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SHORT FORM ORDER

COPY

INDEX No. 03-26862

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 15 - SUFFOLK COUNTY

PRESENT:

Hon. PATRICK HENRY
Justice of the Supreme Court

MOTION DATE 1/13/04
ADJ. DATE 2/20/04 (#002)
2/27/04 (#003)
Mot. Seq. # 002 - MD
003 - XMotD

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WELLS FARGO BANK MINNESOTA, N.A., as Trustee for GMAC Commercial Mortgage Securities, Inc., Mortgage Pass Through Certificates, Series 2001-C1,

Plaintiff,

- against -

ZOBE, L.L.C., ISAAC POLLAK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and "John Doe No. 1" to "Jane Doe No. 100," inclusive, the last ten names being fictitious and unknown to plaintiff, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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Upon the following papers numbered 1 to 155 **read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers** 1 - 120 **; Notice of Cross Motion and supporting papers** 121 - 144 **; Answering Affidavits and supporting papers** _____ **; Replying Affidavits and supporting papers** 145 - 155 **; Other** _____ **; (and after hearing counsel in support and opposed to the motion) it is,**

ORDERED that defendants' request for partial summary judgment which determines: (1) that the underlying mortgage **was** not in default on the date the foreclosure action commenced; (2) that defendants are entitled to credit/reimbursement or setoff in the sum of **$48,539** plus interest under the mortgage and **on** the second counterclaim; and **(3)** that good faith has been shown, the technical default alleged is minor, subject to cure, and does not permit acceleration of the loan or an entitlement to foreclosure, is decided as follows; and it is

ORDERED that the cross motion by the trustee plaintiff which requests: (1) *summary* judgment against Zobe LLC; **(2)** dismissal of defendants Zobe and Pollack's affirmative defense and counterclaims; and (3) severance of plaintiffs claims against the guarantor, is denied; and it is

ORDERED that the cross motion by the trustee for: (1) judgment on default against defendant *NYS* Department of Taxation and Finance for failure to appear and answer; and (2) amending the caption of this action to delete the "John Doe" and "Jane Doe" defendants without prejudice; and (3) denying defendant summary judgment, is granted. The caption is deemed amended upon service of the within order with notice of entry thereon; and it is

ORDERED that the cross motion to issue an order to appoint a referee to hear and report on the issue of whether defendants were in default of the mortgage and subject to foreclosure on the date the action was filed, is denied without prejudice until disclosure and the disposition of questions of fact are resolved; and it is

ORDERED that the ex-parte order signed by the court on October 31, 2003 for the appointment of a receiver to collect and preserve rents, profits and fees from all occupants, tenants and licensees of the premises in foreclosure pursuant to 22 NYCRR Part 36, CPLR 6401, ***et seq.;*** Jud Law $35-A and RPAPL Article 13, is stayed pending further order of this court.

In the alternative, it **is** the recommendation of this court that the parties consent to withdraw the proceeding without prejudice and on condition that payments be made by plaintiff from the IOLA account equal to amounts past and currently due under the mortgage from November 2003 without penalty or additional interest. On the other hand, the sum of $24,259.60, which defendants admit was an inadvertent default, shall be computed with interest from October 2003. In addition, defendants must unequivocally consent in writing to make timely future payment in the amounts agreed for principal, interest, tax, insurance, escrow and reserve within reasonable time of actual due date. In the event agreement is negotiated, acceleration is cancelled and the consolidated mortgage is reinstated or refinanced, subject to strict performance and enforcement as expressed in writing. On the other hand, upon payment of all sums due plaintiff and application to the court or on consent, this matter may be removed from the calendar without prejudice to restore to allow defendant reasonable opportunity to obtain new financing.

This is an action to foreclose an amended, restated, modified, first mortgage on the premises owned by defendant Zobe, LLC, located at 900 Route 111, Hauppauge, New York. The mortgage secured a loan in the sum of $2,980,000.00 initially between Deutsche Banc Mortgage Capital LLC (DBMC) and the mortgagor/defendant dated January 10, 2001. By an assignment dated August 16, 2001, the mortgage was assigned to plaintiff, Wells Fargo Bank Minnesota, **N.A.,** as trustee for GMAC.

Plaintiff contends that the mortgagor fell into default when defendant failed to make payment **of** exact amounts as required under the mortgage instrument. Defendant contends that plaintiff allocated payments prematurely in excess amounts to escrow for taxes, insurance and miscellaneous expenses which caused shortfall and arrears and virtually created a default which would not exist except for the sum of approximately $24,259.60, which defendant admits. Furthermore, the non-monetary defaults

alleged by failure to **disclose** all books and records and comply with appraisal demands were not warranted and should not have occurred. Upon failure of defendants to cure the default as demanded by letter of August 25,2003, plaintiff accelerated the loan by letter dated October 24,2003, making the entire debt due and payable. This action was filed October 30,2003 with an ex parte order to show cause signed October 31, 2003 to appoint a receiver. The appointment was stayed pending a hearing. The stay is continued pending the appointment of a referee to hear and report as to whether the mortgage was in default. The order to appoint a referee is also held in abeyance pending disclosure, disposition of questions of fact and reasonable effort to negotiate an amicable resolution prior to a trial, which appears fueled by misunderstanding and struggle for power and will.

In response, the mortgagor denies default on the date the action commenced. Defendant contends with volumes of figures and documents that payments were regularly made for principal and interest with sufficient amount for the escrow of taxes, insurance, and reserve. Payment was always made, though not in the exact sums demanded. There is no evidence that payment of principal and interest was ever in default. The only dispute is specifically addressed to allocations made to escrow, which the mortgagor contends were premature and in excess of that actually needed for timely compliance. Defendant claims good faith repeated requests for billing statements, and accountings of the escrow allocations were ignored. Defendant also claims that demand for repayment of repairs and improvements owed from the reserve escrow account in the sum of $48,539.00 was ignored despite a reserve of $123,498.61, which defendant advanced. Moreover, plaintiffs consent permitting defendant to lease to a reputable tenant is alleged to have been withheld or delayed and caused loss.

After this action was filed, defendant deposited payments due under the mortgage in the IOLA escrow account of counsel, Jason Chang, **Esq.** At the time this motion was filed, $129,125.43 was allegedly on deposit to cover payments for November and December 2003. The account is expected to reflect that deposits have continued, and the amount should be commensurate with sums owed on the mortgage to date. The October payment was accepted by plaintiff despite the commencement of the within action on October 30,2003. Defendant has submitted extensive documentation to show that with the exception of the $24,259.60 oversight caused by confusion of records, plaintiff cannot establish an actual default in the principal, interest or the escrow account for actual payment of taxes, insurance and reserves. Of course, plaintiff insists that a strict construction of the mortgage terms reflect that default occurred and that acceleration and foreclosure are warranted.

Clearly the record does not show that the acceleration of the debt was invoked by the failure of defendant to timely pay principal and interest. Even the escrow amounts allocable to tax, insurance and reserve are not clearly in default. Although the amounts paid by defendant deviated from the exact sums demanded, the payments were sufficient and timely satisfied the due date for tax and insurance premium. In addition, reserve was in excess. The acceleration appears to be based on the mortgagor's unilateral calculations, annoyance at defendants' management, independent assessment of amounts, and the irregular payments which conflict with plaintiffs demands but covered sums due. There is a distinction between default in payment of principal and interest and other contractual defaults (***Caspert v Anderson Apts.***, 196 Misc2d 555, 94 NYS2d 521 [1949]; ***Loughery v Catalano***, 117 Misc393, 191 *N Y S* 436, *affd* 207 AD 895,201 NYS2d 919 [1923]). Although the strict terms of the mortgage may not conform, acceleration may have been unconscionable on the facts shown unless actual default is

demonstrated in amounts paid to have prejudiced, rather than merely annoyed, plaintiff. The value of the security interest was never at risk. There is no support that defendant management was not successful in the operation of the property. There is no suggestion that the value of the security interest is in jeopardy to require an appraisal or the disclosure of business records to trigger **a** non-monetary default. This is precisely what equity requires to confirm an acceleration and foreclosure not based on default **of** principal and interest (***Loughery v Catalano, supra; DiMatteo v N. Tonawanda,*** 101 AD2d 692,476 NYS2d 40 [1984]).

Summary judgment is drastic. The relief is not granted where doubt is cast by questions of fact pertaining to default and unconscionability ***(Nassau Trust Co. v Montrose Concrete Products Corp.***, 56 NY2d 175, 451 NYS2d 663 [19821). The court is convinced that issues of fact raised mandate disclosure, trial and every available effort to negotiate a settlement (***DiMatteo v N. Tonawanda, supra; Red Rock Holdings v Mandel***, 220 AD2d 495,632 NYS2d 212 [1995]; ***Karas v Wasserman***, 91 AD2d 812,458 NYS2d 280 [1982]).

Finally, the appointment of receiver is typically warranted to preserve the premises and to prevent the party in default from risk of damage to the interest. No risk to the security is shown. Other than conflicts in personalities, operational styles, calculation of sums and due dates for payments from escrow, the circumstances do not currently warrant a receiver or justify a premature appointment (***WIM Corp. v Cipulo***, 216 AD 46,214 *N Y S* 718 [1926]).

Dated: 22 JUNE 2004

J.S.C.

___ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**