SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

GRAND BANK, N.A., Plaintiff,	Trial Part 9 Present: HON. ANTHONY I. GIACOBBE
-against-	DECISION AND ORDER
TOTTENVILLE AUTO SPA AND LUBE, INC., SABINA J. MAROTTA, Individually, VINCENT G. ALESSI, Individually and BARBARA A. ALESSI, Individually, Defendants.	Index No. 102748/09 Motion Nos. 001, 002

The following papers numbered 1 to 5 were fully submitted on the 29th day of January, 2010.

	Papers Numbered
Notice of Motion to Dismiss by Defendants Tottenville Auto Spa and Lube, Inc., Sabina J. Marotta, Vincent G. Alessi and Barbara A. Alessi, with Supporting Papers and Exhibits (dated January 4, 2010)	1
Affirmation in Opposition by Plaintiff Grand Bank, N.A., with Exhibits (dated January 19, 2010)	2
Reply Affirmation, with Exhibit (dated January 25, 2010)	3
Notice of Cross Motion for Leave to Amend and Other Relief by Plaintiff, Grand Bank, N.A., with Supporting Papers, Affidavit and Exhibits (dated January 19, 2010)	4
Affirmation in Opposition to Cross Motion by Defendants (dated January 25, 2010)	5

Upon the foregoing papers, the motions are decided as indicated herein.

Defendants Tottenville Auto Spa and Lube, Inc. and individual defendants Sabina J. Marotta, Vincent G. Alessi, and Barbara A. Alessi (hereinafter, collectively,"Auto Spa"), move to dismiss the complaint pursuant to CPLR 3211(a)(7) on the ground it fails to

state a cause of action. Plaintiff Grand Bank, N.A. (hereinafter, the "Bank") opposes the motion and cross-moves for multiple reliefs including (1) leave to file an amended complaint; (2) leave to maintain this action pursuant to Real Property Actions and Proceedings Law § 1301; and (3) the appointment of a Receiver. Defendant Auto Spa opposes the cross motion in its entirety.

This is an action to foreclose a leasehold mortgage covering the premises known as 230 Page Avenue on Staten Island, New York. Defendant Tottenville Auto Spa and Lube, Inc. is a New York Corporation having an address of 230 Page Avenue on Staten Island, and is the ground lessee of the subject premises, which are owned by non-party Tottenville Commons, LLC. All of the individually named defendants reside at One Stayman Court, Manalapan, New Jersey. Plaintiff Bank is a national banking association with its principal place of business located at One Edenburg Road, Hamilton, New Jersey. The action was commenced by the filing and service of a summons with complaint upon the defendants on or about November 27, 2009. Prior thereto, plaintiff had commenced another action in the Superior Court of New Jersey in Mercer County to recover a money judgment on the notes secured by the leasehold mortgages and guarantees which are the subject of this action.

As is relevant, Real Property Actions and Proceedings Law § 1301, entitled "Separate Action for Mortgage Debt", provides as follows:

> 1. Where final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action

> shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff of the county where he resides, if he resides within the state, or if he resides without the state, to the sheriff of the county where the judgment-roll is filed; and has been returned wholly or partly unsatisfied.
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> 2. The complaint shall state whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part has been collected.
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> 3. While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.

Relying upon this section and citing certain case law (*e.g.*, *Gizzi v. Hall*, 309 AD2d 1140 [3rd Dept. 2003]; *New York Trap Rock Corp. v. Ussher*, 271 AD2d 842 [3rd Dept. 2000]; *Wyoming County Bank & Trust Co. v. Kiley* , 75 AD2d 477 [4 th Dept. 1980]), defendants contend that the instant foreclosure action must be dismissed because (1) it violates the "one action rule", and (2) plaintiff failed to allege that a prior action had been brought to recover the mortgage debt.

In opposition, plaintiff contends that the New Jersey action does not violate RPAPL 1301 because the notes upon which suit is brought contain a choice of law provision under which New Jersey law governs. In addition, plaintiff contends that its failure to comply with RPAPL 1301(2) is a mere irregularity that can be cured by granting its cross motion for leave to amend the complaint to

conform with the requirements of that subdivision. Plaintiff further argues that leave should be granted to maintain both actions simultaneously, as special circumstances exist in this case, *i.e.*, it appears improbable that the foreclosure will satisfy the leasehold mortgage debt. In support, plaintiff cites a summary appraisal report attached as Exhibit "C" to its affirmation in opposition by John P. Mitchell, Esq., dated January 19, 2010.

It is familiar law in New York that the holder of mortgage in default has two alternative remedies which can pursued: (a) at law, to recover on the obligation (*i.e.*, the note or bond) or (b) in equity, to foreclose against the mortgaged property *(Copp v. Sands Point Marina, Inc.*, 17 NY2d 291, 293 [1966]; *Finkelstein v. Ilan*, 239 AD2d 545 [2nd Dept. 1997]). Application of the above rule not only avoids a multiplicity of lawsuits with possibly inconsistent results, but serves to promote certainty should a mortgagee fail to move for a deficiency judgment where the proceeds of the foreclosure sale are insufficient to satisfy the existing lien. Upon such a failure, the proceeds of the sale, regardless of the amount, shall be deemed full satisfaction of the debt secured thereby (*see*, RPAPL 1371; *Sanders v. Palmer*, 68 NY2d 180, 185 [1986).

However, RPAPL 1301(3) also provides that a Court may, in special circumstances, exercise its discretion to allow both actions to co-exist.[1] In exercising this discretion, the focus of

[1]Although not directly relevant, it is also well settled that an election need not be made where the property at issue is

the inquiry is whether it appears improbable that the foreclosure sale will satisfy the mortgage debt *(Rainbow Venture Associates, L.P. v. Parc Vendome Associates, LTD*, 221 AD2d 164 [1st Dept. 1995]; *see*, *Stein v. Nellen Development Corp.*, 123 Misc2d 268, 271 [Sup. Ct. Suff. Co. 1984]). In this regard, plaintiff at bar relies upon an unaffirmed appraisal report prepared for its exclusive benefit.

With these criteria in mind, this Court is of the opinion that plaintiff's commencement of this foreclosure proceeding violates RPAPL 1301(2), and that it has failed to demonstrate such "special circumstances" as would prompt this Court to allow both actions to proceed simultaneously, particularly as they are pending in different states. Moreover, assuming without deciding that RPAPL 1301 governs the substantive rights of the parties rather than matters of procedure (which are governed by the law of the forum State, here, New York), the comparable New Jersey Law (NJ Stat §§ 2A:50-2, 50-2.3) suggests a preference that a foreclosure proceeding and an action on the underlying note not be litigated simultaneously, although that State's strict "foreclosure first" rule (NJ Stat § 2A:50-2) is not controlling where, as here, "the debt secured is for a business or commercial purpose" (NJ Stat § 2A:50-2.3). Accordingly, while plaintiff at bar would not be statutorily required to proceed first in foreclosure under New Jersey law, nothing submitted by the bank supports the proposition

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located without the state (*see*, *Provident Savings Bank & Trust Co. v. Steinmetz*, 270 NY 129 [1936]; *Lombardo II v. Fielding*, 225 AD2d 672 [2nd Dept. 1996]).

that an action on the note and foreclosure proceedings may be maintained simultaneously thereunder. Rather, in New Jersey as in New York, considerations of judicial economy and questions of collateral estoppel suggest that the actions should proceed *seriatim* (*see*, *First Union National Bank v. Penn Salem Marina, Inc.*, 190 NJ 342, 355-356 [Sup. Ct. NJ 2007]).

Upon the foregoing analysis, it is the determination of this Court that the foreclosure action must be dismissed and plaintiff's cross motion denied (RPAPL 1301; *cf.*, *Aurora Loan Services, LLC. v Spearman*, 68 AD3d 796 [2nd Dept. 2009]).

The Court has considered plaintiff's other contentions and finds them to be without merit.

Accordingly, it is

ORDERED that defendants' motion is granted and the complaint dismissed, without prejudice; and it is further

ORDERED that plaintiff's cross motion is denied as academic; and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R,

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J.S.C.

Dated: April 5, 2009