

La Jolla Bank, FSB v Whitestone Jewels, LLC

2011 NY Slip Op 33362(U)

December 7, 2011

Supreme Court, Queens County

Docket Number: 13920/09

Judge: Orin R. Kitzes

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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF QUEENS

PART 17
 HON. ORIN R. KITZES

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 LA JOLLA BANK, FSB,

Plaintiff,

- against -

WHITESTONE JEWELS, LLC, MASSOOD
 MATT COHEN, SAEED COHEN,
 CHRISTOPHER V. PAPA ARCHITECTS,
 P.C., CITY OF NEW YORK ENVIRONMENTAL
 CONTROL BOARD, "JOHN DOE #1" through
 'JOHN DOE #12," the last twelve names being
 fictitious and unknown to plaintiff, the persons
 or parties intended being the tenants, occupants,
 persons, or corporations, if any, having to claiming
 an interest in or lien upon the premises, described
 in the complaint,

Defendants.

Index No. 13920/09
 Motion Date: 11/30/11
 Motion No. 32

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 Dated: December 7, 2011

Plaintiff moves for an orders granting summary judgment pursuant to CPLR 3212 against defendants Whitestone Jewels, LLC ("Jewels"), Massood M. Cohen ("M. C.") and Saeed Cohen ("S. C.") for a default judgment pursuant to CPLR § 3215 in its favor and against defendants Christopher V. Papa Architects, P.C. and the City of New York Environmental Control Board (collectively referred to hereafter as the "Defaulting Defendants"); to amend the caption of this action to replace La Jolla Bank, FSB as plaintiff with "OneWest Bank, FSB, the current owner and holder of the Note and Mortgage pursuant to the Purchase and Assumption Agreement dated February 19, 2010 between OneWest Bank, FSB as purchaser and the Federal Deposit Insurance Corporation, as Receiver for La Jolla Bank, FSB, as seller," and to delete defendants sued herein as "John Doe No. 1" through "Jane Doe No. 10"; and for the appointment of a referee to compute the amount due to OneWest under the Mortgage which is the subject of this foreclosure action. Defendants Jewels, M. C. and S.C. oppose this motion.

In moving for summary judgment 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). In Wells Fargo, *supra*, the Second Department held that

plaintiff bank sustained its initial burden of demonstrating its entitlement to judgment as a matter of law by submitting proof of the existence of the note, mortgage, and consolidation agreement, and the defendants' default in payment. *Id.* Once plaintiff's burden has been met, it becomes incumbent on the defendants to demonstrate, by admissible evidence, the existence of a triable issue of fact as to a bona fide defense. *Id.*

According to the complaint and Plaintiff's evidence, this action was commenced to foreclose a mortgage encumbering real property known as 150-14 Powells Cove Boulevard, 150-12 Powells Cove Boulevard, 5-5 150th Street, 150-114 6th Avenue, 150-65 6th Avenue, 150-55 6th Avenue and 150-13 6th Avenue, Whitestone, New York (collectively, the "Premises"). The basis of this foreclosure action is Jewel's failure to tender the monthly mortgage payments due under the terms of the subject notes and mortgages. On September 14, 2006, Jewels executed and delivered to NY Community ("NY") a Note ("the First Note"), dated September 14, 2006 evidencing an indebtedness to NY in the amount of \$15,350,000., together with interest thereon, payable in monthly installments. On that date, Jewels also signed a Mortgage to secure payment for this debt to NY whereby Jewels mortgaged to NY the Premises . This First Mortgage was duly recorded in the New York City Office of the City Register (the "City Register") on September 28, 2006.

On March 26, 2007, NY assigned the First Note and First Mortgage to La Jolla Bank ("La Jolla"). An assignment of mortgage evidencing the assignment of the First Mortgage and all notes and obligations described in the First Mortgage was recorded on April 6, 2007 with the City Register. Thereafter, to evidence a loan that Mortgagor received from La Jolla, Jewels executed and delivered to La Jolla a Mortgage Note dated March 30, 2007 (the "Gap Note"), whereby Jewels agreed to pay to the order of La Jolla the amount of \$2,150,000. together with interest thereon, in monthly installments. The First Note and the Gap Note were then combined and restated to form a single indebtedness in the combined original principal sum of \$17,500,000., as evidenced by a certain Restated Mortgage Note, also executed and delivered by Jewels to La Jolla on March 30, 2007 (the "Restated Note"). As collateral security for the repayment of all sums payable pursuant to the Restated Note and the performance of all of Mortgagor's obligations under the Restated Note, Jewels executed, acknowledged and delivered to La Jolla a Mortgage, dated March 30, 2007 (the "Gap Mortgage") encumbering the entire Premises which was recorded on April 6, 2007 with the City Register. On March 30, 2007, Jewels and La Jolla signed a Consolidation, Extension and Modification Agreement (the "Consolidated Mortgage"), which, inter alia, consolidated the First Mortgage and Gap Mortgage to constitute a single lien. This Agreement also combined and coordinated the First Note and the Gap Note for an outstanding principal sum thereon of \$17,500,000. The Consolidated Mortgage was duly recorded on April 6, 2007 with the City Register. Also on March 30, 2007, defendants M.C. and S.C. executed and delivered to La Jolla an unlimited Guaranty, which, inter alia, absolutely, unconditionally and irrevocably guaranteed payment of all amounts due under the Restated Note, Consolidated Mortgage and such other agreements executed, acknowledged and delivered to La Jolla related to the

Loan, as well as the due and prompt performance of Mortgagor's obligations thereunder.

On February 19, 2010, the Office of the Thrift Supervision closed La Jolla and appointed the Federal Deposit Insurance Corporation (the "FDIC") as receiver for La Jolla. As receiver, the FDIC succeeded to all of La Jolla's right, title, powers and privileges and had possession of all of La Jolla's assets, including the subject Loan. On that same date, the FDIC as receiver and OneWest entered into a purchase and assumption agreement whereby OneWest acquired certain assets of La Jolla, including the subject Loan, which were delivered and assigned to OneWest. OneWest is the holder of the Restated Note pursuant to an allonge to the Restated Note and the Consolidated Mortgages and mortgages referred to there pursuant to an assignment of mortgage which was recorded with the City Register on September 21, 2010.

Jewels had defaulted under terms of the Restated Note and Consolidated Mortgage by failing to pay the monthly interest payments (the "Monthly Payments") as of October 1, 2008 and continuing thereto (the "First Default"). In addition, the Loan matured on April 1, 2010 (the "Maturity Date") and Jewels failed to repay the entire amount of the Debt (as defined in the Loan Documents) on the Maturity Date ("Second Default," collectively referred to hereafter as the "Default"). By letter dated November 14, 2008, La Jolla had given notice to Jewels of the First Default. However, Jewels failed to cure the First Default. As a result, by letter dated May 1, 2009, La Jolla accelerated the Loan and declared the entire Debt immediately due and payable. Jewels failed to pay the total amount due under the Restated Note and Consolidated Mortgage and remains in default, and there remains due and owing to OneWest the unpaid principal amount of \$17,500,000, together with unpaid interest calculated at the Interest Rate, default interest calculated at the Default Rate, late charges, prepayment premium, attorneys' fees and expenses, plus additional costs and expenses as provided for under the loan documents.

Plaintiff also claims that the affirmative defenses of Jewels, and M.C. are not capable of raising an issue of fact regarding this motion, for the following reasons:

The first Affirmative Defense of culpable conduct because the concept of apportioning culpable conduct is one related to torts and not in the context of a breach of contract. The second Affirmative Defense of Mitigation of Damages because mitigation of damages is not an affirmative defense to an action to foreclose a mortgage. Moreover, any dispute as to the exact amount owed by Jewels may be resolved after a reference pursuant to the Real Property Actions and Proceedings Law §1321. The third Affirmative defense alleging failure to serve requisite notices because under the terms of the Consolidated Mortgage, Jewels and the Cohens expressly waived their right to any notice of default or payment. The fourth affirmative defense of alleged defect in chain of instruments OneWest. The fifth Affirmative Defense of implied duty of Good Faith and Fair Dealing because it is well-settled that a party to a contract does not breach its implied duty of good faith and fair dealing by exercising its rights under the contract. Here, based on Jewel's default, plaintiff has properly exercised its right under the Consolidated Mortgage to accelerate the Loan and foreclose. The sixth Affirmative Defense

of fraud and/or material omission because Jewels has failed to plead any facts constituting an alleged fraud in sufficient detail to meet the pleading requirements of CPLR § 3016. Here, the restated Note was executed on March 30, 2007 and Jewels paid the first of seventeen monthly Payments on May 1, 2007 until it defaulted on October 1, 2008. After a year and a half of having paid the Monthly Payments, Jewels cannot now claim that the Loan is unenforceable because the executed version of the Loan Documents were different than that of the term sheet provided to Obligors before closing. Through its regular, consistent and lengthy payments, Mortgagor ratified the Loan Documents and waived its right to repudiate them. The seventh Affirmative Defense of predatory lending practices because the claim that the loan was allegedly in excess of the fair market value of the collateral is at best a poorly veiled "breach of fiduciary duty" claim, and there is no fiduciary duty arising out of the contractual arm's length debtor and creditor legal relationship between a borrower and a bank. The eighth Affirmative Defense of unconscionable conduct because they fail to allege, and cannot prove, that La Jolla acted unconscionably so as to "shock the conscience" in connection with any of the Loan Documents, which is a necessary element. The ninth Affirmative Defense of alleged breach of fiduciary duty the relationship between a lender and a borrower is that of debtor and creditor, and, more importantly, that no fiduciary duty arises from this relationship. The tenth Affirmative Defense of bad faith and unclean hands because a defense of unclean hands is not a valid defense to a mortgage foreclosure action and may not be asserted. Even if such a defense were available here, it would have to be dismissed because Jewels and M. Cohen fail to allege, and cannot allege, any immoral or illegal conduct by La Jolla. The eleventh Affirmative Defense of equitable subordination because priority of a mortgage is determined based on the date of recording and the Consolidated Mortgage has priority over all subsequent liens on the Premises. The twelfth Affirmative Defense of waiver and estoppel because there is no allegation of "an intentional relinquishment of a known right" by La Jolla, and they fail to allege detrimental reliance, which are necessary elements. The thirteenth and fourteenth Affirmative Defense of Lack of Standing because the plaintiff is the assignee of the mortgage and the underlying note at the time the foreclosure action was commenced, and has standing to maintain the action. The fifteenth Affirmative Defense of failure to name a necessary party because the absence of a necessary party in a mortgage foreclosure action simply leaves that party's rights unaffected by the judgment of foreclosure and sale. In any event, it fails because it does not particularize who Jewels and M.C. deem to be an indispensable or necessary party who are not named in the foreclosure action. The sixteenth Affirmative Defense that loan documents allegedly do not comply with terms of Letter of Intent and Commitment because Jewels and M.C. have signed a consolidation, extension and modification agreement with respect to a promissory note secured by a mortgage on real property. As such, they are judicially estopped from denying knowledge of and motive for executing the [documents] and is thus liable under them. Moreover, Jewels ratified the terms of the Restated Note and Consolidated Mortgage and waived all rights it may have had to repudiate its obligations under them by making regular Monthly Payments from May 1, 2007 until the Default on October 1, 2008.

The seventeenth Affirmative Defense based on the no space rule because ownership of a note may be transferred by an allonge to the note indorsed by the original lender and mortgagee to its assignee. This was done here. The eighteenth affirmative Defense of alleged abrogation of rights of contribution and indemnity because, as a general matter, indemnification and contribution are not defenses to a foreclosure action and cannot relieve the mortgagor and obligors of their liability to the holder of the mortgage. Furthermore, there are only unsubstantiated and conclusory allegation of Lender's alleged abrogation of their rights to contribution and indemnity lacks particularity. The nineteenth Affirmative Defense based on form of funding because defendants executed the Loan Documents thereby agreeing to be obligated under them and La Jolla funded the Loan in compliance with the contract terms. The twentieth Affirmative Defense based on an alleged doctrine of instrumentality because they do not allege any of the elements of control that might possibly be considered a basis for some type of lender liability.

Plaintiff also claims that S. Cohen's affirmative defenses cannot raise an issue of fact regarding this motion, for the following reasons:

The first Affirmative Defense of mitigation of damages because, it is not an affirmative defense to an action to foreclose a mortgage. The second Affirmative Defense regarding the prepayment premium because under the Consolidated Mortgage, La Jolla has a right to collect a prepayment premium upon the occurrence of an Event of Default (as that term is defined under the Consolidated Mortgage). The third Affirmative Defense barring default interest because La Jolla is entitled to recover interest at the default rate based on the express terms of the Restated Note. S. Cohen's claim that collection of default interest is barred by the laches, waiver and estoppel fails as a matter of law. The doctrine of laches is not available in a foreclosure action brought within the period of limitations. The defenses of waiver and estoppel are not available to S. Cohen in this commercial foreclosure action because he fails to allege key elements of waiver and estoppel. In particular, there are no allegations of "an intentional relinquishment of a known right" and detrimental reliance. The fourth Affirmative Defense barring Deficiency Judgment because as Guarantor, S. Cohen is liable to La Jolla for all debt that remains unsatisfied after the sale of the Premises.

The Court finds that Plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law on its claims against Jewels and the Guarantors for foreclosure and sale and the appointment of a referee to compute the balance owed on the Restated Note and Consolidated Mortgage. Plaintiff has also established entitlement to the dismissal of all of the affirmative defenses. Plaintiff has submitted to the Court copies of the duly executed Notes and Mortgages and has established that One West is the owner and holder of the Restated Note, Consolidated Mortgage, the Guaranty and all other documents evidencing and securing the Loan. Plaintiff has also established that Jewels has failed to make, or cause to be made, payment in accordance with the terms of the Restated Note and Consolidated Mortgage. Plaintiff has also established that the Defaulting Defendants are in default and OneWest is entitled to entry of default judgment against the Defaulting Defendants. Thus,

the burden now shifts to Jewels, M.C. and S.C. to establish by competent evidence that a triable issue of fact exists to warrant denial of Lender's motion for summary judgment on its Complaint.

Defendant Saeed Cohen opposes this motion on the ground that plaintiff elected to foreclose on its mortgage pursuant to Article 13 of the RPAPL and therefore its claim against the guarantor is only for a deficiency judgment. In its Complaint, plaintiff states that co-guarantor is made a party because "a deficiency judgment may be sought." S.C. points out that deficiency judgment claims are to be addressed, pursuant to RPAPL § 1371, only after the foreclosure sale. Until the foreclosure is completed and the property sold, there is no way of knowing whether or not there will be a deficiency.

Saeed Cohen also claims that his affirmative defenses have merit. Regarding his first Affirmative Defense, which asserts that because Plaintiff has not mitigated its damages it cannot recover a deficiency judgment against the Guarantor, he claims that parties generally have a duty to mitigate damages. Here, La Jolla failed to negotiate a resolution of this action with S. C. despite his efforts for such. Regarding his second Affirmative Defense, the Prepayment Penalty, he claims that prepayment premiums are not enforceable under default circumstances in the absence of a specific clause in the loan documents so providing. Here, no such specific clause exists in the Restated Note permitting La Jolla to collect a prepayment premium in the event of a foreclosure. Regarding his third Affirmative Defense, S.C. asserts that La Jolla cannot collect default interest against him due to plaintiff's dilatory conduct. Regarding his fourth Affirmative Defense that plaintiff's claims for a Deficiency Judgment are barred in whole or in part by the doctrines of Waiver and Estoppel, based upon equitable considerations that are present in this case.

Defendants Massood Matt Cohen and Jewels oppose this motion, claiming there are facts in dispute that require this Court to exercise its equitable jurisdiction and deny the summary judgment motion. Specifically, they claim that they have valid affirmative defenses to Plaintiff's bad faith attempt to foreclose a mortgage; defenses, which at the very least, require discovery from plaintiff's officers and Directors on issues for which Plaintiff has no direct knowledge or involvement. They have submitted an affidavit of M. C. wherein he states the following: Nick Coredias ("Coredias"), an authorized agent of La Jolla, established a fiduciary relationship between La Jolla and the Jewels and M.C., which they justifiably relied upon, whereby La Jolla would co-develop and co-market the mortgaged commercial property with them. La Jolla failed to meet its obligations and the mortgaged commercial property was neither developed nor marketed. La Jolla, through the conduct of Coredias, became a de facto equity co-partner with Jewels and M.C. and committed to them significant additional and necessary funding for the development and marketing of the mortgaged commercial property. La Jolla failed to provide the money to these defendants. Finally, that La Jolla, through the conduct of Coredias, induced the Jewels and M.C., both passive investors with no prior real-estate experience, to invest substantial sums of money, combined with a personal guarantee from M. Cohen (and his brother), to obtain a loan far in excess of the reasonable and fair market value of the collateral,

a vacant parcel of commercial land in Queens, New York, that is encumbered with various environmental issues. Jewels and M.C. claim that these facts, establish La Jolla's actions are inconsistent with equitable principles, and as foreclosure is an equitable remedy, La Jolla's successor should be barred from receiving equitable relief from the Court.

