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

PRESENT: ALICE SCHLESINGER PART IA Part 16

Index Number : 119923/2003

RED TULIP, LLP.

INDEX NO. _____

vs

NEIVA, JUNIA HISSA

MOTION DATE _____

Sequence Number : 008

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

AUG 31 2006

COUNTY CLERK'S OFFICE

NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: AUG 25 2006

ALICE SCHLESINGER

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

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

----------X

RED TULIP, LLC,

Plaintiffs,

-against-

Index No. 119923/03

JUNIA HISSA NEIVA, ENTREE INTERNATIONAL LIMITED, GOLD & APPEL TRANSFER, S.A., and WALTER C. ANDERSON a/k/a WALT ANDERSON,

Motion Seq. No. 008

Defendants.

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GOLD & APPEL TRANSFER, S.A.,

Third-Party Plaintiff,

-against-

DONALD A. BURNS and 419 BROOME STREET, LLC,

Third-Party Defendants.

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SCHLESINGER, J.:

By Stipulation and Order dated January 30, 2004, the above action (the "*Red Tulip* action") was consolidated for joint discovery and joint trial with a related action entitled *Palm Beach Mortgage Management, LLC v. Red Tulip, LLC, Walter C. Anderson a/k/a Walt Anderson and Junia Hissa Neiva*, Index No. 100952/03 (the "*Palm Beach*" action). The *Palm Beach* action was marked "stayed" as the litigation proceeded under the *Red Tulip* caption. The plaintiff in the *Palm Beach* action now moves for an order pursuant to CPLR §3212 granting it summary judgment, striking the verified answers and any counterclaims asserted by the various defendants, and appointing a Referee to ascertain and compute the amount due the plaintiff so the premises at issue, 419 Broome Street in

Manhattan, may thereafter be sold. The motion is vigorously opposed by defendant Junia Hissa Neiva. Defendant Red Tulip, LLC, now controlled by Donald Burns, who also controls plaintiff Palm Beach Mortgage Management, LLC, does not oppose the requested relief. Defendant Walter Anderson has defaulted on the motion.[1] Accordingly, the stay is vacated and the motion is determined as provided herein.

Background Facts

The relevant facts were outlined in part in two prior decisions of this Court dated July 29 and November 17, 2004, the latter decision having been affirmed by the Appellate Division. *Palm Beach Mtg Mngmt, LLC v. Red Tulip, LLC, et al.*, 18 AD3d 379 (1st Dep't 2005). They will be briefly summarized herein.

At issue here is a five-story loft building at 419 Broome Street, New York, New York (the Building), containing a commercial space and four residential units, including a penthouse occupied by defendant Junia Hissa Neiva (Neiva). In this action, plaintiff Palm Beach Mortgage Management, LLC (Palm Beach or PBMM) and its principal Donald Burns (Burns) seek to foreclose a first mortgage in the original sum of $8,850,000 which was given as security for a building loan note and which constitutes a first lien against the Building.

In the spring of 1999, defendant Neiva purchased the Building with her friend and partner defendant Walter Anderson (Anderson) in the name of their company Red Tulip, LLC. Anderson, via his wholly owned corporation Entree International, Ltd (Entree), owned

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[1]Nor have Anderson's companies Entree International, Ltd. and Gold & Appel Transfer, S.A., direct defendants in the *Red Tulip* action, submitted anything.

88%, and Neiva owned 12%.[2] Red Tulip apparently purchased the Building for $4.8 million in cash.

In November 2001, with a plan to significantly renovate the Building and create luxury loft condominium residences, Red Tulip borrowed $8,850,000.00 from RCG Longview, LP (RCG). The loan was secured by the Building and by a personal Guaranty executed by Anderson and Neiva.

In the interim, Anderson's finances began a downward spiral. In August 2000, Anderson borrowed $13 million from his former employee and then good friend Donald Burns. As security, Anderson pledged various assets, including the membership interest which his company Entree held in Red Tulip. With Anderson unable to repay Burns in March 2001, the due date of the loan was extended to December 31, 2001 and the amount was increased to about $14 million. Anderson again pledged Entree's membership interest in Red Tulip as collateral, along with other assets. It appears that RCG was aware to some degree of the pledge in November 2001 when it made its loan to Red Tulip, but it nevertheless proceeded based on assets held by Anderson's various companies and based on the Building's apparent potential for profitability.

Following the RCG loan, Burns and Anderson modified their loan agreement, providing for a new maturity date of February 11, 2002. Anderson restated his pledge regarding Entree's Red Tulip interest. The February due date came and went without payment, but Burns apparently took no action to enforce the pledge or assume the Red Tulip membership interest until some six months later. In the meantime, renovations at the

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[2]At some later date, Neiva transferred 11% of her 12% back to Red Tulip in exchange for her right to "own the penthouse condominium unit."

Building were continuing, along with efforts to prepare a condominium conversion offering plan. Apparently pleased with the progress, RCG was renegotiating its loan with Red Tulip.

It was at that point, in August 2002, that Burns exercised his rights with respect to the Red Tulip membership interest which Anderson had pledged. Burns notified the parties involved in the renovation project, including RCG, of his assertion of rights. RCG then asserted that Anderson's pledge of Entree's membership interest constituted a default in the terms of its loan with Red Tulip. Thereafter, for reasons debated by the parties, RCG declined to renegotiate the loan with Red Tulip and instead sold the loan to Burns' company Palm Beach, the plaintiff herein, at a 3% premium.

There is no dispute that Red Tulip failed to pay the monies due to Palm Beach on November 1, 2002 after Burns assumed the RCG loan. Based on that default, Palm Beach elected to call the entire balance of the loan due and now seeks to foreclose.

Discussion

Palm Beach has established a prima facie right to foreclose based on the documents provided and the undisputed assertion of nonpayment. *LPP Mortgage, Ltd. v. The Card Corp.*, 17 AD3d 103 (1st Dep't 2005), citing *Hypo Holdings v. Chalasani*, 280 AD2d 386 (1st Dep't 2001), *lv denied* 96 NY2d 717. The question is whether any viable defenses have been asserted by defendant Neiva, the only defendant who has opposed the motion.

In her Second Amended Answer, filed jointly with Anderson in November 2004, Neiva asserts eleven affirmative defenses, two of which are also counterclaims. (Exh. 11 to Motion). The defenses may be characterized as follows: (I) Palm Beach promised to withdraw the foreclosure action; (ii) Palm Beach acted in bad faith and with unclean hands;

(iii) champerty bars the action; (iv) the doctrine of merger bars the action; (v) the Palm Beach claims are barred by estoppel and waiver; and (vi) Palm Beach failed to mitigate damages and took actions without a legitimate business purpose. Those defenses are addressed as follows.

A. The Alleged Promise by Burns Does Not Bar Summary Judgment

In her first affirmative defense, Neiva argues that Burns, on behalf of Palm Beach, allegedly promised in his October 6, 2003 Affidavit to withdraw this foreclosure action if he was permitted to exercise management rights at the Building without interference from Neiva or Anderson. Neiva asserts that the condition has been satisfied and that she is entitled to enforce Burns' promise to bar this action. Palm Beach asserts that the precise issue was determined by this Court in the July 29, 2004 decision and order denying the motion by Anderson and Neiva to dismiss. While not disputing that the Court previously addressed the issue, Neiva urges the Court to "revisit" the issue, suggesting that the Court mistakenly described the condition as "unfettered control." (Plaintiff Memo at p. 33).

This Court stands by its prior decision. In his affidavit (at ¶30), Burns stated:

> If I am permitted to take ownership of the Red Tulip membership interests and if I am permitted to exercise management rights without further interference from Mr. Anderson and Ms. Neiva, I intend ...to withdraw the foreclosure action that PBMM commenced. However, I will not take those steps if I do not also have the power to manage Red Tulip and to ensure that Red Tulip conducts its operations with a proper regard for the legal right of its creditors and the interests of its owners.

In finding that Burns did not acquire the broad management rights contemplated in his affidavit, this Court stated in its July 29, 2004 decision as follows:

> Thus, Burns therein communicated that the withdrawal of the foreclosure action was conditioned on his obtaining full rights of ownership without further interference. But he did not obtain these rights. While he does have the right to manage the property and to make and act upon various decisions regarding the building, he is limited by the October 14 Stipulation in his ability to exercise full ownership prerogatives...
>
> Specifically, Burns was restricted [by the October 14 Stipulation] in selling the building, interfering with Neiva's occupancy of the penthouse unit, or making any irrevocable decisions regarding its form of ownership.

The finding in the prior order is law of the case. *Martin v. City of Cohoes*, 37 NY2d 162 (1975). Neiva has failed to persuade the Court that any reason exists to change that finding. Therefore, the promise by Burns does not bar summary judgment in favor of Palm Beach, and the first affirmative defense is therefore stricken.

B. The Defense of Unclean Hands and the Guaranty

In her answer Neiva asserts various defenses based on the theory that plaintiff is not entitled to the equitable relief of foreclosure because Palm Beach and Burns acted in bad faith or with "unclean hands." Essentially, Neiva claims that Palm Beach, through Burns, "induced and/or instigated the transfer of the loan to itself for the purpose of litigation ... [and] actual payment [by Neiva and Anderson] was actually prevented." (Def. Memo at p. 38). Plaintiff asserts that these defenses are barred by the Guaranty signed by Neiva and that, in any event, the claims are unsupported by the facts.

In relying on the Guaranty, plaintiff points to earlier decisions in this case. In 2004, when Anderson and Neiva were represented by the same counsel,[3] Anderson moved to enjoin the sale of his condominium apartment in Washington, D.C., which he had pledged as security for the loan, specifically arguing that Burns' actions taken in bad faith barred Burns from relying on the Guaranty to seek the equitable relief of foreclosure on the condominium. Also in that motion, Anderson and Neiva sought leave to amend their joint answer to add a defense and counterclaim based on plaintiff's failure to mitigate damages. This Court denied Anderson injunctive relief based in part on the failure to show a likelihood of success on the merits of the Guaranty claim, but allowed the mitigation defense and counterclaim to be asserted. Anderson appealed the denial of injunctive relief, and the Appellate Division affirmed this Court. In determining the claim, the Appellate Division found that the Guaranty was sufficiently broad and enforceable to justify the denial of injunctive relief, despite the claim of unclean hands. The Court stated that:

> The guaranty specified that Anderson would "remain liable as principal until the full amount of the principal owed pursuant to the Loan Documents, with interest . . . shall have been fully paid . . . notwithstanding any act, omission, or thing which might otherwise operate as a legal or equitable discharge of the Guarantor." Furthermore, the guaranty was noted to be "absolute and unconditional in all respects and shall at all times be valid and enforceable irrespective of any other agreements or circumstances of any nature whatsoever which might otherwise constitute a defense to this Guaranty and the obligations of the Guarantor

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[3]That attorney, Peter Levine, was thereafter granted leave to withdraw. Kent Karlsson has since appeared for Neiva. As noted above, Anderson has not appeared by counsel, or on his own behalf, in opposition to this motion.

> under this Guaranty or the obligations of any other person or party (including, without limitation, the Debtor) relating to this Guaranty." Similarly, Anderson "absolutely, unconditionally and irrevocably" waived his right to assert "any defense, set-off, counterclaim or cross claim of any nature whatsoever with respect to this Guaranty . . . except the defense of actual payment." Notwithstanding Anderson's claims to the contrary, this language was sufficiently specific to constitute a waiver of the defenses pleaded herein.

Palm Beach Mtg Mngmt, LLC v. Red Tulip, LLC, et al., 18 AD3d 379, 380 (1st Dep't 2005).

The Guaranty signed by Neiva is identical to the one signed by Anderson and is entitled to the same enforcement described by the Appellate Division. Plaintiff has also cited various cases which broadly enforce Guaranties with language similar to that at issue herein. *See, e.g., Citibank, N.A. v. Plapinger*, 66 NY2d 90 (1985). However, the Guaranty does not constitute a waiver of all defenses. Rather, as noted by the Appellate Division, the Guaranty expressly preserves the defense of actual payment. Thus, while Neiva may not assert "unclean hands" as a bar to the enforcement of the Guaranty, the factual allegations she has raised in connection with that claim may be asserted to the extent they are relevant to her claim that plaintiff made actual payment impossible. Neiva has alleged that Burns acted in bad faith by, for example, interfering with attempted apartment sales at the Building, with the construction and condominium conversion process, and with defendants' refinancing efforts. Burns explains in response that all his actions were legitimate business judgments he made to protect his own financial interests.

Since the resolution of the dispute turns so much on credibility, the Court finds that issues of fact exist which preclude the drastic remedy of summary judgment dismissing

Neiva's second and third affirmative defenses in light of the express preservation of the "actual payment" defense in the Guaranty. For the same reasons, the Court declines to strike at this time Neiva's ninth affirmative defense that Burns' actions had no legitimate business purpose and her eleventh affirmative defense and second counterclaim for a declaration that Neiva is not liable under the Guaranty.[4]

C. The Defense of Champerty

As and for a fourth affirmative defense, Neiva asserts that the actions of Palm Beach are "contrary to the law of champerty and the provisions of Section 489 of the New York Judiciary Law." Judiciary Law §489 expressly prohibits champerty, which is defined as the buying or taking of an assignment of a debt or note "with the intent and for the purpose of bringing an action thereon...". Plaintiff asserts that the defense is without merit, as Burns' actions were consistent with a legitimate business purpose.

