

**JP Morgan Chase Bank, N.A. v Aciton Hous.II,
LLC**

2009 NY Slip Op 30010(U)

January 5, 2009

Supreme Court, New York County

Docket Number: 115265/07

Judge: Martin Shulman

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

JP Morgan

INDEX NO. 115265/07

- v -

MOTION DATE _____

Action Housing

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits 1-9
~~Notice of Cross-Motion~~
Answering Affidavits — Exhibits

PAPERS NUMBERED	
1, 2	_____
3, 4	_____
5, 6, 7, 8, 9	_____

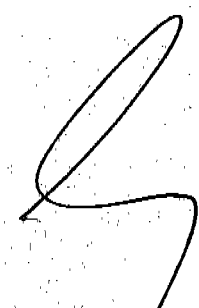
Replying Affidavits Opp. to Cross-Motion

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are
decided in accordance with the attached
decision and order.

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

Dated: January 5, 2009


MARTIN SHULMAN J.S.C. J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 1

-----X
 JP MORGAN CHASE BANK, N.A.,

Index No. 115265/07

Plaintiff,

Decision & Order

-against-

ACTION HOUSING II, LLC, et al,

Defendants.
 -----X

MARTIN SHULMAN, J.:

In motion sequence 001, plaintiff JP Morgan Chase Bank, N.A. ("plaintiff" or "JP Morgan Chase") moves *inter alia* for summary judgment in this mortgage foreclosure action, dismissal of defendants' affirmative defenses and appointment of a referee to compute the amounts due to plaintiff as principal and interest under the relevant mortgages and notes. Defendants Action Housing II, LLC ("Action II"), Transcorp Construction Corporation ("Transcorp"), Amran Niazi ("Niazi"), Kenneth Morrison and Leroy Morrison (collectively the "Morrison") oppose the motion, and Action II and the Morrissions cross-move to consolidate this action with the action entitled *Niazi v. JP Morgan Chase Bank*, NY County Index No. 602614/07 (the "Fraud Action") and for discovery from plaintiff. Niazi and Transcorp oppose the cross-motion while plaintiff consents to the portion of the cross-motion seeking consolidation.

In motion sequence 004, Transcorp and Niazi move to compel JP Morgan Chase to assign the first mortgage and note to Niazi upon his payment of the sums due thereunder. Motion sequences 001 and 004 are consolidated for disposition.

Background

On or about May 14, 2004, defendants Transcorp and Action II entered into a general construction agreement whereby Action II agreed to pay Transcorp \$5,250,000.00 to renovate Action II's properties located at 111 West 137th Street, 111-113 West 137th Street and 2830 Frederick Douglass Boulevard in New York City (the "Properties"). The financing for the renovation project was obtained through government financial grants and loans and through plaintiff.

On May 26, 2004, Action II entered into a construction loan with plaintiff JP Morgan Chase entitled Building Loan Agreement ("BLA"), pursuant to which Action II was entitled to borrow up to \$5,715,949.00¹ to cover the costs involved in the project. As security for the BLA, Action II executed a series of four mortgages and notes in favor of JP Morgan Chase. Plaintiff also made the acquisition of a letter of credit a further condition for extending the construction loan to Action II.² Defendants Niazi and the Morrisons are guarantors of Action II's obligations under the mortgages and notes. Transcorp guaranteed certain of Action II's construction obligations.

The basis of this action is Action II's default in failing to pay the notes upon maturity. Each note had an initial maturity date of November 25, 2005, and was subject to a one-time option to extend the maturity date for six months. The option was exercised and plaintiff contends the maturity date for each mortgage note was extended

¹ Plaintiff alleges that as of the date of the complaint, it had advanced \$5,089,380.51 of the loan proceeds to Action II.

² Plaintiff's allegedly improper draw down on the letter of credit is the subject of the Fraud Action.

to May 25, 2006. It is undisputed that the notes were not paid on the May 25, 2006 maturity date. In March 2007 plaintiff drew down on the letter of credit and in July 2007 JP Morgan Chase notified Action II of its default.

Defendants dispute that they are in default and even if they were, contend that plaintiff failed to properly notify them of the default and provide them an opportunity to cure. Action II and the Morrisons base their claim that there has been no default upon plaintiff's alleged direct communications to them and actions indicating an intent to extend the BLA maturity date. Specifically, defendants cite JP Morgan Chase's delay in declaring the notes due and payable and acquiescence to extend the construction deadline as a result of construction delays allegedly caused by Transcorp.

Plaintiff commenced this action in November 2007 to foreclose its mortgages. Defendants Action II, Niazi, Transcorp and the Morrisons appeared in this action by counsel and interposed answers to the complaint. Action II's answer asserts five affirmative defenses and a cross-claim against Niazi and Transcorp. The Morrisons' answer asserts the same five defenses³ and a cross-claim against Niazi and Transcorp. Finally, Niazi's and Transcorp's amended answer asserts three affirmative defenses⁴ and cross-claims against Action II and the Morrisons.

³ The defenses include failure to state a cause of action, waiver, estoppel, failure to mitigate damages and failure to comply with the terms of the loan documents.

⁴ The first affirmative defense alleges that the mortgages sought to be foreclosed are subordinate to Transcorp's mechanic's liens to the extent of any loan advances made after the mechanic's liens were filed. The second and third defenses allege estoppel based upon plaintiff's alleged "conspiratorial conduct" with the Morrisons (second defense) and unconscionable conduct in attempting to settle this action by insisting that Niazi withdraw his claims against plaintiff in the Fraud Action and Transcorp withdraw its claims for construction costs.

Analysis

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st Dept., 1984), *affd.*, 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986).

To establish a *prima facie* case for foreclosure of a mortgage, the mortgagee must “establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant’s default in payment . . .” *Witelson v. Jamaica Estates Holding Corp. I*, 40 A.D.3d 284, 835 N.Y.S.2d 179 (1st Dept. 2007). Here, plaintiff has established its *prima facie* case against defendants in this foreclosure action. There is no dispute as to the execution of the relevant loan documents and guaranties, nor do defendants deny that they did not pay the notes upon maturity as provided for in the loan documents. Further, as more fully discussed below, the asserted defenses fail to raise any issues of fact which would preclude summary judgment in plaintiff’s favor.

Plaintiff having established its *prima facie* case, the burden of proof shifted to defendants to “assemble, lay bare and reveal [their] proofs, in order to show that the matters set up in [their] answer[s] are real and are capable of being established upon a

trial.” *Spearmon v. Times Square Stores Corp.*, 96 A.D.2d 552, 553, 465 N.Y.S.2d 230 (2nd Dept., 1983). With respect to mortgage foreclosures, “a mortgagor is bound by the terms of his contract as made and cannot be relieved from his default, if one exists, in the absence of waiver by the mortgagee, or estoppel, or bad faith, fraud, oppressive or unconscionable conduct on the latter’s part.” *Ferlazzo v. Riley*, 278 N.Y. 289, 292 (1938). Here, Action II’s and the Morrisons’ identical defenses generally consist of bare, conclusory allegations and are insufficient to create any issues of waiver and/or estoppel which would defeat plaintiff’s entitlement to summary judgment.

For example, their fourth and fifth affirmative defenses merely state failure to mitigate damages and failure to comply with terms of the loan documents, with no supporting facts. Action II and the Morrisons offer no substantiation of these claims in their opposition to plaintiff’s motion. No basis is even alleged for the existence of a duty on plaintiff’s part to mitigate damages. It is well settled that defenses which merely plead conclusions of law without supporting facts are insufficient and should be stricken. *170 West Village Associates v. G & E Realty, Inc.*, 56 A.D.3d 372, 868 N.Y.S.2d 36 (1st Dept. 2008).

Action II and the Morrisons do elaborate upon their second and third defenses in opposing the motion for summary judgment. Their waiver and estoppel claims are predicated upon their contention that plaintiff, through its alleged representations to them and its actions (specifically, not taking action for over a year after the loan maturity date), effectively extended the loan maturity date. Further, defendants argue that the purported extension of the maturity date remains in effect since plaintiff never properly notified defendants they were in default, thus precluding this foreclosure action.

It is well established that waiver "is the voluntary abandonment or relinquishment of a known right." *Park Holding Co. v. Power*, 161 A.D.2d 143, 554 N.Y.S.2d 861 (1st Dept. 1990), citing *Jefpaul Garage Corp. v. Presbyterian Hosp. in City of New York*, 61 N.Y.2d 442, 446, 474 N.Y.S.2d 458 (1984). A waiver occurs when there is "such conduct or failure to act as to evince an intent not to claim the purported advantage." *Park Holding, supra*, citing *Hadden v. Consolidated Edison Co. of New York, Inc.*, 45 N.Y.2d 466, 469, 410 N.Y.S.2d 274 (1978).

First, the court notes defendants' reliance upon *Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 451 N.Y.S.2d 663 (1982). However, unlike the defendants in *Nassau Trust*, defendants here do not specifically state what representations plaintiff mortgagee allegedly made to them, who made them and when they were made. Turning to the notice argument, this court previously determined in the Fraud Action that the loan documents do not require notice to be given where, as here, the default involves failure to pay the loans upon maturity.

As in *New York State Mortgage Loan Enforcement & Admin. Corp. v. Coney Island Site Five Houses, Inc.*, 109 A.D.2d 311, 491 N.Y.S.2d 671 (2nd Dept., 1985), *app. dism.* 67 N.Y.2d 1049, 504 N.Y.S.2d 1024 (1986), Action II's and the Morrisons' defenses "are totally at odds with the terms of the parties' written loan documents, which show that they intended to be bound only by the terms of said writings." Significantly, each of the loan documents contains a clear no waiver clause and requires that any modifications thereto be in writing.

In this case, the BLA provides for only one extension of the loan maturity date for a period of six months. In order for plaintiff to have extended the maturity date further, the loan documents require such a modification to be in writing, which was not done here. Under these circumstances, this court declines to infer a waiver from the mere passage of time. Accordingly, Action II and the Morrisons fail to establish their defense of waiver.

"Equitable estoppel is a principle that is applied in the interest of fairness to preclude a party from speaking against his own acts, commitments or representations which induced another, who reasonably relied on such words or conduct and who would suffer injury if such conduct or representations were allowed to stand (citation omitted). The doctrine has been successfully invoked to prevent the enforcement of rights which would otherwise work a fraud or injustice upon the person against whom enforcement is sought . . ." *Sandra S. v. Larry W.*, 175 Misc.2d 122, 667 N.Y.S.2d 632 (Family Ct., Bronx Co., 1997); citing *Nassau Trust Co. v. Montrose Concrete Products Corp.*, *supra*. It "does not operate to create rights otherwise nonexistent; it operates merely to preclude the denial of a right claimed otherwise to have arisen". *Wilson v. One Ten Duane St. Realty Co.*, 123 A.D.2d 198, 510 N.Y.S.2d 603 (1st Dept. 1987).

Action II and the Morrisons maintain that JP Morgan Chase induced them into spending more money on the project, thus enhancing its value for plaintiff. However, defendants do not establish that plaintiff should be estopped from foreclosing its mortgages since they cannot claim to have justifiably relied on the maturity date having been extended in the face of the BLA's clear language regarding the maturity date and

any extensions thereof. See, *New York State Urban Dev. Corp. v. Marcus Garvey Brownstone Houses, Inc.*, 98 A.D.2d 767, 469 N.Y.S.2d 789 (2nd Dept. 1983) ("In the face of the outstanding conflict between the alleged oral representations and the uncontroverted documentary evidence . . . appellant cannot claim justifiable reliance and, thus, has failed to establish the elements of a defense of . . . estoppel [see *Merchants Nat. Bank & Trust Co. v. Syracuse Eagles Hockey Club Corp.*, 58 A.D.2d 1004, 397 N.Y.S.2d 38])."

The first affirmative defense merely alleges a failure to state a cause of action without setting forth any factual support for said defense. Since plaintiff established its prima facie entitlement to summary judgment and defendants' other affirmative defenses are legally insufficient as set forth above, the first affirmative defense of failure to state a cause of action must also be dismissed. *Raine v. Allied Artists Productions, Inc.*, 63 A.D.2d 914, 406 N.Y.S.2d 59 (1st Dept. 1978).

Turning to Niazi's and Transcorp's defenses, the court finds them similarly unavailing. The second and third defenses allege estoppel based upon plaintiff's alleged "conspiratorial conduct" with the Morrisons which allegedly caused Action II's default (second defense) and unconscionable conduct in attempting to settle this action by insisting that Niazi withdraw his claims against plaintiff in the Fraud Action and Transcorp withdraw its claims for construction costs. Neither is a valid defense to this foreclosure action.

Niazi's and Transcorp's first affirmative defense alleges that the mortgages sought to be foreclosed are subordinate to Transcorp's mechanic's liens to the extent of

any loan advances made after the mechanic's liens were filed. The notes and mortgages were recorded on August 9, 2004 while Transcorp's mechanic's liens were filed May 21, 2007. No proof is submitted to show any loan funds were advanced after May 21, 2007 and Niazi's and Transcorp's first defense also fails to refute plaintiff's right to summary judgment.

The portion of the cross-motion seeking to consolidate this action with the Fraud Action is denied as moot based upon the award of summary judgment to plaintiff and by this court's June 2, 2008 dismissal of the Fraud Action. Simultaneously with the issuance of this decision and order, this court has denied Niazi's and Transcorp's motion for reargument and renewal of the June 2, 2008 decision and order in the Fraud Action. Similarly, the request for discovery is now moot. The portion of plaintiff's motion seeking a default judgment against non-appearing defendants Department of Housing Preservation and Development, Workers' Compensation Board of New York State, Criminal Court of the City of New York and City of New York Environmental Control Board is granted, and the caption shall be amended accordingly to delete the defaulting defendants and the fictitious parties therefrom.

Finally, in light of the granting of JP Morgan Chase's motion for summary judgment, Niazi's and Transcorp's motion to compel plaintiff to assign the first mortgage and note to Niazi is also denied. In any event, as plaintiff notes in its opposition, *Chemical Bank v. Meltzer*, 93 N.Y.2d 296 (1999), relied upon by Niazi and Transcorp., is factually distinguishable from the case at bar, thus precluding Niazi's entitlement to such relief. Accordingly, it is

ORDERED that plaintiff is granted judgment on default against defendants Department of Housing Preservation and Development, Workers' Compensation Board of New York State, Criminal Court of the City of New York and City of New York Environmental Control Board, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's motion for summary judgment and appointment of a referee is granted; and it is further

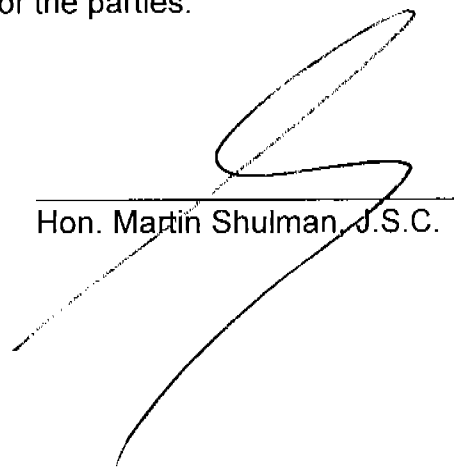
ORDERED that the cross-motion is denied in its entirety; and it is further

ORDERED that Transcorp's and Niazi's motion to compel assignment of the mortgages is denied.

Plaintiff is directed to settle an order upon notice appointing a referee to compute and amending the caption.

The foregoing constitutes this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York, New York
January 5, 2009



Hon. Martin Shulman, J.S.C.