

<b>BRT Realty Trust v Terrapin Indus., LLC</b>
2008 NY Slip Op 31111(U)
April 11, 2008
Supreme Court, New York County
Docket Number: 0111308/2007
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. MICHAEL D. STALLMAN

PRESENT: \_\_\_\_\_  
Justice

PART 7

Index Number : 111308/2007  
BRT REALTY TRUST  
vs.  
TERRAPIN INDUSTRIES, LLC  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 4/5/08  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. 19

d on this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
1-3  
4-5  
6-7

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-M  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is determined in accordance with the annexed memorandum Decision and Order.*

*Note: This motion also determines, paragraph 2 of related action Terrapin v BRT #111557/07*

*Settle order including direction for appointment of a referee to cooperate.*

*Copies to both sides*

MICHAEL D. STALLMAN  
J.S.C.

  
J.S.C.

Dated: 4/11/08

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7**

-----X

BRT REALTY TRUST,

Plaintiff,

- against -

TERRAPIN INDUSTRIES, LLC, COLIN D. RATH,  
PAMELA HARVEY-RATH, and "JOHN DOE" NOS.  
1-25,

Defendants,

The Names of the "John Doe" Defendants  
being fictitious and unknown to  
Plaintiff, the persons and entities  
intended being those who may be in  
possession of or may have possessory  
liens or other interests in, the  
premises herein described.

-----X

TERRAPIN INDUSTRIES, LLC, COLIN RATH,  
individually and on behalf of his minor  
child Breanna Rath, GEORGE RATH, and  
BARBARA RATH,

Plaintiffs,

- against -

BRT REALTY TRUST, TD WATERHOUSE INVESTOR  
SERVICES, INC. a/k/a TD AMERITRADE, INC.,  
and MASSACHUSETTS MUTUAL LIFE INSURANCE  
COMPANY,

Defendants.

-----X

**HON. MICHAEL D. STALLMAN, J.:**

These two motions in two different actions concern three loans  
made by plaintiff BRT Realty Trust (BRT) to defendants Terrapin  
Industries, LLC (Terrapin), Colin D. Rath (Rath) and Pamela Harvey-  
Rath. In *BRT Realty Trust v Terrapin Industries LLC*, Index No.  
111308/07 (the first action), BRT seeks summary judgment in an

**Index No. 111308/07**

**Decision and Order**

**Index No. 111557/07**

action to foreclose on the mortgages, while defendants cross-move to dismiss the action based on the failure to obtain personal jurisdiction. In *Terrapin Industries LLC v BRT Realty Trust*, Index No. 111557/07 (the second action), in which the Terrapin plaintiffs seek a declaratory judgment that they are not in default of the loans, BRT moves for an order staying the second action until the determination of the summary judgment motion in the first action.

### I. Background

The transactions at issue are: (1) a loan in the sum of \$13,000,000 made by BRT to Terrapin, and evidenced by a Mortgage Note, secured by a mortgage dated August 31, 2006, on property located at 121-123 West 15<sup>th</sup> Street, New York, New York; and (2) two later mortgages, dated May 16, 2007 (the May mortgage), made by Terrapin and the individual defendants, and June 11, 2007 (the June mortgage), made by the individual defendants, evidenced by two separate notes, to secure repayment of two additional loans totaling \$120,000 (all three notes, the Notes).

BRT accelerated all of the loans in August 2007, after defendants' failure to pay monthly installments of principal and interest in June 2007. BRT seeks a total of \$6,163,764.19, plus interest, allowable late charges, and other sums due under the loan documents.

II. Discussion

A. Cross Motion: Faulty Service

Personal jurisdiction, being a threshold issue, should be addressed first. See *National Union Fire Insurance Company of Pittsburgh, Pa. v St. Barnabas Community Enterprises, Inc.*, 48 AD3d 248 (1<sup>st</sup> Dept 2008). Defendants cannot establish a defense of lack of jurisdiction for several reasons.

