

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 23-01420

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, GREENWOOD, AND HANNAH, JJ.

DEUTSCHE BANK TRUST COMPANY AMERICAS, AS
TRUSTEE FOR THE REGISTERED HOLDERS OF WELLS
FARGO COMMERCIAL MORTGAGE SECURITIES, INC.,
COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2011-C4, ACTING BY AND THROUGH RIALTO
CAPITAL ADVISORS, LLC, AS SPECIAL SERVICER
UNDER THE POOLING AND SERVICING AGREEMENT
DATED AS OF AUGUST 1, 2011, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

FREDONIA TEMPLE/BRIGHAM APARTMENTS LLC,
BRETT J. FITZPATRICK, DAVID A. HUCK, LORETTA
FITZPATRICK, AS EXECUTRIX OF THE ESTATE OF
J. MICHAEL FITZPATRICK, DECEASED, GERALD E.
KELLY, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

PHILLIPS LYTTLE LLP, BUFFALO (PRESTON L. ZARLOCK OF COUNSEL), AND
HOLLAND & KNIGHT LLP, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

KAVINOKY COOK LLP, BUFFALO (SCOTT C. BECKER OF COUNSEL), FOR
DEFENDANT-RESPONDENT FREDONIA TEMPLE/BRIGHAM APARTMENTS LLC.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (MATTHEW J. BECK OF
COUNSEL), FOR DEFENDANT-RESPONDENT BRETT J. FITZPATRICK.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR
DEFENDANT-RESPONDENT DAVID A. HUCK.

BENGART & DEMARCO, LLP, TONAWANDA, LAW OFFICE OF PHILIP MILCH, AMHERST
(PHILIP A. MILCH OF COUNSEL), FOR DEFENDANT-RESPONDENT LORETTA
FITZPATRICK, AS EXECUTRIX OF THE ESTATE OF J. MICHAEL FITZPATRICK,
DECEASED.

Appeal from an order of the Supreme Court, Chautauqua County
(Emilio Colaiacovo, J.), entered July 17, 2023. The order, among
other things, denied the motion of plaintiff insofar as it sought to
sever the fifth cause of action.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by granting that part of the motion
seeking to sever the fifth cause of action, and by severing that part

of the first cause of action asserting claims against defendants Brett J. Fitzpatrick, David A. Huck, Loretta Fitzpatrick, as executrix of the estate of J. Michael Fitzpatrick, deceased, and Gerald E. Kelly, and as modified the order is affirmed without costs.

Memorandum: These appeals arise out of a commercial loan made by plaintiff's predecessor-in-interest, non-party General Electric Capital Corporation, to defendant Fredonia Temple/Brigham Apartments LLC (Fredonia Temple) for the construction of student housing near the State University of New York at Fredonia. The loan, secured by a mortgage on the property, matured in 2021 and obligated Fredonia Temple to make a balloon payment at that time. Concurrently with the execution of the loan agreement, defendants Brett J. Fitzpatrick, David A. Huck, Loretta Fitzpatrick, as executrix of the estate of J. Michael Fitzpatrick, deceased, and Gerald E. Kelly (collectively, individual defendants) executed a joinder agreement whereby each guaranteed the payment and performance of Fredonia Temple's obligations in limited circumstances. Plaintiff commenced this action for, inter alia, foreclosure on the property based on Fredonia Temple's default in failing to make the balloon payment, as well as other alleged non-monetary defaults. In appeal No. 1, plaintiff appeals from an order of Supreme Court that, inter alia, denied plaintiff's motion insofar as it sought summary judgment on its claims of non-monetary defaults and severance of the fifth cause of action alleging breach of the joinder agreement by the individual defendants. In appeal No. 2, plaintiff appeals from an order that denied plaintiff's motion seeking, inter alia, leave to amend the complaint. In appeal No. 3, plaintiff appeals from a supplemental order that granted the motion of the court-appointed receiver seeking to expand his powers and authority to, inter alia, market and sell the property.

In appeal No. 1, plaintiff contends that the court erred in denying its motion with respect to the issue of severance. "In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue" (CPLR 603). "The determination of a severance motion under CPLR 603 is a matter of judicial discretion which will not be disturbed on appeal absent an abuse of discretion or prejudice to a substantial right of the party seeking severance" (*Utica Mut. Ins. Co. v American Re-Insurance Co.*, 132 AD3d 1405, 1405 [4th Dept 2015] [internal quotation marks omitted]; see *Finning v Niagara Mohawk Power Corp.*, 281 AD2d 844, 844 [3d Dept 2001]). Here, the individual defendants are not necessary parties to this action insofar as the relief sought is the sale of the premises (see generally *Marine Midland Bank v Berley*, 90 AD2d 646, 646 [3d Dept 1982]). Additionally, any undue delay of the foreclosure sale of the premises can be avoided by the severance (see CPLR 603; see generally *Marine Midland Bank*, 90 AD2d at 646-647). Therefore, we conclude that the claims against the individual defendants in the first and fifth causes of action should be severed and subject to later determination by the court after the sale of the property. We thus modify the order in appeal No. 1 accordingly.

Plaintiff also contends in appeal No. 1 that the court erred in

refusing to apply the loan agreement's default interest rate to the non-monetary defaults. In light of the court's determination that plaintiff failed to meet its burden on the motion insofar as it sought summary judgment on the alleged non-monetary defaults, which determination is not challenged on appeal by plaintiff, we conclude that the court did not make a finding as to the issue whether the default interest rate applies and, thus, the issue is not properly before us (see generally *Matter of Monroe Sq. Assoc., L.P. v Board of Assessors*, 23 AD3d 985, 986 [4th Dept 2005]).

Addressing appeal No. 2, we agree with plaintiff that the court erred in denying its motion insofar as it sought leave to amend the complaint to add allegations of intentional misrepresentations and unauthorized debt incurred by Fredonia Temple. It is well settled that permission to amend pleadings should be "freely given . . . , unless prejudice would result to the nonmoving party or the proposed amendment is plainly lacking in merit" (*Haga v Pyke*, 19 AD3d 1053, 1054 [4th Dept 2005] [internal quotation marks omitted]; see CPLR 3025 [b]; *Manufacturers & Traders Trust Co. v Reliance Ins. Co.*, 8 AD3d 1000, 1001 [4th Dept 2004]). Here, the proposed amendments are based on allegations similar to those contained in the original complaint, are consistent with plaintiff's existing theories, are not patently devoid of merit, and will not result in significant prejudice or surprise (see *Haga*, 19 AD3d at 1055). The proposed amended complaint does not allege any additional causes of action; it sets forth new factual allegations that relate back to the date on which the causes of action in the original complaint were interposed (see *id.*). We therefore modify the order in appeal No. 2 accordingly.

Finally, we agree with plaintiff in appeal No. 3 that the court erred insofar as it granted the motion of the court-appointed receiver by expanding his authority and powers to market the property for sale "in a commercially reasonable and transparent manner." RPAPL 231 (1) provides that "[a] sale of real property made in pursuance of a judgment affecting the title to, or the possession, enjoyment or use of, real property, shall be at public auction to the highest bidder." Thus, the sale of the subject property must be at public auction (see *Lauriello v Gallotta*, 70 AD3d 1009, 1010 [2d Dept 2010]). We therefore modify the supplemental order in appeal No. 3 accordingly.