

Washington Mut. Bank v Obsidian Holdings, LLC
2008 NY Slip Op 32020(U)
July 11, 2008
Supreme Court, New York County
Docket Number: 0109090/2007
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KORNREICH
Justice

PART 54

WASHINGTON MUTUAL BANK

INDEX NO.

109090/07

MOTION DATE

4/24/08

MOTION SEQ. NO.

03

MOTION CAL. NO.

- v -
OBSIDIAN HOLDINGS, LLC,
ETAL,

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

Notice of Motion/ Order to Show Cause — Affidavits 2 Exhibits ... 5

Answering Affidavits 1 Exhibits 10

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

FILED

JUL 18 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/11/08

HON. SHIRLEY WERNER KORNREICH
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 54

-----X

WASHINGTON MUTUAL BANK,

Plaintiff,

Index No.:109090/2007

-against-

**DECISION and
ORDER**

OBSIDIAN HOLDINGS, LLC, MATTHEW TOLLIN,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY HIGHWAY DEPARTMENT,
and HARLEM NIGHTS VARIETY,

Defendants.

-----X

FILED
JUL 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER, J.:

Defendant Obsidian Holdings, LLC ("Obsidian"), on order to show cause, moves to set aside and vacate the Receiver and dismiss the complaint of plaintiff Washington Mutual Bank brought to foreclose a mortgage lien. Plaintiff opposes. In support each party submits an attorney's affirmation and exhibits.

History and Facts

Plaintiff is the owner and holder of the note and mortgage for premises located at 761 Saint Nicholas Avenue, New York, New York 10031. Obsidian, as mortgagor, and defendant Matthew Tollin, as guarantor, were obligated to repay the principal sum of \$478,626.25, with interest. By Complaint filed July 2, 2007, plaintiff alleged that Obsidian had failed to comply with the terms and provisions of the Note and Mortgage by failing and omitting to pay, within

fifteen days, the installments that had become due on the first day of December 2006 and January-February 2007. Plaintiff also alleged violations of the covenant to maintain insurance and to provide plaintiff, within twenty days, with requested annual and operating statements. On January 19, 2007, plaintiff declared the loan immediately due and payable under the provisions of the amended and restated mortgage and security agreement (mortgage). Exh. B, opposition. Obsidian filed and served an Answer to the Complaint on January 7, 2008, six months after the Complaint was filed. Plaintiff has not to date sought a default judgment on application to the court. By order filed February 21, 2008, the court granted plaintiff's motion for appointment of a receiver, made *ex parte* under the terms of the mortgage (Exh. B, ¶ 5.3)

Discussion and Rulings

Motion to Set Aside Receiver

Obsidian asks the court to set aside and vacate its prior order granting plaintiff's *ex parte* motion to appoint a receiver. Obsidian is not challenging the propriety of plaintiff moving *ex parte*, an argument that would nevertheless be unpersuasive as the mortgage contains a clause specifically authorizing plaintiff to seek the appointment of a receiver without notice in the event of a default. *See Essex v. Newman*, 220 A.D.2d 639 (2d Dept. 1995). Obsidian instead argues that the order was unfounded because it "did not owe plaintiff any moneys" and there was sufficient security for the mortgage. Campbell, Esq. Aff. at ¶¶ 5-13.

At the outset, as the court in *Essex* explained, "Such a clause authorizes the appointment of a receiver without notice and without regard to the adequacy of the security." *Id.* at 640. The court referred to Real Property Law § 254 [10], which provides in pertinent part,

A covenant "that the holder of this mortgage, in any action to foreclose it, shall be

entitled to the appointment of a receiver," must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness.

Obsidian's reliance on the case of *W.I.M. Corp. v. Ctpulo*, 216 A.D. 46 (1st Dept. 1926), to support its argument that adequate security precluded the receiver appointment, is misplaced. *See Bergman on New York Mortgage Foreclosures*, § 10.05(2), pp. 10-19. The *W.I.M.* case has been interpreted to recognize a court's continuing equitable power to deny a motion for appointment of a receiver when one is no longer necessary. *Id.* (citations omitted).

Nor has Obsidian provided the court with sufficient evidence that reasonable grounds did not exist at the time of the appointment or that circumstances have changed so as to now warrant a different result. *See 500 West 172nd Street Realty, Inc. v. Romax Properties Corp.*, 126 Misc. 2d 268, 270 (Sup. Ct., N.Y., 1984) (court retained equitable power to vacate receiver appointment), *citing Ardeb Realty Corp. v. East Estates, Inc.*, 12 Misc. 2d 167 (Sup. Ct., N.Y., 1984) (court declined to vacate receiver appointment). Plaintiff submitted sworn documents evidencing a number of defaults by Obsidian under the mortgage and note. Plaintiff adequately showed that Obsidian had repeatedly failed to make its mortgage payments on time, had failed to maintain insurance and had failed to furnish requested Annual Operating Statements and Rent Rolls within the fifteen days required by the contract. Each of these constituted a default. Promissory Note §9; Mortgage §§ 4.4, 4.12, 5, 7.

Obsidian has provided two brief, nearly identical affidavits, one from defendant Tollin

and another from Obsidian, with an unidentified signatory and illegible signature. Both state “When plaintiff filed their complaint in this action, I did not owe plaintiff any moneys according to said note and mortgage.” Owing money is not the only basis for default under the contract, which entitles the lender to invoke the remedies of acceleration and foreclosure upon the occurrence of “any event of default.” Mortgage §5. Further, whether or not Obsidian owed plaintiff money is an issue of opinion based on application of the contract to the facts, which in key respects are not disputed, and does not resolve the issue of default, which results from lack of compliance with any number of clauses in the parties’ contract. The motion is denied.

Motion to Dismiss

Because Obsidian’s motion to dismiss is based on CPLR 3211(a)(7) (failure to state a cause of action), it may be brought after service of the responsive pleading. CPLR 3211(e). Regardless, the motion has no merit. Obsidian relies on the same arguments discussed above to support its claim that the Complaint does not state a cause of action. The Complaint alleges multiple defaults and is more than sufficient on its face. *See e.g. Morone v Morone*, 50 N.Y.2d 481, 484 (1980) (on motion to dismiss, court must accept facts as true, accord Plaintiff every favorable inference and determine whether facts support cognizable legal theory).

The motion to dismiss is frivolous and Obsidian is cautioned that its submission of any additional frivolous motions will result in sanctions. Accordingly, it is

ORDERED that defendant Obsidian’s motion to set aside and vacate the receiver is denied; and it is further

ORDERED that defendant Obsidian’s motion to dismiss is denied; and it is further

(Handwritten initials)

July 17, 2008

ORDERED that the parties are to appear in Part 54 on August 7, 2008, at 9:30 a.m. for a status conference.

ENTER:

(Handwritten signature)

J.S.C.

Date: July 11, 2008
New York, N. Y.

FILED
JUL 18 2008
COUNTY CLERK'S OFFICE
NEW YORK