Initially, defendants lose their motion on procedural grounds. CPLR 3211 (e) states that a defense of lack of sufficient service is waived if it is not brought within 60 days after service of the answer, unless the court "extends the time upon the ground of undue hardship." See *Wiebusch v Bethany Memorial Reform Church*, 9 AD3d 315 (1<sup>st</sup> Dept 2004); *Worldcom, Inc. v Dialing Loving Care Inc.*, 269 AD2d 159 (1<sup>st</sup> Dept 2000). Defendants answered the complaint on or about September 23, 2007. The present cross motion was not made until November 30, 2007, more than 60 days after service of the answer. Defendants do not deny this fact, or attempt to establish that there is any undue hardship which caused their delay in moving. Therefore, the defense of lack of personal jurisdiction has been waived, and the cross motion must be denied.

Defendants' cross motion would fail in any event. Defendants claim that the affidavits of service (Notice of Motion, Ex. C) do not explain how the documents, served by "nail and mail" service pursuant to CPLR 308 (4), were actually "affixed" to the premises

at 121-123 West 15<sup>th</sup> Street on August 29, 2007. Also, the affidavits do not delineate which of the two addresses was the place of service, as Terrapin is located at 121 West 15<sup>th</sup> Street (as are, apparently, the individual defendants), and not at 123.

Plaintiffs also complain that service on Terrapin, a limited liability company, was not made according to CPLR 311, in that this section does not allow for substitute service, as does CPLR 308. Lastly, defendants claim that the process server failed to use due diligence in serving the individual defendants, in that, allegedly, he only made three "perfunctory" attempts, all during normal business hours.

In reply, BRT provides an expanded affidavit of service in which the process server, Yoler Jean-Baptiste, indicates that he (1) affixed the documents to the door of 121 West 15<sup>th</sup> Street with "clear plastic box-tape" (Aff. of Jean-Baptiste, Reply Ex. B, at 2); (2) that he served process on 121 West 15<sup>th</sup> Street because "123 West 15<sup>th</sup> Street was a demolished building which was barricaded by a plywood barrier preventing access to the premises (*id.* at 1); and (3) that he made three attempts to serve the individual defendants: at 1:05 P.M. on Wednesday, August 22, 2007, 9:42 P.M. on Friday, August 24, 2007, and 7:33 P.M. on Tuesday, August 28, 2007. Jean-Baptiste attests to mailing the documents to each of the individual defendants on September 12, 2007.

This Court finds that there is no infirmity in service of process on the individual defendants. BRT's process server has clarified the exact address upon which he affixed the documents, and how he affixed them.

Jean-Baptiste's affidavit also affirms that the three attempts he made to serve the individual defendants satisfied the requirement of "due diligence" under CPLR 308 (4). Due diligence "refers to the quality of the efforts made to effect personal service, and certainly not to their quantity or frequency [interior quotation marks and citation omitted]." *Estate of Waterman v Jones*, 46 AD3d 63, 66 (2d Dept 2007). The due diligence requirement "may be satisfied with a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such location at those times." *Id.*

Due diligence may be established by evidence of attempts at service at "diverse times, including early in the morning and late at night." *Brown v Teicher*, 188 AD2d 256, 256 (1<sup>st</sup> Dept 1992); see also *Lara v 1010 E. Tremont Realty Corp.*, 205 AD2d 468 (1<sup>st</sup> Dept 1994) (attempts made at 7:25 P.M., 9:09 P.M., and 11:45 P.M., on three separate weekdays, constituted due diligence). Contrary to defendants' claims, both the original affidavits of service, and the affidavit produced in opposition to the cross motion, show that attempts at service were not made only during working hours, but

[\*7]  
rather, while one attempt was made mid-day, one was made "early in the morning," and another "late at night." *Brown v Teicher*, 188 AD2d at 256. Thus, the due diligence requirement has been met, and service successfully made on the individual defendants.

Service on a limited liability corporation is to be made pursuant to CPLR 311-a. See *Tommy G. Products, Inc. v Meserole Avenue LLC*, 297 AD2d 319 (2d Dept 2002). CPLR 311-a requires service on a member, manager or an agent designated as authorized to accept service by the limited liability company. Therefore, service upon Terrapin by substitute service was ineffective. However, defendants do not deny that Terrapin authorized the Secretary of State as its authorized agent for service of process, and BRT has established that such service was made, by way of the process server's affidavit (Plaintiff's Opposition to Cross Motion, Ex. A.<sup>1</sup> See Reply Aff., Ex. A. Therefore, jurisdiction over all of the defendants has been established. No triable factual question has been presented.

#### **B. Summary Judgment**

"A prima facie showing to warrant summary judgment on foreclosure of a mortgage requires the movant to establish the existence of the mortgage and mortgage note, ownership of the

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<sup>1</sup> CPLR 317 allows a party who was not served by personal service to challenge service, if he or she "did not personally receive notice of the summons in time to defend ... ." *Id.* However, defendants have made no such claim.

mortgage, and the defendant's default in payment." *Witelson v Jamaica Estates Holding Corp.* I 40 AD3d 284 (1<sup>st</sup> Dept 2007); see also *Household Finance Realty Corporation of New York v Winn*, 19 AD3d 545 (2d Dept 2005). BRT provides all of the loan and mortgage documents, as well as proof of non-payment, and thus, has made a prima facie case for summary judgment. *Id.*

In their opposition to the summary judgment motion, defendants claim that BRT's conduct in "inducing and perpetrating the alleged default herein bars the award of summary judgment" to BRT. Affirmation of Matthew Hearle, at unnumbered page 7. Defendants insist that BRT's conduct should "bar any award of relief in [BRT's] favor." *Id.*

Defendants' argument is based on the following allegations. According to Rath, under the terms of the mortgages, only payments of interest were due until the maturity of the Notes in September 2007. Defendants defaulted in their payments of interest due in June 2007. Thereafter, Rath alleges, after receiving BRT's notices of default, but before the acceleration of the Notes, Rath procured the sum of \$250,000 through the refinancing of his unit, which, in agreement with BRT, he paid to BRT to cure the defaults by paying the unpaid interest. However, Rath claims that BRT breached this agreement by applying the \$250,000 to the payment of principal, leaving the default in place. Thus, Rath claims that he did cure the default before the acceleration of the Notes, and that BRT

"misdirected" the payment in order to "thwart defendants' efforts to cure and wrongfully bring about this foreclosure." Affidavit of Rath, at unnumbered page 3. Defendants' attorney, Matthew Hearle, was apparently the attorney working with defendants at the time of the default, because he says that he discussed the matter of the \$250,000 payment with BRT, and that they had agreed that the payment would "serve [these] two purposes, i.e., cure the default and, to the extent of any balance, reduce the principal." Aff. of Hearle, at unnumbered page 8.

BRT denies that the parties had any such understanding, producing as evidence e-mails to and from BRT and Rath. Affidavit of Lonnie Halpern, Ex. A. In an e-mail from Rath to Halpern, dated June 22, 2007, Rath states "[y]ou are getting a \$250,000 payment Monday.<sup>2</sup> We need to resolve this today and apply it to the interest payment and remove the default notice or I do not see any reason to make that payment." *Id.* Halpern responds, "[a]s discussed, the proceeds from the refinance will be used to pay down the principal of the loan." *Id.*

BRT further bases its claim that the \$250,000 payment was always intended to be made to pay down principal on Section 2.18 (d) of the mortgage, which states:

[m]ortgagee shall permit Mortgagor to obtain a mortgage on the Rath Unit on such terms as shall be acceptable to Mortgagee in its sole but reasonable discretion, provided

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<sup>2</sup> The Monday after June 22, 2007 was June 25, 2007.

and on the condition that, simultaneously with obtaining such new mortgage, Mortgagor shall make a payment in reduction of the principal balance of the Note in an amount equal to the greater of (I) the full amount of the new loan less customary third-party closing costs approved by Mortgagee which in no event shall exceed five (5%) percent of the amount of the new loan, or (ii) \$6,500,000. In such event, Mortgagee shall subordinate the lien of this Mortgage on the Rath Unit to such new mortgage pursuant to an intercreditor/subordination agreement reasonably satisfactory to the lender.

Finally, BRT notes that all three Notes became due in September 2007, irrespective of when defendants were first in default. There is no question that the loans are now in default.

According to the initial Note for \$13,000,00:

(i) Interest on the principal of this Note for the period from the date hereof through September 1, 2006 shall be paid simultaneously with the execution hereof;

(ii) Interest only on the principal balance of the Note shall be due and payable on October 1, 2006 and on the first (1<sup>st</sup>) day of each and every succeeding calendar month thereafter through and including the Maturity Date; and

(iii) The entire outstanding principal balance of this Note, together with accrued interest thereon, shall be due and payable on September 1, 2007 (the Maturity Date).

