

**MEMORANDUM**

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAIME A. RIOS

IA PART 8

Justice

\_\_\_\_\_  
NORTHERN FUNDING, LLC,  
\_\_\_\_\_  
Plaintiff,  
  
\_\_\_\_\_ - against -

X Index  
Number: 118/06  
  
Motion  
Date: October 18,  
2006

NAI-MORE DEVELOPER CORP., DERLING  
HODGSON, NEW YORK STATE DEPARTMENT OF  
TAXATION AND FINANCE, NEW YORK CITY  
DEPARTMENT OF FINANCE, VICTOR ROMAIN,  
DEBORAH GARVIN, ALEX HAMILTON and  
"JOHN DOE #1" through "JOHN DOE #10",  
the last ten names being fictitious and  
unknown to the Plaintiff, the persons or  
parties intended being the tenants, occupants,  
persons or parties, if any, having or claiming  
an interest in or lien upon the mortgaged  
premises described in the Verified Complaint,  
  
Defendants.

Motion  
Number: 17

X

In this action to foreclose a mortgage on real property located at 147-33 110<sup>th</sup> Avenue, Jamaica, New York (BLOCK 11950, LOT 400) and 147-37 110<sup>th</sup> Avenue, Jamaica, New York (BLOCK 11950, LOT 398), the plaintiff moves, inter alia, for summary judgment and an order of reference.

By Summons and Complaint dated March 7, 2006, plaintiff commenced this action to foreclose on certain mortgage instruments which were consolidated into a single note executed by defendant Nai-Mor Developer Corp. (Nai-Mor), in the amount of \$511,000.00 on May 10, 2005 and recorded on June 2, 2005. According to plaintiff, Nai-Mor defaulted by failing to make the monthly payments of principal and interest beginning on October 1, 2005. Under the terms of the note, plaintiff demanded

payment in full. As a result plaintiff claims that the sum of \$461,000.00 plus interest and late charges is due as of September 1, 2005. By Order of this Court (Rios, J.) dated March 24, 2006, plaintiff was granted leave to file and serve a supplemental summons and amended complaint in order to add defendants Victor Romain, Deborah Garvin and Alex Hamilton, the guarantors of the mortgage. All defendants were duly served and only Nai-Mor, Victor Romain, Deborah Garvin and Alex Hamilton (defendants) have answered. In their answer, defendants denied the material allegations in the complaint, but admitted that Nai-Mor executed the mortgage and that Victor Romain, Deborah Garvin and Alex Hamilton executed their Guaranty of Payment. They also asserted ten affirmative defenses and one counterclaim. Defendant New York State Commissioner of Taxation and Finance appeared and waived notice of this application in its Notice of Appearance and defendant New York City Department of Finance appeared and demanded notice of this application in its Notice of Appearance.

Plaintiff currently moves, inter alia, to strike defendant's answer and for summary judgment and to amend the caption by striking the name "John Doe # 1" and replacing it with the name Victor Romain, Jr. and striking the remaining John Does. Plaintiff submits the affidavit of service for Victor Romain, Jr.

Plaintiff also moves for an order appointing a referee to ascertain and compute the total amount due plaintiff for unpaid principal, accrued interest and costs and expenses.

In support of the motion, the Chief Financial Officer (CFO) of plaintiff submits an affidavit wherein he affirms, inter alia, all the allegations in the complaint and notes that since the commencement of this action, no payments have been made. The CFO also argues that defendants have failed to raise any issues of fact in their answer.

In opposition, defendants argue, inter alia, that there is an issue of fact with respect to their affirmative defense of waiver and estoppel. They state that Nai-Mor relied on plaintiff's acceptance of late payments in the past and as such plaintiff waived its right to acceleration of the full debt. Defendants allege that in telephone conversations with

plaintiff, it was agreed that the default would be held in abeyance until Nai-Mor concluded a pending sale of the mortgaged property.<sup>1</sup> Defendants also argue that there remains an issue of fact with respect to their affirmative defense of usury. They state that plaintiff has violated New York's usury laws by intentionally categorizing added interest costs (rates) as so-called escrow funds and fees thereby making the interest rate above 16% per annum.

In reply, plaintiff argues that it never made any promises to defendants nor did it waive any of its rights. Plaintiff further states that a corporate borrower cannot interpose the defense of usury in any action.

Here, the note and mortgage called for monthly payments, which defendants do not deny were not made after September 1, 2005 and the right of plaintiff to accelerate should Nai-Mor default on its monthly obligation. Nothing in the defendants' affidavits or pleadings suggests how they were misled into believing that plaintiff was waiving its right to accelerate the indebtedness and such bald assertions are insufficient to raise a genuine issue of fact (see Zuckerman v State of New York, 49 NY2d 557 [1980]). In fact, the evidence shows that plaintiff never accepted late payments from Nai-Mor, but instead, applied the money in its escrow account towards the overdue monthly payments. It was when the escrow account was depleted that plaintiff chose to accelerate the loan and commence this action.

Furthermore, General Obligations Law 5-521[1] states that no corporation shall interpose a defense of usury, accordingly defendants cannot assert usury as a defense (see Intima-Eighteen, Inc. v A.H. Schreiber Co., Inc., 172 AD2d 456 [1<sup>st</sup> Dept] lv den 78 NY2d 856 [1991]).

Insofar as defendants' unsubstantiated allegations and conclusions have failed to raise any issue of fact, the plaintiff's motion is granted in its entirety.

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<sup>1</sup> According to defendants, the pending sale never occurred because it was disclosed that a former officer of Nai-Mor transferred the property illegally.

Settle Order

Dated: November 15, 2006

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J.S.C.