Community Natl. Bank v Teresa's Family Cleaning, Inc.
2014 NY Slip Op 32171(U)
July 11, 2014
Supreme Court, Suffolk County
Docket Number: 17191/13
Judge: Thomas F. Whelan
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MEMO DECISION/SHORT FORM ORDER

INDEX No. 17191/13

ORIGINAL

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3/27/14
ADJ. DATES 6/13/14
Mot. Seq. # 003 - Mot D
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COMMUNITY NATIONAL BANK,

Plaintiff,

-against-

TERESA'S FAMILY CLEANING, INC., KEVIN PETER WARD, TERESA MARY DEBARI WARD, ROCKY SHORES VETERINARY HOSPITAL, PC, "JOHN DOE No. I" to "JOHN DOE No. XXX" inclusive, the last thirty names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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Upon the following papers numbered 1 to 11 read on this motion for summary judgment and an order of reference and other relief; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ____; Answering papers 5-7; Reply papers 8-9 ____; Other 10 (memorandum); 11 (memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#003) by the plaintiff for summary judgment against the answering defendants on certain of the plaintiffs' its causes of action, an order dropping certain persons as party defendants and an order appointing a referee to compute is considered under CPLR Article 32 and RPAPL Article 13 and is granted as indicated below.

The plaintiff commenced this action to foreclose two mortgages of unequal priorities given by the corporate defendant whose obligations thereunder were guaranteed in writing by the individual Ward defendants. The First mortgage for which foreclosure is demanded is one dated March 6, 2008

in the amount of $380,000.00. The plaintiff also seeks foreclosure of a subordinate, second mortgage in the amount of $50,000.00 that was likewise given by the corporate defendant and guaranteed by the Ward defendants. Although said mortgage was executed on the same date as the First, the second states expressly that it is second and subordinate to the first mortgage.

The complaint served and filed herein contains seven causes of action. Foreclosure of the First mortgage is set forth in the First cause of action while the foreclosure of the second mortgage is the subject of the Second cause of action. A deficiency judgment against the obligor defendants is demanded in the Third cause of action and a demand for possession of rents under a separate security agreement is demanded in the Fourth. The Fifth cause of action is entitled "Right to Foreclosure" and it sets forth a demand for a declaration that the first and second mortgages "be declared as first, second and prior liens on the property and that plaintiff be granted immediate possession of the property". The Sixth cause of action contains a claim for recovery of counsel fees. In the Seventh cause of action, the plaintiff demands, in effect, a judgment declaring the First and Second mortgages to be of equal priority upon a consolidation thereof solely for purposes of conducting a single foreclosure sale. Alternatively, the plaintiff demands in its final cause of action, incorrectly denominated as "FIFTH", that the court direct two separate, consecutive sales of the property, the first of which would represent the foreclosure of the Second mortgage with the second representing the foreclosure of the First mortgage.

Issue was joined by service of a joint answer by the corporate and guarantor defendants who therein assert ten affirmative defenses including, estoppel, waiver and a lack of standing on the part of the plaintiff. A separate joint answer was served by defendant, Rocky Shores Veterinary Hospital, P.C., in which it was joined by two individuals apparently having interests in Rocky Shores. Therein, these answering parties assert one affirmative defense in which they claim a prior leasehold interest in the premises that is allegedly superior to the liens of the plaintiff and thus not subject to extinguishment.

By the instant motion, the plaintiff seeks an order dropping as party defendants, the unknown defendants listed in the caption and an order of reference upon the granting of summary judgment against the answering defendants. The mortgagor/guarantor answering defendants oppose upon equitable grounds such as waiver, estoppel and unclean hands but do not contest the validity of the mortgage loans nor their defaults in payment. The Rocky Point defendants have not opposed the plaintiff's motion. For the reasons set forth below, the motion is granted to the extent set forth below.

It is now well settled that a prima facie case for foreclosure and sale is established by the plaintiff's production of the mortgage, the unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; ***Key Bank Natl. Ass'n v Chapman Steamer Collective, LLC***, 117 AD3d 991, 986 NYS2d 598 [2d Dept 2014]; ***Independence Bank v Valentine***, 113 AD3d 62, 64, 976 NYS2d 504 [2d Dept 2014]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***Solomon v Burden***, 104 AD3d 839, 961 NYS2d 535 [2d Dept 2013]; ***Baron Assoc., LLC v Garcia Group Enters., Inc***., 96 AD3d 793, 793, 946 NYS2d 611 [2d Dept 2012]). To establish prima facie entitlement to judgment as a matter of law on the issue of liability with respect to a guaranty, a plaintiff must submit proof of the underlying note, a guaranty, and the failure of the defendant to make payment in accordance with the terms of those instruments (*see* ***Griffon V, LLC v 11 East 36th, LLC***, 90 AD3d 705, 934 NYS2d 472 [2d Dept 2011]; ***Baron Assoc., LLC v Garcia Group Enter., Inc***., 96 AD3d 793, *supra*).

Here, the moving papers included copies of the loan documents that are the subject of the plaintiff's First and Third causes of action including the consolidated note and mortgage of June 11, 2007 and the written guarantees of the obligations of the mortgagor thereunder. The moving papers also included due proof that the mortgagor/guarantor defendants defaulted on the payment obligations under the terms of both mortgage loans and that neither the mortgagor defendant nor the guarantor defendants have cured the defaults in payment. The plaintiff thus established its entitlement to summary judgment on its First, Second, Third and Sixth causes of action set forth in the complaint, in which the plaintiff seeks foreclosure of the first and second mortgages, deficiency judgments against the mortgagor/guarantor defendants and an award of counsel fees from such defendants.

The moving papers further established a prima facie showing of an entitlement to summary judgment with respect to the plaintiff's Seventh cause of action sounding in declaratory relief that would effect a consolidation of the First and Second mortgages as to priority. The moving papers established, prima facie, the plaintiff's entitlement to such relief by virtue of the commonality of the date of the execution of the two mortgages, the absence of intervening encumbrancers and the absence of opposition to the plaintiff's demands for such relief by any party, including, the mortgagor/guarantor defendants who alone opposed this motion. The court thus awards summary judgment to the plaintiff on its Seventh cause of action for declaratory relief and declares the Second mortgage to be consolidated with the First mortgage so as to have equal priority with that of the First mortgage, thereby allowing both to be sold at but one public auction of the premises. The last cause of action, incorrectly denominated as a second "Fifth' cause of action for separate sales of the premises which is posited in the alternative to the Seventh cause of action is dismissed as the same was conditionally withdrawn by the plaintiff upon the granting of judgment on the Seventh cause of action.

Those portions of the plaintiff's motion wherein it seeks summary judgment on its Fifth cause of action entitled "Right to Foreclosure" is denied as no showing of any entitlement to accelerated judgments thereon under CPLR Article 32 was advanced in the moving papers. The Fifth cause of action, together with the Fourth seeking rents under a separate security instrument, which was not addressed in the moving papers, are severed from all others set forth in the complaint. The severance of these two causes of action must be reflected in the judgment issued thereon, if any.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing of its entitlement to summary judgment on its First, Second Third, Sixth and Seventh causes of action due to their possession of some bona fide defense asserted in their answer or otherwise possessed by them (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, NA v Agnello,*** 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). The Rocky Point defendants failed to oppose the motion and thus raised no question of fact. Summary judgment on these causes of action is thus awarded to the plaintiff to the extent asserted against the Rocky Point defendants.

In their opposing papers, the mortgagor/obligor defendants do not challenge the validity of the loan documents, their execution thereof or their defaults in payment under the terms thereof. Their

challenges to the plaintiff's motion encompass two procedural grounds, one of which is premised upon claims that the plaintiff failed to satisfy the general burdens of proof imposed upon any litigant seeking the drastic remedy of summary judgment by the provisions of CPLR 3212 and the case authorities interpreting same. While the defendants point to a multitude of such case authorities in string citations, the defendants' reliance thereon is misplaced. The standards for a prima facie case in a foreclosure action against the borrower and its guarantors are measured by those imposed by the case authorities cited above and the plaintiff clearly satisfied those standards for the reasons indicated.

The mortgagor/guarantor defendants' second procedural challenge rests upon claims that the motion should be denied as premature so as to afford the defendants the opportunity to engage in discovery as contemplated by CPLR 3212(f). The rule at CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (***Martinez v Kreychmar***, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see* ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). The "'mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered' by further discovery is an insufficient basis for denying the motion" (***Woodard v Thomas***, 77 AD3d 738 at 740, 913 NYS2d 103 [2d Dept 2010], *quoting*, ***Lopez v WS Distrib., Inc.***, 34 AD3d 759, 760, 825 NYS2d 516; *see* ***Friedlander Organization, LLC v Ayorinde***, 94 AD3d 693, 943 NYS2d 538 [2d Dept 2012]). In addition, the movant must show that his or her "ignorance was unavoidable and that reasonable attempts were made to discover the facts which would give rise to a triable issue of fact" (***Zheng v Evans***, 63 AD3d 791, 881 NYS2d 461 [2d Dept 2009]), as the "'mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered' by further discovery is an insufficient basis for denying the motion" (***Woodard v Thomas***, 77 AD3d 738 at 740, 913 NYS2d 103 [2d Dept 2010], *quoting*, ***Lopez v WS Distrib., Inc.***, 34 AD3d 759, 760, 825 NYS2d 516 (2d Dept 2006]; *see* ***Friedlander Organization, LLC v Ayorinde***, 94 AD3d 693, 943 NYS2d 538 [2d Dept 2012]).

Here, the answering defendants failed to satisfy the burdens imposed upon it under these appellate case authorities. Their participation in the transactions by which the mortgage loan documents were executed warrant the rejection of any claim that facts essential to justify opposition to the motion are exclusively within the knowledge and control of the plaintiff or that the plaintiff's motion is otherwise premature (*see* ***Lambert v Bracco***, 18 AD3d 619, 795 NYS2d 662 [2d Dept 2005]).

The remaining grounds for a denial of the plaintiff's motion rest not upon claims that the plaintiff has no viable claim for foreclosure and sale under the loan documents due to the defendants' defaults in payment. Instead, the mortgagor/guarantor defendants implore the court to invoke its equity powers and apply theories of waiver, estoppel, unclean hands, bad faith or other like theories so as to deny the plaintiff the contractual remedy of foreclosure and sale which these answering defendants willingly conferred upon it when they executed the note, mortgage, guarantees and other loan documents and accepted the monies advanced thereunder by the plaintiff. This appeal to the equity

powers of the court, which is based principally upon the parties' engagement in settlement discussions, the terms of which were ultimately not satisfactory to the defendants, is unavailing.

It is well established that a lender has no obligation to forebear its remedies before or after a default by a borrower or to modify the terms of its loan by the extension of a new loan or other refinance arrangement (*see* ***Graf v Hope Bldg. Corp***., 254 NY 254 NY 1, 4–5, 171 NE 884 [1930]; ***Wells Fargo v Meyers***, 108 AD3d 9, 966 NYS2d 108 [2d Dept 2013]; ***Wells Fargo Bank, N.A. v Van Dyke***, 101 AD3d 638, 2012 WL 6699200 [1st Dept 2012]; ***Key Intern. Mfg. Inc. v Stillman***, 103 AD2d 475, 480 NYS2d 528 [2d Dept 1984] mod. on other grounds 66 NY2d 924, 498 NYS2d 795 [1985]; ***Onewest Bank, FSB v Davies***, 38 Misc3d 1230[A], 2013 WL 846573 [Sup Ct. Suffolk County 2013]; ***Flushing Preferred Funding Corp. v Patricola Realty Corp***., 36 Misc3d 1240[A], 2012 WL 3984476 [Sup. Ct. Suffolk County 2012]; ***Carver Fed. Sav. Bank v Redeemed Christian Church***, 35 Misc3d 1228[A], 954 NYS2d 758 [Sup. Ct. Suffolk County 2012]; ***US Bank Natl. Ass'n v Major Holdings, LLC***., 35 Misc3d 1224[A], 953 NYS2d 554 [Sup. Ct. Suffolk County 2012]). Consequently, a failure to modify or refinance an existing loan does not, alone, give rise to an estoppel or constitute bad faith, unclean hands or other conduct upon which a mortgagor defendant may predicate a cognizable defense to a claim for foreclosure and sale (*see* ***Graf v Hope Bldg. Corp***., 254 NY 254 NY 1, 4–5, *supra*; ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; *see also* ***American Airlines Federal Credit Union v Mohamed***, 117 AD3d 974, 986 NYS2d 530 [2 Dept 2014]).

