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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 30
NASSAU COUNTY

METROPOLITAN NATIONAL BANK.

Plaintiff.

Sequence No.: 001
Index No.: 003547/09

- against -

TECH REALTY DEVELOPERS, INC., MICHAEL MAZZEO, JR., R.A., DESIGNS, INC., BOYLE SERVICES, INC., THE PEOPLE OF THE STATE OF NEW YORK, THE CITY OF LONG BEACH, JOHN DOE NOS. 1-100, JOHN DOE CORPORATION NOS. 1-100, and JOHN DOE COMPANY NOS. 1-100.

Defendants.

The names of the "John Doe" Defendants being fictitious and unknown to plaintiff, the persons or firms intended being those who may be in possession of, or may have possessory, lien or other interests in, the mortgaged premises herein described.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

In a commercial foreclosure action, the plaintiff moves for summary judgment. The defendants Tech Realty Developers Inc. (hereinafter referred to as "TECH") and Michael Mazzeo, Jr., oppose the motion. All other named defendants have either defaulted or have waived their rights to notice of all proceedings other than the entry of judgment. For the reasons stated herein, the motion is granted.

The underlying complaint alleges that on June 20, 2005 the plaintiff lent the corporate defendant the sum of $3,187,000 the repayment of which sum was secured by a mortgage on the subject premises. On the same date, the defendant Mazzeo executed a guarantee for the repayment of the note. The note became due on January 31, 2009 and allegedly the defendants

defaulted in the repayment of the note. The instant action ensued.

The answer of the defendants contained certain admissions as to the execution of documents, but otherwise denied the material allegations of the complaint. The answer also contains the affirmative defenses of laches, fraud, equitable estoppel, waiver, unjust enrichment, and unconscionability, and lack of personal jurisdiction. No specificity accompanied any of these defenses.

In the moving papers the plaintiff submits proof negating each affirmative defense. The plaintiff has submitted proof of service on the various defendants in March of 2009. Both of the responding defendants submitted timely answers. As to the remaining affirmative defenses, the defense of laches, waiver, unjust enrichment, and unconscionability are without merit in the context of a complex real estate development in which Mr. Mazzeo was a sophisticated businessman represented by counsel. The documentary proof also negates such issues. The plaintiff's proof also negates the defenses of fraud and equitable estoppel as the proof shows that the loan was a commercial loan for the purchase of realty. The underlying development of the land purchased never bore fruit.

Significantly, the opposing papers are silent as to the defenses of lack of personal service, laches, waiver or unconscionability. In fact, the focus of the opposing papers appears to set forth a scenario for the imposition of the defense of equitable estoppel based on the defendants' assertion that the bank was aware that the loan was but a piece in the larger development of the property and that the bank knew that further credit had to be advanced for the project to move forward. The defendants state that oral representations were made by various bank officials that such funding would be forthcoming and/or that the loan would be extended beyond its termination date. The defendants also claims that the bank changed its commitment representation at the last minute requiring the defendants to pay an origination fee to the bank and a brokers fee to a person who was alleged to be a relative of a bank official. Another term of the loan it is alleged was modified prior to closing was the requirement that the parties were to establish an interest reserve for this loan (of $75,000) from the loan proceeds and that the plaintiff failed to properly account for this reserve and converted said funds to its use.

In reply, the plaintiff offers proof by submission of documentary evidence that shows that when the loan was not in default quarterly statements were sent to defendants as to the interest reserve account. Only after the defendants' default did the plaintiff, as authorized by agreements of the parties, apply the balance in the interest reserve to the sums due the plaintiff. These documents also refute any suggestion that interest on the reserve account were not paid. More significantly, the express language in the various documents indicate that no oral representations were made or relied upon in executing any of the operative documents. The documents also include a clause that the broker of record was the individual who received the broker's fee.

On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v. King, 10 A.D.3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 N.Y.3d 627 (2005), *citing* Alvarez v. Prospect Hosp., 68

N.Y.2d 320, 324 (1986); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v. King, supra, at p.74; Alvarez v. Prospect Hosp., supra; Winegrad v. New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v. Prospect Hosp., supra, at p. 324. In the instant case, the plaintiff has met its *prima facie* case.

The burden then shifts to the defendant to demonstrate that there is an issue of fact either as to the assertions of the plaintiff or as to the viability of its affirmative defenses. Alvarez v. Prospect Hosp., supra. The parol evidence offered by defendant in opposition to the plaintiff's proof which established the contract in question, may not be offered to vary the terms thereof (e.g. the extension of the loan obligations). See, Can-Am Development Corp. v. Meldor Development Corp., 214 A.D.2d 695, 625 N.Y.S.2d 600. Moreover, such proof is inadequate to create an issue of fact as to the equitable defenses interposed by defendant. In order to establish the defense of equitable estoppel, the defendants must plead and prove that the plaintiff made a false representation as to a material fact, inducing the defendants in reliance thereon to take action to their detriment. See, Fundamental Portfolio Advisors Inc. v. Toqueville Asset Management L.P., 7 N.Y.3d 96, 817 N.Y.S.2d 606. The doctrine is one founded in the principle that there should be fair dealings between parties to a contract or where to hold otherwise would work a great injustice to the party victimized by fraudulent conduct. Lynn v. Lynn, 302 N.Y. 193. Where, as here, there is an absence of admissible evidence that the defendants were misled by the plaintiff's conduct or justifiably relied on the conduct to their disadvantage, equitable estoppel will not lie. See, Rose v. Spa Realty Assoc., 42 N.Y.2d 338, 397 N.Y.S.2d 992; Springside Land Co. LLC v. Board of Managers of Springside Condominiums, 56 N.Y.S.2d 654, 869 N.Y.S.2d 101. Here, the very documents in question contain language that only the facts set forth in the documents were the facts upon which the parties relied. Moreover, there is no question that the defendant are not even able to argue that they could obtain more favorable terms elsewhere or would not have borrowed the money if they had known what they now claim to be the true state of facts.

The record herein demonstrates that the defendants (experienced real estate developers) purchased real property with the vision that they would be able to get a substantial variance. When such a variance was not obtained and a second less extensive variance was also denied they were not able to quickly achieve the necessary cash flow to sustain their obligations in a timely fashion. Other then the defendant Mazzeo's statement that the defendants resolved to develop the site "as of right" (allegedly for six town houses) there is no proof demonstrating that but for the alleged conduct of the plaintiff they were prevented from doing so. In this regard there is not a scintilla of admissible evidence that the plaintiff issued the loan for purchase of the realty with any obligation to fund the future development of the project. The only proof submitted was that the plaintiff was afforded a first right of refusal to provide such funding if and when the defendant were prepared to go forward with the project. (See, defendants' ex. O). Curiously, defendants papers are devoid of any proof that they made any effort to comply with the obligations set forth in this exhibit. In any event, nothing in that letter obligates the plaintiff to provide additional financing. In view of these circumstances, the plaintiff's motion for summary

judgment is granted.

The plaintiff is given leave to settle an order of reference within 60 days of the date hereof. The failure to do so may be deemed an abandonment of the relief sought herein.

Settle Order.

A.J.S.C.

Dated: August 11, 2009