

Leviton v East Atl. Prop., LLC
2009 NY Slip Op 33182(U)
December 21, 2009
Supreme Court, Nassau County
Docket Number: 003430-09
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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MARTHA LEVITON,

Plaintiff,

-against-

**TRIAL/IAS PART: 25
NASSAU COUNTY**

**Index No: 003430-09
Motion Seq. No: 1
Submission Date: 11/16/09**

**EAST ATLANTIC PROPERTIES, LLC and
"JOHN DOE #1" through "JOHN DOE #12," the
last twelve names being fictitious and unknown to
plaintiff, the persons or parties intended being the
tenants, occupants, persons or corporations, if any,
having or claiming an interest in or lien upon the
premises, described in the complaint,**

Defendants.

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Papers Read on this Motion:

- Notice of Motion, Affirmation in Support,**
- Affidavit in Support and Exhibits.....X**
- Affidavit in Opposition and Exhibits.....X**
- Reply Affirmation and Exhibits.....X**

This matter is before the court on the motion by Plaintiff Martha Leviton ("Leviton" or "Plaintiff"), filed on May 13, 2009 and submitted November 16, 2009. For the reasons set forth below, the Court grants the motion, and directs that a trial will be conducted before a Special Referee to determine 1) the amount that Defendant owes Plaintiff, pursuant to the mortgage documents, in principal and interest, 2) the amount of attorney's fees that Defendant owes Plaintiff, pursuant to the mortgage documents, to compensate Plaintiff for counsel fees it has incurred in pursuing this action, and 3) whether the premises in question can be sold in parcels.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order 1) pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the counterclaim of Defendant East Atlantic Properties (“East Atlantic” or “Defendant”); 2) pursuant to CPLR § 3212, granting summary judgment to Plaintiff; and 3) granting Plaintiff an award of attorney’s fees pursuant to the terms of the mortgage. East Atlantic opposes Plaintiff’s motion.

B. The Parties’ History

Plaintiff commenced this foreclosure action as the assignee¹ of a mortgage between Defendant East Atlantic, the mortgagor, and Macleben Company, LLC (“Macleben”), the mortgagee (“Mortgage”). Defendant affirms that Theodore Leviton, Plaintiff’s husband, manages Macleben. The Mortgage served as security for a loan to East Atlantic in the sum of \$190,250, which was the subject of a mortgage note (“Note”) executed by East Atlantic which provided that East Atlantic would make monthly payments in the amount of \$2,410.01. East Atlantic executed the Mortgage, as collateral security for the payment of the Note, with respect to premises known as 538 West Walnut Street, Long Beach, New York (“Premises”). Plaintiff alleges that East Atlantic defaulted under the terms of the Mortgage and Note by failing to make the monthly installment payment of \$2,410.10 beginning January, 2008, or subsequent payments, despite Plaintiff’s due demand. Additionally, Plaintiff alleges that East Atlantic violated the terms of the Mortgage by failing to provide proof of insurance coverage naming Plaintiff as additional insured, as required by paragraphs 2 and 10 of the Mortgage.

In response to Plaintiff’s September 17, 2008 Default Notice demanding payment in the amount of \$21,690.09, representing nine outstanding loan installments plus accrued interest, and the Notice of Acceleration dated October 10, 2008, East Atlantic attempted, on December 16, 2008, to tender payment in the amount of \$16,870, which East Atlantic contends represented full satisfaction of the amount it owes under the Mortgage and Note. Specifically, in a letter dated December 16, 2008 (Ex. G to P’s Mot.), East Atlantic’s counsel advised Plaintiff’s counsel that East Atlantic disputed Plaintiff’s claim that East Atlantic owed \$32,103.36, and asserted that

¹ By assignment dated June 19, 2000, the MacLeben Company, Plaintiff’s predecessor, assigned the Note and Mortgage dated October 13, 1998 to Plaintiff. The assignment was recorded in the office of the Nassau County Clerk on June 23, 2000.