It is equally well established that while the remedy of foreclosure is equitable in nature and may be denied in cases of estoppel, bad faith, fraud or oppressive or unconscionable conduct (*see* ***Nassau Trust Co. v Montrose Concrete Prods. Corp***., 56 NY2d 175, 183, 451 NYS2d 663, 667 [1982]; ***Ferlazzo v Riley***, 278 NY 289, 16 NE2d 286 [1938]), a foreclosure action is in the nature of a proceeding in rem to appropriate the land and, as such, is unlike most other equity actions which operate in personam (*see* ***Jo Ann Homes v Dworetz***, 25 NY2d 112, 302 NYS2d 799 [1969]). This distinction is not without a difference as it compels a vastly more limited application of equitable principles to foreclosure actions than to other actions equitable in nature. A court's resort to equity to deny the remedy of foreclosure is thus limited to cases wherein there is clear and convincing evidence of fraud, exploitive overreaching or unconscionable conduct on the part of the obligee to exploit an inadvertent, inconsequential, technical, non-prejudicial default by the mortgagor (*see* ***Cohn v Middle Rd. Riverhead Dev. Corp***., 162 AD2d 578, 556 NYS2d 764 [2d Dept 1990]; ***Key Intern. Mfg. Inc. v Stillman***, 103 AD2d 475, *supra*; ***Karas v Wasserman***, 91 AD2d 812, 458 NYS2d 280 [3d Dept 1982]; *see also* ***Federal Home Loan Mtge. Corp. v Bronx New Dawn***, 1995 WL 412399, [SDNY 1995]; *cf.*, ***Graf v Hope Bldg. Corp***., 254 NY 1, *supra*).

Here, the mortgagor/guarantor defendants have demonstrated neither a factual nor legal basis upon which this court might invoke its equity powers so as to deny the plaintiff the contractual rights and remedies these defendants so willingly conferred upon it under the terms of the mortgage and other loan documents. The defendants' reliance upon their good faith efforts to negotiate a settlement in order to stay in possession of the premises and continue to their business and maintain the property is misplaced. The mere engagement in settlement discussions, before or after the commencement of suit, is not a defense to a claim for foreclosure and sale and there is no statutory entitlement to a mandatory

settlement conference for commercial loans such as those at issue here (*see* ***Independence Bank v Valentine***, 113 AD3d 62, *supra* ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, *supra*).

To the extent that the defendants' calls for equity rest upon claims that the remedy of foreclosure and sale is simply too harsh and should thus be denied by the court under the circumstances of this case, they are rejected as unmeritorious. The Second Department's recent reiteration of the long standing rule that "the stability of contract obligations must not be undermined by judicial sympathy" casts serious doubt upon the efficacy of any "harshness" defense (***Emigrant Mtge. Co., Inc. v Fisher***, 90 AD3d 823, 935 NYS2d 313 [2d Dept. 2011], *quoting* ***First Natl. Stores v Yellowstone Shopping Ctr.***, 21 NY2d 630, 638, 290 NYS2d 721 [1968], *quoting* ***Graf v Hope Bldg. Corp.***, 254 NY 1, 4–5, *supra*; *see also* ***Independence Bank v Valentine***, 113 AD3d 62, *supra*). Any resort to equity under the circumstances of this case would violate the clear proscription against the undermining of the stability of contracts.

In view of the foregoing, the court finds that the plaintiff is awarded summary judgment on its First, Second, Third, Sixth and Seventh causes of action against the answering defendants and to the dismissal of the affirmative defenses asserted in the answers served by such defendants. The court thus declares the Second mortgage to be consolidated with the First mortgage so that the lien of the Second mortgage enjoys an equal priority with that of the First mortgage, thereby allowing both to be sold at one public auction of the premises as directed in the judgment of foreclosure of sale, if any be entered herein. Summary judgment is denied with respect to the plaintiff's Fourth and Fifth causes of action which causes are severed from those upon which summary judgment has been granted. The final cause of action advanced in the complaint which incorrectly labeled "Fifth" is dismissed as academic in light of its withdrawal by the plaintiff.

Those portions of the instant motion wherein the plaintiff seeks an order dropping as party defendants the unknown defendants listed in the caption are granted. The plaintiff's further demands for an order amending the caption to reflect same is also granted.

Proposed Order of Reference, as modified by the court, has been signed.

DATED:
THOMAS F. WHELAN, J.S.C.