

<b>54, LLC v East 128th St., LLC</b>
2009 NY Slip Op 33113(U)
December 21, 2009
Supreme Court, New York County
Docket Number: 116084/08
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**IA PART 16**  
PART \_\_\_\_\_

PRESENT: ALICE SCHLESINGER

Index Number : 116084/2008
<b>54, LLC</b>
VS.
<b>EAST 128TH STREET</b>
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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 decided in accordance with the accompanying memorandum decision.*

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

Dated: DEC 21 2009  
*12/21/09*

*Alice Schlesinger*  
**ALICE SCHLESINGER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 16

-----X  
54, LLC

Plaintiff,

Index No. 116084/08

- against -

Motion Seq. Nos. 001 & 002

EAST 128<sup>TH</sup> STREET, LLC and CAROLE RICHARDS,  
et al.,

Defendants.  
-----X

**SCHLESINGER, J:**

Plaintiff 54, LLC, a commercial lender is moving for summary judgment in its favor in this foreclosure action. Consistent with this relief, they are also moving to strike the defendants' answer, with its affirmative defenses and counterclaim. Finally, they are asking the Court to appoint a referee to compute the amount due.

In support of the motion is an affidavit from Michael Goldberg, Managing Member of 54, LLC. He is also the individual who signed the verification for the complaint. The affidavit references the pertinent documents, all of which refer to the premises 2077 Fifth Avenue, 2079 Fifth Avenue and 1 East 128<sup>th</sup> Street, New York City.

The mortgage which is being foreclosed upon was executed by defendant East 128<sup>th</sup> Street by its sole and managing member Carole Richards. It is in the principal sum of \$8,500,000 plus interest at the rate of 15% per annum from March 5, 2008 to April 4, 2008 and thereafter at a default rate of 24.00% per annum.

The action was commenced by filing the complaint with the County Clerk on or about December 2, 2008. Before that, on November 6, 2008, a letter was sent to

defendants giving notice that they were in default as of April 5, 2008 and demanding total payment of the amount then due and owing of \$9,780,564.80.

The defendant's principal Carole Richards is a licensed architect. It was her plan to build a twelve unit condominium, and she needed financing for all aspects of this project. Plaintiff provided two payments to defendant in exchange for notes covering each mortgage. The first loan was in the amount of \$1,975,000.00 and this note and mortgage was executed on May 31, 2006. On December 5, 2006, an additional loan in the amount of \$6,525,000.00 was made, also secured by a note and mortgage. On this same date, defendant executed an amended promissory note combining both preceding loans, and here the mortgagor agreed to pay the aggregate sum of \$8,500,000 with interest initially set at a rate of 15%. A provision on the note allowed the lender to call for the payment of the principal amount plus interest whenever a default occurred. Defendant asserts in paragraphs #15 and 16 of the Answer, as well as its counterclaim and in an affidavit from Ms. Richards, that plaintiff is not entitled to the relief it seeks because the lender deceived her by promising to provide follow-up refinancing loans to support the debt and conclude the project but failed to do that. Thus, defendant alleges that 54, LLC comes to court with "unclean hands."

Specifically, in an affidavit from Carole Richards dated May 11, 2009, she asserts that she "relied on one or more statements made by plaintiff through its agent that refinancing would be available to restructure plaintiff's debt approximately four to six months after the start of construction." She says further that she "understood these statements to mean that plaintiff itself would refinance the loan once the construction was underway for approximately four to six months". She said this "made sense" to her

because the plaintiff "could reduce its interest once the project" got started. She states that she relied on these statements "by plaintiff through its agent" and accepted the construction financing.

Finally, she says "in the absence of the statements regarding refinancing, I would not have signed the note and mortgage and proceeded with construction because I understood that the building economics could not support the interest rate in the plaintiff's \$8.5 million mortgage and note." In conclusion, Ms. Richards describe the hardships she would suffer in the event of foreclosure, including the loss of the residence wherein she resides, a triplex on the premises.

Mr. Goldberg, in paragraph (h) in his affidavit in support of the motion, states "I can affirmatively state neither I nor any member of the Plaintiff had committed to refinance the loan."

It should be noted that defendant never disputes the loan itself, its amount, or the fact of the default. She exclusively relies on the above-described affirmative defense and counterclaim. She and her counsel believe this claim is sufficient to create issues of fact and permit forthcoming discovery and to defeat summary judgment. But I disagree.

First of all, the documents are all in order. They say nothing of a further loan. And parole evidence, unless actual fraud is asserted, is insufficient to alter the written promises given on a note and mortgage.

Second, fraud is not stated here. At best, Ms. Richards insists that someone associated with plaintiff committed itself to give more money at a later stage. Promises of future conduct have no legal effect.

Third, Ms. Richards' affidavit gives no details whatsoever. She speaks about plaintiff or an agent but names no one. Nor are any specific dates given as to when these promises were made. As pointed out by counsel for the plaintiff, Ms. Richards was a professional embarking on a multimillion dollar project, one that required substantial financing. Unlike the unwary residential borrowers, who appeared to have been exploited by unscrupulous lenders in the cases cited by her counsel such as *M & T Mortgage Corp. v. Foy*, 20 Misc3d 274, 2008 (Sup. Ct., Kings Co.), Ms. Richards was an architect who planned or devised a major commercial venture.

Fourth, as to her reliance on this alleged commitment, there is no duress asserted by the defense. Ms. Richards arguably was free to seek out refinancing from others.

Therefore, I believe the opposition fails in creating any issues of fact in the face of the mortgage documents and in the face of the loans being made and not repaid. The motion for summary judgment is granted, and the answer and counterclaim is stricken, and this Court will appoint a referee. However, the motion to appoint a receiver is denied, as I believe plaintiff has failed to prove its entitlement to the latter. This constitutes the decision and order of this Court. Plaintiff shall settle an order on notice by Submission to Room 119.

Dated: December 21, 2009

**DEC 21 2009**

  
\_\_\_\_\_  
J.S.C.  
**ALICE SCHLESINGER**