SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARYLIN G. DIAMOND PART 48

Justice

ROGER SOLER,

Plaintiff,

-against-

LUBOV KLIMOVA, GARY REM a/k/a GORDON REM and MIRIAM WEISBECKER

Defendants.

INDEX NO. *603251102*

MOTION SEQ. NO. 001

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 001 and 002 are consolidated herein for decision. In this action, the plaintiff seeks to discharge and cancel a mortgage and lien which the defendants hold on his cooperative apartment on the ground that the loan is usurious. The plaintiff. Roger Soler, owns shares in a cooperative corporation which are appurtenant to the apartment in which he resides in a building located on East 38th Street in Manhattan. In August, 1999, he obtained a mortgage from Bank Audi USA in the amount of $100,000 with interest payable at a rate of 1.5% above the prime rate. Apparently, plaintiff thereafter fell into arrears on his maintenance payments to the coop. In July, 1999, he obtained a $12,850 loan from Bank Audi, secured by his coop shares, to assist him in curing his default on the maintenance payments. When plaintiff failed to cure, Bank Audi scheduled a non-judicial foreclosure sale of his unit. Plaintiff then brought an action in this court seeking, *inter alia,* a stay of the sale on the ground that the bank had made an erroneous payment from his account of $25,000 and had refused to credit him for this amount. By decision and order dated April 18, 2000, the court (Paula J. Omansky, J.) denied plaintiffs motion to stay the sale and dismissed the complaint, finding that the evidence undercut his claim that the $25,000 payment at issue had been made without his consent. For reasons that are not found in the record, Bank Audi did not thereafter conduct a foreclosure sale on the plaintiffs coop unit. On June 27, 2001, at a time when the plaintiffs debt to Bank Audi had risen. with interest. to $152,758.11, the defendant Lubov Klimkova purchased the entire debt from Bank Audi for $135,000. On that same date, plaintiff (1) executed an estoppel certificate in which he agreed that Ms. Klimova held a mortgage on his coop shares in the amount of $152,758.11, with interest at the rate of 4% above the prime rate, (2) obtained an additional $20,000 loan from Ms. Klimova and issued to Ms. Klimova a promissory note which provided for interest on the loan at an annual rate of 16% and (3) executed an affidavit for judgment by confession in favor of Ms. Klimova in the amount of $152,758.11. with interest at the rate of 4% above the prime rate, plus $20,000, at the rate of 16%.

At some point thereafter, the plaintiff obtained a purchaser for his apartment. The sale was scheduled to close on September 9,2002. Plaintiff claims that, in anticipation of the closing, he sought to pay off his debt to Ms. Klimova who, it appears, may have since assigned her rights to defendant Miriam Weisbecker. By letter dated August 25,2002, plaintiff calculated the debt as totaling $192,406.67. In the letter. plaintiff indicated that he reached this amount by (1) assuming a principal of $135,000 arising from his debt to Bank Audi and $20.000 arising from the $20,000 loan from Ms. Klimova, for a total principal of $155.000. (2) multiplying this amount by an annual interest rate of 20%. which added $31,000 to his debt for the first 12 months of the loan, and (3) calculating the amount of interest on the final two months

(June 27. 2002 to August 27. 2002) by adding the $31,000 of interest to the $155,000 of principal ($186.000) and multiplying this amount by a 20% annual rate over a 62-day period. Although there is nothing in the record which indicates that the defendants ever demanded a 20% interest rate or ever agreed that plaintiffs debt to Bank Audi was only $135,000 on the date that the mortgage was assigned to Ms. Klimova. they nevertheless accepted the amount of the payoff which plaintiff had calculated. Thus. by letter to plaintiff dated August 26, 2002, the counsel for Ms. Klimova and Ms. Weisbrecker, Gordon I. Remer. confirmed that the payoff amount for all loans held by Ms. Klimova against the plaintiff's apartment was, through August 27,2002, $192,406.67.

Despite the fact that it was the plaintiff who had taken the initiative to fix the payoff amount ostensibly so that he could close on the sale of his apartment, he nevertheless refused to pay the very amount which he himself had calculated. Rather, shortly after receiving the letter from the defendants' counsel agreeing to the $192,406.67 amount, plaintiff commenced the present action claiming that the defendants had charged him interest on his loan at the usurious rate of 20% and that his entire debt to the defendants should therefore be cancelled. In conjunction with the commencement of this action, in motion sequence number 001, the plaintiff moved, by order to show cause, for an order declaring that the loan held by Ms. Klimova is void and unenforceable because it is usurious under the General Obligations Law and directing the surrender of the collateral and the cancellation of the notes. In signing the order to show cause on September 9,2002, this court issued a temporary restraining order directing defendants to appear that day at the closing and to surrender the collateral held to secure their lien on the property and to release any such lien, upon the condition that plaintiff would deposit in escrow with his counsel or with the court the amount of the alleged payoff, $192,406.67.

The defendants appeared at the closing. Plaintiff's counsel, Mel B. Ginsburg, also appeared and showed defendants and their counsel a bank check payable to his law firm, Vernon & Ginsburg LP, for $180,081.69 as a deposit to be held in escrow. He informed the parties that the balance of the $192,406.67 which plaintiff was required to deposit in escrow as a necessary condition for the TRO was held in escrow as part of the refundable down payment which the purchaser of the apartment had given to the plaintiff. The defendants asserted that the down payment held in escrow did not satisfy the condition precedent imposed under the TRO and refused to surrender their collateral on the apartment and release the lien. As a result, the closing was unable to go forward, the purchaser canceled the sale and demanded from the plaintiff. and received, a return of the down payment.

Thereafter, the defendants cross-moved for an order vacating the TRO, pursuant to CPLR 6314. and for summary judgment dismissing the complaint, pursuant to CPLR 3212. The defendants also sought an award of attorney's fees. In his reply, the plaintiff sought an order holding the defendants in contempt of court for violating the TRO by refusing to cancel the lien at the hearing. In addition, on October 24. 2002, the plaintiff served an amended complaint in which he added a second cause of action to recover the damages he suffered by reason of the defendants' alleged failure to comply with the terms of the TRO.

Discussion

As to the defendants' cross-motion, it should first be noted that they have incorrectly denominated the motion as one for summary judgment. Under CPLR 3212(a), a summary judgment motion may only be brought after issue has been joined. Here, an answer has not yet been served. Although wrongly labeled. the motion is nevertheless valid since it is, in actuality, a motion to dismiss the complaint pursuant to CPLR 3211 (a)(1) "on the ground that...a defense is founded upon documentary evidence." Under this provision, a dismissal is warranted "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon* v. *Martinez,* **83** NY2d at 83, 87 (1994).

Here. the defendants have submitted concrete evidence which conclusively refutes the plaintiffs allegations of usury. As previously discussed, the defendants have provided the court with an estoppel certificate, a promissory note and a judgment by confession, all of which the plaintiff executed, showing

that. as of June 27, 2001. the plaintiff was indebted to them for two loans totaling $172,758.11 and that the rate of interest charged on the two loans fell well within the State's legal limits. The plaintiff has not denied that he voluntarily and knowingly signed these documents. Although plaintiff suggests that the documents were intended to provide the defendants with legal cover for their usurious scheme, he has not submitted any evidence that the defendants ever demanded that he pay a rate of interest on the loans higher than the rates provided for under these three documents. Although he has submitted various notes he wrote either to himself or to one or more of the defendants in which he referred to the assigned loan from Bank Audi as actually amounting to only $135,000, these notes are not probative since they were all written prior to the date. June 27,2001, on which the estoppel certificate, promissory note and judgment by confession loan were executed and since there is no evidence that any of the defendants ever received these notes or agreed to their terms. The only evidence the plaintiff has submitted in support of his contention is a letter from the defendants' counsel confirming that the defendants would accept as a payoff amount the $192,406.67 which plaintiff had calculated. Although plaintiffs calculations were predicated on a loan of $155,000 at a 20% rate of interest, it would appear that the amount which defendants agreed to accept was actually less than they would have been legally entitled to obtain under the estoppel certificate, promissory note and judgment by confession. Clearly, an interest charge over a 14-month period of approximately $20,000 on a $172,000 debt is not usurious.

The plaintiffs claim is ultimately based on his assertion that the total of the two loans which he obtained from the defendants was not $172,758.11, but only $155,000. According to the plaintiff, as a settlement of his dispute with Bank Audi, he himself obtained a concession from the bank lowering his mortgage from $152,758.11 to $135,000. He therefore argues that the defendants, in purchasing the mortgage from Bank Audi, were only entitled to this amount, plus interest. The plaintiff, however, has not submitted any evidence from Bank Audi indicating that the amount of the mortgage had been reduced. Indeed, in view of Justice Omansky's determination rejecting plaintiffs contention that the bank's calculations were inaccurate, the bank had no reason to settle since there was no longer any dispute as to the amount which plaintiff owed. Moreover, the official bank documents assigning the loans to Ms. Klimova do not indicate that the amount due had ever been reduced. In view of the plaintiffs acknowledgment in the estoppel certificate, promissory note and judgment by confession that the mortgage was $152,758.11 as of June 27, 2001, his bald assertion that the mortgage was only $135,000 does not raise a triable issue of fact. The defendants' cross-motion to dismiss the complaint must therefore be granted as to the plaintiffs request for declaratory and injunctive relief.

As the court has already noted, after this motion was brought, the plaintiff amended his complaint so as to add a cause of action seeking monetary damages resulting from the cancellation of the sale of his coop shares due to defendants' refusal to comply with this court's order that they release the lien. In view of the fact that the parties have fully addressed this issue, the court will treat the defendants' cross-motion to dismiss as directed to the amended complaint. *See Sage Realty Corp. v. Proskauer Rose LLP*, 251 AD2d 35. 38 (1st Dept 1998).

Clearly, under the TRO, the defendants were not obligated to release the lien on the plaintiffs property unless the plaintiff had first deposited the amount of the alleged payoff, $192,406.67. with his attorneys in an escrow account or with the court. The plaintiff failed to satisfy this condition. Rather, it appears that he only deposited the sum of $180,081.69 with his attorney in an escrow account earmarked for the defendants. Although plaintiffs counsel also held almost $40,000 in another escrow account, this account did not satisfy the TRO since it had been earlier established solely for the purpose of returning the purchaser's down payment in the event that the sale of the plaintiffs apartment was canceled. The court's order essentially directed that an escrow account in the fixed amount be set up and earmarked for payment to the defendants. It did not intend that a discrete, pre-existing escrow account which had been opened with plaintiff's counsel for another purpose could somehow be used to supplement a new escrow account which had been established pursuant to the TRO so as to patch together the requisite deposit. Under the

circumstances, the defendants, who had only been shown the check for $180,081.69, properly refused to release the lien. Since the defendants did not therefore violate the TRO, the plaintiffs second cause of action fails to state a cause of action and must be dismissed. In view of the court's dismissal of the complaint herein, the TRO is lifted and the plaintiffs request for declaratory relief is denied, as is his request for an order finding the defendants in contempt of the TRO. The defendants' request for attorney's fees is denied.

In motion sequence number 002, the defendants have moved to vacate a stipulation which they entered into with the plaintiff at a court conference held on September 24, 2002. In the stipulation, they agreed that pending this action, they would place in escrow with their attorney all original lien documents relating to the plaintiff's coop shares. The motion is denied as moot since, upon the dismissal of the complaint herein, the stipulation has expired.

Accordingly, in motion sequence number 001, the plaintiff's motion for a declaratory order is denied and the TRO is hereby lifted. The plaintiffs request that the defendants be held in contempt of court is also denied. The defendants' cross-motion to dismiss, incorrectly denominated as a motion for summary judgment, is granted and the amended complaint is hereby dismissed in its entirety. The defendants' request for an order vacating the September 24, 2002 stipulation is denied as moot. Their request for attorney's fees is also denied.

The Clerk Shall Enter Judgment Herein

Dated: 1/17/03

MGD

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [X] FINAL DISPOSITION **[ ] NON-FINAL DISPOSITION**