

80P2L LLC v U.S. Bank Trust, N.A.
2018 NY Slip Op 33339(U)
December 20, 2018
Supreme Court, New York County
Docket Number: 153849/2015
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

-----X INDEX NO. 153849/2015

80P2L LLC,

Plaintiff,

MOTION SEQ. NO. 001, 002

- v -

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 139

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 131, 132, 133, 134, 135, 136, 137, 138, 140, 141

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motions are decided as follows.

In this declaratory judgment action, plaintiff 80P2L LLC moves (motion sequence 001), pursuant to CPLR 3212, for summary judgment: 1) on its complaint; 2) declaring that it has priority over defendant U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, on the property known as 80 Park Avenue, Unit 2L, New York, New York; 3) declaring that the mortgage by Michelle Hipshman Zar in favor of Washington Mutual Bank, N.A. recorded in the New York City Register's Office on April 18, 2015 at CFRN 2005000221020 was improperly recorded; 4) striking the mortgage from the record; and 5) for such other relief as this Court deems proper.

In motion sequence 002, defendant moves 1) pursuant to CPLR 3212, for summary judgment dismissing the complaint; 2) declaring that any interest in the apartment claimed by plaintiff is subordinate to defendant's judgment of foreclosure and sale dated March 28, 2016 and filed in the New York County Clerk's office under Index Number 810027/12 on May 9, 2016 ("the foreclosure judgment") or, in the alternative; 3) declaring that an equitable lien superior to any claimed interest by plaintiff arose against the apartment and in favor of defendant based on the foreclosure judgment; and 4) for such other relief as this Court deems just and proper. Doc. 42. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On or about March 18, 2005, Michelle Hipschman Zar ("Zar") purchased unit 2L ("the apartment") at the 80 Park Avenue Condominium ("the condominium"). The apartment was identified as Block 869, Lot 1216. In connection with the purchase of the apartment, Zar took out a mortgage from Washington Mutual Bank ("WMB") in the amount of \$361,200 ("the mortgage"). Docs. 6 and 8. The mortgage was recorded by the Office of the City Register ("the City Register") on April 18, 2005 as CFRN 2005000221020. Doc. 8.

In 2008, JPMorgan Chase Bank, N.A. ("Chase") acquired certain assets and liabilities of WMB, including the mortgage, from the Federal Deposit Insurance Corporation ("FDIC"), which had acted as receiver for WMB. Doc. 90.

In September 2011, the Board of Managers of the condominium ("the Board") filed a lien against the apartment for unpaid common charges ("the lien"). In January 2014, the condominium commenced an action, under New York County Index Number 150651/14,

seeking to foreclose the lien, resulting in a judgment of foreclosure entered September 5, 2014.

Doc. 91. On December 31, 2014, while the lien action was pending, Chase assigned its interest in the mortgage to defendant, as Trustee for LSF9 Master Participation Trust (“LSF9”), the current mortgage holder. Doc. 93. The assignment from Chase to LSF9 was recorded on June 2, 2015 under CRFN 2015000185248. Doc. 93. The successful bidder at the auction assigned the apartment to plaintiff, which now owns it, in February 2015. Doc. 92. Plaintiff recorded the deed with the City Register in February 2015 under CRFN 2015000065239. Doc. 92. In the foreclosure judgment dated March 28, 2016 and entered May 9, 2016, this Court (Kenney, J.) directed that defendant could sell the premises in order to discharge the mortgage. Doc. 105.

On November 15, 2017, plaintiff commenced the captioned action seeking a declaration that the mortgage is void as against plaintiff’s interest in the property since it was not properly acknowledged, and therefore was not in recordable form. Docs. 1 and 6. Plaintiff also sought to bar any person or entity from claiming an interest in the apartment. Docs. 1 and 6.

Chase joined issue by its verified answer filed June 4, 2015. Doc. 19. In its answer, it asserted, *inter alia*, a counterclaim that, if the mortgage was not duly recorded, it has an equitable lien dating back to March 18, 2015, the date Zar executed the mortgage. Doc. 47.¹

Plaintiff and defendant now move, under motion sequences 001 and 002, respectively, for the relief set forth above. Docs. 42 and 87.

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law on the undisputed facts. *See Winegrad v New York Univ. Med. Ctr.*,

¹ Defendant was substituted for Chase as defendant pursuant to so-ordered stipulation entered September 16, 2016. Doc. 32.

64 NY2d 851, 853 (1985). The movant must produce sufficient evidence to eliminate any issues of material fact. *Id.* If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. *See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff's Motion for Summary Judgment (Motion Sequence 001)

Here, plaintiff has established its prima facie entitlement to summary judgment by submitting, inter alia, the mortgage documents filed with the New York County Clerk (Doc. 89), which reflect that the mortgage was not properly acknowledged as required by Real Property Law section 309-a(1). Indeed, as plaintiff stresses, defendant concedes that, if the mortgage lacked the proper acknowledgment, it would suffer from a “glaring defect rendering [it] unrecordable.” Doc. 130 at p. 4.

However, in opposition to plaintiff's motion, defendant submits sworn affidavits of several individuals who attest to the fact that the original mortgage bore a notary stamp. These include, inter alia, Trey Conner, a title curative analyst employed by defendant's attorney-in-fact, who submits “a copy of the [m]ortgage made from the ink original document” which contains the notary stamp of Jasmine Hahn Cordova. Doc. 61, at par. 7; Doc. 65. Joseph G. Devine, Jr. of Chase submits an affidavit which attaches a mortgage containing Cordova's notary stamp. Docs. 70-71. Richard Icklan, President of Lex Terrae Ltd. (“Lex”), a licensed title insurance producer, submits

an affidavit in which he states that, on March 18, 2005, Lex acted as an agent for Zar's title insurer in connection with Zar's purchase of the apartment and Cordova notarized the mortgage at the closing. Doc. 74. Icklan also submits a copy of the mortgage containing Corova's notary stamp, which he attests was on the mortgage submitted for recording. Doc. 74, 76.

Cordova, too, submits an affidavit attesting to the fact that she notarized the mortgage. Doc. 77. She states, inter alia, that she has never notarized a signature unless the signator was known to her, signed in her presence, and the person acknowledged that the signature was made in the capacity reflected in the document signed. Doc. 77 at par. 15. She reviewed the notary stamp on the mortgage submitted by Lex and avers that she notarized Zar's signature at the closing on March 18, 2015. Doc. 77, at par. 14.

Given these affidavits, this Court finds that defendant has raised a triable issue of fact and thus plaintiff's motion must be denied. The Court of Appeals has held that:

a party can rely on custom and practice evidence to fill in evidentiary gaps "where the proof demonstrates a deliberate and repetitive practice by a person in complete control of the circumstances" (*Rivera v Anilesh*, 8 NY3d 627, 634 [2007] [internal quotation marks and citation omitted]), thereby creating a triable question of fact as to whether the practice was followed on the relevant occasion.

Galetta v Galetta, 21 NY3d 186, 197 (2013).

This Court finds that Cordova's representations that she never notarized a signature unless the signator was known to her, that a signator would only execute a document in her presence, and that a signator always acknowledged that his or her signature was made in the capacity reflected in the document signed (Doc. 77 at par. 15) are sufficient to raise a triable

issue as to whether she followed these practices on the day of the closing. *Cf. Galletta*, 21 NY3d at 197.

Defendant's Motion For Summary Judgment (Motion Sequence 002)

Since questions of fact exist regarding whether the mortgage was properly acknowledged, defendant's motion for summary judgment is also denied.

This Court finds that the remaining arguments by the parties are either without merit or need not be addressed in light of the foregoing conclusions.

In light of the foregoing, it is therefore:


ORDERED that the motion by plaintiff 80P2L LLC for summary judgment (motion sequence 001) is denied; and it is further

ORDERED that the motion by defendant U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust for summary judgment (motion sequence 002) is denied; and it is further

ORDERED that the parties are to appear for a compliance conference on January 22, 2019 at 80 Centre Street, Room 280 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

12/20/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE