

**GE Commercial Fin. Bus. Prop. Corp. v BMT
Holdings - Lynbrook, LLC**

2012 NY Slip Op 30839(U)

March 26, 2012

Sup Ct, Nassau County

Docket Number: 015330-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**GE COMMERCIAL FINANCE BUSINESS
PROPERTY CORPORATION,**

**TRIAL/IAS PART: 16
NASSAU COUNTY**

Plaintiff,

**Index No: 015330-11
Motion Seq. No: 1
Submission Date: 2/21/12**

-against-

**BMT HOLDINGS - LYNBROOK, LLC, SIXTH
AVENUE ELECTRONICS CITY, INC., and JOHN
DOE DEFENDANT NOS. 1-25, the Names of "John
Doe" Defendants Being Fictitious and Unknown to
Plaintiff, the Persons and Entities Intended Being Those
Who May be In Possession of, or May Have Possessory
Liens or Other Interests in the Premises Herein
Described,**

Defendants.

-----x

Papers Read on this Motion:

Notice of Motion, Affidavit in Support, Affirmation in Support and Exhibits....x

This matter is before the court on the motion filed by Plaintiff GE Commercial Finance Business Property Corporation ("GE" or "Plaintiff") on February 1, 2012 and submitted on February 21, 2012. For the reasons set forth below, the Court grants the motion.

BACKGROUND

A. Relief Sought

Plaintiff moves, pursuant to CPLR 1321 of the New York Real Property Actions and Proceedings Law ("RPAPL"), for judgment for the relief demanded in the Verified Complaint ("Complaint") or for an Order appointing a referee and directing the referee to compute the amount due Plaintiff for principal, interest and other costs, fees and expenses, including

attorney's fees, on the note and mortgage set forth in the Complaint and the amount due to such of the Defendants as are prior encumbrances of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels and, if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due, upon the ground that the Defendants BMT Holdings - Lynbrook, LLC ("Borrower") and Sixth Avenue Electronics City, Inc. ("Lessee Defendant") have not appeared, answered or otherwise responded to the Summons and Complaint in a timely manner.

B. The Parties' History

The Complaint (Ex. 1 to Isser Aff. in Supp.) is verified by Steven Benko ("Benko") who attests that 1) he is a Senior Asset Manager and Authorized Signatory of Plaintiff; 2) he has read the Complaint and knows its contents are true, except to those matters stated upon information and belief, which he believes to be true to the best of his knowledge; and 3) he makes the Verification because Plaintiffs is a corporation organized and existing under the laws of the State of Delaware and he is an officer thereof. Plaintiff also filed a Notice of Pendency regarding the property at issue (*id.* at Ex. 2).

The Complaint alleges as follows:

This is an action for the foreclosure of a commercial mortgage held by Plaintiffs as security for a loan ("Loan") made to Borrower in the principal sum of \$4,165,000.00, the purpose of which was to fund Borrower's acquisition of property ("Property") located at 831-835 and 839 Sunrise Highway, Lynbrook, Nassau County, New York. The Lessee Defendant is named as a party defendant by virtue of allegedly having a lease for the Property.

The "John Doe" defendants constitute tenants, occupants, or other persons and entities who may be in possession of, and/or may have possessory liens and/or other interests in, the Property, and which possessory liens and/or other interests, if any, are subsequent and/or subordinate to the mortgage being foreclosed. These Defendants are named as party defendants for the purpose of terminating such possessory liens and other interests.

On or about January 24, 2008, Borrower executed a Promissory Note ("Note") in the amount of \$4,165,000.00 payable to the order of Plaintiffs (Ex. 1 to Compl.), as evidence of the Loan. The Note is secured by a Commercial Mortgage, Security Agreement and Assignment of

Leases and Rents dated January 24, 2008, granted by the Borrower to the Plaintiff, in the amount of \$4,165,000.00 ("Mortgage") (*id.* at Ex. 2). The Property encumbered by the Mortgage consists of land described at pages 6-9 of the Complaint. On or about January 30, 2008, Plaintiff recorded the Mortgage and paid all applicable mortgage recording taxes. The Note, and other documents executed in connection with the Loan and their amendments, are referred to collectively as the "Loan Documents."

Pursuant to the Loan Documents, the Borrower was required to make monthly payments of principal ("Required Monthly Payments"). Borrower failed to make the Required Monthly Payments due on May 1 and June 1 of 2011. As of June 30, 2011, \$3,154,592.17 in principal had been advanced by Plaintiff to Borrower under the Loan and was outstanding. Pursuant to the Note, the outstanding principal of the Loan bears interest at a rate of 7.25% per annum. By letter dated June 17, 2011 (Ex. 3 to Compl.), Plaintiff notified Borrower of its failure to make the Required Monthly Payments, and further advised Borrower that if Borrower failed to make the payments within the designated time, those failures would constitute Events of Default under the Loan Documents, entitling Plaintiff to accelerate all amounts due under the Loan and demand that all obligations due under the Loan Documents be paid immediately. Borrower failed to make the Required Monthly Payments within the designated time frame.

By letter dated July 1, 2011 (Ex. 4 to Compl.), Plaintiff notified Borrower of the acceleration under the Loan Documents and demanded immediate payment of all obligations due under the Loan Documents which totaled \$3,899,317.96 consisting of outstanding principal, accrued and unpaid interest, interest at the default rate, late charges, expenses, attorney's fees and other costs and fees. Borrower has not met its obligations and remains in default of the Loan. Plaintiff seeks to foreclose the mortgage ("Mortgage") securing the Loan and to obtain the appointment of a Receiver for the Property, in accordance with the express terms and conditions of the Loan Documents, and the RPAPL.

The Complaint contains two (2) causes of action. In the first, Plaintiff outlines the sums due and owing under the Note and other Loan Documents, totaling \$4,095,629.09, and asks that this action proceed to judgment of foreclosure and sale and that the Property be sold pursuant thereto. In the second, Plaintiff seeks a judgment as against the Borrower for any deficiency that

may remain following the foreclosure sale of the Property, to the extent permitted by the Loan Documents and applicable law.

In his Affirmation in Support, Plaintiff's counsel affirms that the Borrower and Lessee Defendant were served with the Summons and Complaint, and Notice of Pendency, in November of 2011 and provides supporting documentation (Exs. 3 and 4 to Isser Aff. in Supp.). He affirms, further, that the Defendants captioned as "John Doe #1" through "John Doe #25" were not served with copies of the Summons and Verified Complaint and are not necessary party defendants, and requests that these Defendants be excised from the caption of the action.

Plaintiff's counsel affirms that the Borrower and Lessee Defendant have not answered or moved with respect to the Complaint, their time to do so has expired, and their time to respond has not been extended. Since the filing of the Notice of Pendency, the Complaint has not been amended to include new parties, embrace real property other than that described in the Complaint, or extend Plaintiff's claim against the Mortgaged Property.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment by default against the Defendants for all of the relief requested in the Complaint by establishing an Event of Default under the Note and Mortgage whose terms authorize Plaintiff, *inter alia*, to 1) declare all outstanding indebtedness, together with accrued interest, due immediately due and payable; 2) collect from Defendants attorney's fees and costs incurred by Plaintiff in enforcing its rights under the Note and Mortgage; and 3) institute foreclosure proceedings and sell the Mortgaged Premises. Plaintiff has also established that it served Defendants with the Summons and Complaint, and Notice of Pendency, Defendants have failed to appear or move in this action, and their time to do so has expired.

RULING OF THE COURT

A. Default Judgment

On a motion for leave to enter a default judgment pursuant to CPLR § 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing. *Atlantic Casualty Ins. Co. v. RJNJ Services, Inc.*, 89 A.D.3d 649, 651 (2d Dept. 2011), citing

CPLR § 3215(f) and *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

B. Foreclosure

In an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default. *Wells Fargo v. Webster*, 61 A.D.3d 856, 856 (2d Dept. 2009), citing *Republic Natl. Bank of N.Y. v. O’Kane*, 308 A.D.2d 482, 482 (2d Dept. 2003), quoting *Village Bank v. Wild Oaks Holding*, 196 A.D.2d 812, 812 (2d Dept. 1993).

C. Appointment of Referee

Real Property Actions and Proceedings Law (“RPAPL”) § 1361(2) provides that the Supreme Court, by reference or otherwise, shall ascertain the amount due to any claimants and the priority of any liens for purposes of the distribution of surplus money. *American Holdings Invest Corp. v. Josey*, 2010 N.Y. App. Div. LEXIS 2457 (2d Dept. 2010). A referee may inquire into and determine all questions of law and fact, and every question tending to show the equities of the claimant, to decide to whom surplus money belongs. *Id.*, quoting *Wilcox v. Drought*, 36 Misc. 351, 352-353 (Sup. Ct. N.Y. County, 1901), *aff’d*, 71 App. Div. 402 (1st Dept. 1902).

D. Deficiency Judgment

RPAPL § 1371, titled “Deficiency judgment,” provides, in pertinent part, as follows:

1. If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained in such judgment, the amount thereof to be determined by the court as herein provided.
2. Simultaneously with the making of a motion for an order confirming the sale, provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct.

Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher.

E. Application of these Principles to the Instant Action

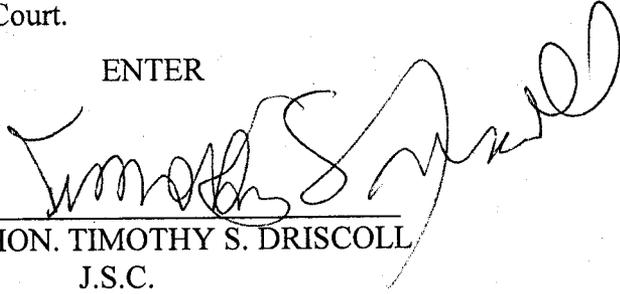
The Court concludes that Plaintiff has demonstrated its entitlement to judgment for the relief demanded in the Complaint by 1) establishing its service of the Complaint on Defendants, and their failure to appear in this action; and 2) demonstrating its right to judgment by establishing that Plaintiff is the holder and owner of the Mortgage and Note, which Plaintiff has produced, and demonstrating that there has been an Event of Default entitling Plaintiff to the requested relief pursuant to the Mortgage and Note. The Court also grants Plaintiff's application to amend the caption to delete the "John Doe" Defendants.

The Court will sign the proposed Order Appointing Referee to Compute (Ex. 5 to Isser Aff. in Supp.) provided by Plaintiff.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
March 26, 2012

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
MAR 29 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE