

**Matter of Madison Realty Capital v Equan Realty**

2008 NY Slip Op 31375(U)

May 13, 2008

Supreme Court, New York County

Docket Number: 102256/08

Judge: William J. Davis

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

PRESENT: DAVIS  
Justice

PART 33

MADISON REALTY CAPITAL  
- v -  
EDUAR REALTY INC

INDEX NO. 107256/08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 2  
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 for a temporary restraining order staying this foreclosure by power of sale and directing that all further proceedings be conducted by judicial sale pursuant to RPAPL article 13 is decided in accordance with the Court's decision and order issued this same date, May 13, 2008.

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COUNTY CLERK  
*[Signature]*

Dated: May 13, 2008

J.S.C.

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: PART 33

-----X  
IN THE MATTER OF THE NON-JUDICIAL  
FORECLOSURE BY POWER OF SALE PURSUANT TO  
RPAPL ARTICLE 14 OF PREMISES BLOCK 1915, LOT  
64

DECISION AND  
ORDER

Index No. 102256/08

MADISON REALTY CAPITAL, L.P.,  
Mortgagee,

-against-

EQUAN REALTY, INC.  
Mortgagor.

-----X  
WILLIAM J. DAVIS, J.:

By order to show cause dated March 27, 2008, the mortgagor Equan Realty, Inc. ("Equan") moved pursuant to RPAPL § 1421 (2) for a temporary restraining order staying this attempted foreclosure by power of sale pursuant to RPAPL article 14 (*see*, RPAPL § 1403) and directing that all further proceedings be conducted by judicial sale pursuant to RPAPL article 13. The issue for this Court's consideration is whether Equan has demonstrated one or more of the grounds specified in RPAPL § 1422 (2) and may thereby compel the mortgagee Madison Realty Capital, L.P. ("Madison Realty") to proceed by the more time consuming procedure of judicial foreclosure.

Madison Realty is the holder of a mortgage, as modified by Agreement of Spreader and Modification of Mortgage ("the mortgage"), dated October 23, 2006, between Equan and Madison Realty's predecessor-in-interest CFA Capital Partners, LLC ("CFA") in the original principal sum of \$3,030,000.00, which is secured by Equan's commercial property located at 2207 Seventh Avenue, New York, New York ("the mortgaged premises"). The mortgaged premises consists of

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COUNTY CLERK'S OFFICE  
NEW YORK

a multi-story commercial building which presently has two tenants, both of which are owned and controlled by Earl Martin, who is the President and sole shareholder of Equan. The aggregate monthly rent roll is \$74,878.12. The maturity date of the note and mortgage was October 22, 2007, or sooner by acceleration as set forth in the mortgage.

On February 11, 2008, Madison Realty filed a Notice of Pendency of Non-Judicial Foreclosure by Power of Sale pursuant to RPAPL article 14. A notice of intention to foreclose was sent to Equan on that same date. The terms of the mortgage expressly entitle the mortgagee to sell the mortgaged premises by exercise of power of sale and to foreclose the mortgage by a non-judicial foreclosure.

In support of this application and in keeping with the requisite factual allegations of RPAPL § 1421 (2), Equan advances a number of claims as follows: (1) the power of sale proceeding will cause Equan and Mr. Martin as its principal undue hardship by undermining their efforts to refinance the mortgage or otherwise find investors to raise funds to pay off Equan's indebtedness; (2) the mortgage is invalid due to fraud and/or misrepresentation on the ground that the mortgagor was never advised that the mortgage permitted the mortgagee to proceed by non-judicial foreclosure and Madison never provided the relevant loan documents to Equan; and (3) Equan has meritorious defenses to foreclosure based upon Equan's right provided in the mortgage to exercise an option to extend the loan beyond the October 22, 2007 maturity date, and other equitable defenses including waiver, estoppel, laches and unclean hands.

Mr. Martin in his affidavit contends that although he was represented by counsel during the loan negotiations his attorney was not present at the closing on October 23, 2006. However, Mr.

Martin's attorney had allegedly advised Mr. Martin that he had read the loan documents and it was all right to sign them. Mr. Martin now claims that neither his attorney nor the mortgagee advised him of the non-judicial foreclosure clause or the right to appointment of a receiver and the assignment of rents upon default and further that he was advised that monies for interest and taxes were withheld at the closing so that no payments would be due during the first year of the mortgage. Moreover, Mr. Martin contends that at the closing he was advised that he had the right to extend the loan for another year through October 2008, and states that such extension was not effectuated because Madison conditioned the extension on terms that were unfair and unjust, namely, that Equan waive all rights against Madison. In support of his claim that he would suffer undue hardship if the non-judicial sale were permitted to proceed, Mr. Martin asserts that essentially all of his life savings and equity in his residence were used to finance the purchase of the mortgaged premises and would be lost if he is not given sufficient time to refinance the mortgage or find investors. He alleges that he has contacted three lending institutions (only one of which he names) and also has a potential investor who is interested in developing the property into a hotel or other residential building.

In opposing the application, Madison Realty contends that all loan documents were sent to Equan's attorney shortly after the closing in 2006. Annexed to the affirmation in opposition is a letter dated November 16, 2006, from Madison Realty's attorneys and addressed to Steven J. Cooper, Esq. listing the documents being forwarded including the subject mortgage as modified by the October 23, 2006 agreement. Madison Realty contends that having signed the loan documents, Equan is bound by their terms including the right to proceed by power of sale. By the terms of the mortgage, Equan's right to seek an extension of the loan was foreclosed by Madison's declaration

of Equan's default. Madison Realty's negotiations with Equan after its default with respect to a possible modification of the loan documents and extension of the maturity date was conditioned upon Equan curing its defaults. Madison prepared a mortgage note modification and extension agreement which was forwarded to Equan's attorney, Steven Cooper. On January 22, 2008, Madison Realty sent an e-mail to Mr. Cooper indicating that Equan should deliver the executed modification and extension agreement together with a check in the amount of \$103,000 no later than 2:00 p.m. on January 23, 2008. When Equan failed to execute the extension agreement or provide the monies to cure its default, Madison commenced this non-judicial foreclosure proceeding.

On April 15, 2008, the parties appeared for oral argument on Equan's application. Apparently, Equan is no longer represented by Steven Cooper, Esq. Mr. Martin, Equan's principal, personally appeared before the court together with a new attorney Michael Heitman of Martin & Loicono. Madison Realty appeared by Joseph Barbieri, Esq. of Cole, Schotz, Meisel, Forman & Leonard, P.A. After hearing the arguments of the respective attorneys and Mr. Martin's own personal plea in support of the application, the Court reserved decision.

Initially, the court rejects Equan's argument predicated on RPAPL § 1421 (2) (b) (2), to wit, that the mortgage may be invalid. Equan's contention that it did not receive the loan documents is specifically refuted by the letter to his attorney dated November 16, 2006, attached to Madison Realty's opposition papers. Otherwise, Equan's assertions of fraud or misrepresentation on the part of the mortgagee find no support in the record. The allegation that Mr. Martin was ignorant of key provisions in the loan documents, including the right of the mortgagee to proceed by non-judicial foreclosure, or that such terms were not specifically brought to his attention carries little weight. As

a signatory to the agreement, Mr. Martin is conclusively presumed to know its contents and to assent to them (*see, British West Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234 [1<sup>st</sup> Dept. 1991]; *Poplar Realty v Po*, 3 Misc3d 22, 24 [App. Term, 2<sup>nd</sup> & 11<sup>th</sup> Jud. Dists. 2003]; *cf., Wranovics v Finnerty*, 277 AD2d 841, 843 [3d Dept. 2000]). If Mr. Martin is ignorant of the terms of the mortgage, it is only because he chose not to make the effort to read the loan documents. He cannot escape responsibility for the knowledge of the terms which a reading of such documents would have provided.

With respect to possible defenses Equan may have predicated upon negotiations between the parties relative to modification of the loan documents and extension of the maturity date, Equan conceded at oral argument that it had not sought to exercise its right to seek an extension of the loan beyond the October 22, 2007 maturity date within the time and in the manner required under the loan documents. Notwithstanding such failure and the fact that it had no obligation to do so, Madison engaged in negotiations with Equan to possibly extend the loan maturity date while specifically reserving its right to proceed under the loan documents. Although Madison reduced a proposed agreement to writing, it was never executed by the parties. Thus, the provisions of the loan documents remained in full force and effect and based upon Equan's default Madison was entitled to accelerate the due date and to commence the non-judicial foreclosure. Equan is not entitled to rely upon such negotiations to circumvent its obligations under the loan documents and avoid the consequences of its default.

Lastly, Equan argues that allowing this non-judicial foreclosure to proceed will cause it to suffer undue hardship by undermining its ability to refinance or obtain investors within the short

duration of the proceeding. It submits that during the longer period generally required to conclude a judicial foreclosure Equan would likely be able to obtain the funds necessary to pay off its indebtedness. This argument is not easily resolved as the statute does not provide a definition of undue hardship. While the court is sympathetic to the situation in which Mr. Martin finds himself as he scrambles to obtain financing to save his ownership of the property and satisfy the mortgage, the situation is largely of his own making in that he did not comply with the payment provisions of the loan and further did not follow the time and manner indicated therein for obtaining an extension. Moreover, at the time of oral argument on the application, nearly six months had elapsed since the maturity date of the mortgage and an additional three months had passed since the settlement negotiations with Madison Realty had broken down. Yet, despite this passage of time, Mr. Martin did not demonstrate that he had any substantial possibilities for either refinancing or investors interested in providing funds to pay off Equan's indebtedness. The present state of the economy built in large measure on the crisis in the mortgage market makes it unlikely that directing the mortgagee to proceed by judicial foreclosure will better Equan's position as interest at the default rate and late fees in addition to other charges would continue to accrue. In fact, it would seem to run counter to the purpose of the legislation repealing the prior article 14 of the RPAPL (foreclosure by advertisement) and substituting a new article 14 ( foreclosure by power of sale), which was to streamline procedures for foreclosure particularly of commercial mortgages and avoid the burdensome delays inherent in the judicial foreclosure proceedings governed by article 13 of the RPAPL (*see, generally, Bergman, Non-Judicial Actions: Statutory Ambiguities Could Cause Delay in Default Cases*, N.Y.L.J., 2/10/99 (p. 5, col. 2) . This legislation was expected to have a remedial effect and generate more commercial mortgage money by allowing commercial lenders to foreclose

their collateral in a more timely and cost effective way through the predictable process of a non-judicial foreclosure.

Accordingly, upon review of the supporting papers and the papers in opposition and considering the arguments of the respective parties and the applicable law, Equan's motion to stay this non-judicial foreclosure and direct Madison Realty to proceed by judicial foreclosure under RPAPL article 13 is denied.

This constitutes the decision and order of the court.

DATED: May 13, 2008



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J.S.C.

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