

Xceed Mtge. Corp. v Ramchandani
2010 NY Slip Op 30691(U)
March 29, 2010
Supreme Court, New York County
Docket Number: 112044/2008
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 112044/2008

XCEED MORTGAGE

vs

RAMCHANDANI, FARIDA

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Summary Judgment

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}
motion and cross-motion are decided in accordance
with accompanying memorandum decision.

FILED

MAR 31 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/29/10

Saliann Scarpulla

SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
XCEED MORTGAGE CORP. and
XCEED FUNDING CORP.,

Plaintiffs,

- against-

Index No.:112044/2008
Submission Date:2/24/10

FARIDA RAMCHANDANI,

DECISION AND ORDER

Defendant.

----- X
For Plaintiff:
Hodgson Russ LLP
One Grand Central Place
60 East 42nd Street, 37th Floor
New York, New York 10165

For Defendant:
Sean E. Stanton, Esq.
1799 Lexington Avenue
New York, NY 10029

Papers considered in review of this motion for summary judgment:

Notice of Motion	1
Aff in Support	2
Aff in Opp	3
Mem of Law	4
Reply Aff.	5

FILED
MAR 31 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to recover for a Canadian mortgage default, Defendant Farida Ramchandani ("Ramchandani") moves for summary judgment dismissing the complaint pursuant to CPLR 3211 and 3212. This action arises from the purchase by Ramchandani, an American citizen and resident of New York, of a property in Toronto, Ontario, Canada in or around January 2006. To make the purchase, Ramchandani borrowed money from plaintiffs

Xceed Mortgage Corp. and Xceed Funding Corp. ("Xceed"). The money borrowed was secured by a Charge (akin to a mortgage) against the property purchased in Toronto. Ramchandani subsequently defaulted on repayment of the loan, and or around September 26, 2006, Xceed brought an action against Ramchandani in Canada to recover on the loan.

Xceed commenced the action by filing a Statement of Claim with the Superior Court of Justice in the Province of Ontario. On or around November 15, 2006, Ramchandani, through her Canadian counsel, filed her Statement of Defense, answering the Canadian action. Ramchandani then, through a Consent of Counsel, agreed to a judgment on the loan in the amount of \$316,989.63 and to permit a foreclosure sale of the Toronto property. The Ontario Superior Court of Justice (Justice M. Quigley) then entered the Judgment, ordering Ramchandani to pay Xceed \$316,989.69 inclusive of interest to January 25, 2007, deliver to Xceed possession of the Toronto property, and to pay Xceed costs in the amount of \$4,468.50, plus interest on the costs at the rate of 6.0% per annum.

On or about April 12, 2007, a Writ of Seizure and Sale was filed with the Sheriff of the City of Toronto directing the seizure and sale of the Toronto property in accordance with the Court's Judgment. Xceed states that it then sold the Toronto property at a foreclosure sale on August 30, 2007 for \$298,740.34 in net proceeds. Xceed, in this action, is seeking to recover the balance of \$8,971.01, plus post-judgment interest and counsel fees.

Xceed commenced this action by summons and motion for summary judgment in lieu of complaint pursuant to CPLR 3213, dated September 2, 2008. This Court (Justice Lehner)

[* 4]

denied plaintiff's motion for summary judgment, and also denied Ramchandani's cross-motion to dismiss. The Court then directed Xceed to file a formal complaint, which it did on or around August 26, 2009. In response, Ramchandani filed this motion, and has not yet answered the complaint.

In support of her motion for summary judgment, Ramchandani argues that this action must be dismissed against her because a New York Court has no jurisdiction over a "Canadian case" and there is no deficiency judgment entered in Canada to enforce in New York. Ramchandani asserts that the lack of a Canadian deficiency judgment is a "fatal defect" to Xceed's action. In the alternative, Ramchandani seeks additional time to interpose an answer to Xceed's complaint.

In opposition, Xceed argues that summary judgment is inappropriate due to the existence of factual disputes. Xceed points to this Court's previous finding that it could not, as a matter of law, determine the precise amount of defendant's obligation. Xceed also points out that Ramchandani provides no support for her "fatal defect" theory which claims that Xceed's lack of a Canadian deficiency judgment (which Xceed contends is unnecessary under Canadian law) is a basis for summary judgment in her favor.

In reply, Ramchandani challenges the sufficiency of Xceed's affidavits submitted in opposition to summary judgement. Also on reply, Ramchandani raises for the first time the argument the Xceed's supplemental summons and complaint are untimely and defective.

Discussion

Summary judgment is an extraordinary remedy and is only appropriate where the movant has established that there is no question of fact on any issue which would require a trial. *See Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974). The court may grant summary judgment upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact. CPLR 3212(b); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Where the proponent fails to meet this burden, the motion should be denied even if the papers in opposition are inadequate. *Pastoriza v. State of New York*, 108 A.D.2d 605 (1st Dept. 1985). On a motion for summary judgment the testimony of the nonmoving party is accepted as true. *O'Sullivan v. Presbyterian Hosp. in City of New York at Columbia Presbyterian Medical Center*, 217 A.D.2d 98, 101 (1st Dep't 1995).

“As a matter of international comity, CPLR article 53 accords recognition by this state to a final foreign country judgment (*see* CPLR 5303), which grants or denies the payment of a sum of money (*see* CPLR 5301[b]; 4303) provided the foreign court had personal jurisdiction over the judgment debtor and the judgment was rendered by a system that provides an impartial tribunal that utilizes procedures compatible with due process (*see* CPLR 5302[a]).” *Wimmer Canada, Inc. v. Abelle Tractor & Equipment Company, Inc.*, 299 A.D.2d 47, 48 (3d Dep't 2002) (citation in original). *See also Lenchyshyn v. Pelko Electric, Inc.*, 281 A.D.2d 42, 46 (4th Dep't 2001) (CPLR Article 53 “sets forth substantive

requirements that must be met before a foreign country judgment will be recognized in New York. Those primarily concern whether the foreign country's court had personal jurisdiction over the judgment debtor and subject matter jurisdiction over the case; whether it was an impartial tribunal utilizing procedures compatible with due process of law; and whether enforcing the foreign country money judgment would be unfair, work a fraud, or violate New York's public policy.") (citations omitted).

Ramchandani first argues that this action should be dismissed because this Court lacks jurisdiction over a "foreign Canadian case," but cites no authority for this claim nor explains her basis for asserting it. If Ramchandani is attempting to argue that the Court lacks subject matter jurisdiction, that argument fails. It is well established that this Court has jurisdiction over an action to enforce a foreign judgment. *See generally* CPLR Article 53. Moreover, if Ramchandani is attempting to argue that the Court lacks personal jurisdiction over her, that argument also fails. Ramchandani, by her own admission, is a resident of New York. Even lacking that, "no jurisdictional basis for proceeding against the judgment debtor need be shown" for "recognition and enforcement of foreign country money judgments" in this State. *Lenchyshyn*, 281 A.D.2d at 48 (citations omitted).

Ramchandani also asserts that this Court "has no way to determine if the Canadian Foreclosure sale was properly conducted under New York Law" However, that is not the appropriate standard. Article 53 clearly provides the standards for recognition and enforcement of a foreign judgment, *see* CPLR 5303, 5304 and 5305, and does not require

[* 7]

that the foreign judgment be acquired pursuant to New York law, but rather that they meet other criteria, as discussed above.

Without addressing the merits of the Canadian judgment at issue, the Court notes that Canadian judgments have often been found to meet the Article 53 requirements for recognition and enforcement. For example, the Appellate Division, Fourth Department concluded in *Lenchyshyn v. Pelko Electric, Inc.*, that “the judicial procedures and substantive laws of Ontario, a common-law jurisdiction, comport with due process requirements and with New York’s public policy, and as a general matter we of course would accord an Ontario judgment the same recognition as a sister state judgment, albeit as a matter of international comity rather than constitutional imperative.” *Lenchyshyn*, 281b A.D.2d at 47. *See also Larwex Enterprises, Inc. v. Bacharach*, 302 A.D.2d 565, 566 (2d Dep’t 2003) (affirming lower court’s grant of plaintiff’s motion for summary judgment enforcing Canadian money judgment against defendant); *Wimmer Canada*, 299 A.D.2d 47 (same).

Ramchandani’s assertion that Xceed’s failure to have a deficiency judgment constitutes a “fatal defect” is also without merit. Were Xceed attempting to enforce a New York judgment on foreclosed real property pursuant to the Real Property Actions and Proceedings Law (“RPAPL”), a deficiency judgment might be required. However, as discussed above, the RPAPL requirements are not invoked in Article 53, and are not applicable to a judgment from a foreign jurisdiction. *See, e.g., Yager v. Rubymar Corp.*, 34 Misc. 2d 704, 711 (N.Y. Sup. Ct. 1961) (procedures for deficiency proceedings “has

8]

application to foreclosure actions involving mortgages covering property in this State and not to foreign mortgages”); *Harris S.A. de C.V. v. Grupo Sistemas Integrales De Telecomunicacion S.A. De C.V.*, 279 A.D.2d 263 (1st Dep’t 2001) (“plaintiff was not required either under parties’ underlying contract or governing Mexican law to obtain a deficiency judgment within the Mexican foreclosure action in order to enforce its money judgment, to the extent that such judgment remained unsatisfied subsequent to the Mexican foreclosure sale”).

Ramchandani has failed to establish a *prima facie* showing of entitlement to judgment dismissing the complaint as a matter of law. Questions of fact remain as to how much, if any, Ramchandani still owes to Xceed as a result of her mortgage default. As such, Ramchandani’s arguments, raised in her reply papers, concerning the alleged insufficiency in Xceed’s papers in opposition need not be addressed.

In accordance with the foregoing, it is

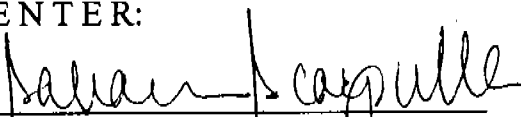
ORDERED that defendant Farida Ramchandani’s motion for summary judgment to dismiss plaintiffs Xceed Mortgage Corp.’s and Xceed Funding Corp.’s complaint is denied; and it is further

ORDERED that defendant shall answer the complaint within thirty (30) days of the date of entry of this order.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
March 29, 2010

ENTER:


Saliann Scarpulla, J.S.C.

FILED
MAR 31 2010
NEW YORK
COUNTY CLERK'S OFFICE