

Fortress Credit Corp. v CPW Acquisition Corp.

2008 NY Slip Op 32984(U)

October 29, 2008

Supreme Court, New York County

Docket Number: 106647/08

Judge: Joan A. Madden

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

PRESENT: **HON. JOAN A. MADDEN**

PART 4

J.S.C. Justice

Index Number : 106647/2008
FORTRESS CREDIT CORP.
VS.
CPW ACQUISITION CORP.
SEQUENCE NUMBER : # 001
DEFAULT JUDGMENT

INDEX NO. 106647-08
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

_____ 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 *is consolidated for determination with motion sequence no. 002 & the consolidated motions are determined in accordance with the annexed decision & order.*

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

Dated: October 29, 2008

J.M.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

FORTRESS CREDIT CORP. as Security Trustee,

INDEX NO. 106647/08

Plaintiff,

-against-

CPW ACQUISITION CORP. and TRUMP
INTERNATIONAL HOTEL AND TOWER
CONDOMINIUM,

Defendants.

-----X

JOAN A. MADDEN, J.:

In this mortgage foreclosure proceeding, plaintiff moves for an order pursuant to CPLR 3215 granting a default judgment of foreclosure and sale against defendant CPW Acquisition Corp. ("CPW"), based on said defendants' failure to appear and answer (motion sequence no. 001).¹ Defendant CPW opposes the motion, and moves for an order pursuant to CPLR 2005 and 3012 compelling plaintiff to accept a late answer (motion sequence 002).²

To successfully oppose a motion for a default judgment, defendant CPW must demonstrate a justifiable excuse for its default and a meritorious defense to the action. See

¹It appears from the papers that there was an original mortgage of \$10,000,000, on a condominium unit in the building know as Trump International Hotel and Tower Condominium, located at One Central Park West in Manhattan, Tower Unit No. PH52A, which was subsequently increased to \$14,000,000. The mortgage, however, is part of a larger transaction, involving more than \$30,000,000 of alleged debt.

²Motion sequence numbers 001 and 002 are consolidated for disposition.

Johnson v. Deas, 32 AD2d 253 (1st Dept 2006); ICBC Broadcasting Holdings-NY, Inc. v. Prime Time Advertising, Inc., 26 AD3d 239, 240 (1st Dept 2006). Defendant CPW satisfies neither requirement.

The only excuse defendant CPW offers for its default in appearing and answering is that “throughout May and June 2008, plaintiff’s representatives, who have been in regular contact with CPW, repeatedly represented to CPW that plaintiff would not take further legal action, including but not limited to seeking default judgment against CPW, pending the parties’ efforts to settle the action and/or CPW’s efforts to sell another property owned by CPW and known as Apartment 102 in Fountain House, located at Park Street, London W1, England (the ‘London Property’).” Defendant CPW further asserts that “[r]elying on the representations made by plaintiff’s representatives that plaintiff would forego further legal action in these proceedings pending settlement negotiations and CPW’s selling of the London Property, CPW did not answer plaintiff’s Complaint or otherwise appear in the action.”

The foregoing proffered excuse as to CPW’s understanding that it did not need to answer while it was engaged in settlement negotiations with plaintiff, is belied by the record. Plaintiff submits a June 26, 2008 e-mail from plaintiff’s attorney to defendant’s attorney, explicitly cautioning defendant that it would not “suspend” the foreclosure proceedings. Specifically, plaintiff’s counsel stated that “we hereby stress that, under the current circumstances, Fortress does not intend to suspend any of the foreclosure proceedings which are pending or about to be commenced, and therefore there is no availability from Fortress to grant any moratorium.” That same e-mail concludes with a statement by plaintiff’s counsel that “[w]e reiterate for the sake of

clarity that the above does not affect at all the continuation by Fortress of the foreclosure proceedings which are pending or about to be commenced over the other properties.” In light of these clear and express statements by plaintiff’s counsel, defendant CPW’s reliance on settlement negotiations does not constitute a reasonable or justifiable excuse for its default in answering the complaint.

Defendant CPW likewise fails to establish a meritorious defense to this foreclosure proceeding. Defendant CPW does not deny that money is owed, but simply questions whether the amount claimed by plaintiff reflects the “credits, payments and/or offsets to which CPW is entitled.” Any dispute as to the amount, is not a defense, but rather a matter for the referee appointed to determine the amount due on the mortgage. See Mortgage Electronic Registration Systems, Inc. v. Schuh, 48 AD3d 838 (3rd Dept), app dismissed 10 NY3d 951 (2008); Long Island Savings Bank of Centereach v. Denkensohn, 222 AD2d 659 (2nd Dept 1995). Defendant CPW also asserts that it is currently engaged in efforts to sell the London property and to procure another mortgage, and that the proceeds of both transactions will be used to satisfy the amount owed to plaintiffs. Such efforts are not a defense to this foreclosure proceeding, and may still continue, even after plaintiff has secured a default judgment.

Accordingly, it is hereby

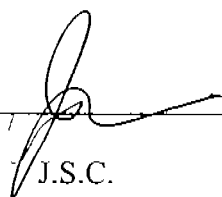
ORDERED that plaintiff’s motion for a default judgment of foreclosure against defendant CPW Acquisition Corp., is granted (motion sequence no. 001); and it is further

ORDERED that the motion of defendant CPW Acquisition Corp. is denied (motion sequence no. 002); and it is further

ORDERED that plaintiff shall settle on notice, an Order of Reference, for this court's signature.

DATED: October 29, 2008

ENTER:



J.S.C.