

U.S. Bank N.A. v Middle Dam St. Inc.
2021 NY Slip Op 30686(U)
March 4, 2021
Supreme Court, Kings County
Docket Number: 520972/20
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 Civic Center, Brooklyn, New York, on the 4th day of March, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR VELOCITY COMMERCIAL CAPITAL LOAN
TRUST 2018-1,

Plaintiff,

- against -

Index No. 520972/20

MIDDLE DAM STREET INC.; MAUREEN ASSOUMOU;
3405 CHURCH AVENUE MANAGEMENT CORP.;
COZY FUNDING INC.; DOMINGUEZ FAMILY
LIMITED PARTNERSHIP; D&P RESTAURANT AND
COCKTAIL LOUNGE INC.; NEW YORK STATE
DEPARTMENT OF FINANCE; NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE;
CRIMINAL COURT OF THE CITY OF NEW YORK
(KINGS); NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD; "JOHN DOE #1 - #50" and
"MARY DOE #1 - #50", the last two names being
fictitious, it being intended to name all other parties
who may have some interest in or lien upon the
premises described in the complaint,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

30, 32-33

39-54

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Upon the foregoing papers in this action to foreclose a commercial mortgage on the mixed-use property at 3405 Church Avenue in Brooklyn (Property), defendants Middle Dam Street Inc. (Middle Dam or borrower), Maureen Assoumou (Assoumou or guarantor) and 3405 Church Avenue Management Corp. (3405 Church Avenue)¹ (the current owner of the Property) (collectively, defendants) move (in motion sequence [mot. seq.] one) for an order: (1) dismissing the summons and complaint, pursuant to CPLR 3211 (a) (1) and (a) (7), and (2) cancelling the notice of pendency filed on October 28, 2020 against the Property, pursuant to CPLR 6514 (a).

Background

On October 28, 2020, plaintiff U.S. Bank National Association, as Trustee for Velocity Commercial Capital Loan Trust 2018-1 (US Bank) commenced this commercial foreclosure action by filing a summons, a complaint and a notice of pendency against the Property. The complaint alleges that the borrower, Middle Dam, borrowed \$787,500.00 from US Bank's predecessor, which was secured by a mortgage on the Property, and defendant Assoumou guaranteed payment under the loan. The complaint alleges that Middle Dam "failed and neglected to comply with the terms and conditions of the debt instrument and mortgage . . . by failing and omitting to pay the items of principal, interest, taxes, assessments, water rents, insurance premiums, escrow and/or other charges [due on February 1, 2020], or by failing to perform a covenant . . ." (complaint at ¶ 9 and exhibit G). The complaint asserts three causes of action: (1) against Middle

¹ While defendants' notice of motion inadvertently omitted defendant 3405 Church Avenue, the remainder of defendants' moving papers reflect that 3405 Church Avenue is also a movant. This obvious error is corrected pursuant to CPLR 2001.

Dam, the borrower, to foreclose the Property under the mortgage based on the borrower's payment default; (2) against Assoumou, the guarantor, to collect under the guaranty; and (3) against Middle Dam for defaulting under the mortgage by transferring the Property to defendant 3405 Church Avenue.

On January 4, 2021, defendants Middle Dam, Assoumou and 3405 Church Avenue collectively answered the complaint, asserted six affirmative defenses, including that "[d]efendants have been affected by [the] Covid-19 pandemic and the within matter should not have been commenced pursuant to State, Local and Federal laws." Defendants also asserted seven counterclaims that are unrelated to the instant motion.

Defendants' Dismissal Motion

Defendants Middle Dam, Assoumou and 3405 Church Avenue now move to dismiss the summons and complaint and cancel the notice of pendency filed against the Property on the ground that this commercial foreclosure action "was brought at a time when there was a moratorium on mortgage foreclosure actions" due to the COVID-19 pandemic. Defendants argue that this commercial foreclosure action should be dismissed because it was barred by Governor Cuomo's Executive Orders 202.28 and 202.70, which prohibited foreclosures of commercial property through January 1, 2021.

Defendants submit an affidavit from Assoumou, the guarantor and the president of Middle Dam, in support of defendants' "application to dismiss this action on legal grounds based on a direct violation of the Governor's Executive Orders." Assoumou attests that the Property "is a mixed use building with two apartments and a store on the ground floor" and "[i]t goes without saying that my entity has been unable to receive any

revenue as a result of COVID-19.” Assoumou explains that she is a “Landlord who manages multiple properties here in New York City,” “most of my rent rolls are quite simply not performing” and “I am unable to resort to the Court system and take steps to enforce any lease agreements during this period as Landlord/Tenant actions are effectively fro[z]e[n].” Notably, although Assoumou references a COVID-19 hardship declaration, there is no such declaration annexed to her moving affidavit.

US Bank's Opposition

US Bank, in opposition, asserts that defendants’ dismissal motion should be disregarded because it was filed and served by a different defense attorney than defendants’ answer. US Bank argues that “[e]xcept for unusually complex litigation or special circumstances, a party may be represented by only one attorney.”

US Bank also asserts that Assoumou “is neither the borrower nor the mortgagor, and no foreclosure action is necessary to enforce the guaranty” and “[t]herefore, the Executive Orders staying the enforcement of mortgage foreclosures are of no avail to her, and her motion should be denied.” US Bank argues that the Executive Orders only stayed the commencement of commercial foreclosures based on nonpayment and Assoumou “overlooks the third cause of action in the complaint, which asserts as an event of default the mortgagor’s transfer of the property to a third party without the prior written consent of the plaintiff.” Essentially, US Bank argues that the Executive Orders do not stay its second cause of action against the guarantor and its third cause of action against the borrower for transferring the Property.

US Bank further argues that Middle Dam is not covered by the Executive Order 202.28, which was extended by Executive Orders 202.64 and 202.70, because the plain language of Executive Order 202.28 “demonstrates that it was meant [to] apply to persons, not corporations.” US Bank asserts that “[t]he Executive Order applies to those who are either eligible for unemployment benefits, or are facing financial hardship due to the pandemic” and “[t]he first qualifier clearly applies only to persons, because corporations are not eligible for unemployment benefits.”

US Bank further argues that Middle Dam defaulted by failing to pay the monthly payment due on February 1, 2020, “pre-dating the declaration of a state of emergency and the issuance of all of the executive and administrative orders.” US Bank also asserts that “[o]ther than [Assoumou’s] conclusory statement, she offered no proof of [Middle Dam’s] hardship, or its cause.” US Bank notes that “Ms. Assoumou does not even claim that one or more of the tenants in this commercial property stopped paying rent as a result of the pandemic” and that “[n]o leases, current rent rolls, tax returns, or copies of pre-pandemic rent demand letters, accompany the motion.” US Bank also notes that “having transferred its interest in the real property, the defendant/mortgagor Middle Dam isn’t even entitled to receive any revenue from the mortgaged property.”

US Bank also argues that dismissal is not the appropriate remedy under Executive Order 202.28. US Bank explains that “[f]ollowing the pronouncement of the Executive Order, Chief Administrative Judge Marks issued Administrative Order 157/20” which provided “a mechanism to determine whether the action should be paused.” Finally, US

Bank assert that Executive Order 202.28 is unconstitutional because “the courts cannot impair contracts”

Defendants’ Reply

Defendants, in reply, submit an attorney affirmation arguing that the action should be dismissed pursuant to the Executive Orders because “Plaintiff is suing a natural person, Maureen Assoumou in a foreclosure action for her guarantee of a mortgage on a property affected by COVID.” Defendants also argue that the Governor’s Executive Orders are constitutional.

Discussion

Executive Order 202.2, issued on March 20, 2020, provides, in relevant part, that “[t]here shall be no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days.” Thus, Executive Order 202.2 merely provided a stay for all applicable foreclosure actions.

Executive Order 202.28, issued on May 7, 2020, provides, in relevant part, that:

“[t]here shall be no initiation of a proceeding or enforcement of . . . a foreclosure of a residential or commercial mortgage, for nonpayment of such mortgage, owned or rented by someone that is either eligible for unemployment insurance benefits under state or federal law or otherwise facing financial hardship due to COVID 19 pandemic for a period of sixty days beginning on June 20, 2020.”

Executive Orders 202.48, 202.64 and 202.70, which were issued on July 6, 2020, September 18, 2020 and October 20, 2020, respectively, extended the pause period through January 1, 2021.

Importantly, the aforementioned Executive Orders do not authorize the dismissal of commercial foreclosure actions commenced during the COVID-19 pause period, pursuant to CPLR 3211. Consequently, defendants' dismissal motion is denied, since the Executive Orders do not provide a basis for the relief that defendants seek. Accordingly, it is hereby

ORDERED that defendants' dismissal motion (in mot. seq. one) is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE