SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

LISA BEDZINER,

INDEX NO.: 026228/09

Plaintiff,

MOTION DATE:1-5-10
SUBMIT DATE:4-6-10
SEQ. NUMBER - 001

-against-

CITIMORTGAGE, INC.,

Defendant.

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The following papers have been read on this motion:

Order to Show Cause, dated 12-23-09.....1
Verified Answer, dated 3-6-10.....2
Affirmation in Opposition, dated 3-13-10.....3
Reply Affirmation, dated 3-29-10.....4

Plaintiff's motion for a preliminary injunction pursuant to CPLR §6301 enjoining during the pendency of this action or sooner order of this Court, defendant, its successors or assigns from conducting a sale in any form of plaintiff's shares of stock held by defendant as loan collateral or in any other way from enforcing its rights or remedies as owner and holder of the Note and Loan Security Agreement, both dated as of May 28, 1998 made by plaintiff to defendant, is granted.

This is a motion for a preliminary injunction enjoining the defendant from enforcing its rights and remedies against plaintiff with respect to a loan made by defendant to plaintiff's predecessor in the amount of $30,000.00 and upon which defendant claims is due in excess

of $20,000.00. (the Loan). The Loan is evidenced by a note (the Note) and is secured by a Loan Security Agreement (the Security Agreement) both dated May 28, 1998 pursuant to which plaintiff pledged as security to defendant her shares of stock in and lease to her from Harbor Owners Corp., a Cooperative (the Coop). The Note requires monthly payments of $212.34.

Plaintiff's motion is supported by her affidavit, affirmation from her attorney, copies of correspondence from defendant's attorney, a notice of sale, the Security Agreement and the Note. Since the issue has not been raised, the Court will assume for the purposes of this motion that the Loan and supporting documents have been assigned to defendant.

In opposition, defendant has submitted an answer verified by its attorney and an affirmation from its attorney to which is appended an unauthenticated loan escrow statement dated August 2007, which shows an additional required escrow payment of $282.99 per month for flood insurance that was added to the monthly payment of $212.34, due under the Note.

Plaintiff had always had her monthly payment due on the Note taken automatically from her checking account and had never been in default. She terminated the automatic charge after she realized that she was paying the extra monthly amount and attempted to pay the original monthly amount directly. However, payment was rejected by defendant. According to the defendant's attorney, the defendant purchased flood insurance. We are not told if the insurance was for the building in which plaintiff's unit is located or for the unit and no policies, invoices or other documents are submitted to support this claim. Counsel

asserts that the Security Agreement requires the Coop to maintain certain types of insurance and that a failure by the Coop to do so creates an event of default under the Security Agreement. Hence, the default claimed is that the Coop did not comply with paragraph 19 of the Security Agreement. Contrary to counsel's misleading description that provision provides in relevant part that the plaintiff is in default if "(2) The Corporation (*ie* the Coop) fails to insure the building of which the Apartment is a part against fire and/or other hazards as a mortgage lender may require... ."

There is no evidence that the Coop has not complied with this section, that the insurance being carried did not comply, that compliance was ever sought or requested, that plaintiff was given any notice of default, opportunity to cure, or that the defendant itself had the right to purchase flood insurance.

Notably absent from defendant's submission is any proof of any flood insurance coverage having been purchased, its coverage or its cost.

The provision in the Security Agreement upon which the defendant relies to support its right to buy flood insurance is paragraph 15 which has also been mischaracterized. Counsel claims that if there is an event of default, self help may be employed, however, as relevant here, the clause provides "If the borrower fails to perform the covenants and agreements contained in this Agreement or the Lease ... then Lender, at its option, may do and pay for whatever is necessary to protect the value of the stock and the Lease and the Lender's rights in the stock and the Lease."

The foregoing does not give the defendant self help for a failure of the Coop to comply with paragraph 19. The default section of the Security Agreement (10 l) gives the

defendant the right to declare a default if an event specified in paragraph 19 (the insurance section for the Coop) occurs. However, there is no proof that the defendant ever accelerated the Loan or gave any notice of default or opportunity to comply and it does not appear that the self help clause (paragraph 15) is triggered by a defined event of default. The acceleration letter sent by defendant's counsel in December 2009, does not specify the nature of payments due with any particularity and does not state the source of the attorney's knowledge or authority.

It is well established that in order to obtain a preliminary injunction the movant must demonstrate a probability of success on the merits, irreparable harm absent the granting of the relief, and a balancing of the equities in the movant's favor. *Aetna Ins. Co. v Capasso,* 75 NY2d 860, 862 (1990); *Grant Co. v Srogi,* 52 NY2d 496 (1981); *Washington Deluxe Bus Inc., v. Sharmash Bus,* 47 AD3d 806 (2d Dept. 2008); *Abinanti v. Pascale*, 41 AD3d 395 (2d Dept. 2007).

Because the defendant has failed to make any submission by someone with knowledge of the events and despite having had ample time to assemble a meaningful opposition to this motion, the motion is essentially unopposed. It is well settled that an attorney's affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 152 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *cf Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007). Here, defendant's attorney does not profess to possess personal knowledge of any facts asserted and except for reference to plaintiff's exhibits, has not employed his affirmation as a vehicle to refer to other competent evidence.

On this motion the documentation presented by the defendant is insufficient to raise an issue of fact as to whether plaintiff was ever in default, ever given notice thereof and opportunity to cure and whether defendant actually incurred and paid the insurance premium charges for which it claims plaintiff is responsible. The offering by defendant's counsel does not provide any meaningful information, lacking as it does, the information described above and is insufficient to raise an issue of fact that would either bar issuance of a preliminary injunction or require a hearing. CPLR §6312 (c). *Eklund v. Pinkey*, 31 AD3d 908, 909 (3d Dept. 2006).

In sum, plaintiff has met the requisite of showing probability of success on its action. The Court recognizes that the only challenge to this motion is in the form of an attorney's affirmation and that the defendant may possess sufficient evidence within its coffers to ultimately prevail. However, applying the standards for a preliminary injunction to the papers submitted on this motion leads to the conclusion that plaintiff has demonstrated likelihood of success.

In balancing the equities, the Court finds that a preliminary injunction will maintain the status quo and, while defendant can be made whole by a payment of money, the plaintiff risks the loss of her apartment and eviction if this motion is not granted. Hence, the equities weigh in favor of plaintiff. *Randisi v. Mira Gardens, Inc.*, 272 AD2d 387 (2d Dept. 2008).

Although not challenged, plaintiff has also demonstrated that irreparable harm will result from what would amount to a foreclosure of her apartment. The Security Agreement does not require immediate enforcement since interest and penalties have and will continue to accrue on the debt if found to be valid.

CPLR §6312(b) requires that a party seeking a preliminary injunction must give an undertaking. *Griffin v. 70 Portman Road Realty, Inc.*,47 AD3d 883 (2d Dept. 2008). This preliminary injunction is conditioned upon the plaintiff filing an undertaking in accordance with CPLR §6312. The Court fixes the amount of said undertaking to be $2,500.00. Plaintiff shall have a period of 33 days from the date of this Decision and Order to file an undertaking and the temporary stay contained in the Order to Show Cause is extended until the first to occur of the filing of the undertaking or 33 days from the date hereof.

All parties shall appear at a preliminary conference at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., lower level, on May 19, 2010, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: April 9, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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