The Court finds that defendants Jewels, M.C. and S.C. have failed to create a triable issue of fact that prevents this Court from granting the motion. Initially, the Court notes that none of the defendants dispute the failure to make the required payments on the Restated Note. Moreover, the claim by Jewels and M.C. that they relied on several oral promises allegedly made by La Jolla Bank at the time the Loan was originated regarding, inter alia, the joint-venture nature of their project, is without merit. It is well settled under State and Federal Law that borrowers are estopped from asserting claims or defenses that are based on any unwritten or oral agreement by the original lender that would tend to diminish the interest of the FDIC, or its assignee, in an asset (e.g., a loan) acquired by the FDIC. ICC Bridgeport Limited Partnership v. Primrose Development Corp., 221 A.D.2d 417 (2nd Dept. 1995.) Moreover, any defense based on a breach of fiduciary duty is without merit. In general, the relationship between a lender and borrower is that of debtor and creditor and no fiduciary duty arises from this relationship. Tennenbaum v. Gibbs, 27 A.D.3d 722 (2nd Dept. 2006.) Jewels and M.C. attempt to avoid this rule of law by alleging that La Jolla Bank made "representations" to them agreeing to a joint-venture is to no avail since they allege only oral representations and do not attach any written agreements or admissible evidence that demonstrate the existence of a partnership or joint-venture with La Jolla Bank. See, Home Savings Bank v. Arthurkill Associates, 173 A.D.2d 776 (2nd Dept. 1991) Since, there is insufficient proof of a joint-venture partnership between La Jolla Bank and Jewels and M.C., there is no basis for the defense that La Jolla failed to fulfil its alleged "funding commitments." Moreover, from all of the loan documents and from S. Cohen's affidavit, it is clear that the requested funds were provided. Additionally, Jewels and M.C. have failed to offer any admissible evidence that La Jolla Bank agreed in writing to obtain a fair market value appraisal of the property as a condition to funding the \$2,150,000. new debt and refinancing the existing \$15,530,000. indebtedness. The sole documents submitted in support of this contention is M. Cohen's affidavit, which is replete with unsubstantiated conclusions devoid of evidentiary value and insufficient to defeat summary judgment. Zuckerman v. City of New York, 49 N.Y.2d 557(1980). This is especially so given the loan documents that are clear and unambiguous, which prevents the use of any parol evidence to interpret them.

The Court also finds that the Cohens, as Guarantors are properly named as parties in this foreclosure action. A mortgagee that fails to name a guarantor as a defendant in a mortgage foreclosure proceeding could lose the right to seek a deficiency judgment against the guarantor. Thus naming Guarantors as defendants to this foreclosure action is an acceptable way to preserve any deficiency judgment claim that plaintiff may have against the Cohen brothers as Guarantors arising from their obligations under the Guaranty. However, as plaintiff implicitly concedes, such deficiency judgment

cannot be rendered until after the sale of the premises. However, contrary to S. Cohen's claim, plaintiff is seeking a determination that Jewels and the Cohen brothers are liable to plaintiff under the Loan Documents. To the extent S. Cohen questions the amount of damages that are payable, he will have an opportunity to contest plaintiff's calculation of the amount due to the referee, who is appointed by the Court to calculate the amount of the indebtedness. The claims by S. Cohen regarding La Jolla's inadequate attempts to resolve this matter are without merit since evidence concerning settlement negotiations is barred by CPLR §4547. In any event, the loan documents provide that a party may seek judicial resolution of a dispute even though settlement negotiations of the dispute are taking place.

Based on the foregoing, plaintiff is entitled to a judgment of foreclosure and sale and the Court grants plaintiff's motion for summary judgment and strikes the affirmative defenses and appoints a referee to compute the amount of damages due and owing under the Loan Documents pursuant to RPAPL § 1321. The branch of the motion seeking a default judgment against the above-mentioned defaulting defendants is granted without opposition. The branch of the motion seeking to amend the caption is granted, without opposition.

SUBMIT JUDGMENT

ORIN R. KITZES, J.S.C.