Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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USA BANK,

Plaintiff,

Index No.: 12581/08
Motion Date: 7/29/09
10/28/09
Motion Cal. No.: 25, 37
Motion Seq. No.: 4, 5

-against-

MAURIZIO CARUSONE a/k/a Maurizo Carusone a/k/a Mario Carusone, and JOHN DOE,

Defendants.

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The following papers numbered 1 to 20 read on this motion by plaintiff USA Bank for an order: (1) pursuant to CPLR Rule 3211(b), dismissing defendant Maurizio Carusone's, first, second, third and fourth affirmative defenses as set forth in defendant's Verified Answer with Counterclaims on the ground that said affirmative defenses have no merit; or, alternatively, (2) pursuant to CPLR Section 603 and CPLR Rule 3212(e), severing defendant's first and second counterclaims (also designated as defendant's third and fourth affirmative defenses) as set forth in defendant's Verified Answer with Counterclaims; (3) pursuant to CPLR Rule 3212, granting summary judgment in favor of plaintiff to foreclose the mortgage on the subject premises described in the Complaint and Notice of Pendency; and (4) pursuant to RPAPL Section 1321, for an Order of Reference appointing a referee to compute the amount due to plaintiff under the mortgage being foreclosed in this action [Motion Cal. No. 25]; and on this motion by Gary M. Darche, Esq., directing defendants to turn over all security deposits to the receiver; and permitting the receiver to employ a managing agent for the property [Motion Cal. No. 37].

	PAPERS NUMBERED
Order to Show Cause-Affidavits--Exhibits.....	1 - 6
Affirmation in Opposition-Exhibits.....	7 - 10
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Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is a commercial foreclosure action to foreclose on a mortgage acknowledged and delivered by defendant Maurizio Carusone ("defendant") to Delta Funding Corporation on June 4, 2002,on an apartment building located at 33-53 Vernon Boulevard, Long Island City, New York, to secure the payment of $266,000.00. Subsequently, on December 5, 2002, the mortgage was assigned to Wells Fargo Bank, and thereafter, on April 26, 2006, to plaintiff USA Bank ("plaintiff"). Defendant thereafter executed a second mortgage, a gap mortgage, with plaintiff on July 24, 2006, in the amount of $70,302.51, which, on that same date was consolidated with the first mortgage, resulting in one lien in the amount of $331,500.00, to be repaid in monthly payments of $2,533.00, beginning on September 1, 2006, with a "balloon payment" due on August 1, 2001. Upon defendant's default in making his monthly mortgage payment on October 1, 2007, and each month thereafter, plaintiff, on May 13, 2008, commenced the instant action. Upon defendant's default in answering, this Court, on September 12, 2008, signed an Order of Reference, which was entered September 17, 2008. Defendant thereafter moved for an order vacating the Order of Reference granted on September 12, 2008, and dismissing the Summons and Complaint or, in the alternative, vacating the Order of Reference and granting leave to defendant to file and serve a Verified Complaint. On the March 11, 2009 return date of the motion, the parties entered into a stipulation pursuant to which plaintiff consented to vacating defendant's default in answering the complaint, and agreed to accept defendant's answer with counterclaims; the Order of Reference was vacated by order of this Court dated May 4, 2009. Plaintiff now moves for an order dismissing defendant's first (unclean hands), second ("equitable estoppel"), third ("fraudulent inducement") and fourth (failure to disclose) affirmative defenses on the ground that they have no merit; or, alternatively, severing defendant's first ("fraudulent inducement") and second (failure to disclose) counterclaims; granting summary judgment in favor of plaintiff to foreclose the mortgage on the subject premises; and granting an Order of Reference.

Relevant Facts

Plaintiff is a New York state-chartered FDIC-insured, publicly traded community bank that was chartered in 2005, and funded, pursuant to responses to Offering Circulars dated October 2005 and May 2006, by investors purchasing shares in the bank. The Offering Circulars, inter alia, warned the potential investor, referred to as a "founder," that "an investment in the securities involves a high degree of risk and should be considered only by persons who can afford to sustain a loss of their entire investment." The potential investor further was advised of the Risk Factors, including the possibility that : "USA Bank will incur substantial expenses in establishing itself as a going concern, and we cannot assure you that we will be profitable or the future earnings, if any, will meet the levels of earning prevailing in the banking industry." The October 2005 Offering Circular set forth the management structure of the bank, identified the "50 Founders who have made working capital advances" during the "Pre-Opening Organization Expenses," identified the Founder Directors and the Independent Directors, and identified defendant as a founder not proposed as a director or executive officer. Defendant was similarly described in the May 2006 Offering Circular.

Defendant, a mortgage origination officer with USA Mortgage Bankers of America, Inc. ("USA Mortgage"), allegedly secured the mortgage loan from plaintiff to repay private lenders from whom defendant borrowed money to enable defendant to purchase USA stock, pursuant to a Founders Offering. In his verified answer with counterclaims, defendant alleges that while plaintiff was in formation, he and his brothers were approached to invest and to "receive status as a "Founder,"pursuant to a "Founders Offering," by "initially invest $60,000.00 for 10,000 shares at $6.00 per share." Defendant further alleges that while plaintiff was in formation, he and his brothers were induced to renovate the Vernon Boulevard property, at the approximate cost of $100,000.00, "for the express purpose of establishing a USA Mortgage Bank Branch which, upon implementation of the Plan, would become a branch of the Plaintiff Bank." Defendant also alleges that while plaintiff was in formation, he was induced to invest additionally in a real estate affiliate ("LLC") that would be created for the purpose of buying properties which the LLC would rent to the Bank at premium rents for the benefit of the LLC owners and the Bank's Founders, and that upon plaintiff's purchase of USA Mortgage, plaintiff would lease property owned by defendant and his brother, at premium rents, for use as a branch bank.

Discussion

Plaintiff moves to dismiss the affirmative defenses and counterclaims, pursuant to CPLR § 3211(a)(7), on the ground that each fails to state a claim. "[A] motion to dismiss affirmative defenses and counterclaims limits the court's inquiry to whether the defendant's facts, as alleged, raise an issue to be resolved by the trier of fact." "Upon a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed (see Amerada Hess Corporation v. Town of Southold, 39 A.D.3d 442, 833 N.Y.S.2d 232; Warwick v. Cruz, 270 A.D.2d 255, 704 N.Y.S.2d 849)." Federici v. Metropolis Night Club, Inc., 48 A.D.3d 741 (2nd Dept. 2008). In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference. See Warwick v Cruz, 270 A.D.2d 255 (2nd Dept. 2000); Abney v Lunsford, 254 A.D.2d 318 (2nd Dept.1998). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed. See, Fireman's Fund Ins. Co. v. Farrell, 57 A.D.3d 721 (2nd Dept. 2008); Warwick v. Cruz, 270 A.D.2d 255 (2nd Dept. 2000); Becker v Elm A.C. Corp., 143 A.D.2d 965 (2nd Dept. 1988). However, affirmative defenses which merely plead conclusions of law without any supporting facts must be dismissed. See, Fireman's Fund Ins. Co. v. Farrell, supra. "The movants bear 'the burden of demonstrating that those defenses [a]re without merit as a matter of law' (Vita v. New York Waste Servs., LLC, 34 A.D.3d 559, 559, 824 N.Y.S.2d 177)." Butler v. Catinella, 58 A.D.3d 145 (2nd Dept. 2008). Plaintiff failed to meet its burden.

Here, defendant, in his affidavit in opposition to plaintiff's summary judgment motion seeking dismissal or severance of his affirmative defenses and counterclaims, asserts that contrary to the assertions of plaintiff regarding the disclaimers in the Offering Circulars as a bar, the counterclaims asserted by defendant against plaintiff are predicated upon alleged misrepresentations made by Fred DeCaro, and other Directors of USA Bank on behalf of USA Bank, prior to the

dissemination of the Offering Circular, and that these "acts occurr[ed] prior to and simultaneously with, the granting of the subject loan and mortgage." He argues:

> The purpose of an Offering Circular is to put one on notice for potential risks in investments. However, despite the writings in the Offering Circulars, the then President of the Bank, the Chairman of the Board of Directors, Fred DeCaro II, assured Defendant, a newcomer to stock investments, that this investment was 'rock solid,' and legal documents were of no concern. The President and Chairman of the Board of a bank normally does not become involved in each investor's stock purchase transaction. Fred DeCaro's involvement, in asking Defendant to do business with the bank, to help create the bank, and become one of the largest investors in the bank, and then **offering** an investor a mortgage loan in order to afford the investments, surely take this matter outside of the realm of a 'routine foreclosure' [emphasis in original].

Defendant also alleges that "he refinanced loans he did not otherwise need to, in order to convert property he owned into a branch of Plaintiff's bank at which he was to be employed." It is further alleged that plaintiff made numerous representations at its investor meetings that it intended to "acquire USA Mortgage Bankers of America, in order to make the bank immediately profitable;" the acquisition or merger, however, never took place. Defendant alleges:

> The subject loan and mortgage did not come about in the routine home purchase manner, with me negotiating with a loan officer. Plaintiff essentially knew I needed a large sum of cash to repay loans I incurred to fund my investment into Plaintiff's creation, and Plaintiff offered me a loan by which to do this, and to complete my contribution to the USA Real Estate LLC which I was required to make as a Founder of Plaintiff, and provide a source of funds for construction work to convert a building I owned into a bank where I would be Branch Manager for Plaintiff once they merged with USA Bank.

Prior to defendant's investment of "more than three quarters of a million dollars," the property sought to be foreclosed by plaintiff, which was to be leased by plaintiff as a branch bank, was owned by defendant.

Although it is well established that a mortgagor is bound by the terms of the mortgage, it is equally recognized that a mortgagor in default can be relieved from that default in the circumstances in which the mortgagee' conduct gives rise to claims of estoppel, bad faith, fraud, or oppressive or unconscionable conduct. See, Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 N.Y.2d 175 (1982); Dimacopoulos v. Consort Development Corp., 166 A.D.2d 631 (2nd Dept. 1990). In

opposition, defendant raises an issue of fact as to whether plaintiff resorted to fraud or misrepresentation in procuring the mortgage that is the basis of this foreclosure action. Accordingly, the motion to dismiss or sever the affirmative defenses and counterclaims are denied.

With regard to the motion by the court-appointed Receiver, Gary M. Darche, Esq., for an order directing defendants to turn over all security deposits to the receiver, and permitting the receiver to employ a managing agent for the property, that motion is granted to the extent that the matter is hereby set down for a conference before this Court on December 16, 2009 at 10:30 a.m., in Part 19, Courtroom 63. All parties are directed to appear to address the issues presented by Receiver Darche with regard to the underlying property.

Dated: November 2, 2009

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J.S.C.