Acres Loan Origination LLC v 170 E. 80th St. Mansion, LLC
2021 NY Slip Op 32477(U)
November 19, 2021
Supreme Court, New York County
Docket Number: Index No. 850126/2021
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS KAHN, III **PART** 32

Justice

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ACRES LOAN ORIGINATION, LLC,

Plaintiff,

- v -

170 EAST 80TH STREET MANSION, LLC,KATESHIN GALLERY LLC,KATE SHIN, THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN DOE NO I TO JOHN DOE NO. XX

Defendant.

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INDEX NO. 850126/2021

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion is determined as follows:

The within matter is an action to foreclose on an amended, consolidated and restated mortgage encumbering a premises located at 170 East 80th Street, New York, New York. The mortgage originally secured an indebtedness of $23,000,00.00, but according to the complaint the principal balance is $18,000,000.00. Defendant 170 East 80th Street Mansion, LLC ("Mansion") is the owner and mortgagor of the premises. Defendant Kate Junghee Shin ("Shin") is the sole member of Mansion. Defendants Shin and Kateshin Gallery, LLC ("Kateshin") are guarantors of the loans secured by the mortgage. Shin is also the sole member of Kateshin.

Plaintiff commenced this action on May 1, 2021 by filing a complaint which alleged two causes of action for: foreclosure of the amended, consolidated and restated mortgage as well as an award of attorney's fees.

Defendants Mansion, Shin and Kateshin move, pre-answer, to, *inter alia*, dismiss pursuant to: [1] CPLR §3211[a][1], [2] and [7]; [2] the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (L. 2020, c. 381); [3] the COVID-19 Emergency Protect Our Small Business Act of 2021 (L. 2021, c. 73); [4] Administrative Order 159/21; [5] RPAPL §1303 and §1304 and, in the alternative; [6] a stay pursuant to CPLR §3408. Plaintiff opposes the motion.

The branch of the motion to dismiss the complaint pursuant to CPLR §3211[a][7] and §3013 as insufficiently pled is denied (*see J.P. Morgan Mtge. Acquisition Corp. v South Homes, Inc.*, 189 AD3d 1381 [2d Dept 2020]; *Agin v Krest Assocs.*, 157 Misc. 2d 994 [Sup Ct NY Cty 1992]). "Even if the pleadings 'reek of miserable draftsmanship,' if they state any cause of action, no motion under CPLR 3211 (a) (7) will stand (*id at* 997, *citing* Siegel, NY Prac § 208, at 301 [2d ed 1991]). The complaint, as

pled, gave Movants sufficient notice of the claims thereunder and no proof was proffered that conclusively refuted same or established a defense as a matter of law.

Defendants' reliance on RPAPL §1304 is misplaced as it is inapplicable to this action. Compliance with that section is limited to "home loans" where, *inter alia*, the borrower is a "natural person" and the "debt is incurred by the borrower primarily for personal, family, or household purposes" neither of which are established here (*see* RPAPL §1304[6][1][i] and [ii]; *HSBC Bank USA, N.A. v Tigani*, 185 AD3d 796, 799 [2d Dept 2020]). Movant also failed to demonstrate the applicability of RPAPL §1303 as that section requires notice only be given to a mortgagor of an owner-occupied one-to-four dwelling or any tenant of a residential dwelling unit (*see* RPAPL §1303[1][a] and [b]; *Federal Natl. Mtge. Assn. v Onuoha*, 172 AD3d 1170, 1172 [2d Dept 2019]). In any event, as to both sections, Defendant Shin's affidavit fails to establish, as a matter of law, those notices were not served.

The branch of the motion to dismiss pursuant to the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (L. 2020, c. 381) ("CEEFPA") is denied as that legislation is not applicable in the present case. By its terms CEEFPA only applies when the "owner or mortgagor of such property is a natural person". Here, it is undisputed that the owner and mortgagor of the premises is a limited liability company which is not a natural person.

Movant's reliance on the language "regardless of how title is held" immediately following the above quoted is unavailing. The Court is mindful that, when interpreting CEEFPA, "generally speaking remedial statutes are liberally construed to carry out the reforms intended and to promote justice" (McKinney's Statutes §321). Nevertheless, the Court must also ensure that "[a]ll parts of [the] statute [are] harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof" (McKinney's Statutes §98). Were the Court to read "regardless of how title is held" to include the members of limited liability company, that interpretation would entirely negate the requirement that a "natural person" be the owner or mortgagor. The legislature has similarly limited other foreclosure protections to "natural persons" and courtc have given effect to those limitations when a limited liability company is the owner/mortgagor/borrower (*see* CPLR §3408; Banking Law § 6-l; RPAPL §1304[6][a][1][i]; *HSBC Bank USA, N.A. v Tigani*, supra; *Independence Bank v Valentine*, 113 AD3d 62 [2d Dept 2013]). Moreover, CEEFPA refers to "how" title is held, not "who" holds title. In custom and practice, the term "how title is held" refers to the type of estate involved (ie, tenancy in common, joint tenancy, tenancy by the entirety).

As to the branch of the motion to dismiss pursuant to the COVID-19 Emergency Protect Our Small Business Act of 2021 (L. 2021, c. 73) ("CEPOSBA"), Plaintiff's assertion that CEPOSBA was not in effect when this action was commenced as it expired on May 1, 2021 is incorrect. Section 30 of Chapter 104 of the Laws of 2021, which extended the provisions of CEPOSBA until August 31, 2021, was "deemed to have been in full force and effect on May 1, 2021" (L. 2021, c. 104, Section 30). As such, sections 1 – 9 and 11 of subpart A of part B of CEPOSBA were in effect when this action was commenced.

With respect to the applicability of CEPOSBA, from Defendant Shin's affidavit, it would appear, preliminarily, that Defendant Mansion falls within the proscribed requisites (*see* L. 2021, c. 73, part B, subpart A, §1). Defendants Shin and Kateshin are not covered as neither is an owner or mortgagor of the property at issue.

Nevertheless, contrary to Defendants' assertion, CEPOSBA did not blanketly prohibit the institution of a foreclosure action when this matter was commenced. That bar only applied if the mortgagor provided a hardship declaration to the mortgagee (*see* L. 2021, c. 73, part B, subpart A, §5). The commercial hardship declaration annexed to the moving papers is dated July 26, 2021, months after this action was commenced.

Sections 4 and 6 of part B, subpart A of CEPOSBA present a different issue. Section 4 requires, in part, that the "foreclosing party shall include a 'Hardship Declaration' with every notice required provided to a mortgagor prior to filing an action for foreclosure". The mortgage at issue provides in section 4.1[5] that the mortgagor is required to provide written notice in the event of either a monetary or non-monetary default prior to instituting a foreclosure action. Defendant Shin established in her affidavit that neither she nor her attorney received a copy of a hardship declaration prior to commencement of this action. As Plaintiff did not provide any contradictory evidence, compliance with Section 4 is lacking. Section 6 states that "[n]o court shall accept for filing any action to foreclose a mortgage unless the foreclosing party or an agent of the foreclosing party files an affidavit" attesting to service of a hardship declaration and that the lender did not receive same from the mortgagor. A review of the Court file does not reveal any such affidavit on file and Plaintiff has not proffered same in opposition to this motion. Compliance with Section 6 is also absent.

Concerning a remedy for the above non-compliance, it is important to note that CEPOSBA does not mandate dismissal for non-compliance. Other statutes using mandatory terms like "shall" (*see eg* RPAPL §§1303, 1304; RPL §§232-a, 735[1]; VTL §313; GML §50-e) and with remedial purposes have been interpreted to be conditions precedent with a consequence of dismissal of the action for non-compliance (*see First Natl. Bank of Chicago v Silver*, 73 AD3d 162 [2d Dept 2010]). Unlike those statutes, CEPOSBA appears to contain a cure provision in Section 6 when a mortgagor has not received a hardship declaration which states:

> If the court determines a mortgagor has not received a hardship declaration, then the court shall stay the proceeding for a reasonable period of time, which shall be no less than ten business days or any longer period provided by law, to ensure the mortgagor received and fully considered whether to submit the hardship declaration.

Having the foregoing as a remedy as opposed to mandatory dismissal would seem consistent with the intended "limited" and "temporary" nature of the legislation (*see* CEPOSBA section 3 ["As such, it is necessary to *temporarily* allow small businesses impacted by COVID-19 to remain in their place of business. A *limited, temporary* stay is necessary to protect the public health, safety and morals of the people the Legislature represents from the dangers of the COVID-19 emergency pandemic] [emphasis added]). That legislative intent differs from that underlying statutes enacted as more permanent solutions to perceived ills. For example, the Home Equity Theft Prevention Act (RPL §265-a) and its statutory progeny were enacted to serve enduring social policies (RPL §265-a[1][b]["it is the express policy of the state to preserve and guard the precious asset of home equity, and the social as well as the economic value of homeownership"]).

Accordingly, the branch of the motion to dismiss for failure to comply with Sections 4 and 6 of part B, subpart A of CEPOSBA as well as Administrative Order 159/21, which is entirely derivative of this legislation, is denied. However, as an unchallenged hardship declaration has been filed this matter is stayed until January 15, 2021.

The branch of the motion for a stay pursuant to CPLR §3408 is denied as that statute is inapplicable as it does not involve a "home loan" as defined by RPAPL §1304.

The complaints concerning allegedly excessive interest charges are not a basis for dismissal as the amount owed under a mortgage are generally irrelevant to the viability of the claim for foreclosure (*see eg Board of Mgrs. of Cent. Park Place Condominium v Potoschnig*, 111 AD3d 586 [1st Dept 2013] *Bank of Am., N.A. v Terry,* 177 AD3d 669 [2d Dept 2019]). Parenthetically, the Court notes that to the extent Defendants may be asserting the defense of usury, that defense is unavailable to a limited liability company or an individual guarantor of such an entity's debt (*see* General Obligations Law 5-521[1]; LLCL §1104[a]; *Schneider v Phelps*, 41 NY2d 238, 242; *Bankers Trust Co. v Braten*, 184 AD2d 239 [1st Dept 1992]).

Accordingly, it is

ORDERED that the Defendants' motion is denied in its entirety, and it is

ORDERED that this matter is stayed until January 15, 2021, and it is

ORDERED that all parties are to appear for a virtual conference pursuant to Administrative Order 157/20 via Microsoft Teams on **February 10, 2022 at 10:20 a.m.** Part Clerk Tamika Wright (tswright@nycourt.gov) will forward all appearing parties an invitation to the conference.

11/19/2021
DATE

FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE