

Bank of Am., N.A. v Oliver, LLC
2011 NY Slip Op 31105(U)
April 27, 2011
Supreme Court, New York County
Docket Number: 602513/09
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES

PART 59

Justice

BANK OF AMERICA, N.A., as Lender and Plaintiff,

Index No.: 602513/09

Plaintiff,

Motion Date: 07/30/10

- v -

Motion Seq. No.: 002

OLIVER, LLC, 951 LLC, SIMON ELIAS, IZAK SENBAHAR, STEVEN ELGHANAYAN, BANK OF AMERICA, N.A., GATEWAY DEMOLITION CORP., FCV SEWER & WATER, INC., EDDINGTON SECURITY, INC., MAYRICH CONSTRUCTION COMPANY, TWIN COUNTY SHEET METAL, INC., LOUIS L. BUTTERMARK & SONS, INC., RC DOLNER LLC, SEN CONSULTING CORP., POLO ELECTRIC CORP, DFC STRUCTURES, LLC, BW REPROGRAPHICS LLC, ACTIVE FIRE SPRINKLER CORP., ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK DEPARTMENT of FINANCE, STATE of NEW YORK, and "JOHN DOE" NOS. 1-25, Defendants.

Motion Cal. No.: _____

The following papers, numbered 1 to 10 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED
1, 2
3 - 9
10

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff brings this action seeking to foreclose upon a mortgage securing two commercial real estate loans.

The two loans, governed by separate agreements dated October 12, 2007, are 1) the "Fee Acquisition Loan Agreement" (Fee Loan)

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

and 2) the "Development Rights Acquisition Loan Agreement" (Development Loan). Plaintiff Bank of America, N.A. was the lender ("Lender" or "Mortgagee") under the agreements and defendants Oliver, LLC and 951 LLC were the borrowers (collectively the "Borrower" or "Mortgagor"). Pursuant to a Mortgage Assumption, Consolidation, Modification and Spreader Agreement dated October 12, 2007, the total indebtedness represented by the Fee Loan in an amount of approximately \$28.32 million, is secured by a mortgage (the "Acquisition Mortgage") that incorporated prior mortgages securing approximately \$9.2 million in indebtedness and a "Gap Mortgage" (pursuant to a Gap Mortgage, Assignment of Leases and Rents and Security Agreement dated October 12, 2007) that secured the remaining \$19.1 million in borrowings. It is uncontested on this motion that the Acquisition Mortgage and the Gap Mortgage securing the Fee Loan was recorded in the City Register on November 9, 2007.

Pursuant to the terms of the Development Loan, on April 29, 2008, plaintiff advanced to Borrower \$2.3 million, and obtained a mortgage to secure the advance (Development Mortgage) which was filed with the City Register on May 9, 2008.

Plaintiff alleges that Borrower defaulted on the Loans on May 1, 2009 and now seeks to foreclose upon the mortgages.

The court shall grant plaintiff's application for a default judgment against defendants EDDINGTON SECURITY, INC., TWIN COUNTY

SHEET METAL, INC., LOUIS L. BUTTERMARK & SONS, INC., SEN CONSULTING CORP., POLO ELECTRIC CORP., DFC STRUCTURES, LLC, BW REPROGRAPHICS, LLC, ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK DEPARTMENT OF FINANCE, and STATE OF NEW YORK. With respect to the aforementioned defendants, plaintiff has complied with the requirements of CPLR 3215 and those defendants have defaulted in answering and have not submitted opposition to the motion. The court notes however that defendants TWIN COUNTY SHEET METAL, INC., LOUIS L. BUTTERMARK & SONS, INC., POLO ELECTRIC CORP., DFC STRUCTURES, LLC, and CITY OF NEW YORK DEPARTMENT OF FINANCE, have filed appearances pursuant to RPAPL 1361 with respect to any surplus monies and are entitled to the notice pursuant to the statute.

The court shall grant summary judgment on default in favor of the plaintiff over defendant ACTIVE FIRE SPRINKLER CORP. because that defendant, having interposed and answer with cross-claims, has not appeared in opposition to the motion.

With respect to plaintiff's motion under for summary judgment pursuant to CPLR 3212, defendants Simon Elias, Izak Senbahar, and Steven Elghanayan (collectively, the "Guarantors") and the Borrowers, jointly oppose the motion and cross-move to disqualify plaintiff's counsel. At oral argument of this motion, the cross-motion was WITHDRAWN based upon this court's Order resolving Motion Sequence No. 1. The court shall grant

plaintiff's motion for summary judgment against the Borrowers and Guarantors. "A plaintiff in an action to foreclose a mortgage establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default. Once the plaintiff has made such a showing, it is then incumbent upon the defendant to assert any defenses which could properly raise a triable issue of fact regarding the default." Wells Fargo Bank, N.A. v Cohen, 80 AD3d 753, 755 (2d Dept 2010). Plaintiff's submissions here satisfy its prima facie burden.

The Borrowers and Guarantors fail to raise any triable issue of fact in opposition. It is argued that plaintiff acted in bad faith because it failed to extend additional credit to defendants. However, not only do the loan documents contain merger clauses precluding such claims, the plaintiff submits in support of its motion a March 24, 2009 letter executed by the Borrowers and Guarantors that expressly disclaims any reliance by them upon negotiations to extend further credit in consideration of the obligation to pay the mortgage. This disclaimer must be given effect and defeats defendants' affirmative defenses. See New York State Urban Development Corp. v Marcus Garvey Brownstone Houses, Inc., 98 AD2d 767 (2d Dept 1983). Therefore, the court shall grant summary judgment to plaintiff against the Borrowers and Guarantors.

Defendants Gateway Demolition Corp., FCV Sewer and Water Inc., Mayrich Construction Company, and RC Dolner LLC, (collectively the "Lienors") oppose plaintiff's motion for summary judgment on the grounds that their Mechanics' Liens have priority over plaintiff's mortgage because of plaintiff's failure to comply with Sections 13 & 22 of the Lien Law. The Lienor's assert that the Development and Fee Loans constitute "Building Loan Contracts" pursuant to Lien Law § 2 (13), and that because the verified statement required by Lien Law § 22 was not filed prior to the filing of the liens, the Lienor's interests have priority pursuant the Lien Law § 13.

A building loan contract "means a contract whereby a party thereto, in this chapter termed 'lender,' in consideration of the express promise of an owner to make an improvement upon real property, agrees to make advances to or for the account of such owner to be secured by a mortgage on such real property." Lien Law § 2 (13). Lienors assert that the mortgages inclusion of terms stating that the "Mortgagor will receive the advances secured hereby . . . as trust fund to be applied first for the purpose of paying the 'cost of improvement,' as such quoted term is defined in the New York Lien Law" causes the Development and Fee Loans, by inclusion of the mortgages' terms, to qualify as building loan contracts. The Lienors' argument is without merit because the Development and Fee Loan contracts do not contain the

detailed express promise to improve the property. As stated by the Court,

the statement required under section 22 of the Lien Law is associated with building-loan contracts and there was no such contract between plaintiff and [mortgagor]. A review of the documents related to this transaction between plaintiff and [mortgagor] reveals that there was no express promise by [mortgagor] to improve property, a promise which is required for there to be a "building-loan contract" (Lien Law, § 2, subd 13). In fact, the documents between plaintiff and [mortgagor] are merely a mortgage note and mortgage which contain provisions usually associated with a permanent loan. Accordingly, the failure to file a statement pursuant to section 22 of the Lien Law with regard to the transactions between plaintiff and [mortgagor] was not improper.

Amsterdam Sav. Bank v Terra Domus Corp., 97 AD2d 41, 44 (3d Dept 1983). In the absence of any contractual terms implying any express promise to use the loaned funds to improve the premises, the Lienors' argument must fail (see Juzsak v Lily & Don Holding Corp., 224 AD2d 588, 589 [2d Dept 1996]) and summary judgment granted to plaintiff.

Finally, the court shall deny the cross-motion of Mayrich Construction Company because as stated in the prior discussion the mortgages at issue here have priority over the mechanics' liens filed by the Lienors and therefore Mayrich's amendment of its responsive pleading is futile as it merely asserts an impermissible "trust fund" claim. Lien Law § 13 (3) provides that plaintiff has no obligation as to the advances made to the

owner as long as the requisite covenant is included in the mortgages as occurred in this case.

Accordingly, it is

ORDERED that the plaintiff's motion for a default judgment against EDDINGTON SECURITY, INC.; TWIN COUNTY SHEET METAL, INC., LOUIS L. BUTTERMARK & SONS, INC.; SEN CONSULTING CORP., POLO ELECTRIC CORP., DFC STRUCTURES, LLC, BW REPROGRAPHICS, LLC, ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK DEPARTMENT OF FINANCE, and STATE OF NEW YORK is GRANTED; and it is further

ORDERED that plaintiff's motion for summary judgment against the remaining defendants and for the appointment of a referee is GRANTED; and it is further

ORDERED that plaintiff's motion to amend the caption to delete the references to "JOHN DOE" NOS. 1-25 is GRANTED and the plaintiff shall settle order to so amend the caption; and it is further

ORDERED that the cross-motions are denied in the their entirety; and it is further

ORDERED that the plaintiff is directed to settle order on notice appointing a referee to compute and amending the caption.

This is the decision and order of the court.

Dated: April 27, 2011

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.