

**Copperfield Inv., LLC v 67-03 Realty Corp.**

2015 NY Slip Op 30469(U)

March 25, 2015

Sup Ct, Queens County

Docket Number: 5065/2009

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

- - - - - x

COPPERFIELD INVESTMENTS, LLC, Index No.: 5065/2009  
Plaintiff, Motion Date: 12/16/14  
- against - Motion No.: 34

67-03 REALTY CORP., BAYVILLE REALTY Motion Seq.: 3  
CORP., NEW YORK CITY DEPARTMENT OF  
FINANCE, NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD, NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU, NEW YORK CITY  
DEPARTMENT OF TAXATION AND FINANCE,  
PEOPLE OF THE STATE OF NEW YORK, PRYOR  
& MANDEUP, LLP; JOHN DOE (Said name  
being fictitious it being the  
intention of the plaintiff to  
designate any and all occupants of the  
premises being foreclosed herein, and  
any parties, corporations or entities,  
if any, having or claiming an interest  
or lien upon the mortgaged premises),

Defendants.

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The following papers numbered 1 to 22 were read on this motion by the plaintiff, COPPERFIELD INVESTMENTS, LLC, for an order striking the answer of defendant, 67-03 Realty Corp., granting summary judgment pursuant to CPLR 3212; for an order granting a default judgment pursuant to CPLR 3215 against all other non-answering defendants; for an order amending the caption by substituting ROUNDPOINT MORTGAGE SERVICE CORPORATION as party plaintiff; and by deleting the JOHN DOE defendants and substituting the names of the present tenants, GALAXY CHECK CASHING and COMANCHE DINERO; ordering that the additional notice of pendency be amended nunc pro tunc; and for an order pursuant to RPAPL § 1321 appointing a referee to ascertain and compute the amount due to the plaintiff; and the cross-motion of defendant Bayville Realty Corp for an order dismissing the plaintiff's

motion for summary judgment; or in the alternative, for an order directing a referee to be appointed to limit the recovery of interest on the plaintiff's note; vacating the default of Bayville Realty Corp; and for an order permitting Bayville Realty to withdraw its Limited Notice of Appearance and to interpose an answer:

Papers  
Numbered

Plaintiff's Notice of Motion-Affidavits-Exhibits.....	1 - 7
Bayville Realty Notice of Cross-Motion-Affirmation-Exhibits.	8 - 11
Plaintiff's Affirmation in Opposition to Cross-Motion.....	12 - 16
Reply Affirmations(2).....	17 - 22

In this mortgage foreclosure action, plaintiff, Copperfield Investments, LLC, moves for an order striking the answer of defendant, 67-03 Realty Corp; granting summary judgment against said defendant on the ground that the answer contains no valid defense and that no triable issues of fact exist; granting a default judgment against the remaining defendants who have not answered; appointing a referee to compute the sums due and owing to plaintiff; and amending the caption.

This action pertains to the commercial rental property located at 67-03 Roosevelt Avenue, Woodside, New York, 11377. Based upon the record before this court, defendant 67-03 Realty Corp. entered into a mortgage with Greenpoint Mortgage Funding, Inc., on May 5, 2003 to secure a loan in the principal amount of \$490,000. Defendant also executed and delivered an Adjustable Rate Mortgage Note to Greenpoint Mortgage Funding, Inc. acknowledging the loan, the rate of interest, and the monthly installments.

The Note was assigned by Greenpoint to the plaintiff by virtue of an Assignment of Mortgage recorded on August 7, 2008. The note includes an allonge and an indorsement by Greenpoint making the Note payable to Copperfield Investments, LLC. Following the commencement of the action the note was assigned to Private Capital Corp. on March 25, 2010 and then to Roundpoint Mortgage Servicing Corp. on March 18, 2014.

The instant action was commenced by the filing of a summons and complaint and lis pendens on March 4, 2009. None of the defendants answered the complaint with the exception of 67-03 Realty Corp. who served an answer dated February 5, 2009 containing only a general denial and no affirmative defenses. Bayville Realty Corp. served a Limited Notice of Appearance dated March 18, 2009 which did not oppose the relief sought in the complaint.

In support of the motion for summary judgment, the plaintiff submits the affirmation of counsel, Craig K. Beideman, Esq., the affidavit of merit of Dawn Kernicky Vice President-Foreclosure of Roundpoint Mortgage Servicing Corporation, successor in interest to Copperfield Investments, LLC; ; a copy of the note and mortgage; copies of the affidavits of service on all the defendants; a copy of the pleadings; a copy of a notice of default dated December 15, 2008; a copy of the attorney affirmation pursuant to the Administrative Order of the Chief Administrative Judge dated October 13, 2014, under AO/548/10, executed by Craig K. Beideman, Esq; a document from the New York State Department of Corporations showing that defendant, 67-03 Realty Corp. was dissolved on January 26, 2011; and a further order from United States Bankruptcy Court, Eastern District, indicating that defendant, 67-03 Realty Corp's Bankruptcy petition was dismissed on October 14, 2009.

In her affidavit in support of the motion, Dawn Kernicky, Vice President, Foreclosure of Roundpoint Mortgage Servicing Corporation, states that she has personal knowledge of the facts regarding this matter based upon her independent examination of the financial books and business records maintained by the plaintiff. Based upon her personal review of the records she states that Copperfield Investments, LLC was the holder of the Note at the time this action was commenced. She states that the defendant defaulted under the terms of the note and mortgage by failing to tender funds for the May 1, 2006 payment and all successive payments thereafter.

In his affirmation, plaintiff's counsel asserts that plaintiff has established a prima facie case through the production of the unpaid note and mortgage. Counsel asserts that although the defendant filed Chapter 11 Bankruptcy on August 13, 2009 in the United States Bankruptcy Court for the Eastern District of New York, the Chapter 11 Bankruptcy petition was dismissed on October 14, 2009. The defendant corporation was dissolved on January 26, 2011.

Defendant 67-03 Realty Corp. has not opposed the motion for summary judgment.

Defendant Bayville Realty Corp., the holder of a second mortgage on the property, cross-moves for an order dismissing the motion for summary judgment or in the alternative directing a referee to be appointed in this matter to limit the recovery of interest on plaintiff's note, vacating Bayville's default, permitting Bayville to withdraw the Limited Notice of Appearance and to interpose an answer. In support of the cross-motion Bayville submits an affidavit from Nikos Andreadis, Esq.,

President of Bayville Realty Corp, and an affirmation from counsel Richard J. Boccio, Esq.,

In his affidavit, Mr. Andreadis states that he is in-house counsel and President of Bayville Realty. He states that plaintiff commenced a previous action to foreclose on this mortgage on January 10, 2008 under Index No. 739/2008. The present action was commenced on March 4, 2009, 14 months later. Counsel claims that the instant action must be dismissed pursuant to RPAPL 1301(3) which prohibits the plaintiff from commencing a second foreclosure action to recover the mortgage debt while a prior action is pending. The court records indicate that the prior action was never discontinued (see Aurora Loan Servs., LLC v Spearman, 68 AD3d 796 [2d Dept. 2009][while a foreclosure action is pending, no other action shall be commenced or maintained to recover any part of the mortgage debt without leave of the court in which the former action was brought]). Here. the plaintiff did not obtain leave of the court prior to commencing the instant action and therefore Bayville contends that the instant action is a nullity.

Mr. Andreadis explains that Bayville Realty was named and served as a party-defendant in this action because it held a second mortgage on the property. Mr. Andreadis claims that between March 2009 and October 2014 there has been no activity on the matter notwithstanding that the borrower's Chapter 11 proceeding was dismissed in 2009, more than five years ago. Counsel states that he did file an answer so as not to delay the matter as any delay in litigating the matter would have been a detriment to Bayville. Bayville asserts that the interest accruing on the first mortgage diminishes the possibility that Bayville will be able to recover surplus monies. Counsel claims that the plaintiff filed a notice of pendency in this action in March 2009 which expired in March 2012. Counsel asserts that the plaintiff did not file a second notice of pendency until February 22, 2013 and that there was a lapse of eleven months prior to the filing of the second notice of pendency.

Mr. Andreadis states further that while the instant matter was pending, he commenced a separate foreclosure action on behalf of Bayville based upon the second mortgage against 67-03 Realty Corp in 2008 under Index No. 5223/2008. A Judgment of Foreclosure and Sale in that action was signed by Justice James Golia on May 14, 2009. The property was sold at auction on January 21, 2010 to Bayville for \$1,000. On January 22, 2010 Bayville assigned its interest to Subar Enterprises Inc. On December 21, 2012, the premises were deeded from Subar to Subar Andreadis LLC, the present owner of record. Mr. Andreadis states that for over three years he has been in negotiations with the plaintiff but the

plaintiff has not agreed to Subar's offer to purchase the premises in a short sale. Counsel asserts, therefore, that in the interests of justice the referee in this matter should only compute interest through July 6, 2011. Counsel also seeks to interpose an answer on behalf of Bayville on the ground that it had a reasonable excuse for not answering the complaint and a meritorious defense to the action.

In opposition to the cross-motion, plaintiff contends that Bayville assigned its interest in the premises to Subar and no longer has standing in this action as it no longer holds an interest in the mortgaged premises. Plaintiff claims that Bayville was named as a defendant because it held a second mortgage executed in the amount of \$130,000. As a result of the Judgment of Foreclosure in that action and the judicial sale to Subar Enterprises, defendant no longer holds a mortgage on the subject property and no longer has an interest in the property. Plaintiff claims that defendant was made whole by the foreclosure sale in 2010 and its lien on the property was satisfied at that time.

Plaintiff also claims that even if surplus monies were to result from a foreclosure sale in this action, Bayville would no longer be entitled to any. Plaintiff claims that Bayville no longer is entitled to request or be granted any relief in this proceeding because it is no longer an interested party. In addition, plaintiff claims that Bayville waived the defense of another action pending by failing to serve an answer to the complaint. Lastly, plaintiff claims that the deed from Referee Sheldon Glass to Subar Enterprises Inc and the deed from Subar Enterprises Inc to Subar Andriadis were both recorded after the filing of a notice of pendency and during the periods of effectiveness and thus Subar took its interest subject to the rights of the plaintiff herein

In reply, counsel for Bayville, asserts that the cross-motion is viable because Subar Andreadis, the current owner of the property, is controlled by the same individuals as Bayville and are successors in interest to Bayville. Counsel request that the cross-motion be converted to request that Subar Andreadis, LLC, the current property owner and the holder of the right of redemption, be permitted to intervene and file an answer to the complaint. Counsel claims that Subar should be permitted to intervene as of right pursuant to CPLR 1012((a)(3) because it hold title to the property in question and because it will be bound by a judgment in this action. Subar claims that a judgment in this action may act to cut off its right of redemption.

This court finds that in view of the fact that there are significant issues in this matter for both sides and considering that the parties were reportedly close to a settlement in this matter with a Note Purchase and Sale Agreement having been proffered by the plaintiff to Andreadis Capital, it is hereby,

ORDERED, that this matter shall be conferenced with the court with a view towards settlement. All counsel and parties shall appear at **10:00 a.m** on **April 23, 2015** for conference prior to a determination of the motion.

Notify counsel.

Dated: March 25, 2015  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**