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

PRESENT: DEBRA A. JAMES **PART 59**
Justice

CDR CRÉANCES S.A., as successor to SOCIÉTÉ DE BANQUE OCCIDENTALE,

Plaintiff,

- v -

EURO-AMERICAN LODGING CORPORATION; MACSON EXPRESS S.A.; MACSON EXPRESS CORPORATION; MACSON EXPRESS USA, INC.; WORLD BUSINESS CENTER, INC.; OSPIN INTERNATIONAL, INC.; THE CITY OF NEW YORK *; NEW YORK CITY DEPARTMENT OF FINANCE *; THE PEOPLE OF THE STATE OF NEW YORK *; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE *; STATE OF NEW YORK COMMISSIONER OF LABOR *; SCHINDLER ELEVATOR CORPORATION; COMMISSIONER OF THE STATE INSURANCE FUND *; PREMIER WOODCRAFT, LTD.; SUMMERSON INTERNATIONAL ESTABLISHMENT (FORMERLY FLATOTEL INTERNATIONAL ESTABLISHMENT); STEVEN ELGHANAYAN; and "JOHN DOE #1" through "JOHN DOE #12,"

Defendants,

--and --

ATLANTIC BANK OF NEW YORK,

Defendant-Intervenor.

* - Sued solely in its capacity as a holder of an interest in the mortgaged property.

Index No.: 108392/03

Motion Date: 07/23/04

Motion Seq. No.: 03

Motion Cal. No.: ____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 6 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1 - 3
Answering Affidavits - Exhibits	4, 5
Replying Affidavits - Exhibits	6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Defendant-Intervenor Atlantic Bank of New York (Atlantic Bank) moves to dismiss the complaint in its entirety on the

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ground that this foreclosure action is barred by Section 1301 (1) of the Real Property Actions and Proceedings Law (RPAPL). Pursuant to a stipulation of all the parties that have appeared in this action as so-ordered by this court on July 31, 2003, Atlantic Bank was permitted to intervene as a defendant in this action. Plaintiff CDR Créances S.A. (CDR) opposes the motion.

This foreclosure action concerns the property at 135 West 52nd Street, New York County, which is currently being operated as a Flatotel among other commercial space on the premises. Plaintiff's complaint alleges that pursuant to a May 14, 1991, agreement between plaintiff's predecessor-in-interest Société De Banque Occidentale (SDBO) and co-defendant Euro-American Lodging Corporation (EALC), defendant EALC as mortgagor gave SDBO two mortgages upon the property to secure various debts in the aggregate principal amount of $75 million dollars. The mortgages were assigned to plaintiff CDR by SDBO pursuant to an agreement dated June 1, 2001. Under the terms of the mortgage, French courts were to have sole and exclusive jurisdiction to determine whether any event of default upon the indebtedness occurred and whether the indebtedness could be accelerated.

The complaint further alleges that in October 1992, EALC commenced a breach of contract action in France against SDBO. SDBO interposed a counterclaim alleging EALC's default under the terms of the loan agreement between the parties. After a decade

of court proceedings, by judgment dated February 13, 2003, the Paris Court of Appeal directed EALC to pay CDR approximately $82 million in principal upon the various indebtedness at issue in addition to other amounts the parties were directed to pay to each other (the "French judgment"). CDR asserts in its complaint that the total amount owed by EALC under the French judgment exceeds $154 million inclusive of interest.

In this action CDR seeks a judgment of foreclosure and sale based upon EALC's continuing defaults under the Mortgage and Loan Agreements. In a second-related action CDR is moving against EALC seeking to recognize the French Judgment by way of CPLR 3213 and CPLR Article 53 and 62, and seeks an attachment of EALC's property (Index No. 115951/2003, the "Recognition action"). In a third related action CDR sues for fraud and breach of contract related to agreements which allegedly pledged shares of EALC as collateral for loans made by CDR/SDBO (Index No. 109565/2003, the "Pledge action").

Atlantic Bank moves to dismiss the complaint on the grounds that CDR's foreclosure action is barred by RPAPL 1301 (1). That statute states that

> 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.

RPAPL 1301 (1). "The purpose of section 1301 (subd. 1) and its predecessors was to avoid multiple litigation to recover the same debt, and to confine the proceedings to collect the mortgage debt to one court and one action." Brandenberg v Tirino, 66 Misc2d 193, 196 (Sup Ct, Nassau County, 1971), affd 37 AD2d 713 (2d Dept 1971), appeal dismissed 29 NY2d 486 (1971), appeal dismissed 29 NY2d 792 (1971). "It is fundamental that the holder of a note (or bond) and mortgage has two remedies: one at law in a suit on the debt as evidenced by the note, the other in equity to foreclose the mortgage. The note represents the primary personal obligation of the mortgagor, and the mortgage is merely the security for such obligation." Copp v Sands Point Marina, Inc., 17 NY2d 291, 293 (1966).

Atlantic Bank argues that the French judgment constitutes a "final judgment" to recover the underlying mortgage debt and therefore bars CDR's foreclosure action. See Simms v Soraci, 252 AD2d 519, 520 (2d Dept 1998); Finkelstein v Ilan, 239 AD2d 545, 547 (2d Dept 1997) ("since the court granted the plaintiff judgment on the note, the plaintiff may not pursue the remedy of foreclosure unless an execution upon the judgment to the sheriff has been returned wholly or partly unsatisfied").

CDR argues that CPLR 1301 (1) applies only to New York final judgments and does not apply to foreign judgments. In support of

its position CDR cites Tomor v 1733 Development Corp. (297 AD2d 374 [2d Dept 2002]). The Tomor decision, however, has no applicability to the facts of this case. In Tomor, the Court held that RPAPL 1301 (1) did not bar a foreclosure action where judgment in a separate proceeding to confirm an arbitration award was never entered and the proceeding was withdrawn. Tomor did not involve a foreign judgment as is present in this case, nor was there any final judgment entered in any court. Therefore, the Tomor case does not provide any guidance to the issues raised on this motion.

Neither the parties nor this court have found any reported cases interpreting whether the term "final judgment" in RPAPL 1301 refers only to New York judgments. It is clear however that the election of remedies set forth in the statute only applies where the property attempted to be foreclosed upon is located within this State as it has been held that "where an action has been brought on the debt instead of foreclosing the mortgage given to secure the debt, execution must be first issued and returned unsatisfied. This clearly applies to a debt secured by mortgage upon property in this State. The section refers to any part of the mortgage debt and says that any action to foreclose the mortgage shall not be commenced, etc. As no action can be maintained to foreclose a mortgage except upon property in this State, the debt thus sued upon must be one secured by mortgage

upon property in this State." Fielding v Drew, 94 AD2d 687 (1st Dept 1983) (emphasis added) quoting Provident Sav. Bank & Trust Co. v Steinmetz, 270 NY 129, 131 (1936).

The precedents set forth that in determining the applicability of RPAPL 1301 the important factor is whether the mortgaged property is in the State rather than where the action upon the debt took place. In line with this principle, a Court has held that under RPAPL 1301 (3), where a judgment of foreclosure on property located outside New York State took place there (i.e., property located in Massachusetts foreclosed in a Massachusetts court), an action in law upon the debt within New York State is not barred by the statute. FDIC v De Cresenzo, 207 AD2d 823, 824 (2d Dept 1994).

While the court agrees with CDR's argument that a foreign judgment must be recognized within the State before it may be executed upon, that fact does not make the judgment any less final or unenforceable in the courts of this State. See Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v Navimpex Centrala Navala, 29 F3d 79, 81 (2d Cir 1994) (ruling of the Paris Court of Appeal is within the category of judgments entitled to recognition in New York). CPLR 5303 provides that in the courts of this State "a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action

by counterclaim, cross-claim or affirmative defense." It has therefore been held that "New York, desirous of streamlining litigation for the recognition and enforcement in New York of a money judgment of a foreign country, has emphasized that its courts' reviewing role in such cases, as discussed below, is simply 'ministerial.'" Attorney General of Canada v Gorman, 2 Misc3d 693, 694 (Civ Ct, Queens County, 2003). The policy embodied within CPLR Article 53 is to accord foreign judgments enforceability in New York with only limited exceptions codified in CPLR 5304 and 5305. See CIBC Mellon Trust Co. v Mora Hotel Corp. N.V., 100 NY2d 215, 221 (2003). In light of this policy, it is consistent to interpret foreign judgments that are capable of recognition in New York to be within the scope of RPAPL 1301 as that statute's policy is the avoidance of duplicative litigation in multiple forums.

Furthermore, if this court were to construe RPAPL 1301 (1) not to apply to a foreign money judgment secured by property within this State, it would exclude from the operation of the statute an entire class of debts which were secured by property within this State and would promulgate a rule that would give parties greater rights in enforcing their obligations without the State than within the State.

The facts of this case go to the very heart of the policy underlying the statute. CDR has brought two separate actions in

law and equity based upon a foreign judgment, both of which initially were returnable before two Justices of this court, that has required extensive judicial resources to resolve in a consistent manner. This is contrary to the very purpose of RPAPL 1301 which "is to avoid multiple suits to recover the same mortgage debt and confine the proceedings to collect the mortgage debt to one court and one action." Dollar Dry Dock Bank v Piping Rock Builders, Inc., 181 AD2d 709, 710 (2d Dept 1992).

This court must subscribe to the rule enunciated by the First Department in Fielding, supra, which is that it is the location of property within the State, not where the remedy is pursued, that determines the applicability of the election of remedies bar in RPAPL 1301 (1). Accordingly, the court holds that RPAPL 1301 (1) applies to the French judgment sought to be foreclosed upon here and bars CDR's foreclosure action.

CDR's further argument that is should be allowed to pursue its foreclosure action because enforcing the French judgment would be "a wild goose chase" is meritless. The fact is that CDR has itself undertaken this supposed "wild goose chase" before this court by seeking the enforcement of its French judgment on the debt in the Recognition action and is seeking attachment in that action. The "unique circumstances" present in Valley Savings Bank v Rose, (228 AD2d 666, 667 [2d Dept 1996]) where the Court held that equitable considerations militated against the

application of RPAPL 1301 (1) are not present here. In Valley Savings the Court held that because a money judgment obtained in New Jersey and registered in this State could not be executed upon having been discharged in bankruptcy, the mortgagee could maintain the foreclosure action in spite of the statute because it would otherwise be deprived of a remedy. Id. at 667-668. The Court found that because the mortgagee had exhausted its remedies at law, there was no possibility of duplicative litigation as is now occurring in this case. In contrast, CDR by pursuing its money claims in the Recognition Action implicitly acknowledges that it has a remedy at law.

Nor does this case fall within the exception recognized in Brandenberg v Tirino, (37 AD2d 713 [2d Dept 1971]) as the complaint itself in paragraphs 15 through 33 alleges that the original amount of the mortgage given here was meant to secure the principal amount of EALC's indebtedness to SDBO.

Finally, equity does not rescue CDR here as it is CDR's own failure to elect its remedy under the statute which is the cause of its difficulties. It was CDR's predecessor-in-interest which agreed that any dispute as to a default upon the debt would be determined in an action at law in France. This was not a choice compelled by statute or case law (contrast, Valley Savings, supra) but was instead a decision made by a sophisticated corporate institution in negotiating an arms length agreement.

This court is not empowered to choose CDR's litigation strategy. CDR having freely selected its forum and remedy must now abide by that choice.

Therefore, this court shall grant Atlantic Bank's motion and dismiss this foreclosure action. By Order dated May 13, 2003, this court appointed at Temporary Receiver of the Property under the mortgage. The court shall therefore schedule a conference of the parties, the Temporary Receiver, and Counsel to the Temporary Receiver to discuss the status of the temporary receivership.

Accordingly, it is

ORDERED and ADJUDGED that the motion by defendant-intervenor Atlantic Bank to dismiss the complaint is GRANTED, the complaint is DISMISSED, and the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: February 16, 2005 ENTER:

J.S.C.

DEBRA A. JAMES
J.S.C.