the legal costs incurred by Progressive amounted to a mere $500 and subsequently rose to the sum of $17,719 by the end of 2017. The defendant brings proof of this amount based on a document from Cullen & Dykman LLP with the above figure of $17,719. The defendant claims that these fees are unreasonable because all that occurred to substantiate the amount demanded was summary judgment motion practice and the matter now before the Court. Lastly, the defendant claims that the only reason the mortgage was not satisfied is due to issues relating to the estate of Michael Gleizer, the owner of RAM Realty Corporation and the relevant property.

Specifically, the defendant points to the fact that there was an administrator appointed and probate commenced based on the "purported" last will and testament of Michael Glazer. Defendant claims that this will is not valid and filed objections accordingly in New York and Florida Courts. Following these filings, a Surrogate Court ordered the sale of the property on August 20, 2018. Pursuant to the order of sale, a buyer entered into a contract to purchase the property, and the defendant agreed to pay off the mortgage before distribution. Therefore, the defendant asserts that if he had notice of the pending

assignment, he would have advised Progressive and its attorneys of his intention to pay off the mortgage at closing. The defendant stresses that he should not be obligated to pay any legal fees associated with the assignment or the cost of bringing the motion because all costs stemmed from the lack of notice.

The defendant cites to several cases to support the notion that he is not obligated for the legal costs. In particular, the Defendant cites to Kenneth Pregno Agency., Ltd. v. Letterese 112 A.D.2d 1032, 492 N.Y.S.2d 824 (2nd Dept 1985), where the court established several factors to consider in determining reasonable attorney's fees. These factors are whether the fees are expressly provided for in the mortgage, whether they bore a reasonable relationship to the unrecovered principal, and the time and effort expended in prosecuting the foreclosure action. Additionally, the defendant claims the Court should place great weight on policy considerations of an owner redeeming his property against any time spent or effort expended in prosecution. The defendant cites a 2005 decision of this Court as support for this proposition (see, NYCTL 1998-1 Trust v. Oneg Shobbos Inc.,8 Misc 3d 645, 800 NYS2d 808 [Supreme Court Kings County 2005]). While the defendant accurately presents the holding of this case, the appeals court subsequently held this proposition is incorrect (see, NYCTL 1998-1 Trust v. Oneg

Shabbos, Inc., 37 AD3d 789, 830 NYS2d 763 [2d Dept., 2007]). The Appellate Court remarked that "the Supreme Court erred in determining that consideration of the owner's equitable right of redemption *alone* required a reduction of the legal fees" (id). Ultimately, the Appellate Court remanded for further determination stating, "the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered" (Id at 765). Thus, this Court will consider whether the legal fees are reasonable under the circumstances based on the factors cited above. This determination will happen at a subsequent proceeding where each party will have an opportunity to submit evidence supporting their position.

Turning to the primary issue, substitution of parties, Viand responded to the above motion by the defendants, by reiterating that the courts generally allow for the substitution of parties when there has been a transfer of interest (see, Medallion Auto Inc. v. Sanders, 272 AD2d 85, 707 NYS2d 322 [1st Dept., 2000]). Viand points out that Progressive had no obligation to inform the defendant of the transfer of the assignment. The note contained a clause expressly authorizing the lender to transfer the mortgage, and the buyer waived any prior notice of the transfer (see Viand's Motion-Exhibit A- Article 13-Transfer). In general,

"[a]bsent a provision in the mortgage instrument restricting transfer . . . a mortgagee may assign its mortgage to another party" (Culhane v. Aurora Loan Services of Nebraska, 708 F.3d 282, 292 [1st Cir. 2013]). In THIS case, there is a provision explicitly allowing transfer without notice whose existence the defendant has not disputed. Additionally, Federal laws which require lenders to give notice to borrowers regarding assignments of mortgages generally only apply in a residential context (see, The Real Estate Settlements Procedure Act, 12 USC §2601 (a); see also, Patriot Nat. Bank v. Amadeus B, LLC, 2010 WL 4272603, at *3 (N.Y. Sup.,2010) [internal citations omitted]("TILA and RESPA do not apply to credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes). The defendant, in this case, agrees that this was a commercial mortgage foreclosure (see Defendant's Opposition, ¶ 12). Viand further raises issues regarding the Surrogate Court order and legal fees raised by Gleizer. Viand contends that any agreement between a third party and Gleizer, even if the agreement requires that the mortgage be paid in full, should not affect the matter of the substitution of parties or impose any obligations on Progressive or Viand (see Viand's reply motion, ¶ 14). Viand asserts that the amount owed or due is not a matter before the Court and can be decided at a later proceeding. At that time,

Gleizer will be able to submit evidence and dispute any legal fees which he feels are unreasonable. Thus, the issue is whether the Court should grant the motion for substitution of parties when the amount owed is under dispute.

In Citibank, N.A. v. Van Brunt Properties,LLC, 95 AD3d 1158, 945 NYS2d 330 [2d Dept., 2012], the held that the Supreme Court should have granted the plaintiff's motion for the substitution of parties even prior to a motion for judgment of foreclosure. However, the Court is not required to grant a motion for substitution and may deny a plaintiff's request if the defendant can demonstrate prejudice (NationsCredit Home Equity Services v. Anderson, 16 AD3d 563, 792 NYS2d 510 [2d Dept., 2005]). For example, in Melcher v. Greenberg Taurig LLP, 44 Misc. 3d 1224(A), 998 N.Y.S.2d 307 [Supreme Court New York County 2014], an individual plaintiff filed a motion to substitute a LLC as plaintiff in his stead. The court denied the motion citing the fact that the proposed substitution would prejudice the defendants "by shifting the risks of litigation to a shell entity, making plaintiff less accessible to discovery, and allowing Melcher, a non-party, to continue to direct the litigation through his alter ego" (id). The defendant insists that allowing substitution of Viand in place of Progressive opens him up to the possibility of being liable for unreasonable legal

fees because he does not know what fees are part of the assignment. However, this fear is unfounded. As Viand contends, and the court agrees, the matter of legal fees is a matter for a later motion regarding judgment on foreclosure. At that point, the defendant will have the opportunity to submit evidence regarding who is liable for the legal fees associated with the defendant's default. The defendant has not provided any clear reason why the court should not grant Viand's motion for the substitution of parties (see, Mortgage Electronic Registration Systems, Inc. v. Holmes, 131 AD3d 680, 17 NYS3d 31 [2d Dept., 2015]).

Lastly, Gleizer claims that he should not be liable for any legal fees associated with the assignment and with the cost of bringing the motion because Viand and Progressive could have avoided all of the fees by notifying him of the assignment (see Defendant's Opposition, ¶ 9). However, this is a matter that can be decided presently based on the clear provision in the note cited by Viand. The provision makes it clear that Progressive had no obligation to inform Gleizer of the assignment. Therefore, the provision (which as stated above-the defendant does dispute) provides for the possibility that Gleizer is liable for the legal fees which he claims are Progressive's obligation. Whether Gleizer is obligated for these fees is a matter which

should be left for a later proceeding when a motion for judgment of foreclosure of sale is introduced.

In conclusion, the Court hereby grants Viand's motion for substitution of parties and postpones a decision on all legal fees and other related costs to a proceeding on foreclosure. At that subsequent proceeding, both parties will have the opportunity to submit evidence defending their position.

So ordered.

ENTER:

DATED: December 6, 2018
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC