

Wells Fargo Bank, N.A. v Ashkenazi

2015 NY Slip Op 31006(U)

June 9, 2015

Supreme Court, New York County

Docket Number: 850263/2013

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ

PART 13

Justice

WELLS FARGO BANK, NATIONAL ASSOCIATION,
AS INDENTURE TRUSTEE FOR THE GRAND
PACIFIC BUSINESS LOAN TRUST 2005-1, acting
by and through Grand Pacific Holdings Corp., in its
capacity as Subservicer,

INDEX NO. 850263/2013
MOTION DATE 04-01-2015
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

Plaintiff,

-against-

ALEXANDER ASHKENAZI, AMIT LOUZON, and
"JOHN DOE NO. 1" to "JANE DOE NO. 10,"
inclusive, the last ten names being for fictitious
and/or unknown to plaintiff, the persons or parties
intended being the persons or entities, if any, having
or claiming an interest in or lien upon the premises
described in the complaint,

Defendants.

The following papers, numbered 1 to 30 were read on this motion for summary judgment,
cross-motions for summary judgment and leave to extend their time to serve and answer.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1 - 6

Answering Affidavits — Exhibits _____

7-14, 15-17, 18-20, 21-23

Replying Affidavits _____

24-25, 26-27, 28-30

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered, that plaintiff' motion for
summary judgment against defendants is granted to the extent of granting plaintiff
summary judgment as against Amit Louzon, defendant Amit Louzon's cross-motion for
summary judgment dismissing the complaint as asserted against him is denied, defendant
Alexander Ashkenazi's cross-motion dismissing the complaint as asserted against him is
denied as moot.

This is an action to foreclose on a Mortgage encumbering a residential apartment
located at 251 West 89th Street, Unit 5D, New York, N.Y. 10024 (herein "NY Premises"),
and occupied by a rent regulated tenant (herein "Tenant"). Grand Pacific Finance Corp.
(herein "GPFC") issued a mortgage loan(herein "Loan") to BHY Partners, LLC (herein
"BHY") on a property located at 800 East 14 Mile Road, Madison Heights, Michigan (herein
"MI Premises"). In exchange, BHY executed and delivered to GPFC a Promissory Note
wherein BHY would pay GPFC the principal sum of \$5,800,000, together with interest.
Defendant Alexander Ashkenazi executed and delivered to GPFC a Guaranty whereby he
guaranteed payment of BHY's obligations under the Promissory Note. As security for the
repayment of Loan, Ashkenazi executed a mortgage (herein "Mortgage") encumbering the
Premises, which Ashkenazi owned at the time of the Mortgage.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

BHY and Ashkenazi defaulted on their payments to GPFC. By letter dated February 20, 2008, GPFC demanded immediate payment in full of the Loan. On July 31, 2008, a Notice of Default was issued by Grand Pacific Holding Corp. (herein "GPFC"), as sub-servicer for GPFC. An action was commenced in Oakland County Michigan Circuit Court to foreclose on the MI Premises due to BHY and Ashkenazi's default on the Loan (herein "MI Action") The MI Premises was sold for the sum of \$2,240,000.00 pursuant to a power of sale and a Sheriff's Deed issued to GPFC on behalf of GPFC in December 2008. After the MI Premises was sold, a Third-Party Complaint was filed by the plaintiff in this action against Ashkenazi seeking a deficiency judgment. By stipulation and order dated October 5, 2011, the parties agreed to resolve all outstanding claims, with prejudice and without costs or attorneys fees to any party (herein "Stipulation") [see Cross-Motion, Amit Louzon Aff., Exhibit D].

The NY Premises was sold by the Board of Managers of the building where the NY Premises is located for Ashkenazi's failure to pay common charges and other assessments and charges due under the condominium's by-laws. A foreclosure sale of the NY Premises was held in March 2011, Amit Louzon purchased the NY Premises and received title to the NY Premises pursuant to a Referee's Deed given by David J. Peck, Esq., as Referee, dated July 5, 2012 (herein "Deed"), and recorded in the Office of the City Register of the City of New York on October 17, 2012 in CRFN 2012000473064 (see Moving Papers, Exhibit I). The Deed states, in relevant part, that Louzon took the Deed:

"Subject also to such other liens, agreements, covenants, easements, restrictions, consents and other matters of record as pertain to the [Premises], to the Land and/or the Building ... including, but not limited to, that certain mortgage in the original principal amount of \$2,000,000. given by [Ashkenazi] in favor of [GPFC] dated February 22, 2005, recorded May 13, 2005 in the Office of City Register of the City of New York at CRFN:2005000279484" (see Id.).

Prior to closing on the sale of the NY Premises, Louzon pursued litigation against plaintiff and its predecessors in interest over the validity of plaintiff's mortgage. Louzon brought various motions by Order to Show Cause seeking to declare the Memorandum of Sale invalid because the additional \$2,000,000 payment (plaintiff's mortgage) was unconscionable. Louzon's motions were denied and he appealed to the Appellate Division, First Department. In an Order dated July 2, 2013, the Appellate Division, First Department denied Louzon's appeal and stated:

"The terms of the judgment of foreclosure explicitly provide that Louzon's purchase of the condominium unit at issue is subject to prior liens of record. The evidence establishes that plaintiff's mortgage was duly recorded and that the terms of sale, distributed to all prospective purchasers prior to the foreclosure auction, specifically listed the mortgage among the prior liens of record. In addition, the transcript of the auction reveals that the terms of sale, which were announced before the bidding began, made clear that the unit was being sold subject to plaintiff's mortgage" (see Doc. No. 103).

Plaintiff commenced this action on August 29, 2013 seeking to foreclose on the NY Premises, appoint a receiver of rents, that the court direct that the NY Premises be sold, that the proceeds from the sale of the NY Premises be computed and applied towards monies allegedly owed by Ashkenazi to plaintiff, and that if the proceeds of the sale of the NY Premises are not enough to cover monies owed by Ashkenazi, that the officer making the sale of the NY Premises specify the amount of the deficiency. Defendant Ashkenazi has not answered or pled in this action and is in default. Defendant Louzon served an answer dated January 21, 2014.

Plaintiff now moves under Motion Sequence 001 for summary judgment seeking a default judgment against Ashkenazi. Plaintiff also moves for summary judgment to foreclose on the NY Premises arguing that Louzon is estopped from challenging the validity of the mortgage because the Deed explicitly states that the Deed is subject to the \$2,000,000 mortgage.

Louzon cross-moves for summary judgment arguing that this action is barred by the October 25, 2011 stipulation and order; plaintiff failed to comply with the notice requirements of RPAPL § 1303; and that plaintiff lacks standing to commence this action. Alternatively, Louzon seeks leave to amend his pleadings.

Ashkenazi also cross-moves pursuant to CPLR § 2004 and 3012(d) for an order extending his time to plead and to compel the acceptance of said pleading. In opposition to the cross-motion, plaintiff withdraw their deficiency judgment claim against Ashkenazi and consents to the discontinuance of this action as against Ashkenazi (see Memo of Law in Opp to Cross-Motion, Doc. No. 132, Pg. 3). No formal stipulation of discontinuance has been filed, nor has the caption been amended.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

§ 1303 of the RPAPL states:

1. The 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.

2. The notice to any mortgagor required by paragraph (a) of subdivision one of this section shall be delivered with the summons and complaint. Such notice shall be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page.

4. The notice to any tenant required by paragraph (b) of subdivision one of this section shall be delivered within ten days of the service of the summons and complaint. Such notice shall be in bold, fourteen-point type, and the paragraph of the notice beginning with the words "ALL RENT-STABILIZED" and ending with the words "FULL HEARING IN COURT" shall be printed entirely in capital letters and underlined. The foreclosing party shall provide its name, address and telephone number on the notice. The notice shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type. The notice shall be on its own page. For buildings with fewer than five dwelling units, the notice shall be delivered to the tenant, by certified mail, return receipt requested, and by first-class mail to the tenant's address at the property if the identity of the tenant is known to the plaintiff, and by first-class mail delivered to "occupant" if the identity of the tenant is not known to the plaintiff. For buildings with five or more dwelling units, a legible copy of the notice shall be posted on the outside of each entrance and exit of the building.

Plaintiff makes a prima facie case for mortgage foreclosure by annexing the mortgage, unpaid note with the mortgagor's signature and evidence of default. The Deed given to Louzon at the foreclosure sale expressly stated that he was taking title to the Premises subject to a \$2,000,000 mortgage held by plaintiff. The validity of the Deed and the mortgage were litigated and the Appellate Division, First Department upheld the validity of the foreclosure sale and the \$2,000,000 mortgage on the Premises.

Plaintiff annex proof of service on Juan Ungaro, the rent-stabilized tenant living at the Premises and on Louzon and that the documents conform to the notice requirements as set forth in the RPAPL. Plaintiff also annexes proof that GPHC physically possessed and delivered to plaintiff "the Note, Allonge, the Guaranty and the other Loan Documents. As custodian for Plaintiff these are actions that may be taken by the Subservicer pursuant to the Servicing Agreement (see Aff. In Supp, Carl Lin, Doc. No. 70, Pg. 4; CWC Capital Asset Mgt. v. Charney-FPG 114 41st St., LLC, 84 A.D.3d 506, 923 N.Y.S.2d 453 [1st Dept., 2011]).

Plaintiff also comes forth with proof that this action is not barred by the Stipulation. The Stipulation states, in relevant part, that:

Guaranty of Ashkenazi. Notwithstanding anything contained herein to the contrary, the Guaranty, the Note and the New York Mortgage shall not be terminated hereunder and shall not constitute a Released Claim. Instead, the Guaranty shall be deemed amended by this Agreement to be a non-recourse guaranty, meaning that the Guaranty shall still support the debt owed under the Note and the Guaranty shall continue to be secured by the New York Mortgage, but any recovery under the New York Mortgage shall be limited to the value of the collateral securing the New York Mortgage. (See Doc. No. 76, Pg. 6).

Plaintiff makes a prima facie showing of entitlement to judgment as a matter of law. Louzon fails to come forward with sufficient evidence to raise a triable issue of fact precluding summary judgment.

Plaintiff also moves under Motion Sequence 002 for leave to amend the caption to reflect that B&H Florida Notes LLC, the owner of the mortgage being foreclosed herein, is the plaintiff herein. In February 2015, pursuant to an Allonge, an Assignment of Mortgage was made and recorded in the Office of the City Register of New York County on March 23, 2015 as CRFN 2015000097690, plaintiff assigned to B&H Florida all of its right, title and interest in and to, the applicable promissory note and mortgage (see Mot. Seq. 002, Aff. In Supp., Exhibit D, Doc. No. 137).

Accordingly, it is ORDERED, that plaintiff's motion for summary judgment as against defendant AMIT LOUZON is granted, and it is further,

ORDERED, that the plaintiff settle order on notice under Motion Sequence 001 by serving upon the General Clerk's Office (Room 119 - Order Section) a copy of the proposed order for their review, to be forwarded to this Court, and it is further,

ORDERED, that defendant AMIT LOUZON's cross-motion for summary judgment and for leave to amend his pleadings is denied, and it is further,

ORDERED, that defendant ALEXANDER ASHKENAZI's cross-motion for an extension of time to answer is denied, as moot, contingent on plaintiff serving and filing a stipulation of settlement and discontinuance within 10 days from service of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that plaintiff's motion for leave to amend the caption is granted, and it is further,

ORDERED, that the caption in this action is amended as follows:

B&H FLORIDA NOTES LLC,

Plaintiff,

-against-

ALEXANDER ASHKENAZI, AMIT LOUZON, and
"JOHN DOE NO. 1" to "JANE DOE NO. 10,"
inclusive, the last ten names being for fictitious
and/or unknown to plaintiff, the persons or parties
intended being the persons or entities, if any, having
or claiming an interest in or lien upon the premises
described in the complaint,

Defendants.


,and it is further,

ORDERED, that the plaintiff serve the parties with a copy of this Order with Notice of Entry within 20 days from the date of this Order, and upon the General Clerk's Office (Room 119) and upon the County Clerk (Room 141B), who are directed to amend the caption and the court's records accordingly, and it is further,

ORDERED, that the Clerk of the Court is Directed to enter judgment accordingly.

Enter: **MANUEL J. MENDEZ**
J.S.C.

Dated: June 9, 2015



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE