

Investors Bank v Rodney Realty, LLC
2022 NY Slip Op 32631(U)
July 29, 2022
Supreme Court, Kings County
Docket Number: Index No. 500832/21
Judge: Lawrence Knipel
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At an IAS Term, Part COMM-6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of July, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
INVESTORS BANK,

Plaintiff,

-against-

Index No. 500832/21

RODNEY REALTY, LLC; HERMAN MEISELS;
JOEL WEBER, AS TRUSTEE OF THE HORIM FAMILY TRUST;
MORDECHAI KRAUSZ, AS TRUSTEE OF THE HORIM FAMILY
TRUST; BERNARD GOLDBERGER, AS TRUSTEE OF THE HORIM
FAMILY TRUST; ENVIRONMENTAL CONTROL BOARD OF THE
CITY OF NEW YORK; NEW YORK STATE COMMISSIONER
OF LABOR; SIMCHA GRUENHUT; NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE; AND
"JOHN DOE #1 THROUGH JANE DOE #15" AND
"ABC CORP. #1 THROUGH #10", these last names being
fictitious and unknown to the Plaintiff, the persons
or parties or entities, if any, having or claiming any
interest in or lien upon the mortgaged premise
described in the Verified Complaint,

Mot. Seq. 1,2

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

20-44; 46-54

Opposition Affidavits (Affirmations) Annexed _____

55-56; 57-58

In this action to foreclose a commercial mortgage on the real property known as 170
Rodney Street in Brooklyn, New York (Block 2193, Lot 26) (hereinafter "Property"),
plaintiff, Investors Bank (plaintiff or "Investors"), moves (in motion sequence [mot. seq.]

one) for an order: (1) granting plaintiff summary judgment and striking the answer and counterclaims of defendants Rodney Realty, LLC and Herman Meisels and the verified answer of defendants Joel Weber, As Trustee of the Horim Family Trust and Mordechai Krausz, As Trustee of the Horim Family Trust, (2) appointing a referee to compute the amount due, (3) amending the caption to substitute “John” Green as John Doe #1, Hersch Meisels as John Doe #2, Zissel Silberstein as John Doe #3, “John” Obelander as John Doe #4, Joe Blumenberg as John Doe #5, Henry Blumenberg as John Doe #6, Yoseph Kraus as John Doe #7, and Toby Kraus as Jane Doe #1, and to strike the remaining John Doe, Jane Doe, and ABC Corp. defendants except John Doe #8 who was served but his name is unknown.

Defendants Joel Weber, as Trustee of the Horim Family Trust and Mordechai Krausz, as Trustee of the Horim Family Trust (hereinafter collectively referred to as “Defendant Movants”) oppose plaintiff’s motion for summary judgment and cross-move, in mot. seq. two, for summary judgment dismissing plaintiff’s complaint in its entirety for failure to comply with the notice requirements under Real Property Actions and Proceeding Law (RPAPL) 1303 (b).

Background

On January 12, 2021, plaintiff commenced this commercial foreclosure action by filing a summons and verified complaint and a notice of pendency against the Property (see NYSCEF Doc Nos. 1, 2). The complaint alleges that defendant Rodney Realty, LLC (hereinafter “Borrower”), executed and delivered a promissory note dated January 28, 2016 (hereinafter “Note”) in the principal amount of \$2,100,000.00 in favor of Investors, which

was secured by a mortgage and security agreement made as of January 28, 2016 (hereinafter “Mortgage”) for the principal sum, which was duly recorded in the Office of the City Register of the City of New York on February 10, 2016 (NYSCEF Doc No. 1 at ¶¶ 6, 7). The complaint also alleges that the loan was further secured by a guaranty and suretyship agreement (hereinafter “Guaranty”) executed and delivered by defendant Herman Meisels (“Meisels”) on or about January 28, 2016, whereby Meisels unconditionally guaranteed payment of any and all obligations of Borrower (*id.* at ¶ 26).

The complaint alleges that Borrower defaulted under the Note and Mortgage by failing to make “the payment due on March 1, 2020 and all subsequent monthly payments” (*id.* at ¶ 12). The complaint also alleges a default under the Mortgage due to the transfer by Borrower of “a fifty percent (50%) interest in the mortgaged premises without obtaining the consent of the Plaintiff” (*id.* at ¶ 13). In this regard, the complaint alleges that Defendant Movants have a fifty percent (50%) ownership interest in the Property by a deed from the Horim Family Trust, dated January 30, 2019 and recorded in the Office of the City Register of the City of New York on February 11, 2019 (*id.* at ¶ 9).¹

The complaint alleges that plaintiff “is the current holder of the Note and Mortgage” (*id.* at ¶ 10). Annexed to the complaint are copies of the Note, Mortgage and Guaranty (*see id.* at Exhibits A-C).

¹ According to the complaint, previously, the Property was transferred to the Horim Family Trust, Joel Weber, Trustee, and Bernard Goldberger, Trustee by a deed from Borrower dated April 21, 2016 and recorded in the Office of the City Register of the City of New York on May 12, 2016, under which defendant Bernard Goldberger, as Trustee of the Horim Family Trust, may still have an interest in said premises (NYSCEF Doc No. 1, ¶ 9).

On June 13, 2021, Borrower and Meisels filed a joint answer to the complaint in which they asserted seventy-seven (77) affirmative defenses and seven counterclaims (NYSCEF Doc No. 15). On June 16, 2021, Defendant Movants filed an answer asserting 12 affirmative defenses (NYSCEF Doc No. 16). One of Defendant Movants' affirmative defenses is plaintiff's failure "to meet the legal requirements that are conditions precedent to bringing a residential mortgage foreclosure action by... failing to provide the notices to all tenants and residents of the subject premises as required pursuant to RPAPL § 1303(b), 1304 and 1306" (*id.* at ¶ 7).

Investors' Motion for Summary Judgment

On December 8, 2021, plaintiff filed the instant motion for summary judgment, an order of reference and other relief by submitting an attorney affirmation and an affidavit from Stephen Schwarz (Schwarz), Authorized Signatory and Assistant Vice President of Investors. Plaintiff produces copies of the Note, Mortgage, Guaranty, and deeds evidencing the transfer of the Property in both 2016 and 2019 (see NYSCEF Doc Nos. 23-25, 27). Schwarz avers that Borrower and Meisels "failed to comply with the terms, covenants and conditions of the Note, Mortgage, and Guaranty by defaulting in the payment due on March 1, 2020 and all subsequent monthly payments" (NYSCEF Doc No. 22, ¶ 10). Schwarz further avers that Borrower additionally "defaulted under the Note and Mortgage by transferring a fifty percent (50%) interest in the Property to the Horim Family Trust, Joel Weber, Trustee, and Bernard Goldberger, Trustee without obtaining Plaintiff's consent (*id.* at ¶ 11).

Plaintiff also argues that defendants' answers fail to raise any genuine issues of material fact to contradict its proof of default under the Note, Mortgage, and Guaranty. Further, that the answer filed by Borrower and Meisels constitutes frivolous conduct. Regarding Defendant Movants' third affirmative defense alleging plaintiff's failure to provide notices to all tenants and residents of the Property under RPAPL 1303(b), Schwarz avers that said provisions are inapplicable since they only apply to residential foreclosures and that the subject action is a commercial foreclosure (*id.* at ¶ 24(3)).

Defendant Movants' Cross-motion for Summary Judgment

Defendant Movants oppose plaintiff's motion and cross-move for summary judgment arguing that the complaint must be dismissed in its entirety due to plaintiff's undisputed failure to comply with RPAPL 1303(b). Defendant Movants point out that, by way of Schwarz's affidavit, plaintiff admits that it failed to provide the requisite notice to tenants upon the mistaken belief that it was not required to do so. In addition, Defendant Movants contend that plaintiff's failure has been substantiated by two sworn affidavits from Property tenants, Joel Blumenberg and Joseph Krausz, who attest that they personally handle their mail "especially when the subject matter of a letter relates to financial matters pertaining to the residence of" their family (NYSCEF Doc Nos. 52-53, ¶ 6). Further, their attorneys provided them a sample "1303 Notice," a document that they aver having never seen until supplied by their attorneys (*id.* at ¶ 5) and they are certain they did not receive the "1303 Notice" at any point in time (*id.* at ¶ 7).

Defendant Movants also assert that RPAPL 1303 is clear on its face that tenants are required to receive notice of a foreclosure action when the property on which they reside

is residential. Notably, the cover page of the mortgage annexed to plaintiff's papers states that the Property is a "dwelling only" occupied by four families (see NYSCEF Doc No. 24). Defendant Movants further contend that RPAPL 1303 does not require that the loan be made to an individual and thus, the fact that the alleged loan was made to a corporate entity does not alter the reality that the subject property is residential.

Defendant Movants additionally argue that plaintiff is not entitled to summary judgment because it failed to establish that Borrower defaulted on the Note. Specifically, Defendant Movants contend that plaintiff's evidence, namely, the Schwarz affidavit, is insufficient to establish a default without production of any business records evidencing a default since a supporting affidavit's role is simply to lay a proper evidentiary foundation of the underlying business record.

Plaintiff's Opposition

In opposition to Defendant Movant's cross-motion to dismiss and in reply to its own motion, plaintiff argues that Defendant Movants cannot rely on RPAPL 1303(b) because they are not tenants living at the Property. Further, that the cases relied upon by Defendant Movants are inapposite because they involve mortgagors who claim that they themselves did not receive the 1303 notice. Nevertheless, plaintiff states that it served the 1303 notice to tenants on February 15, 2022, via certified and first-class mail. Plaintiff proffers a copy of the affirmation of service (NYSCEF Doc No. 55).

Regarding proof of default, plaintiff submits a reply affidavit from Schwarz, who avers that "as the loan officer in charge of the loan and with personal knowledge of the facts, I submitted an affidavit attesting that the default occurred and providing details

regarding the default including the date of the default and the amount due” (NYSCEF Doc No. 56, Schwarz Affidavit, ¶ 3). Nevertheless, Schwarz provides that he has attached a copy of plaintiff’s record showing that the next payment date for the loan is March 1, 2020 (the date of default) as further proof of the default under the loan (*see id.*).

Defendant Movants’ Reply

In reply, Defendant Movants assert that plaintiff’s delivery of the requisite notices more than a year after commencement of this action is unavailing since RPAPL 1303 requires that the notice be delivered to tenants within ten days of delivery of the summons and complaint. Because it is undisputed that plaintiff failed to comply with RPAPL 1303, Defendant Movants argue that its cross-motion for summary judgment must be granted and the case dismissed.

Even if they were not granted summary judgment, Defendant Movants contend that plaintiff failed to meet its prima facie burden for summary judgment because the purported business record proffered by plaintiff is deficient insofar as it fails to show the loan history, when actual payments were made, and when the alleged default occurred. Further, that it is evident that the record, which is dated February 11, 2022, was created for the purposes of litigation since the alleged default occurred in March of 2020, approximately two years prior. Because the purported business record was not created contemporaneous to the time of the default, Defendant Movants argue that the proffered record does not constitute a proper business record and is merely inadmissible hearsay.

Discussion

Pursuant to RPAPL 1303(1), “[t]he foreclosing party in a mortgage foreclosure action, involving residential real property shall provide notice to: (a) any mortgagor if the action relates to an owner-occupied one-to-four family dwelling; and (b) *any tenant of a dwelling unit in accordance with the provisions of this section*” (emphasis added). The notice to any tenant required by RPAPL 1303(1)(b) must be delivered within ten days of the service of the summons and complaint (see RPAPL 1303(4)). The contents of the notice required under RPAPL 1303(1)(b) are provided under RPAPL 1303(5). “‘Residential real property’ shall mean real property located in this state improved by any building or structure that is or may be used, in whole or in part, as the home or residence of one or more persons, and shall include any building or structure used for both residential and commercial purposes” (RPAPL 1305 (1)(a)).

“RPAPL 1303 is a condition precedent to the commencement of a foreclosure action and the failure to comply is a basis for dismissal of a complaint which may be raised at any time while the action is pending” (*JPMorgan Chase Bank, N.A. v Lee*, 186 AD3d 685, 687 [2d Dept 2020] [*citing Eastern Sav. Bank, FSB v Tromba*, 148 AD3d 675, 676 [2d Dept 2017]]).

Here, it is undisputed that the subject property is residential. Plaintiff also concedes that notices pursuant to RPAPL 1303 were not mailed to any of the tenants residing at the Property until February 15, 2022, nearly two years from when many of the defendants herein were served with process (see NYSCEF Doc Nos. 3-10). Because it is undisputed that plaintiff did not comply with a condition precedent to suit, Defendant Movants’ cross-

motion to dismiss the complaint must be granted (*see JPMorgan Chase Bank, N.A. v Lee, supra*). As such, the remaining issues need not be addressed.

Conclusion

Accordingly, it is hereby

ORDERED that Investors' motion for summary judgment and an order of reference is denied; and it is further

ORDERED that Defendant Movants' cross-motion for summary judgment dismissing the complaint for failure to comply with RPAPL 1303(b) is granted and the complaint is hereby dismissed in its entirety.

This constitutes the decision and order of the court.

ENTER,



J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**