Notice of Motion, Ex. F, at 1. The May Note and the June Note contain similar language, providing that only interest on the principal balance shall be due on the first of every month. *Id.*, Exs. I and K.

The Notes also contain the following language:

[i]t is expressly agreed that upon the failure of the Maker to make any payment due hereunder beyond any applicable grace, notice or cure period or upon any "Event of Default" under the Mortgage (or the happening

of any default, beyond the applicable notice and/or cure periods, under the other Loan Documents), the principal sum hereof, or so much thereof as may be outstanding, together with accrued interest and all other expenses payable by Maker under the Loan Documents, including, but not limited to, reasonable attorneys' fees for legal services incurred by the Holder hereof in collecting or enforcing payment hereof whether or not suit is brought, and if suit is brought, then through all appellate actions, shall become due and payable at the option of the Holder of this Note, notwithstanding the Maturity Date set forth above. Upon the stated or accelerated maturity of this Note, The Maker agrees that this Note shall bear interest at a rate equal to twenty-four and one-half (24 ½) percent per annum (the Default rate) until the principal, together with accrued interest and any other sums payable by Maker under the Loan Documents, are fully paid.

See e.g. Notice of Motion, Ex. F, at 3.

A review of the Notes reveals no provision for a cure period after BRT sends defendants letters declaring a default. And, in fact, the default letters themselves do not provide for a cure period. Instead, the default letters, dated June 21, 2007, state that defendants are to take notice "that the entire outstanding principal balance of the Note[s] is hereby accelerated and is due and payable IMMEDIATELY ... [emphasis in original]." *Id.*, Ex. M. Thus, Rath's claim that he gave BRT the \$250,000 prior to acceleration of the note is not true.<sup>3</sup> As such, under the language

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<sup>3</sup> The June 22, 2007 e-mail indicates that Rath had received the notices of default. The e-mail states, among other things, "[p]lease in the future contact me ahead of time any notices that you are sending out so that we can be prepared to receive them." It also states that "[w]e need to resolve this today and apply it to the interest payment and *remove the default notice* ... [emphasis supplied]."

of the default letters, defendants did not have the right to pay only interest due at the time of their default, even though the Notes allowed for the payment of interest only on a monthly basis prior to default.

The question then is whether BRT waived the right to accelerate the Notes, by allowing defendants to make a payment of interest after the default. The evidence does not establish such a waiver.

"A waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it . . . . Such a waiver must be clear, unmistakable and without ambiguity [internal quotation marks and citation omitted]." *Matter of Professional Staff Congress-City University of New York v New York State Public Employment Relations Board*, 7 NY3d 458, 465 (2006); see also *Jumax Associates v 350 Cabrini Owners Corp.*, 46 AD3d 407 (1<sup>st</sup> Dept 2007).

The evidence shows that Rath made BRT an offer of a payment of interest, in the hope that BRT would accept the \$250,000 as such. However, the e-mail in question shows that BRT did not see the payment as one of interest, but, instead, only agreed to accept the payment as one of principal. Defendants have not shown that BRT waived its right to accept the payment as a payment of the Notes'

principal debt, after the Notes were accelerated.<sup>4</sup>

As a result, defendants have failed to raise a question of fact as to their failure to cure their defaults, and BRT is entitled to judgment of foreclosure in the first action (*BRT Realty Trust v Terrapin Industries LLC*, Index No. 111308/07).

Furthermore, as a result of this decision, BRT's motion in the second action (*Terrapin Industries LLC v BRT Realty Trust*, Index No. 111557/07) for an order staying the second action until the determination of the summary judgment motion in the first action, is rendered moot.<sup>5</sup>

Settle Order, including provision for appointment of a referee to compute.

Dated: April 11, 2008  
New York, New York

E N T E R:

  
\_\_\_\_\_  
J.S.C.

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<sup>4</sup> It is noted that the failure to pay the notes by September 2007 is irrelevant, as BRT is not seeking a judgment of foreclosure as a result of that default.

<sup>5</sup> The second action, brought by the Terrapin-Rath parties, seeking *inter alia* declaratory relief (essentially concerning the same subject matter as the first action determined here) remains pending, as neither side has yet moved for final relief.