SHORT FORM ORDER INDEX NO. 2193/2004

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:
HON. JOSEPH FARNETI
Acting Justice Supreme Court

METROPOLITAN BANK & TRUST COMPANY,

Plaintiff,

-against-

ROLF W. WITTICH, BELL OIL TERMINAL, INC., AMEROPAN OIL CORP., and AMEROPAN REALTY CORPORATION,

Defendants.

ORIG. RETURN DATE: FEBRUARY 28, 2007
FINAL SUBMISSION DATE: JULY 26, 2007
MTN. SEQ. #: 006
MOTION: MG

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Upon the following papers numbered 1 to 10 read on this motion FOR LEAVE TO REARGUE; Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Affirmation of Regularity and supporting papers 5, 6; Affirmation in Opposition and supporting papers 7, 8; Affirmation in Reply and supporting papers 9, 10; it is,

ORDERED that this motion by plaintiff for an Order, pursuant to CPLR 2221(d), granting plaintiff leave to reargue its prior motion for summary judgment and for an order of reference to ascertain and compute the amounts due plaintiff, which was decided by Order dated November 28, 2006 (Werner, J.), is hereby **GRANTED**. Upon reargument, plaintiff's motion for an Order, pursuant to CPLR 3212, granting summary judgment in favor of plaintiff, and for an order of reference to compute the amounts due plaintiff, is hereby **GRANTED**.

The instant action was commenced on or about January 23, 2004 to foreclose a mortgage lien and to collect upon a debt allegedly owed to plaintiff. Specifically, plaintiff seeks to collect upon a $1,500,000.00 Promissory Note and Loan Agreement, jointly made on or about July 28, 1999 by defendants ROLF W. WITTICH ("WITTICH"), BELL OIL TERMINAL, INC. ("BELL"), and AMEROPAN OIL CORP. ("AOC") in favor of plaintiff in this action. As partial collateral for the loan, defendant ROLF W. WITTICH individually pledged a junior mortgage lien encumbering his real property known as 2 Fenimore Road, Bayport, New York. Plaintiff alerts the Court that at all times relevant, WITTICH has been the sole owner of the aforementioned real property. The loan was further guaranteed by defendant AMEROPAN REALTY CORPORATION ("ARC"), which pledged a collateral mortgage upon its commercial property commonly known as 6500 Jericho Turnpike, Syosset, New York, and by security interests in the assets of AOC and BELL. On January 31, 2003, plaintiff made an additional loan to WITTICH in the amount of $100,000.00, which was also secured by WITTICH's Bayport property. Plaintiff alleges that the total debt owed to it now exceeds $2,000,000.00.

In a related Nassau action, plaintiff sought to foreclose the mortgage held or the commercial property in Syosset. Both loans were defaulted on in May of 2003 when litigation was commenced between WITTICH and his son, PETER WITTICH, regarding the family shareholders of defendant corporations. PETER WITTICH assumed control of the corporations and refused to pay the subject loans alleging that they were not corporate obligations as they were obtained by defendant WITTICH for payment of personal obligations, including payment to his ex-wife as a result of their divorce judgment. The Court has not been made aware of the outcome, if any, of the pending Nassau action.

The corporate defendants have interposed defenses both in this action and the action pending in Nassau with regard to the issue of whether the loans are a corporate liability, as they maintain that plaintiff knowingly permitted WITTICH to pay off personal obligations by pledging corporate assets. WITTICH maintains that the defendant corporations authorized the subject loans and therefore he should not lose his home to foreclosure based upon the refusal of the corporations to pay the amounts due on the loans.

By Order dated November 28, 2006 (Werner, J.), the Court granted plaintiff's prior motion for summary judgment solely to the extent of amending the caption to delete the "John Doe" defendants. The Court further granted plaintiff

leave to renew its application for summary judgment at the completion of discovery. The Court found that the conflicting versions of the events set forth in the parties submissions precluded summary judgment.

A motion for leave to reargue must be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the original motion, but shall not include any matters of fact not offered on the prior motion (*see* CPLR 2221[d]; *Cruz v Masada Auto Sales, Ltd.*, 41 AD3d 417 [2007]; *Barrett v Jeannot*, 18 AD3d 679 [2005]).

In the instant application, plaintiff alleges that as it is undisputed that the loans were in default as May of 2003, the Court mistakenly denied plaintiff's motion for summary judgment on the grounds that issues of fact exist as to whether the debt is a corporate liability or individual liability of WITTICH. Plaintiff argues that the defendants are jointly and severally liable for the debt, and as such, the "issue of fact" regarding responsibility for the debt should not preclude summary judgment at this juncture. Moreover, plaintiff alleges that the corporate defendants do not have standing to challenge plaintiff's right to foreclose, as the corporate defendants are not the owners or mortgagors of the property owned by WITTICH.

In opposition, the corporate defendants argue that the Court properly considered the arguments proffered in support of and in opposition to plaintiff's original application, and correctly found that questions of fact exist that preclude summary judgment. The corporate defendants specifically allege that questions of fact exist regarding plaintiff's "unclean hands" and inequitable conduct in, among other things, knowingly assisting WITTICH to breach the fiduciary duty he owed the corporate defendants and their shareholders; in trying to "cover-up" the improper nature of this loan by restating the purpose of the loan after it had already been approved; in its insistence on making defendants BELL OIL TERMINAL, INC. and AMEROPAN OIL CORP. obligors of the loan at issue; and in knowingly allowing WITTICH to "loot" defendant BELL OIL TERMINAL, INC. of in excess of $1.45 million to pay maintenance due WITTICH's ex-wife in the years before and after the loan at issue was made.

The Court notes that WITTICH, BELL, and AOC are jointly and severally liable to plaintiff for the $1.5 million debt (*see generally CIT Group/Business Credit, Inc. v Walentas*, 28 AD3d 224 [2006]; *Capparelli v Vitiritti*, 228 AD2d 403 [1996]; *Libassi v Chelli*, 206 AD2d 509 [1994]), and therefore the

issue of whether the debt is corporate or solely WITTICH's is not an issue of fact that would preclude summary judgment.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). Plaintiff has established *prima facie* entitlement to the relief demanded in the complaint through the production of the mortgage and notes, and proof in admissible form of defendants' default thereon (*Daniel Perla Assoc., LP v 101 Kent Assoc., Inc.*, 40 AD3d 677 [2007]; *Gro-Wit Capital, Ltd. v Obigor, LLC*, 33 AD3d 859 [2006]; *Marine Midland Bank v Fillippo*, 276 AD2d 601 [2000]; *Marine Midland Bank, N.A. v Freedom Road Realty Associates*, 203 AD2d 538 [1994]). The burden then shifted to the defendants to establish, by competent evidence in admissible form, the existence of material issues of fact that would warrant a trial of this action. Accordingly, the defendants were required to assert any defenses which would raise a question of fact about their default on the mortgage (see *LBV Props. v Greenport Dev. Co.*, 188 AD2d 588 [1992]; *Metropolitan Distrib. Servs. v DiLascio*, 176 AD2d 312 [1991]), such as "waiver by the mortgagee, or estoppel, or bad faith, fraud, oppressive or unconscionable conduct on the latter's part" (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175 [1982], quoting *Ferlazzo v Riley*, 278 NY 289 [1938]).

Notably, WITTICH failed to interpose any opposition to plaintiff's application. The corporate defendants' opposition does not raise any questions of fact that would preclude summary judgment of the issue of foreclosure. The alleged "questions of fact" proffered by the corporate defendants, i.e. whether plaintiff knowingly permitted WITTICH to pay off personal obligations by pledging corporate assets, and whether plaintiff's conduct and actions during the procurement of the subject loan were improper, do not defeat plaintiff's right to summary judgment and an order of reference in this foreclosure action. It is undisputed that plaintiff and the defendants, by their president, executed the loan agreement and ancillary documents on or about July 28, 1999; that plaintiff and WITTICH individually executed the loan agreement and ancillary documents on or about January 31, 2003; that WITTICH pledged his real property as collateral for the loans; that defendants received the funds and began repayment of the July 28, 1999 loan on or about October 28, 1999; that defendants defaulted in payment of both loans in or about May of 2003; and that plaintiff notified defendants of their default on or about October 27, 2003. The Court notes that it will ordinarily be presumed that a president of a corporation has the power to make contracts pertaining to the business of the corporation and coming within the apparent scope of his authority (*Merrell-Benco Agency, LLC v HSBC Bank USA*, 20 AD3d 605 [2005]; *Odell v 704 Broadway Condo.*, 284 AD2d 52 [2001]; *Decana Inc. v Contogouris*, 2007 NY Slip Op 51957[U] [Sup Ct, NY County, 2007]).

The underlying objective of foreclosure actions is to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale (*Polish Natl. Alliance v White Eagle Hall Co.*, 98 AD2d 400 [1983]). All parties having an interest, including persons holding title to the subject premises, must be made a "party defendant to the action" (RPAPL 1311[1]; *see Home Sav. of Am., F.A. v Gkanios*, 233 AD2d 422 [1996]; *Polish Natl. Alliance v White Eagle Hall Co.*, 98 AD2d 400 [1983]). Although the corporate defendants object to the foreclosure of the mortgages held on WITTICH's Bayport property, they do not have an interest in such property, and are therefore not necessary defendants in this action pursuant to RPAPL 1311. Plaintiff alleges that the corporate entities were only made defendants herein as they have a monetary obligation to repay plaintiff, and may be liable for a deficiency judgment (*see* RPAPL 1313).

Further, the Court finds that defendants ratified the loans at issue by making installment payments to plaintiff pursuant to the terms of the Notes. In

the case of the $1.5 million loan, defendants made payments to plaintiff for nearly four years before defaulting thereunder. Moreover, defendants benefitted from the loans, in that a portion of the proceeds were used to pay $192,527.22 in back taxes owed in connection with the Chicago Oil Terminal owned by BELL, and to repay a loan allegedly made by WITTICH to AOC and BELL. Paragraph 2 of the Loan Agreement made on July 28, 1999 relative to the $1.5 million loan specifically states:

> The proceeds of the loan shall be used by [AOC] and [BELL] to repay a loan to them from [WITTICH]. [WITTICH], in turn, is using the proceeds to satisfy a judgment entered against him in connection with divorce proceedings in New York. Upon disbursement of the loan proceeds to Borrower from Lender, all insider loans to the corporate Borrowers from [WITTICH] will have been satisfied, and all judgments entered against [WITTICH] in connection with his divorce proceedings shall have been satisfied and released.

Loan Agreement, July 28, 1999, at 1, ¶ 2.

In addition, DOUGLAS SINSKI, ESQ. represented the interests of all defendants in connection with the loans from plaintiff, and WITTICH, along with other corporate officers, attended the closing held on the $1.5 million loan. In conjunction with said loan, AOC, BELL, and ARC each executed corporate resolutions by their respective Board of Directors authorizing the loan transaction and the pledge of collateral to secure the $1.5 million Note. Further, ARC, BELL, and AOC each executed and delivered to plaintiff a duly notarized Certificate of Incumbency establishing their corporate pledge and ratification of the loan transactions.

Notwithstanding the fact that the corporate defendants do not have any interest in the subject real property, these defendants allege that plaintiff is not entitled to the remedy of foreclosure in that plaintiff comes to the Court with "unclean hands" as a result of its inequitable and fraudulent conduct during the procurement of the loan. This Court is not aware of any reported cases where the defense of unclean hands has been successfully asserted in a mortgage foreclosure action. Courts have repeatedly rejected unclean hands as a defense to mortgage foreclosure (*see Jo Ann Homes at Bellmore, Inc. v Dworetz*, 25

NY2d 112 [1969]; *Trustco Bank, N.A. v Victoria Associates*, 251 AD2d 995 [1998]; *Blueberry Investors Co. v Ilana Realty Inc.*, 184 AD2d 906 [1992]; *Manufacturers & Traders Trust Co. v Federal Electronics*, 52 AD2d 1071 [1976]; *Union Sav. Bank v 285 Lafayette Assocs.*, NYLJ, May 20, 1992, at 22, col 3 [(Sup Ct, NY County, Sklar, J.); *New York State Housing Finance Agency v Promenade Apartments, Inc.*, NYLJ, June 21, 1979, at 6, col 4 [Sup Ct, NY County, Nadel, J.]). Unclean hands is unavailable as a defense unless the party against whom it is to be asserted is guilty of immoral, unconscionable conduct, with the conduct complained of directly related to the subject of the litigation (*see e.g. Goldberg v Goldberg*, 173 AD2d 679 [1991]), and with injury resulting from the conduct (*Security Pacific Mortgage and Real Estate Services v Canadian Land Co. of America*, 690 F Supp 1214 [SDNY 1988]). Indeed, absent a claim of injury, a defense of unclean hands is unavailable as a matter of law (*Security Pacific Mortgage and Real Estate Services v Canadian Land Co. of America*, 690 F Supp 1214, *supra*).

Further, the corporate defendants allege that plaintiff engaged in fraudulent conduct in connection with the loan application process. The corporate defendant's conclusory allegations that plaintiff behaved in a fraudulent and collusive manner are insufficient to create an issue of fact which would warrant a trial (*LBV Props. v Greenport Dev. Co.*, 188 AD2d 588, *supra*). In *Jo Ann Homes at Bellmore, Inc. v Dworetz*, 25 NY2d 112, *supra*, the Court of Appeals held:

> A foreclosure action is a "proceeding in a court of equity which is regulated by statute." Nevertheless, it is well settled that such a proceeding is unlike other equity actions in several ways. Thus, while equity acts only *in personam*, an action for foreclosure "is in the nature of a proceeding *in rem* to appropriate the land" . . . we now conclude that a mortgage may not be set aside solely because the underlying transaction was tainted by a fraudulent representation. The trial court, which was the court of equitable jurisdiction in this instance, chose not to sustain the defense of fraud in the foreclosure proceeding and neither common sense nor precedent warrants a contrary determination.

Jo Ann Homes at Bellmore, Inc. v Dworetz, 25 NY2d 112, 122 (citations omitted).

The corporate defendants have asserted a counterclaim against plaintiff for $6 million plus punitive damages. The Court finds that any claims that plaintiff "aided and abetted" WITTICH in "looting" the corporate assets are insufficient to defeat the instant application for summary judgment, and relate to the corporate defendants' counterclaim for money damages against plaintiff. The Court notes that despite allegations of looting and breach of fiduciary duty on the part of WITTICH, the corporate defendants have not asserted any cross-claims herein against co-defendant WITTICH. Finally, the Court finds the corporate defendants' position that plaintiff is not entitled to foreclosure of the mortgage held on WITTICH's individual property is inconsistent with their position that the subject loans are not corporate obligations.

Accordingly, upon reargument, plaintiff's motion for an Order granting summary judgment in favor of plaintiff, and for an order of reference to compute the amounts due plaintiff, is hereby **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

SUBMIT ORDER OF REFERENCE ON NOTICE (*see* CPLR 4311)

Dated: October 19, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court