Malayan Banking Berhad, N.Y. Branch v Park Place Dev. Primary LLC
2022 NY Slip Op 33425(U)
October 3, 2022
Supreme Court, New York County
Docket Number: Index No. 850083/2020
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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MALAYAN BANKING BERHAD, NEW YORK BRANCH, INTESA SANPAOLO S.P.A., NEW YORK BRANCH, WARBA BANK K.S.C.P., 45 PARK PLACE INVESTMENTS, LLC,

Plaintiff,

- v -

PARK PLACE DEVELOPMENT PRIMARY LLC,PARK PLACE PARTNERS DEVELOPMENT LLC,45 PARK PLACE PARTNERS, LLC,SOHO PROPERTIES GENERAL PARTNER, LLC,SHARIF EL-GAMAL, STATE OF NEW YORK CIVIL RECOVERIES BUREAU, GILBANE RESIDENTIAL CONSTRUCTION LLC,US CRANE & RIGGING LLC,CONSTRUCTION REALTY SAFETY GROUP INC.,TRADE OFF PLUS, LLC,ALL-CITY METAL INC.,PERMASTEELISA NORTH AMERICA CORP., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, TRANSCONTINENTAL STEEL CORP., ISMAEL LEYVA ARCHITECT, P.C.,PERI FORMWORK SYSTEMS, INC.,ULE GROUP CORP. D/B/A UNITED LIGHTING ELECTRICAL CORP., S&E BRIDGE & SCAFFOLD LLC,JOHN DOES 1-100, SOHO PROPERTIES INC.,THE PACE COMPANNIES NEW YROK, INC.,PEAK MECHANICAL SOLUTIONS, INC.,MEN OF STEEL REBAR FABRICATORS, LLC,GOTHAM DRYWALL, INC.,TRANSCONTINENTAL STEEL CORP., ISMAEL LEYVA ARCHITECT, P.C.,PERI FORMWORK SYSTEMS, INC.,ULE GROUP CORP. D/B/A UNITED LIGHTING ELECTRICAL CORP., S&E BRIDGE & SCAFFOLD LLC,

Defendant.

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INDEX NO. 850083/2020

MOTION DATE ________

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 73, 74, 75, 76, 78, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 159, 162, 163, 164, 388, 391, 394, 409, 416, 420, 424, 428

were read on this motion to/for DISMISS.

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

This is an action to, *inter alia*, foreclose on two mortgages, both dated May 17, 2016, given by Defendant Park Place Development Primary LLC ("Borrower") to Plaintiff Malayan Banking Berhad, New York Branch ("Plaintiff") which encumber a parcel of real property located at 43 – 47 Park Place, New York, New York (Block 126, Lot 8) ("Borrower Premises"). One mortgage, a Building Facility

Mortgage ("Building Mortgage"), secures a loan in the original principal amount of $162,112,896.16, and the other, a Project Facility Mortgage ("Project Mortgage") secures a loan with an original principal amount of $11,887,103.84. Approximately a month prior to the execution of these mortgages, Plaintiff and Borrower entered into a Building Facility Agreement ("Building Agreement") and a Project Facility Agreement ("Project Agreement"), both dated April 26, 2016. The purpose of these agreements was to facilitate Borrower's construction of a 43-story condominium tower at 43 Park Place, New York, New York. Pursuant to these contracts, notes memorializing the loans were also executed by Borrower. It is undisputed that Defendant Park Place Partners Development LLC ("Museum Owner") is not a party to any of the above agreements. On the same day it gave the mortgages, Borrower took assignment by deed of the ("Borrower Premises") from Museum Owner, the title holder of a contiguous parcel of property located at 49 – 51 Park Place, New York (Block 126, Lot 9) ("Museum Premises") and the former owner of Borrower Premises.

As part of that assignment, Borrower Defendant and Museum Owner executed the Zoning Lot Development and Easement Agreement ("ZLDA"). In precatory language in the ZDLA, it is noted that the Borrower Premises and Museum Premises were previously "declared a single zoning lot" and the parties "intend to reapportion the tax lots on the Premises, such that the [Borrower Premises] is on its own tax lot owned by [Borrower], and the Museum Premises is on its own tax lot owned by Museum Owner, without effecting the Premises remaining a single zoning lot as declared by the Declaration". Recognized in the ZLDA was that the Museum Premises would contain an art museum as well as a religious facility and that the Borrower Premises would contain a residential building.

