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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART **48**

Greenpoint Bank, F/K/A the Green Point Savings Bank,

Plaintiff,

- against -

Reynold J. Caraballo, Louise R. Caraballo, Associates Home Equity Services, Inc. f/k/a Ford Consumer Finance Company, New York City Transit Authority, Transit Adjudication Bureau, The United **States** of America, Kristina Dacosta, Sabrina Herman, Norman Porter, Shaun Dacosta,

Defendants.

Calendar: 4/25/02

Index No. 35716/99

DECISION/ORDER

HON. RICHARD RIVERA, J.S.C.:

The following papers were considered in deciding this motion for entry of judgment of foreclosure:

Papers	Numbered
Notice of motion and affirmation	1,2 (Exh.A-G)
Affirmations in Opposition	**3,4** (Exhs.)
Reply affirmation	5 (Exh. A)

Plaintiff Greenpoint Bank ("Greenpoint") moves for the entry of a Judgment of Foreclosure and Sale in this action seeking to foreclose on a mortgage on defendant Reynold J. Caraballo's residential property. This case has a long and complicated procedural history and the record reveals that this is the fifth motion filed by Greenpoint seeking similar or related relief. A careful review of the court file reveals the following facts.

Factual Background

The pleadings

The complaint in this case, filed on October 1, 1999, alleges that Greenpoint is seeking foreclosure as a result of defendant Caraballo's default in failing to make monthly payments for principal and interest starting on June 1, 1999. After being served with process on November 1, 1999, Mr. Caraballo timely filed a pro-se answer on November 19, 1999[1]. In his answer, Mr Caraballo denied being in default in failing to make monthly payments of principal and interest, as the complaint alleges. In addition, Mr. Caraballo asserted that Greenpoint erroneously increased the amount due in payment to his escrow account after unnecessarily charging him for insurance premiums. The answer pleads laches as an affirmative defense, and contains a counterclaim in which Mr. Caraballo appears to seek the return of monies he overpaid to Greenpoint in his monthly installments.

On December 6, 1999, Greenpoint filed a reply generally denying the allegations in Mr. Caraballo's answer. Also, on December 6, 1999, defendant Associates Home Equity Services ("Associates") filed a notice of appearance and a claim for any surplus monies arising out of a foreclosure sale of the property in order to satisfy a second and subordinate mortgage covering the property and held by Associates.

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[1] Mr. Caraballo has continued to act pro-se throughout the entire litigation in this case.

Greenpoint's first motion

On January 28,2000, Greenpoint filed its first motion seeking an order striking Mr. Caraballo's answer and granting summary judgment. The motion also sought the appointment of a referee to compute the amount due to plaintiff as a result of Mr. Caraballo's default. In support of this motion, Greenpoint submitted an affidavit by Brady Loyacano, Assistant Secretary of Greenpoint's loan servicing division dated January 14, 2000. This affidavit explained for the first time that Mr. Caraballo's default stemmed from his failure to keep the property insured against loss by fire which led Greenpoint to purchase forced placed insurance covering the property for the period October 28, 1995 to October 28, 1996. Greenpoint again bought insurance for the property for the periods May 28, 1997 to May 28, 1998, May 28, 1998 to May 28, 1999 and from May 28, 1999 to May 28,2000. Mr. Loyacano explains that the policy that Greenpoint bought for the period May 28, 1999 to May 28,2000 was cancelled when Mr. Caraballo showed proof that he had bought insurance effective May 21, 1999 and that Mr. Caraballo's account was credited $643.00. Finally, Mr. Loyacano's affidavit explains that Mr. Caraballo's default stemmed from a deficiency in his escrow account as a result of Greenpoint's purchase of insurance for the property.

In his opposition to the motion, Mr. Caraballo stated that his property had been insured at all times and that he had tried to explain this to Greenpoint several times, that he had protested the amounts charged for insurance by following the instructions for

disputing the bill included in Greenpoint's monthly statements, and that Greenpoint had not addressed his concerns. The instructions on the statements in question stated in part:

> Billing Rights: In case of errors or questions about your Home Equity Rill. If you think your bill is wrong or if you need more information about a transaction on your bill, write to us on a separate sheet of paper, to the above listed Customer Service address, as soon as possible. [...] You do not have to pay an amount in question while we are investigating, but you are still obligated to pay the parts of your bill that are not in question. While we investigate your question, we cannot report you as delinquent or take any action to collect the amount you question.

This motion was marked off the calendar on March 15,2000.

Second motion

On April 4, 2000, Greenpoint filed a second motion seeking identical relief to the one sought in the first motion and relying on the same January 14th affidavit by Mr. Loyacano. In opposition to this motion, Mr. Caraballo submitted copies of numerous correspondence between the parties as proof of the fact that he had contacted Greenpoint on several occasions trying to resolve the differences between them. In one of these letters, Greenpoint informs Mr. Caraballo on March 24, 1997 that as a result of his showing proof of insurance, Greenpoint had cancelled insurance placed on Mr. Caraballo's account effective March 15, 1997 and that his account was being credited and his monthly payment adjusted. Mr. Caraballo also stated and showed proof that Greenpoint returned to him his monthly payment for July, 1999. Finally, Mr. Caraballo attached copies of a monthly statement from a bank account he claimed he opened with

Chase in August, 1999 after Greenpoint rejected his payment. This statement shows that the account is in the name of Mr. Caraballo in trust for Greenpoint Savings Bank and that on March 23, 2000, the account had a balance of $8,578.91. Mr. Caraballo claims that he had been depositing his monthly payments due for the subject mortgage into this account so that he could make immediate payment to Greenpoint once they resolved their differences. Mr. Caraballo asked the court to deny Greenpoint's motion because its actions were not reasonable.

Mr. Loyacano's reply affidavit dated May 31, 2000 explains that Greenpoint charged Mr. Caraballo for the forced placed insurance premiums by increasing the amount of the monthly payments due in Mr. Caraballo's escrow account. This increased the total monthly payment in Mr. Caraballo's account starting on October, 1998 to $1,230.26 ($842.58 for principal and interest and $387.68 for escrow). But, according to Mr. Loyacano's affidavit, Mr. Caraballo continued to pay $977.44 per month, creating a deficiency of $2,022.56 by June, 1999. When Mr. Caraballo sent his monthly payment of $977.44 in July, 1999, Greenpoint rejected and returned the payment because the amount was insufficient. Mr. Loyacano also states in his affidavit that on May 18, 2000 (less than two weeks from the date of his affidavit) Greenpoint had sent a forbearance agreement to Mr. Caraballo which would have resolved the dispute between the parties. This forbearance agreement showed the balance of the arrears in Mr. Caraballo's account to be $20,309.78.

On June 29, 2000, Justice Robert Gigante denied this motion stating that there were issues of fact with respect to whether Mr Caraballo tendered payment of the arrears and with respect to the total amount due in the account.[2]

Third motion

In January, 2001, Greenpoint submitted its third motion, this time seeking reargument of its second motion which resulted in Justice Gigante's order of June 29, 2000, as well as the same relief sought in that motion (striking Mr. Caraballo's answer, summary judgment, and appointment of a referee to compute). In support of the motion to reargue, Greenpoint's counsel disputed the existence of a question of fact based on his contention that tendering of part of the arrears (as opposed to the full amount) is not a complete defense to acceleration of the debt. Greenpoint's counsel also stated that Greenpoint had sought to resolve the dispute between the parties but that Mr. Caraballo did not respond to Greenpoint's attempt to settle this matter. In support of this contention, counsel attached to the motion a letter from counsel to Mr. Caraballo in September, 2000, indicating that as a result of his showing proof of insurance for certain periods, Greenpoint had credited Mr. Caraballo's account accordingly. Also attached to the motion papers is an offer of reinstatement of the loan made by Greenpoint to Mr. Caraballo on November 13,2000. The offer indicates that in exchange for the payment of $24,667.41 on or before November 29, 2000, the loan would be reinstated. This

[2] Justice Gigante's decision and order fails to indicate whether Greenpoint's reply affidavit was considered in rendering the decision.

amount included $2,359.38 in attorneys fees, late charges in the amount of $400.30 and $507.60 in other fees.

On January 3,2001, the return day of this motion, Mr. Caraballo failed to appear and this motion was granted on default on February 20,2001. Justice Gigante's order of February 20th grants all the relief requested by Greenpoint including striking Mr. Caraballo's answer and the appointment of a referee to compute the amount owed to plaintiff. It appears that Greenpoint mailed a copy of this Order to Mr. Caraballo on March 12,2001.

However, on March 15,2001, Mr. Caraballo filed with the clerk's office opposition papers to the motion.[3] In his papers, Mr Caraballo stated that, contrary to the assertion>of Loyacano and Greenpoint's counsel, he did not ignore Greenpoint's offers of settlement from September, 2000 and November, 2000. As proof of his contention, Mr. Caraballo attached copies of letters he had sent to Greenpoint on September 15, 2000, November 23,2000, December 29,2000, January 22,2001 and February 14,2001 expressing his willingness to negotiate and asking for a way to resolve this matter. In his September 15,2000 letter, Mr. Caraballo requests that the credits to his account be applied to reduce the outstanding principal balance and requests a revised statement for activities in his account. In his November 23,2000 letter, Mr. Caraballo appears to reject Greenpoint's reinstatement offer as a result of his belief that Greenpoint had breached its

[3] It is not clear from the record whether Mr. Caraballo had received a copy of the February 20th order or whether he knew that the motion had been decided on default.

"fiduciary duty" in handling his account and that Greenpoint "must take some responsibility for their actions and for the harm they have caused".

In the meantime, pursuant to Justice Gigante's order of February 20,2001, the referee prepared a report dated March 24,2001, calculating the amount due to Greenpoint to be $80,427.77.

Fourth motion

In May, 2001, Greenpoint submitted its fourth motion. This motion sought the entry of a Judgment of Foreclosure and Sale based on the referee's report. Defendant Associates filed a cross-motion for an order directing the referee to compute the amount owed in the subordinate mortgage held by Associates and that, pursuant to RPAPL §§ 1351 and 1354, the Judgment of Foreclosure provide for the payment of the amount owed in this mortgage from any surplus arising from the sale of the property after foreclosure.

Mr. Caraballo submitted papers in opposition to Greenpoint's motion in which he disputes the referee's findings, states once again that there is a dispute about the "erroneous" insurance premiums purchased by Greenpoint, and shows that he had continued to make his monthly payments into the Chase account, which on March 31, 2001, had a balance of $21,490.26.

In addition, on May 16,2001, Mr. Caraballo filed an amended answer adding counterclaims which sought reimbursement for amounts charged in insurance premiums

and compensatory damages as a result of Greenpoint's "failure to exercise due care" and "negligent representation and breach of their fiduciary duties". Greenpoint rejected this amended answer as untimely.

At some point on or before June 6, 2001, the return day of Greenpoint's motion and Associates' cross-motion, Mr. Caraballo submitted a motion seeking to vacate his default in appearing on January 3, 2001 as well as the order signed on default in February 20, 2001. In support of this motion, Mr. Caraballo submitted a letter from a physician stating he was ill and unable to appear in court on January 3, 2001. Mr. Caraballo also submitted a letter from his employer, United Airlines, stating Mr. Caraballo was out from his job due to an illness from December 26, 2000 to January 21, 2001. On June 6th, Justice Gigante reserved decision on the motions.

By decision dated July 19, 2001, Justice Gigante granted Associates' motion and directed the referee to compute the amount owed to Associates in the subordinate mortgage. The order denies Greenpoint's motion for the entry of a Judgment of Foreclosure and Sale without prejudice pending the referee's report regarding the subordinate mortgage. However, the order does not indicate whether Mr. Caraballo's motion seeking to vacate his default was considered and the order does not decide that motion.

Fifth motion

On December 26, 2001, the referee submitted his revised report including the

balance in the mortgage held by Associates **($26,241.36).** Based on this revised report and Justice Gigante's order, in March, 2002, Greenpoint submitted its fifth motion which is the present motion before me.[4] This motion seeks the entry of a Judgment of Foreclosure and Sale.

In opposition to the motion, Mr. Caraballo states that this motion has been denied twice before by Justice Gigante and reiterates that the computation of the amount owed in his account is inaccurate. Mr. Caraballo also disputes owing any money to Associates. He states that his second mortgage is held by a company called Citifinancial, not Associates, and that all payments have been made timely in that account. In its reply, Greenpoint states that a dispute between Mr. Caraballo and the holder of the subordinate mortgage should not affect Greenpoint's entitlement to judgment in this matter.

Discussion

In a foreclosure action, when faced with a mortgagee's motion for summary judgment of foreclosure, the court may properly look beyond the defendant's answer and deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense. Nassau Trust Company v. Montrose Concrete Products, Corp., 56 N.Y.2d **175, 182** (1982).

In general, mortgagors are bound by the terms of their contracts, including the

[4] In September, 2001, Justice Gigante left this court and began sitting in Richmond County Supreme Court. All his pending cases in this county were transferred to me.

acceleration clause, and cannot be relieved from their default, "in the absence of waiver by the mortgagee, or estoppel, or bad faith, fraud, oppressive or unconscionable conduct" on the part of the mortgagee. *Id* at 183.

However, foreclosure is an equitable remedy and it may be denied in order to prevent an unjust result such as unconscionable overreaching by the mortgagee. European American Bank v. Harper, 163 A.D.2d 458 (2nd Dept. 1990). In appropriate cases, such as where there is fraud, exploitative overreaching or unconscionable conduct on the part of the mortgagee, "agreements providing for the acceleration **of** the entire debt upon the default of the obligor may be circumscribed or denied enforcement by utilization of equitable principles." Fifty **States** Mgt. Corp. **v. Pioneer *Auto* Parks.** Inc., 46 N.Y.2d 573, 577 (1979). For instance, where a contract provides for acceleration as a result of a breach of any of its terms, however trivial or inconsequential, such a provision is likely to be considered an unconscionable penalty an will not be enforced by a court of equity. Fifty States Mnt. Corp. v. Pioneer Auto Parks, Inc., ***supra;*** Federal Home Loan Mortgage Corporation v. Bronx **New Dawn** Renaissance **VII,** L.P., 1995 WL 412399 **(S.D.N.Y.** 1995). It is well settled that equity will intervene to prevent forfeiture occasioned by a trivial or technical breach. 1014 Fifth **Avenue** Realty Corp. **v.** Manhattan Realty Co., 111 A.D.2d 78 (1st Dept. 1985).

The court may exercise its equitable powers even after **a** judgment of foreclosure is entered, and may, in the exercise of its discretion and under the appropriate

circumstances, condition the enforcement of the judgment and allow the mortgagor to redeem the mortgage by payment of the amount due. 2301 Jerome Avenue Realty Corp. v. Di Paolo, 190 Misc.2d **383** (Sup. Ct., Westchester Co. 2002).

In this case, the evidence submitted by both sides shows that there has always been a legitimate dispute between the parties regarding whether Greenpoint in fact needed to place forced insurance on the property for all the claimed periods. For instance, on at least three occasions, Greenpoint has had to cancel the insurance it had purchased and credit Mr. Caraballo for insurance that ended up not being needed[5]. It is then understandable why Mr. Caraballo decided to exercise his right to pay the "parts of [his] bill that [were] not in question" and not to pay the amount that was in question, as provided in Greenpoint's monthly statements. But Mr. Caraballo did not just make a decision to "exercise" this right unilaterally. The record shows that Mr. Caraballo wrote to Greenpoint and/or its attorneys on seven different occasions before this action was commenced trying to address Greenpoint's concerns and resolve the dispute. When his payment was rejected, Mr. Caraballo opened a bank account and has deposited the amounts of his monthly payments in that account throughout the length of this litigation.

[5] Greenpoint has agreed to credit Mr. Caraballo's account for premiums purchased by Greenpoint for the period starting March 15, 1997 (see Greenpoint letter to Caraballo dated March 24, 1997); for the period starting on May 21, 1999 (see Loyacano's affidavits dated January 14,2000 and May 31,2000); and for the periods from October 28, 1995 to October 28, 1996 and May 28, 1997 to January 7, 1998 (see, Greenpoint's counsel's letter to Mr. Caraballo dated September 7,2000 and Loyacano's affidavit dated December 4,2000 as well as loan history showing credits, attached as Exhibit Q to Greenpoint's motion to reargue filed in December, 2000).

These are not the actions of a person who is avoiding his financial responsibilities or forfeiting his rights. In the exercise of equity, this court declines to hold that Mr. Caraballo has forfeited his rights and declines to enforce the mortgage's acceleration clause. Fifty States Mgt. Corp. v. Pioneer Auto Parks. Inc., ***supra.***

Neither can the fact that Mr. Caraballo has chosen not to accept Greenpoint's "settlement" offers be regarded as a default under the circumstances of this case. Even though Greenpoint has offered Mr. Caraballo to reinstate the mortgage on at least two different occasions, the offers have been conditioned on the payment of an amount that he was disputing. It now appears that, in retrospect, Mr. Caraballo might have been correct in rejecting those offers: after the first forbearance agreement offered in May, 2001, Greenpoint credited Mr Carahallo in September, 2001 for insurance unnecessarily placed on the property. Had Mr. Caraballo accepted this offer and paid the amount claimed by Greenpoint in May, 2001, there is no doubt that he would have overpaid Greenpoint. In addition, the reinstatement offers required Mr. Caraballo to pay substantial attorneys' fees as well as other fees. Part of these attorneys' fees have been incurred as a result of Greenpoint's insistence on proceeding with this foreclosure action even in the face of proof that the amount owed by Mr. Caraballo in insurance premiums was far from certain (see footnote 5). This court finds that Greenpoint's refusal to reinstate the mortgage unless Mr. Caraballo pays attorneys fees that were incurred as a result of Greenpoint's questionable response and strategy is overreaching conduct on

Greenpoint's part which constitutes another defense to the entry of a judgment in this case. European American Bank v. Harper, ***supra.*** (a mortgagee's refusal to reinstate the mortgage unless the mortgagor pays attorneys' fees which were incurred as a result of the mortgagee's rejection of payment constitutes grounds for vacating a foreclosure judgment); Fifty States Mgt. Corp. v. Pioneer Auto Parks, Inc., ***supra.***

In addition, even though this action is based on failure to pay principal and interest, the uncontroverted evidence shows that Mr. Caraballo never failed to make any of these payments, and that, in fact, he tendered payment on a timely fashion and that such payment was rejected by Greenpoint because of a disagreement with respect to the payment amount due in the escrow account. Assuming, arguendo, that Mr. Caraballo violated his mortgage contract by either failing to insure the property as required or failing to show proof of such insurance, these defaults, if in fact they occurred, were inconsequential or technical in nature under the circumstances presented. In such circumstances, foreclosure would not be appropriate. Massachusetts Mutual Life Insurance Co. v. Transgrow Realty Corp., **101** A.D.2d 770 (1st Dept. **1984)** (summary judgment of foreclosure denied when default consisted of mortgagor's failure to make repairs and halt deterioration of the property, failure to pay real estate taxes, failure to submit required financial statements, and assigning the lease without the mortgagee's consent); Fifty States Mgt. Corp. v. Pioneer Auto Parks, Inc., ***supra;*** Federal Home Loan Mortgage Corporation v. Bronx New Dawn Renaissance VII, *L.Y.*, ***supra;*** **1014** Fifth

Avenue Realty Corp. v. Manhattan Realty Co., ***supra;*** In Rem Tax Foreclosure Action No. 31. Borough of Manhattan, 136 Misc.2d 522 (Sup. Ct., New York Co., 1987)(although courts are not inclined to relieve mortgagors of their default when such default is based on non-payment of interest and principal, this rule is less rigid when the default is based on other failures).

Mr. Caraballo has advanced yet another defense to this foreclosure action, namely, he disputes that he has been properly credited for the amounts charged to his escrow account. A dispute with respect to whether a mortgagor's account has been properly credited creates a question of fact that could constitute reasonable excuse for a mortgagor's default and a viable defense to the foreclosure. Empbanaue Capital Corp. v. Geathers, 224 A.D.2d 238 (1st Dept. 1996).

Finally, by asserting that his second mortgage is being held by a company other than Associates, Mr. Caraballo has raised issues of fact with respect to Associates' entitlement to a judgment of foreclosure. Under all of these circumstances, Greenpoint's motion for the entry of a judgment of foreclosure must be denied.

However, despite the fact that the parties have been involved in this dispute for seven years, the record is unclear as to whether Mr. Caraballo insured the property during all relevant times.[6] Therefore, this court declines to dismiss this foreclosure action and

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[6] Specifically, even after a careful analysis of both parties' voluminous submissions, the court has been unable to find proof that Mr. Caraballo had the property insured from January 7, 1998 to May 21, 1999 and from May 21,2000 to May 21,2001.

chooses instead to exercise its discretion to vacate the judgment entered on default on February 20,2001. The record shows that Mr. Caraballo moved to vacate this judgment but that such motion was never decided. The record also reveals that Mr. Caraballo has shown an excusable default (that he was sick on January 3, 2001), and a meritorious defense, as discussed in detail above. Since the judgment was entered on default, a motion seeking to vacate it may properly be heard by another judge of the same court. C.P.L.R. 2221(a)(1). As stated above, an action to foreclose on a mortgage is equitable in nature, and the court may use equitable principles to fashion an appropriate remedy. Fifty States Mgt. Corp. v. Pioneer Auto Parks, Inc., ***supra.***

In further exercise of its discretion, the court will permit reinstatement of the mortgage upon payment of an amount to be determined after a hearing conducted by the court. The purpose of the hearing is to determine the exact amount due to Greenpoint, if any, for insurance premiums purchased for periods in which Mr. Caraballo cannot show proof of insurance, as well as late fees and monthly payments for principal and interest commencing on June 1, 1999. The hearing is set for **October 31,2002 at 11:00 a.m. at 15 Willoughby Street, room 102.** The parties are advised to bring all relevant proofs, including but not limited to, insurance premiums paid and records of payments made. The proof may be presented through the introduction of both documents and testimony from witnesses.

Conclusion

It follows that Greenpoint's motion seeking the entry of a Judgment of Foreclosure and Sale in this matter is denied. In addition, the court vacates the judgment entered on default on February 20, 2001. The court will conduct a hearing on October 31, 2002 to determine whether the amount to be paid by Mr. Caraballo in order for the mortgage to be reinstated by Greenpoint.

This constitutes the Decision and Order of the Court. The Court is mailing a copy of this decision to the parties today.

Hon. Richard Rivera

Dated: October 7,2002