Neiva insists that a closer examination of Burns' actions reveals that the true reason Burns purchased the mortgage was to foreclose and extinguish any rights held by Neiva. She notes, for example, that Burns was well aware of Red Tulip's financial difficulties when he acquired the mortgage from RCG in 2002 and could not possibly have purchased the mortgage with the expectation of payment. Neiva further points to actions taken by Burns which allegedly interfered with Red Tulip's ability to refinance its loan and complete the renovation project, actions which arguably exacerbated Red Tulip's financial difficulties and

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[4]The Court need not reach plaintiff's assertion that Anderson's claims are barred by *res judicata* based on litigation in Virginia. Neiva was not a party to the Virginia litigation, and Anderson has not opposed this motion. Nor will the Court address the tenth affirmative of failure to allege an assignment, as that defense (not briefed by the parties) suggests, at most, an amendable pleading defect.

its inability to pay the monies due on the mortgage. These actions, at a minimum, raise issues of fact which preclude the summary dismissal of the champerty defense, Neiva claims, citing *Bluebird Partners v. First Fidelity Bank, N.A.*, 94 NY2d 726 (2000). Relying on *Bluebird* and various other cases, such as *Richbell Information Services, Inc. v. Jupiter Partners, LP*, 280 AD2d 208 (1st Dep't 2001), Palm Beach replies that the statutory bar against champerty must be construed narrowly, and that the intent to bring a suit does not constitute champerty where, as here, Palm Beach purchased the loan to protect its own financial interests. Palm Beach therefore urges this Court to strike the affirmative defense of champerty in its entirety.

Under the circumstances here, the Court finds that issues of fact exist which preclude the summary dismissal of the champerty defense. Quoting its seminal case *Moses v McDivitt,* 88 NY 62, 68 (1881), the Court of Appeals in *Bluebird* explained champerty as follows:

> This language [in the statute prohibiting the purchase of a claim "with the intent and for the purpose" of bringing suit] is significant and indicates that a mere intent to bring a suit on a claim purchased does not constitute the offense; the purchase must be made for the very purpose of bringing such suit, and this implies an exclusion of any other purpose. ... To constitute the offense the primary purpose of the purchase must be to enable him to bring a suit, and the intent to bring a suit must not be merely incidental and contingent.

94 NY2d at 735. The Court went on to emphasize that a finding of champerty is not appropriate merely because the party purchasing the debt had an intent to sue:

> The bottom line is that Judiciary Law §489 requires that the acquisition be made with the intent and for *the* purpose (as contrasted to *a* purpose) of bringing an action or proceeding ...

94 NY2d at 736 (citations omitted, emphasis in original).

Recognizing the difficulty in finding champerty as a matter of law based on "the acquisition of rights to claims that are integrated within the sophisticated market transactions" of our times, the Court of Appeals reversed the appellate court's finding of champerty and concluded that a trial was needed to resolve issues of fact:

> Essentially, this case boils down to a weighing of evidence or a credibility determination, albeit within subsets of uncontested facts, regarding Bluebird's proffered reasons for the acquisitions.

94 NY2d at 739.

Similarly in *Richbell, supra,* the Appellate Division reversed the trial court's finding of champerty, holding that issues of fact precluded summary judgment. It defined the issue as whether the investors were "merely speculating on the suit" or whether instead they were "seeking to protect interests of theirs that are financially" legitimate. 280 AD2d at 216. Quoting *Bluebird*, the First Department in *Richbell* concluded that the resolution of the issue required "a weighing of evidence or a credibility determination, albeit within subsets of uncontested facts." *Id.*, citing 94 NY2d at 738.

As in *Bluebird* and *Richbell*, triable issues of fact exist here as to whether Burns purchased the loan for *the* purpose of foreclosing, or whether foreclosure was merely *a* purpose integrated with the legitimate protection of his financial interests. To resolve that issue, the evidence must be weighed and credibility must be assessed at trial. This Court therefore declines to dismiss the champerty defense as a matter of law.

D. The Doctrine of Merger

Neiva claims in her fifth affirmative defense and first counterclaim that plaintiff's claims are barred under the equitable doctrine of mortgage merger. Specifically, she claims that the mortgage lien held by Burns' company Palm Beach has merged with the Red Tulip interest held by 419 Broome Street, the entity formed by Burns to hold the interest he acquired from Anderson, because both entities are an "alter ego" for Burns. Thus, in addition to the denial of foreclosure, Neiva seeks a declaration that Palm Beach, as an alter ego for Burns, should be "disregarded" and that the mortgage is merged with Red Tulip's fee ownership interest or the membership interest held by Palm Beach or both.

Citing *Jemzura v Jemzura*, 36 NY2d 496, 502 (1975), plaintiff correctly notes that, the doctrine of merger has "never been especially favored in equity ... and, to be applied, the greater and lesser estate [the fee ownership and the mortgage, respectively] must generally be in one and the same person, at one and the same time and in one and the same right ... "(citations omitted). Because of Neiva's membership in Red Tulip, the fee title and the mortgage interest are not coextensive, and merger does not apply. Moreover, express non-merger provisions, such as the one at issue here, are typically enforceable. *Egan v Engeman*, 125 App. Div. 743 (1st Dep't 1908).

Accordingly, plaintiff is entitled to summary judgment striking Neiva's forth affirmative defense and first counterclaim.

E. The Defenses Based on Waiver and Estoppel

In her sixth and seventh affirmative defenses, Neiva asserts that this action is barred by waiver and estoppel, respectively. Neither party addresses these defenses separately. As it appears that those specific defenses may overlap with others, they are limited consistent with this decision and otherwise shall remain for trial.

F. Failure to Mitigate Damages

As and for an eighth affirmative defense, Neiva asserts that plaintiff "failed to take all reasonable steps to mitigate its damages." She specifically criticizes plaintiff for having "burdened" Red Tulip with a high interest loan.

Again, neither party separately addresses the defense. As the defense appears to relate to the issue whether Burns' actions were consistent with a legitimate business interest or whether instead they were performed in bad faith, the defense and counterclaim are limited consistent with the terms of this decision and shall otherwise remain for trial.

G. Neiva's Occupancy Rights

In its moving papers, Palm Beach asserts that Neiva's claim to the penthouse apartment at the Building is subordinate to the mortgage and should therefore be summarily extinguished. The genesis of Neiva's rights is the June 27, 1999 Partnership Subscription Agreement between Neiva, Anderson via his companies Gold & Appel and Entree, and Red Tulip (Exh 15 to motion). The Agreement provides in relevant part that:

> 5. JHN [Neiva] may at her option covert the 12% interest in the BUILDING into the right to occupy the top floor of the building by returning to RTL [Red Tulip] 11% of the 12% interest in RTL. The occupied space will be no more than 7000 square feet of usable space and no more than 2 floors. This space will be fully built at the expenses of RTL.
>
> 6. In the event that the BUILDING is converted to condominiums or coops, then the right to use described in option 5 above may be converted by RTL at their option to the right to take ownership in the case of condominium or the right to be a partner in the coop for the same unit and space which JHN previously had the right to use or RTL may maintain ownership of the unit and pay all condo fees.

Palm Beach does not seriously dispute that, at some point, Neiva did exercise her right to covert 11% of her membership interest in Red Tulip into the right to occupy the penthouse apartment. Palm Beach contends, however that, since the Building was never converted to condominiums or otherwise subdivided, Neiva cannot have any ownership interest, and that a contractual occupancy right is "of no weight in resisting a foreclosure complaint" by Palm Beach. Plaintiff also points to loan documents signed by Anderson in which he swore that there were "no tenants" in the Building and "no options to purchase or rights of first refusal."

Neiva necessarily agrees that, at this point in time, she does not own the penthouse apartment because it is not a condominium and has not otherwise been subdivided from the remainder of the Building. However, that acknowledgment does not entitle Palm Beach to summarily extinguish all of Neiva's rights in light of the material issues of fact precluding a judgment of foreclosure at this time.

The documents signed by Anderson do not mandate a contrary result. The representation regarding tenants is relevant to the assignment of rents to the mortgagee, and not to Neiva who occupies without paying rent. To the extent the representation is intended to notify Palm Beach of persons to name in a foreclosure, that notice was provided by Neiva's membership interest in Red Tulip. Nor does Neiva have a written option to purchase the Building or a right of first refusal, per se.

Accordingly, Palm Beach is not entitled to summarily extinguish all of Neiva's rights at this time. Such would follow only if and when a judgment of foreclosure was issued.

Conclusion

For all the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted to the extent of striking Neiva's first and fifth affirmative defenses and her first counterclaim and limiting the remaining defenses and the second counterclaim consistent with this decision, and the motion is otherwise denied; and it is further

ORDERED that the parties in the *Red Tulip* and *Palm Beach* actions (index numbers 119923/03 and 100952/2003) shall appear before this Court in Room 222 on Wednesday, October 11, 2006 at 2:15 p.m. for a status conference to discuss the outstanding issues in the various actions so this matter can move forward to resolution or trial. The movant herein shall notify all affected parties.

Dated: August 25, 2006

AUG 25 2006

J.S.C.
ALICE SCHLESINGER

FILED
AUG 31 2006
COUNTY CLERK'S OFFICE
NEW YORK