

NYCTL 2015-A Trust v 135 W. 13, LLC

2017 NY Slip Op 30907(U)

April 25, 2017

Supreme Court, New York County

Docket Number: 650176/2016

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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NYCTL 2015-A TRUST and THE BANK OF NEW
YORK MELLON, as Collateral Agent and
Custodian for the NYCTL 2015-A TRUST,

Plaintiff

Index No. 650176/2016

v

135 WEST 13, LLC, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, BANK OF
SMITHTOWN, VILLAGE REALTY HOLDINGS, LLC,
COMMERCE BANK, N.A., HEIGHTS CARPENTER
SHOP, INC., and JOHN DOE NO. 1 through
JOHN DOE NO. 100, etc.,

DECISION AND ORDER

MOT SEQ 001

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to foreclose a tax lien, the plaintiff moves pursuant to CPLR 3212 for summary judgment on the issue of liability against the defendant Village Realty Holdings, LLC (VRH), and for the appointment of a referee to hear and report on the issue of the amount due and owing under the lien, plus the amount of attorneys' fees to which it is entitled. It also moves pursuant to CPLR 3025(b) and 1024 for leave to amend the caption to substitute actual persons for four fictitious defendants named in the summons and complaint, and pursuant to CPLR 3217(b) to discontinue the action against the remaining fictitious defendants.

II. BACKGROUND

VRH is the owner of the subject real property in Manhattan, and became obligated to the New York City Department of Finance (DOF) to pay unpaid real property taxes and accrued interest. Although VRH and the DOF entered into a settlement agreement, VRH defaulted thereunder, and has not paid any sums due and owing since June 19, 2014. The plaintiff, which now holds the relevant tax lien certificate, commenced this tax lien foreclosure action against VRH, among others. VRH answered the complaint, asserting that it lacked information sufficient to form a belief as to most of the material allegations in the complaint. It asserted that the plaintiff lacked standing and capacity to prosecute the action. VRH also asserted several affirmative defenses, including allegations that the action is barred by a settlement, an accord and satisfaction, waiver, and election of remedies, and that the plaintiff did not provide it an opportunity to redeem its interest in the property.

III. DISCUSSION

A. SUMMARY JUDGMENT

The plaintiff established both its standing and its prima facie entitlement to judgment as a matter of law through the submission of the pleadings, the tax lien certificate (see Admin. Code of City of N.Y. §§ 11-331, 11-336), the affidavit of the

managing director of its servicing agent, and the affidavit of the Tax Lien Ombudsman for the DOF, which sets forth proof that VRH failed to pay all of the taxes and interest that were due on the subject real property, VRH and the DOF entered into a settlement agreement with respect to the real property taxes and interest, VRH defaulted on the agreement on June 19, 2014, and the plaintiff is the holder of the tax lien.

VRH opposes the motion, asserting that there are numerous facts within the sole province of the plaintiff, and that it cannot properly defend the motion in the absence of disclosure, which could reveal how much remains due and owing. In its opposition, which is supported only by an attorney's affirmation, VRH makes only generalized statements that it needs discovery to ascertain how much it has already paid and what remains outstanding, and makes no specific allegations as to any of its affirmative defenses.

Although CPLR 3212(f) permits a court to deny a summary judgment motion where "facts essential to justify opposition may exist but cannot then be stated," VRH failed to demonstrate how further discovery might lead to relevant evidence. See Alcor Life Extension Found. v Johnson, 136 AD3d 464 (1st Dept. 2016). "The 'mere hope' of defendant[] that evidence sufficient to defeat such a motion may be uncovered during the discovery process is not enough." Frierson v Concourse Plaza Assoc., 189

AD2d 609, 610 (1st Dept. 1993), quoting Jones v Gmeray, 153 AD2d 550, 551 (2nd Dept. 1989). To properly oppose the plaintiff's motion pursuant to CPLR 3212(f), VRH is "bound to show there was a likelihood of discovery leading to such evidence, i.e., that facts may exist but cannot be stated at that time." Frierson v Concourse Plaza Assoc., 189 AD2d at 610. VRH, however, fails to make such a showing here, as it does not explain what discovery is needed to oppose the motion, specifically failing to identify which documents might reveal any facts relevant to its contentions, or what testimony any proposed deposition witnesses might be able to proffer in connection therewith. See Gyabbah v Rivlab Transp. Corp., 129 AD3d 447 (1st Dept. 2015).

Moreover, any dispute as to the exact amount owed by VHR to the plaintiff may be resolved after a reference pursuant to RPAPL 1321, and the existence of such a dispute does not preclude the award of summary judgment to the plaintiff. See Heywood Condominium v Wozencraft, 148 AD3d 38 (1st Dept. 2017); NYCTL 1999-1 Trust v. Stark, 21 AD3d 402 (2nd Dept. 2005).

Thus, summary judgment must be awarded on the issue of liability as against VRH.

The plaintiff correctly contends that, upon the submission of appropriate evidence, it is entitled to recover costs, including a reasonable attorney's fee, since it is the prevailing party this action. See RPAPL 1351, 1354; Admin. Code of City of

N.Y. § 11-335; NYCTL 1996-1 Trust v Stavrinou Realty Corp., 113 AD3d 602, 604 (2nd Dept. 2014).

B. AMENDMENT OF CAPTION

The plaintiff also made a proper showing that Clara Jones, Jill Kenul, Alime Karam, and Mr. Remigio, first name unknown, should be substituted for unknown defendants John Doe Nos. 1 through 4, and that unknown defendants John Doe Nos. 5 through 100 should be dismissed from the action, as they were neither identified nor served. It has thus demonstrated that the caption should be amended accordingly. See CPLR 3025(b), 1024.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the plaintiff's motion is granted to the extent that it is awarded summary judgment on the issue of liability against the defendant Village Realty Holdings, LLC, with the full amount of damages to be determined by a referee, and the affirmative defenses of that defendant are dismissed; and it is further,

ORDERED that Clara Jones, Jill Kenul, Alime Karam, and Mr. Remigio, first name unknown, are substituted as party defendants for unknown defendants John Doe Nos. 1 through 4; and it is further,

ORDERED that the complaint is dismissed and the action is discontinued against the unknown defendants John Doe Nos. 5 through 100; and it is further,

ORDERED that the caption is amended so that it now reads as follows:

NYCTL 2015-A TRUST and THE BANK OF NEW YORK MELLON, as Collateral Agent and Custodian for the NYCTL 2015-A TRUST,
Plaintiff,

v

135 WEST 13, LLC, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, BANK OF SMITHTOWN, VILLAGE REALTY HOLDINGS, LLC, COMMERCE BANK, N.A., HEIGHTS CARPENTER SHOP, INC., CLARA JONES, JILL KENUL, ALIME KARAM, and MR. REMIGIO,
Defendants;

and it is further,

ORDERED that the Clerk of the court shall mark his records accordingly; and it is further;

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

the issue of the amount due to the plaintiff for unpaid obligations on the subject tax lien certificate, interest on those obligations, and costs, including attorney's fees; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for

placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further.

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees' Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

This constitutes the Decision and Order of the court.

Dated: 4/25/17

ENTER: 

HON. NANCY M. BANNON
J.S.C.