Also "contemplated" by the ZLDA was the creation of a Plaza which was described as a "public open area intended for public use and enjoyment" which would be "privately owned" and "located on a portion of the [Borrower Premises] and Museum Premises". The agreement states Museum Owner is responsible for developing and maintaining the Plaza, but that each party is responsible for "damage to property or bodily injury" relating to "their respective portion of the Plaza".

The nature of the grants made by the ZLDA are described in Section 13 which states in pertinent part:

> a. All of the grants; interests, covenants, agreements and conditions contained in this Agreement shall:
>
> i. run with the lands, buildings and appurtenant rights affected;
>
> ii. shall inure to the benefit of and be binding upon every party having any right, title or interest therein or any part thereof and the heirs, distributees, successors and assigns of any such party;
>
> iii. except for liabilities accruing during each respective period of interest, terminate as to such party upon the termination or expiration date of such party's interest in the Museum Premises or the Residential Premises, as the case may be;
>
> iv. shall, to the extent rights hereunder are assigned to the holder of any mortgage encumbering any of the properties affected by this Agreement or any interest therein, be enforceable by any such assignee after a default, past any applicable grace or notice period, in the provisions of such mortgage; and

v. shall be binding upon any other "parties in interest" in and to the Combined Zoning Lot.

b. Any party who hereafter acquires an interest in either the Museum Premises or the Residential Premises, including an interest of the type which would confer the status of Party-in-Interest on such party directly by or through Museum Owner or Residential Owner, respectively, as, for example, a mortgagee (each a "Successor"), shall acquire such interest with notice of and subject to all of the terms, provisions and covenants contained in this Agreement. It is intended that the waivers and consents of either party hereunder shall be binding upon its Successor and shall constitute the waiver, consent or joinder of any such Successor without the need of additional consents, waivers, or joinders. Notwithstanding the foregoing, it is intended that the acquisition of any such interest in a party's premises by a Successor shall be deemed to be an agreement by such Successor to execute all such consents, waivers and documents which the parties have agreed to execute hereunder; provided such waivers and documents are consistent with the purpose and intent of this Agreement.

Plaintiff avers that the ZLDA was necessary to realize the full scope of the projects on the Borrower and Museum Premises. The ZLDA was referenced in the description of the property in the deed for the Borrower Premises and allegedly was recorded against both tax lots. After the allegedly Borrower defaulted in repayment when the Facility Loan matured, Plaintiff commenced the within action and filed a complaint which contained four causes of action, to wit: [1] foreclosure of the mortgages, [2] foreclosure on the security agreements, [3] enforcement, or alternatively, foreclosure of assignment of rents and leases and [4] a deficiency judgment.

Now, Defendant Museum Owner moves to dismiss Plaintiff's complaint pursuant to CPLR §3211[a][1] and [7]. Plaintiff opposes the motion.

A motion to dismiss pursuant to CPLR §3211[a][1] may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and does not include, for instance, affidavits (*see Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]).

On a motion pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see eg. Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*298 Humboldt, LLC, v Torres*, 197 AD3d 1081, 1083 [2d Dept 2021], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the Defendant (*see Guggenheimer, supra*; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11

NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller*, *supra*; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

Defendant Museum Owner asserts the complaint fails to state a claim since it is not a necessary or permissible party to this action pursuant to RPAPL §1311 or §1312. Museum Owner posits that it is not a mortgagor, owner of the encumbered premises nor an obligor under the notes. In opposition, Plaintiff argues, among other things, that Museum Owner is a necessary party under CPLR §1001 which, by virtue of the ZLDA, may be inequitably affected by the judgment herein.

The paramount objective of any foreclosure action is to cause a devolution of title leaving it in the same condition it was when the mortgage was given (*see Scharaga v Schwartzberg*, 149 AD2d 578, 579 [2d Dept 1989]). In a mortgage foreclosure action, this is accomplished, in part, by joining all parties with interests subordinate to the mortgage. "The rationale for joinder of these interests derives from the underlying objective of foreclosure actions -- to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale" (*Polish Nat'l Alliance v White Eagle Hall Co.*, 98 AD2d 400, 404 [2d Dept 1983]). Thus, parties with interests superior to the mortgage generally are not necessary parties to the action (*id.*).

Here, Plaintiff pleads no cause of action, in either its original or amended complaint, against Defendant Museum Owner nor does the "wherefore" clause contain any specifically requested relief against same. All the causes of action seek foreclosure or are directly related thereto. The lot subject to the mortgage and, therefore, foreclosure is the Borrower Premises, not the Museum Premises. Plaintiff's claim that Museum Owner's execution of the ZLDA and its effect on the Museum Property necessitates that Museum Owner be a party is unavailing.

By its express terms, the ZLDA created an easement that affected both the Borrower Premises and the Museum Premises. The title of this document itself states it is an "EASEMENT AGREEMENT". Moreover, the parties agreed that the terms of the ZLDA would "run with the land" and is its terms are binding on all "successors and assigns" of either party.

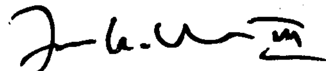
Nevertheless, the ZLDA does not create an easement appurtenant with a dominant and servient estate (*cf. Bogart v Roven*, 8 AD3d 600, 601 [2d Dept 2004]). Rather, it appears to this Court, without holding as such, that the ZLDA created a reciprocal easement by covenant (*see generally Trustees of Columbia College v Lynch*, 70 NY 440, 447 [1877]["Reciprocal easements of this character may be created upon the division and conveyances in severalty to different grantees of an entire tract, and they may be created by a reservation in a conveyance, by a condition annexed to a grant, or by a *covenant*, and even a *parol agreement* of the grantees"][emphasis added]; *see also Wild Oaks, LLC v Beehan*, 77 AD3d 924 [2d Dept 2010]; *Matter of Evans v. Osborne*, 37 A.D.3d 463 [2d Dept 2007]). As stated by the Court of Appeals, "[i]t is entirely competent for adjoining owners of land by grant to impose mutual and corresponding restrictions upon the lands belonging to each, for the purpose of securing uniformity in the position of buildings" (*Wetmore v Bruce*, 118 NY 319, 322 [1899]). By burdening portions of both estates with the creation and existence of the Plaza, along with the other development obligations and limitations, "[t]he covenants being mutual and imposing such restriction in perpetuity are in effect reciprocal easements, the right to the enjoyment of which passes as appurtenant to the premises" and "[o]bservances of such a covenant will be enforced by a court of equity (*id.*).

Plaintiff does not seek to extinguish this easement on its own property. In fact, it expressly pled in paragraph 193 of the complaint (paragraph 208 in the amended complaint) that "the Mortgaged Property should be sold subject to (a) any covenants, restrictions, easements and public utility agreements of record". Even if Plaintiff were seeking to release its property from the ZLDA, it has not pled, nor does it appear from the documentary evidence, that this apparent easement is subject to the mortgage, a necessity to extinguish same (*see HSBC Bank USA v. Reg'l Specialty Food Mktg. & Distrib. Servs.*, 294 AD2d 803, 804 [4th Dept 2002]; *Buroker v Phillips*, 169 AD3d 992 [2d Dept 2019]). Plaintiff has also not sought to extinguish the easement on the Museum Premises nor requested declaratory relief setting the rights and legal obligations of itself and Museum Owner under the ZLDA. Further, it does not appear from all the moving papers that the validity and obligations of the ZLDA are in question (*cf. 114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 781 [2d Dept 2019]).

Based on the foregoing, Museum Owner is neither a necessary nor permissible party and Plaintiff has not stated any cognizable cause of action or claim for relief against Defendant Museum Owner.

Accordingly, it is

ORDERED that Plaintiff's complaint as against Defendant Park Place Partners Development LLC is dismissed.



10/3/2022
DATE

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

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