

**RCG Longview II, L.P. v Lampeas Family Ltd.
Partnership**

2010 NY Slip Op 30056(U)

January 11, 2010

Supreme Court, Queens County

Docket Number: 11261/09

Judge: Bernice Daun Siegal

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 5

	X	Index No. 11261/09 Motion Date 9/30/09 Motion Seq. No. 2 Calendar No. 30
RCG LONGVIEW II, L.P.		
- against -		
 LAMPEAS FAMILY LIMITED PARTNERSHIP NO. 7, et al.		 By: SIEGAL, J. DATED: January 11, 2010
	X	

In this foreclosure action plaintiff moves for an order granting it summary judgment against all defendants pursuant to CPLR 3212, and striking the answer of defendant Lampeas Family Limited Partnership No. 7 (Lampeas LP), Tessie Lampeas, individually, as trustee of The Steve A. Lampeas Revocable Living Trust, and as trustee of The Tessie Lampeas Revocable Living Trust (collectively, the Lampeas defendants), appointing a Referee to compute the sums due under the subject notes and mortgages, and amending the caption of the action herein to strike therefrom the names "JOHN DOE" and "JANE DOE" #1-12, inclusive, without prejudice to any of the proceedings heretofore had herein or to be had herein. The Lampeas defendants cross-move to preclude plaintiff from offering evidence at trial, pursuant to CPLR 3042, for failure to serve a bill of particulars.

Lampeas LP executed a note and mortgage, dated April 7, 2004, in the principal amount of \$2,000,000 (the 2004 Mortgage), in favor of lender Astoria Federal

Savings and Loan Association (Astoria), covering the real property located at 25-32 37th Street, Astoria, New York (the premises).

Lampeas executed another note and mortgage covering the premises, dated March 29, 2006, in principal amount of \$1,025,000, in favor of Astoria (the 2006 Mortgage).

By assignments dated June 7, 2007, Astoria assigned the 2004 Mortgage and the 2006 Mortgage to plaintiff.

Lampeas LP executed a third note and mortgage covering the premises, dated June 7, 2007, in principal amount of \$1,048,633.98, in favor of plaintiff. On or about June 7, 2007, Lampeas LP also executed a Consolidated and Restated Note (the Consolidated Note), in favor of plaintiff in the principal sum of \$3,705,000, which consolidated and extended the three notes held by plaintiff. Simultaneously with the Consolidated Note, Lampeas LP executed a Consolidation and Extension Agreement (the Consolidated Mortgage), in favor of plaintiff, covering the premises, and consolidating the three mortgages held by plaintiff, securing the Consolidated Note.

On or about June 7, 2007, Lampeas LP executed a Building Loan Mortgage Note and Building Loan Agreement (collectively, the Building Loan Note), in favor of plaintiff in the principal amount of \$595,000. Simultaneously, Lampeas LP executed a Building Loan Mortgage (the Building Loan Mortgage), covering the premises, securing the obligations under the Building Loan Note.

The sum of Lampeas LP's indebtedness to plaintiff under the Consolidated Note and Building Loan Note is \$4,300,000. Plaintiff alleges that Lampeas LP has failed to make the required payments due under the Consolidated Note and Building Loan Note. In addition, Lampeas LP's obligations under the Consolidated Note and Mortgage and the Building Loan and Mortgage were jointly and severally guaranteed by Steve A. Lampeas (individually), and defendants Tessie Lampeas (individually), The Steve Lampeas Revocable Living Trust, and the Tessie Lampeas Revocable Living Trust, by execution of a guaranty made as of June 7, 2007 (the Guaranty).

In support of the instant motion for summary judgment, plaintiff submitted copies of the subject notes, mortgages, assignments, the Guaranty, and the affidavit of Dean Ravos, an authorized officer of plaintiff, stating that Lampeas LP has failed to make the required payments due under the Consolidated Note and Building Loan Note, thus establishing prima facie entitlement to summary judgment (*see Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, 559 [1997]).

None of the affirmative defenses, each alleged in single-sentence, conclusory fashion, have any merit. The first defense, that the complaint fails to state a cause of action, is meritless because "a party who asserts the defense of failure to state a cause of action in a pleading will not achieve the intended purpose of dismissal, unless and until he or she makes an appropriate motion" (*Butler v Catinella*, 58 AD3d 145, 151 [2008]). Moreover, plaintiff has already demonstrated its entitlement to summary judgment. The second defense,

that plaintiff comes with unclean hands, is insufficiently pled because there are no allegations that plaintiff “is guilty of immoral, unconscionable conduct” and that the Lampeas defendants were “injured by such conduct” (*Jara v Strong Steel Door, Inc.*, 58 AD3d 600, 602 [2009] [internal quotation marks omitted]). The third defense, alleging that a provision for attorney’s fees is contrary to law and public policy, is meritless, as such provisions are enforceable in foreclosure actions (*see e.g. Kingsland Group, Inc. v J.B. Satcin Realty Corp.*, 16 AD3d 380, 381 [2005]; *Levin v Infidelity, Inc.*, 2 AD3d 691, 692 [2003]). The fourth affirmative defense, alleging that Lampeas LP was fraudulently induced into entering the transaction, must be stricken for failure to allege the facts constituting the fraud “in detail” (*see CPLR 3016 [b]; Andre Strishak & Assoc., P.C. v Hewlett Packard Co.*, 300 AD2d 608, 610 [2002]), or even the elements of a fraud cause of action (*see Cohen v Houseconnect Realty Corp.*, 289 AD2d 277, 278 [2001]). The fifth affirmative defense, alleging plaintiff’s failure to satisfy a condition precedent, must be stricken for failure to allege what that condition precedent was and how it was not satisfied. Moreover, the subject mortgages provide that upon maturity, the notes are due and payable immediately without any notice or demand. Finally, the sixth affirmative defense, alleging “wavier and estoppel,” must be stricken as there are no allegations of “an intentional relinquishment of a known right” (*Braddock v Braddock*, 60 AD3d 84, 92 [2009]), or detrimental reliance (*see McManus v Board of Educ.*, 87 NY2d 183, 186-187 [1995]).

The Lampeas defendants offer no proof in support of their asserted defenses, and merely argue that plaintiff failed to respond to a demand for a bill of particulars. Plaintiff submitted proof that the Lampeas defendants extended the response time to the demand to August 14, 2009, and plaintiff's motion for summary judgment was made on August 7, 2009. A motion for summary judgment stays all discovery (*see* CPLR 3214 [b]), and may not be denied solely on the unsupported speculative claims of a borrower that discovery might turn up something helpful to the borrower's case (*see* 2 Bergman on New York Mortgage Foreclosures § 22.05 [1990]).

Plaintiff's attorney's affirmation stated that neither Astoria nor the Doe defendants have answered or otherwise appeared in the action.

Accordingly, plaintiff motion is granted in all respects, and the Lampeas defendants' cross motion is denied in its entirety.

Settle order.

J.S.C.