

Titan Capital ID, LLC v Sangerman
2007 NY Slip Op 31722(U)
June 15, 2007
Supreme Court, New York County
Docket Number: 0117390/2006
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHIRLEY WERNER KORNREICH

PART 54

Index Number : 117390/2006

TITAN CAPITAL ID, LLC

vs

SANGERMAN, JANE M.

Sequence Number : 001

APPT REF COMPUTE/EXAMINE ACCT.

INDEX NO. 117390/2006
MOTION DATE 4/5/07
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion ~~for~~ ^{for} summary

judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3,4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 6/15/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
TITAN CAPITAL ID, LLC,

Plaintiff,

-against-

INDEX NO. 117390/2006
DECISION & ORDER

JANE M. SANGERMAN, MOUNT STREET
INVESTMENT MANAGEMENT, LLC, PAUL
PLISHKA, and JOSEPH J. VADAPALAS,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

Plaintiff is the holder of two mortgages in default, one for \$1,000,000 and another for \$500,000, on 226 West 71st Street, New York, New York (“the Premises”). Plaintiff is seeking foreclosure of the two mortgages. Plaintiff now moves for summary judgment, appointment of a referee to compute the amount due plaintiff, dismissal of defendants’ counterclaim of fraud, and sanctions against defendants and their counsel for delay caused by submitting a frivolous answer and counterclaim.

I. Statement of Facts

A. Plaintiff’s Proof

The following is taken from the affidavit of Ira Saferstein, managing member of plaintiff, and various documents, detailed *infra*, submitted by plaintiff in support of the motion.

1. The \$1,000,000 and \$500,000 Mortgages

Defendant Jane M. Sangerman is the owner of the Premises. Ms. Sangerman received a

\$1,000,000 loan from Tsuris Funding, LLC (“Tsuris”). In exchange, Ms. Sangerman executed and delivered a mortgage note dated March 10, 2004 in the principal sum of \$1,000,000 (the “\$1,000,000 Note”). As security for payment of the \$1,000,000 Note, Ms. Sangerman granted and conveyed to Tsuris a \$1,000,000 mortgage (the “\$1,000,000 Mortgage”) on the Premises.

Defendant Mount Street Investment Management, LLC (“Mount Street”) received a \$500,000 loan from Tsuris. In exchange, Mount Street executed and delivered a mortgage note dated June 3, 2005 in the principal sum of \$500,000 (the “\$500,000 Note”). Ms. Sangerman and defendant Joseph J. Vadapalas then executed and delivered to Tsuris a General Guarantee of payment of the indebtedness under the \$500,000 Note (the “Guarantee”). As security for her obligations under the Guarantee, Ms. Sangerman granted and conveyed to Tsuris a \$500,000 mortgage (the “\$500,000 Mortgage”) on the Premises.

Ms. Sangerman, Tsuris, and Mount Street signed a Forbearance and Deferral Agreement in Foreclosure in March, 2006 agreeing that, although the \$1,000,000 Mortgage and Note matured on March 9, 2006, Tsuris would forebear from foreclosing the \$1,000,000 Mortgage, provided that Ms. Sangerman paid Tsuris all sums due it under the \$1,000,000 Mortgage and Note by June 1, 2006. The parties also agreed that although the \$500,000 Note and Mortgage were in default, Tsuris would forebear from foreclosing provided the sums due were also paid by June 1, 2006. Ms. Sangerman never paid these sums to Tsuris. The Forbearance Agreement also stated that there were no defenses, offsets, or counterclaims of any nature to any of the loan documents, and that the borrower was represented by counsel.

Both mortgages and notes were assigned to plaintiff on June 27, 2006. Ms. Sangerman, Mount Street and plaintiff then signed another Forbearance Agreement in August, 2006 agreeing

that plaintiff would forebear from foreclosing provided Ms. Sangerman paid plaintiff all sums due it under the mortgages and notes by October 31, 2006. Ms. Sangerman never paid these sums to plaintiff. The August 2006 Forbearance Agreement also stated that the sums were due plaintiff without offset, defense, and/or counterclaim, and that the borrower was represented by counsel. Plaintiff submitted copies of the \$1,000,000 Mortgage, the \$1,000,000 Note, the \$500,000 Mortgage, the \$500,000 Note, the March 2006 Forbearance Agreement, the two Assignments of Mortgage, and the August 2006 Forbearance Agreement.

2. *The Plishka Mortgage*

Paul Plishka holds a \$1,350,000 mortgage (the "Plishka Mortgage") on the Premises made on March 10, 2004. Pursuant to a Subordination Agreement made on June 3, 2005, the Plishka Mortgage is subordinate to the liens of the \$1,000,000 Mortgage and the \$500,000 Mortgage. Plaintiff submitted copies of the Plishka Mortgage and the Subordination Agreement.

3. *The Estoppel Letters*

Plaintiff submitted copies of two notarized Estoppel Letters dated June 22, 2006, signed by and sent from Ms. Sangerman to Mr. Saferstein, encouraging plaintiff to purchase the notes and mortgages from Tsuris.. The first letter states that the \$1,000,000 Note and Mortgage were not modified or extended except as set forth in the March 2006 Forbearance Agreement, and that the \$1,000,000 Note and Mortgage were in full force and effect, and fully enforceable in accordance with their terms. The letter further stated that the principle and other sums were due and payable, without offset, defense, or counterclaim, as of May 31, 2006. The second letter dealt with the \$500,000 Mortgage and Note, and contained similar language, including that the principle and other sums were due and payable, without offset, defense, or counterclaim, as of

May 31, 2006.

4. *Procedural History*

Mr. Pilshka appeared and submitted a Notice of Appearance and Waiver in Foreclosure on December 1, 2006, wherein he admitted the essential allegations of the complaint. Ms. Sangerman and Mr. Vadapalas appeared and submitted an Answer and Counterclaims on December 19, 2006. Mount Street has not appeared. Plaintiff submitted copies of the above documents.

B. *Defendants' Proof*

The following is taken from the affidavit of Mr. Vadapalas submitted by defendants. Mr. Vadapalas is the husband of Ms. Sangerman, and both of them live in the Premises. Mr. Vadapalas states they refinanced their loan with plaintiff in late June, 2006, but no copies of any agreements were submitted. Mr. Vadapalas also states that he and Ms. Sangerman were not represented by counsel when they refinanced. Mr. Vadapalas states that David Saferstein, an employee of plaintiff, made a number of contradictory statements, but does not give any specific examples. Mr. Vadapalas states that the agreement does not embrace the representations made by Mr. Saferstein, but does not state any specific examples.

II. *Arguments*

Plaintiff argues that the facts present a prima facie case for foreclosure of both mortgages, to wit, due execution and delivery, maturity, and non-payment. Plaintiff argues that Ms. Sangerman's and Mr. Vadapalas' Answer fails to plead acts of fraud with particularity as required by the Civil Practice Law and Rules, and that any allegations of fraud have nothing to do with the origination of the mortgages with Tsuris, which were freely assignable to plaintiff.

Plaintiff further argues that Ms. Sangerman agreed in the Estoppel Letters that the mortgages were enforceable and that the sums were due without offset, defense, and/or counterclaim.

Defendants agree with the linear history of the loans set forth by plaintiff. Defendants' Answer, however, contains four affirmative defenses and/or counterclaims: (1) plaintiff fails to state a cause of action; (2) the loans and mortgages are unconscionable; (3) plaintiff is estopped by its own conduct; (4) fraud. In addition, defendants argue that an issue of fact exists over how much is owed. Defendants also allege duress of individual homeowners involved in a complex loan without an attorney at the financing table. Though admitting a lack of statutory law, and citing no case law, defendants argue that this might be a case of "predatory loan concepts." Defendant argues discovery will assist in determining whether the loan was made to defendants without the adequate income and/or credit worthiness. Defendants further argue they will be removed from their home and lose their equity and sweat equity.

III. Conclusions of Law

In order to prevail on a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Upon this showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Id.*

A prima facie showing for mortgage foreclosure requires "the movant to establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment." *Witelson v. Jamaica Estates Holding Corp. I*, 835 N.Y.S.2d 179, 180 (1st

Dept. 2007). Plaintiff's submitted evidence clearly establishes its entitlement to a judgment as a matter of law.

Defendants fail to raise a triable issue of fact to meet their burden. It is well settled that "a mortgagor is bound by the terms of his contract as made and cannot be relieved from his default, if one exists, in the absence of waiver by the mortgagee, or estoppel, or bad faith, fraud, oppressive or unconscionable conduct on the latter's part." *Citidress II v. 207 Second Ave. Realty Corp.*, 21 A.D.3d 774, 776 (1st Dept. 2005) (quoting *Ferlazzo v. Riley*, 278 N.Y. 289, 292 (1938)). Nothing in the record would support one of these contentions. Defendants present no evidence of any bad faith or unconscionable conduct on plaintiff's part. Nothing in the record would provide a ground for estoppel. The interest rates of 12% and 14.5%, while perhaps high, are within the legal limit. General Obligations Law § 5-501(6)(a). While defendants claim they were not represented by counsel, evidence shows that they were represented by counsel when the two Forbearance Agreements were signed. And while they may not have been represented by counsel when the loans were originally signed, no evidence is given that the defendants were induced to sign, or under any type of duress.

Defendants' hope that the case might be embraced under "predatory loan concepts" after discovery, is not enough to defeat the motion. *See Campbell v. City of New York* 220 A.D.2d 476 (2d Dept. 1995) ("the mere hope that evidence sufficient to defeat the motion may be uncovered during the discovery process is not enough to defeat a motion for summary judgment" [internal quotations omitted]). Finally, defendants' counterclaim of fraud fails to state the circumstances constituting the wrong in detail, as required by CPLR § 3016(b). These facts are within defendants' knowledge. Discovery is not necessary to enable the alleged fraud to be

pleaded. Therefore, plaintiff's motions for summary judgment, appointment of a referee, and dismissal of defendants' counterclaim are granted. Plaintiff's motion for sanctions, however, is denied. The conduct of defendants is not so egregious as to rise to sanctionable action.

Accordingly, it is

ORDERED that the motion of plaintiff Titan Capital ID, LLC for summary judgment on the causes of action seeking foreclosure on the two mortgages is granted; and it is further

ORDERED that the motion of plaintiff Titan Capital ID, LLC for appointment of a referee is granted; and it is further

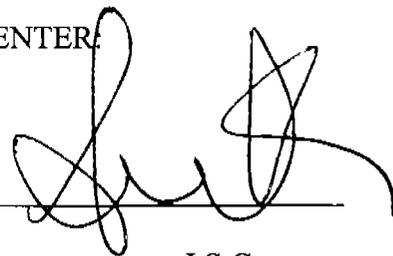
ORDERED that the motion of plaintiff Titan Capital ID, LLC dismissing defendants' counterclaim of fraud is granted; and it is further

ORDERED that the motion of plaintiff Titan Capital ID, LLC for sanctions against the defendants is denied;

Settle Order.

Dated: June 15, 2007

ENTER

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a horizontal line.

J.S.C.