Upstate Natl. Bank v Steuben Place Partners, LP
2009 NY Slip Op 32057(U)
September 11, 2009
Supreme Court, New York County
Docket Number: 1161-09
Judge: Joseph C. Teresi
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.

[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE UPSTATE NATIONAL BANK,

Plaintiff,

-against-

STEUBEN PLACE PARTNERS, LP, HERBERT S. ELLIS, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, CONFERENCE OF BIG 5 SCHOOL DISTRICT, STEUBEN ATHLETIC CLUB, and "JOHN DOE" AND "JANE DOE",

Defendants.

DECISION and ORDER
RJI NO.: 01-09-097005
INDEX NO.: 1161-09

Albany County Supreme Court All Purpose Term, August 21, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:

McConville, Considine, Cooman & Morin, PC
Lucien A. Morin, Esq.
Attorneys for Plaintiff
25 East Main Street
Rochester, New York 14614

Hacker & Murphy, LLP
Thomas D. Buchanan, Esq.
Attorneys for Defendant Herbert S. Ellis & Steuben Place Partners, LP
7 Airport Park Boulevard
Latham, New York 12110

TERESI, J.:

The Upstate National Bank (hereinafter "Plaintiff") commenced this action to foreclose the Note and Mortgage it holds on property owned by Steuben Place Partners, LP (hereinafter "Steuben") and for judgment against Herbert S. Ellis (hereinafter "Ellis") on his guarantee of

Steuben's indebtedness. Issue was joined by Steuben and Ellis[1], and discovery is ongoing. Plaintiff now moves for summary judgment, which Steuben and Ellis both oppose. Because Plaintiff demonstrated its entitlement to judgment against Steuben, and no issue of fact was raised, its motion for summary judgment against Steuben is granted. However, because Plaintiff failed to demonstrate its entitlement to judgment as a matter of law against Ellis, that portion of its motion is denied.

"[S]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869 [3d Dept. 1996]).

On a motion for summary judgment, the movant must "make a prima facie showing of entitlement to judgment as a matter of law." (Ferluckaj v. Goldman Sachs & Co., 12 NY3d 316 [2009] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). "It... is incumbent upon the proponent to tender sufficient evidentiary proof in admissible form to warrant a judgment in its favor." (Salas v. Town of Lake Luzerne, 265 AD2d 770 [3d Dept. 1999]; see CPLR §3212[b] [stating that a summary judgment motion "shall be supported by affidavit, [which] shall be by a person having knowledge of the facts..."]). Only if the movant establishes their right to judgment as a matter of law, will the burden then shift to the opponent of the motion to establish the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

"Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both

---

[1]The remaining named defendants hold some interest or lien on the mortgaged property, and have each filed notices of appearance.

competent and admissible evidence, any defense which could raise a question of fact." (HSBC Bank USA v. Merrill, 37 AD3d 899, 900 [3d Dept. 2007]; United Cos. Lending Corp. v. Hingos, 283 AD2d 764 [3d Dept.2001]; Charter One Bank, FSB v. Leone, 45 AD3d 958 [3d Dept. 2007]).

Considering Plaintiff's motion for summary judgment against Steuben, Plaintiff properly submitted both the note and mortgage being foreclosed. Plaintiff attached, to its motion, the initial Note and Mortgage, both dated November 4, 1992, and the Assignment, dated September 28, 1999, of such Note and Mortgage to Plaintiff. Plaintiff also submitted an Increased Note and Increased Mortgage, both dated October 15, 1999. Additionally, attached to Plaintiff's motion are the October 15, 1999 Consolidated Note and Consolidated Mortgage, which consolidate the above two stated notes and mortgages. Each document was duly attached to Plaintiff's moving papers, and no objection was made to their submission.

Plaintiff also duly demonstrated Steuben's default. Plaintiff submits the affidavit of its Vice President, who alleges personal knowledge of this transaction. He alleges Steuben's default first occurred on February 1, 2008, by its failure to make its monthly payment. On May 5, 2008, Steuben and Plaintiff entered into a Forbearance Agreement, due to such February 1, 2008 default. Steuben then, according to Plaintiff, defaulted on the Forbearance Agreement. Steuben does not deny either of the alleged defaults. As such, Plaintiff duly demonstrated its entitlement to judgment as a matter of law, shifting the burden of proof on this motion to Steuben.

In opposition, Steuben failed to raise an issue of fact. Specifically relevant to this portion of Plaintiff's motion, Steuben claims that the Plaintiff's representatives told it that the foreclosure notices were served only to "satisfy bank regulatory requirements and not to worry

about them". Such allegation fails to demonstrate that Plaintiff specifically waived its right to foreclosure and is unsupported by any documentary evidence. Additionally, the Consolidated Note, Consolidated Mortgage and Forbearance Agreement each include provisions precluding oral modification. Thus, Steuben's implied allegation that Plaintiff orally agreed not to enforce the Consolidated Note or Mortgage's provisions is unenforceable as violative of the Statute of Frauds. (General Obligations Law §5-703, Sleeth v. Sampson, 237 NY 69 [1923]). Nor, on this record, has Steuben demonstrated that an exception to the Statute of Frauds "such as an admission by the other party to the essential terms and actual existence of the oral contract or waiver or estoppel" applies. (Fleet Bank v. Pine Knoll Corporation, 290 AD2d 792, 795 [3d Dept. 2002]).

While Steuben also objects to Plaintiff's motion for summary judgment as "premature" because discovery is not complete, it "failed to demonstrate that further discovery could be expected to yield material and relevant evidence raising triable material issues of fact". (Judd v. Vilardo, 57 AD3d 1127, 1131 [3d Dept. 2008]). Plaintiff's "mere hope" of uncovering additional evidence is insufficient to defeat Plaintiff's summary judgment motion pursuant to CPLR §3212(f). (Merchant v. Greyhound Bus Lines, Inc., 45 AD3d 745 [2d Dept. 2007]; Neryaev v. Solon, 6 AD3d 510 [2d Dept. 2004]).

Accordingly, Plaintiff's motion for summary judgment of its claim against Steuben is granted.

Turning next to Plaintiff's motion for summary judgment against Ellis, Plaintiff failed to demonstrate its entitlement to judgment on Ellis' Guarantee of Steuben's indebtedness. As set forth above, Plaintiff duly demonstrated the existence of its note and mortgage with Steuben, and

Steuben's default of its obligations thereunder. Plaintiff also demonstrated that Ellis entered into a Guarantee with it on October 15, 1999. The Guarantee provides that Ellis "unconditionally guarantees to [Plaintiff] the payment when due, by acceleration or otherwise, of all indebtedness... of [Steuben to Plaintiff]... at any time due and owing from [Steuben to Plaintiff]". Ellis' guarantee further provides that "[n]otwithstanding the foregoing, the obligations of [Ellis] hereunder are limited to the aggregate maximum amount of $500,000.00 expressly conditioned upon: (i) payment in cash in full of obligations hereunder within fifteen days after notice from the Bank that such obligations are due, and (ii) cooperation by [Ellis] as requested by [Plaintiff] in causing [Plaintiff] to be able to immediately realize upon its collateral for [Steuben's] Indebtedness including without limitation causing the delivery, at the request of [Plaintiff], (at the time of payment of this Guaranty) of a deed in lieu of foreclosure and absolute assignment of rents and leases."

The Guarantee, in the first instance, unambiguously obligates Ellis to pay Steuben's indebtedness "unconditionally". Such unconditional language is then limited by the Guarantee's later clause which limits Ellis' liability to $500,000. The limitation on Ellis' obligation is "expressly conditioned upon" Ellis' payment of the "obligations hereunder within fifteen days after notice." While the phrase "obligations hereunder" is not specifically defined, given the "ordinary meaning" of the sentence as a whole, "obligations hereunder" plainly refers to the Guarantee's $500,000 limit. (Crisafulli Brothers, Inc. v. Kilmartin, 100 AD2d 678, 679 [3d Dept. 1984]). As such, Ellis is not required to pay Plaintiff the $500,000 "obligation" until he has been given notice of his obligation to pay. Ellis then has fifteen days, from the date of the notice, within which he must pay Plaintiff $500,000. Thus, Ellis' obligation to pay plaintiff under the

Guarantee arises only upon plaintiff notifying Ellis that his "obligations are due".

On this record, Plaintiff failed to demonstrate that it provided Ellis with "notice" that his obligation to pay $500,000 was due. Plaintiff's purported "notice" does not mention the $500,000 obligation, does not request payment within fifteen days and is not addressed to Ellis (it was sent to Steuben with Ellis noted as Steuben's "General Partner"). Moreover, the "notice" does not reference Ellis' Guarantee. Rather, the "notice" focuses solely on Steuben's default of the Forbearance Agreement. It outlines Steuben's default and directs Steuben to make a specific monetary payment by a specified date. The "notice" cautions that if payment is not made in accord with the demand, then Plaintiff will "consider all of its rights and remedies under the Note..." At no point does the "notice" explicitly demand payment, but rather only states that Plaintiff will "consider" its rights. As such, Plaintiff has not demonstrated its entitlement to judgment as a matter of law because it did not demonstrate that it provided Ellis with the requisite "notice".

Accordingly, Plaintiff's motion for summary judgment of its claim against Ellis is denied.

Finally, Plaintiff seeks attorney's fees but fails to support such motion with any description of the services rendered, the hourly fee charged or the reasonableness of such fee. Accordingly, Plaintiff has failed to demonstrate its entitlement to attorney's fees, and its motion in that respect is denied.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

[* 7]

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: September 11, 2009
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated July 16, 2009; Affidavit of Bruce Rumbold, dated June 4, 2009, with attached Exhibit A; Affidavit of Lucien Morin, dated June 8, 2009, with attached Exhibits A-C.
2. Affirmation of Thomas Buchanan,, dated August 14, 2009, Affidavit of Herbert Ellis, dated August 14, 2009, with attached Exhibits A-O.
3. Affidavit of Shannon Slavin, dated August 18, 2009.