East Atlantic owed only \$16,870.07. Counsel for East Atlantic tendered payment of \$16,870.07, in the form of a check payable to Plaintiff, delivered to counsel for Plaintiff in escrow (underlining in original). East Atlantic's counsel advised Plaintiff's counsel, further, that the terms of the tender required East Atlantic's attorney to retain the check in escrow. Upon East Atlantic's receipt of a satisfaction of the Mortgage, as well as the original Note and Mortgage marked "paid," he would authorize release of the check to Plaintiff.

By letter dated March 4, 2009, Plaintiff rejected that tender. In that letter (Ex. H to P's Mot.), Plaintiff's counsel advised East Atlantic's attorney that 1) he was returning East Atlantic's check because Plaintiff "rejects [East Atlantic's] attempt to satisfy the mortgage obligation for less than is owed[;]" and 2) although Plaintiff would be willing to review her records, East Atlantic's "outright refusal to document the alleged discrepancies leaves [Plaintiff] with no alternative but to accept her records, which she believes to be complete and accurate." This litigation ensued.

In opposition to Plaintiff's motion, Defendant provides an Affidavit of Scott Unger ("Unger"), a managing Member of East Atlantic. Unger submits that there are questions of fact that make summary judgment inappropriate. Unger refers to correspondence between counsel for Plaintiff and counsel for East Atlantic, including the letters referred to *supra*, and suggests that this documentation raises factual issues as to whether East Atlantic is in default. He also disputes Unger's calculation of interest in reaching the sum that she demanded of East Atlantic. Unger also submits that there is an issue of fact with respect to his counterclaim alleging that Plaintiff charged a usurious rate on the loan. Notably, Unger does not affirm that East Atlantic, in fact, made the payments for which Plaintiff now seeks judgment, or provide documentary proof establishing that East Atlantic made any of those payments.

In its Reply Affidavit, Plaintiff submits that the documentation that Unger provides in support of East Atlantic's opposition, with the exception of the correspondence that Plaintiff herself provided in support of her motion, is irrelevant. Plaintiff argues that East Atlantic has made "vague allegations that it has not defaulted since 2000 and appears to be of the impression that this Court will sift [through] these documents and miraculously find something on its own that will forestall this proceeding" (Reply Aff. at ¶ 3). Plaintiff also submits that, after she declared East Atlantic in default and accelerated the loan pursuant to the terms of the relevant

agreements, she was not obligated to accept East Atlantic's tender of less than the full payment owed. Plaintiff also submits that Defendant's claims of usury, or miscalculation of the interest owed, are baseless because a mortgage may impose a rate of interest in excess of the statutory maximum after default.

With respect to Plaintiff's application for counsel fees, the Rider to the Mortgage provides, *inter alia*:

In the event counsel is employed to foreclose this mortgage or to collect the debt, or to defend the lien, the mortgagor hereby agrees to pay a sum equal to fifteen percent (15%) of the unpaid balance secured by this mortgage, but not less than the sum of \$750.00, as and for legal fees.

C. The Parties' Positions

Plaintiff submits that she is entitled to summary judgment because she has submitted proof of the existence of the Note, Mortgage and Assignment, as well as the Defendant's default in payment. Plaintiff submits, further, that Defendant is in default of the Mortgage because he failed to provide evidence of insurance coverage naming the Plaintiff as an additional insured, as required by the terms of the Mortgage. Plaintiff also requests counsel fees, pursuant to the applicable provisions in the Mortgage Rider. Plaintiff submits that the Court should dismiss Defendant's counterclaim alleging that Plaintiff charged a usurious rate on the loan. Plaintiff contends that the defense of usury is inapplicable to the imposition of an interest rate in excess of the statutory maximum after default, as is the case here.

Defendant opposes Plaintiff's motion submitting, *inter alia*, that 1) Plaintiff has miscalculated the interest rate; and 2) Plaintiff charged a usurious interest rate.

RULING OF THE COURT

A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

In addition, it is well settled that a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the

5] factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). However, on such a motion, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Standard for Summary Judgment

The party seeking summary judgment must establish an entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). If the party moving for summary judgment fails to establish a *prima facie* entitlement to judgment as a matter of law, the motion must be denied. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985); *Widmaier v. Master Products, Mfg.*, 9 A.D.3d 362 (2d Dept. 2004); and *Ron v. New York City Housing Auth.*, 262 A.D.2d 76 (1st Dept. 1999). CPLR § 3212(b) further requires that, in ruling on a motion for summary judgment, the court must determine if the movant's papers justify holding as a matter of law "that there is no defense to the cause of action or that the cause of action has no merit." In making this determination, the Court must view the evidence submitted by the moving party in a light most favorable to the non-movant. *Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dept. 1990). The Court may only grant summary judgment when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 (1979).

A plaintiff establishes its entitlement to summary judgment in a mortgage foreclosure action by submitting proof of the existence of the mortgage and the unpaid note, assignment of the mortgage and evidence of default. *Wells Fargo Bank, N.A. v. Webster*, 61 A.D.3d 856 (2d Dept. 2009); *Charter One Bank, FSB v. Leone*, 45 A.D.3d 958 (3d Dept. 2007); *Daniel Perla Associates, LP v. 101 Kent Associates, Inc.*, 40 A.D.3d 677 (2d Dept. 2007); *Ocwen Federal Bank FSB v. Miller*, 18 A.D.3d 527 (2d Dept. 2005), *lv. app. dism.* 5 N.Y.3d 824 (2005); *Coppa*

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v. *Fabozzi*, 5 A.D.3d 718 (2d Dept. 2004). Where, as here, the plaintiff has sustained its burden, the defendant must demonstrate, by admissible evidence, the existence of a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud or oppressive or unconscionable conduct on plaintiff's part, to defeat summary judgment.. *EBC Amro Asset Management Ltd. v. Kaiser*, 256 A.D.2d 161, 162 (1st Dept. 1998).

C. Plaintiff Has Established her Right to Summary Judgment

The Court concludes that Plaintiff has established her *prima facie* entitlement to summary judgment. The Court concludes, further, that Defendant has failed to demonstrate the existence of any genuine issues of fact in support of its claimed defenses that 1) there were no payment defaults in 2008, or at any time prior to the acceleration of the Mortgage; and 2) the mortgaged property was, in fact, covered by insurance at all relevant times.

A valid tender of payment requires an actual proffer of all mortgage arrears. *EMC Mortg. Corp. v. Stewart*, 2 A.D.3d 772, 773 (2d Dept. 2003); *First Federal Sav. Bank v. Midura*, 264 A.D.2d 407 (2d Dept. 1999). Such a tender, however, will cure a default only prior to a notice of acceleration. *Dime Sav. Bank of New York v. Glavey*, 214 A.D.2d 419 (1st Dept. 1995), *lv. app. den.* 87 N.Y.2d 802 (1995); *cert. den.* 517 U.S. 1221 (1996), *reh. den.* 518 U.S. 1046 (1996). When a default in loan payments occurs, even if only for one day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings and equity will not intervene. *New York Guardian Mortgage Corp. v. Olexa*, 176 A.D.2d 399, 401 (3d Dept. 1991); *Home Savings of America, FSB v. Isaacson*, 240 A.D.2d 633 (2d Dept. 1997). Once a default has been declared, and a loan has been accelerated, a mortgagee is not required to accept a tender of less than full repayment as demanded. *EMC Mortg. Corp. v Stewart*, 2 A.D.3d at 773. As a general rule, a tender must include everything to which the creditor is entitled, including interest to the time the tender is made, to be legally effective. *Home Savings of America, FSB v. Isaacson, supra* at 633.

Under these circumstances, in which East Atlantic's tender was untimely and insufficient to cover the arrears claimed, Plaintiff properly refused the tender. Thus, East Atlantic's defense of tender of payment is devoid of merit. Moreover, East Atlantic has provided no proof of the required insurance coverage. The court, in determining whether to grant summary judgment, must draw all reasonable inferences in favor of the non-moving party, and should not pass on

issues of credibility, *Torres v. Jeremias*, 283 A.D.2d 484 (2d Dept. 2001). Applying these principles to the matter *sub judice*, the Court concludes that East Atlantic has failed to raise a triable issue of fact sufficient to defeat Plaintiff's motion for summary judgment. The mere hope that further discovery will yield evidence of a triable issue of fact is not a basis for denying summary judgment, *JPMorgan Chase Bank, N.A. v Aqnello*, 62 A.D.3d 662, 663 (2d Dept. 2009), and the Court determines that summary judgment is appropriate at this time.

In light of East Atlantic's failure to raise an issue of fact as to its default, the Court concludes that Plaintiff is entitled to summary judgment on the Complaint.

D. Defendant's Counterclaim Cannot be Sustained

The Court also concludes that Defendant's counterclaim alleging usury lacks merit and cannot be sustained. It is well established that the defense of usury does not apply where the mortgage and note impose a rate of interest in excess of the statutory maximum only after default or maturity. *Urban Communicators PCS Ltd. Partnership v. Gabriel Capital, L.P.*, 394 B.R. 325, 341 (S.D.N.Y. 2008); *Bristol Inv. Fund, Inc. v. Carnegie Intern. Corp.*, 310 F. Supp.2d 556, 562 (S.D.N.Y. 2003); *Miller Planning Corp. with Delta Funding Corp. v. Wells*, 253 A.D.2d 859, 860 (2d Dept. 1998); *Hicki v. Choice Capital Corp.*, 264 A.D.2d 710, 711 (2d Dept. 1999). Accordingly, the Court dismisses the Counterclaim.

E. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorney's fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. See *Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided

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with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996). In light of the counsel fee provision in the Mortgage Rider, the Court grants Plaintiff's application for counsel fees. See *Emigrant Savings Bank v Bristol*, 282 A.D.2d 497, 498 (2d Dept. 2001) (reversed lower court's denial of plaintiff's request for legal fees and disbursements where mortgage provided for recovery of those expenses after default). The Court, however, cannot determine the amount of those fees on the record before it, and accordingly refers the determination of that issue to the Special Referee.

F. Conclusion

The Court grants Plaintiff's motion for summary judgment, and for dismissal of the Counterclaim, and refers the matter to Special Referee Referee N. Schellace to determine 1) the amount that Defendant owes Plaintiff, pursuant to the mortgage documents, in principal and interest, 2) the amount of attorney's fees that Defendant owes Plaintiff, pursuant to the mortgage documents, to compensate Plaintiff for counsel fees it has incurred in pursuing this action, and 3) whether the premises in question can be sold in parcels. In light of the foregoing, it is hereby

ORDERED, that Plaintiff's Motion for Summary Judgment is granted; and it is further

ORDERED, that Plaintiff's Motion to dismiss the Counterclaim of Defendant East Atlantic Properties, LLC is granted; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank N. Schellace on January 28, 2010 at 9:30 a.m. to hear and determine all issues relating to principal, interest, counsel fees and other costs, if appropriate, and to determine whether the premises in question can be sold in parcels; and it is further

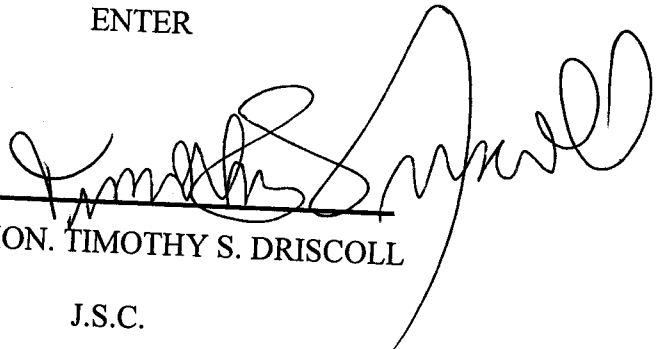
ORDERED, that counsel for Plaintiff file a Note of Issue and pay the appropriate filing fees on or before January 14, 2010; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against the Defendant in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.
This constitutes the decision and order of the Court.

DATED: Mineola, NY
December 21, 2009

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

DEC 28 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE