

Libertypointe Bank v Mastermind Solutions Ltd.

2009 NY Slip Op 31655(U)

July 17, 2009

Supreme Court, Nassau County

Docket Number: 8459/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

LIBERTYPOINTE BANK,

Plaintiff,

INDEX No. 8459/09

MOTION DATE: June 23, 2009
Motion Sequence # 001, 002

-against-

MASTERMIND SOLUTIONS LTD., 661-669
CENTRAL AVENUE LLC and ELIAS
GROISMAN,

Defendants.

The following papers read on this motion:

Notice of Motion.....	XX
Affirmation in Opposition.....	X
Reply Affirmation.....	X
Reply Memorandum of Law.....	X

This motion, by plaintiff, for summary judgment in lieu of complaint, pursuant to CPLR §3213 in favor of plaintiff and against defendants for the sum of \$147,606.10 which includes interest through July 7, 2008, plus interest from July 8, 2008 through entry of judgment in favor of plaintiff and against defendants pursuant to the terms of the Term Note, and the Guaranties, together with the costs and disbursements of this action, including reasonable attorneys' fees, upon the grounds that this action is based upon instruments for the payment of money only and that there is no defense to the action, and for such other and further relief as the Court deems proper, is determined as hereinafter set forth.

FACTS

Elias Groisman is President of Mastermind Solutions, LLC ("Mastermind") and a member of 661-699 Central Avenue LLC ("Central Avenue").

On August 9, 2007, Mastermind executed a written Term Note promising to repay the plaintiff \$160,000.00 plus interest. Under the Term Note, Mastermind agreed to pay the plaintiff \$3,244.22 each month beginning October 1, 2007. Under the Term Note, an Event of Default with respect to any guarantor, includes default in the payment or performance of any other obligation or agreement of any nature or description to or with the plaintiff. The Term Note provides that, in the case of the occurrence of an Event of Default, at the plaintiff's option, the obligations of Mastermind shall become immediately due and payable to the plaintiff. The Term Note also provides that in the case of the occurrence of an Event of Default, each borrower and indorser shall be jointly and severally liable for all costs of enforcement and collection of this Term Note incurred by the plaintiff including but not limited to reasonable attorneys' fees, disbursements and court costs.

On August 9, 2007, Mastermind, Central Avenue, and Elias Groisman each executed a written Unlimited Continuing Guaranty in which each individually and unconditionally guarantees the full and prompt payment to the plaintiff when due, whether by acceleration or otherwise, of any and all indebtedness of Mastermind to the plaintiff. Under the Unlimited Continuing Guaranty, each guarantor agreed to pay on demand all costs and expenses of every kind incurred by the plaintiff including actual attorneys' fees. The Unlimited Continuing Guaranty also provides that the obligations of the guarantors shall be joint and several.

Mastermind sent a check dated April 1, 2008 for \$3,406.43 payable to the plaintiff which was cashed on April 4, 2008. Mastermind sent another check dated May 5, 2008 for \$3,244.22 payable to the plaintiff which was cashed on May 9, 2008. On May 8, 2008, the plaintiff's counsel sent a letter to each of the defendants demanding immediate payment in full of the unpaid balance of the Term Note plus interest and attorney fees by May 15, 2008. The unpaid balance is \$146,430.10 plus an additional \$32.10 per day for every day after May 8, 2008. The defendants failed to pay this amount by May 15, 2008. On June 2, 2008, the plaintiff returned by check the \$3,244.22 that Mastermind had paid

LIBERTYPOINTE BANK

Index no. 8459/09

the plaintiff in May of 2008 because the plaintiff had accelerated the loan.

The plaintiff commenced a foreclosure action against Central Avenue, E Property Management, LLC, Elias Groisman, and Mastermind by filing a summons and complaint in Supreme Court, Nassau County on June 6, 2008.

PLAINTIFF'S CONTENTIONS

The plaintiff asserts that it is the holder of a mortgage on the property located at 661-669 Central Avenue, Cedarhurst, New York and that Central Avenue is the mortgagee; and that Central Avenue defaulted on its mortgage as a result of arrears in monthly payments.

The plaintiff contends that as of July 7, 2008 \$147,606.10 was due and owing from Mastermind to the plaintiff under the Term Note, and additional interest of \$32.10 per day has accrued pursuant to the Term Note; and that Mastermind has not made any payments towards this amount.

The plaintiff contends that Central Avenue, as guarantor of the Term Note, defaulted in its obligation to the plaintiff when it defaulted under the terms of the Mortgage with the plaintiff. As a result, an Event of Default has occurred under the Term Note and the obligations of Mastermind are immediately due and payable to the plaintiff.

The plaintiff contends that summary judgment in lieu of complaint against the defendants is proper because this action is based upon instruments for the payment of money only and the defendants do not have any defense to this action.

DEFENDANTS' CONTENTIONS

The defendants contend that they did not default on the Term Note because the plaintiff received and cashed checks from Mastermind before the defendants received the plaintiff's acceleration notice. The defendants contend, therefore, that the acceleration of the loan was not proper.

The defendants also contend that the plaintiff is impermissibly splitting a cause of action by maintaining a foreclosure action against the defendants in Supreme Court, Nassau County and is thus acting in bad faith.

LIBERTYPOINTE BANK

DECISION

Pursuant to C.P.L.R. § 3213, if an action is based upon an instrument for the payment of money only, the plaintiff may serve with the summons a notice of summary judgment and the supporting papers in lieu of a complaint. A document comes within the purview of C.P.L.R. § 3213 if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms. The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document. (Stallone v. Rostek 27 A.D.3d 449, 809 N.Y.S.2d 920, 2nd Dept., 2006; Russo v. O'Meara 300 A.D.2d 563, 752 N.Y.S.2d 539, 2nd Dept., 2002). Once the plaintiff makes a **prima facie** showing of entitlement to judgment as a matter of law, the burden shifts to the defendant to establish by admissible evidence the existence of a triable issue of fact with respect to a bona fide defense. (Quest Commercial v. Rovner 35 A.D.3d 576, 825 N.Y.S.2d 766, 2nd Dept., 2006).

The plaintiff has made a **prima facie** showing of entitlement to judgment as a matter of law by proving the existence of the defendants' obligation to the plaintiff under the Term Note and Guaranties and the defendants' nonpayment of their obligation pursuant to the terms of the Term Note and Guaranties. The defendants have failed to establish the existence of a triable issue of fact with respect to a bonafide defense. Although Mastermind send the plaintiff several checks, the defendants failed to pay the full balance due under the Term Note by May 15, 2008 as per the plaintiff's acceleration letter. The Term Note executed by Mastermind and guaranteed by the defendants allows the plaintiff to accelerate the loan in the Event of Default. Central Avenue's default on a separate obligation with the plaintiff qualifies as an Event of Default under the Term Note. Thus, the defendants' contention that the acceleration of the loan was not proper is groundless.

The defendants' contention that the plaintiff impermissibly split a cause of action by maintaining a foreclosure action against the defendants in Supreme Court, Nassau County is also groundless. R.P.A.P.L. § 1301(3) provides that while a foreclosure action is pending, no other action shall be commenced or maintained to recover any part of the mortgage debt. However, when the obligation secured by the mortgage is separate and independent from the note accompanying the mortgage, the plaintiff is not barred by R.P.A.P.L. § 1301 from obtaining judgment of foreclosure. (Bank Leumi Trust Co. of N.Y. v. Mari-Age Bridals, Inc. 215 A.D.2d 422, 626 N.Y.S.2d 535, 2nd Dept., 1995). As a result, the plaintiff is permitted to assert this claim while a foreclosure action against the defendant Central Avenue is pending.

LIBERTYPOINTE BANK

Index no. 8459/09

Accordingly, the defendants have not demonstrated that evidence exists so as to create an issue of fact herein.

The plaintiff's motion for summary judgment in lieu of complaint against the defendants is **granted**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated JUL 17 2009

Stephen A. Bucaria
XXX J.S.C.

ENTERED
JUL 21 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE