

New York Bus. Dev. Corp. v HFK Prop. MGMT LLC

2010 NY Slip Op 31246(U)

May 13, 2010

Supreme Court, Suffolk County

Docket Number: 26620/2009

Judge: Joseph Farneti

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

ORDERED that this motion by plaintiff for an Order, pursuant to CPLR 3212, striking the Verified Answer of defendants HFK PROPERTY MGMT LLC, GFK FOOD CORP. d/b/a FOUR SEASONS DELI & CAFÉ, and GEORGE F. KING and granting plaintiff summary judgment, on the grounds that there are no issues of fact and plaintiff is entitled to summary judgment as a matter of law; appointing a referee to compute the sums due and owing to plaintiff; and amending the caption of the pleadings and Notice of Pendency herein, *nunc pro tunc*, to delete references to the "JOHN DOE" defendants, is hereby **GRANTED** in its entirety for the reasons set forth hereinafter. The Court has received opposition to the instant application from defendants HFK PROPERTY MGMT LLC, GFK FOOD CORP. d/b/a FOUR SEASONS DELI & CAFÉ, and GEORGE F. KING.

In this foreclosure action, plaintiff alleges that on February 14, 2007, defendant HFK PROPERTY MGMT LLC ("HFK"), by its managing member, defendant GEORGE F. KING, duly executed and delivered to plaintiff a Mortgage Note ("Note") in the principal amount of \$368,500, memorializing a loan in that amount and encumbering the premises commonly known as 811 Waverly Avenue, Holtsville, New York. As security for its obligations under the note, on or about February 14, 2007, HFK executed and delivered a "Mortgage Modification, Assumption, Reduction, Extension, Spreader and Security Agreement and Assignment of Leases and Rents" ("Mortgage"), which extended certain obligations of HFK into a single mortgage lien in the amount of the indebtedness.

Plaintiff alleges that HFK defaulted in the terms and conditions of the Note and Mortgage by failing to make the monthly payments due on February 1, 2009, and each and every month thereafter. In addition, plaintiff claims that HFK defaulted under the Mortgage by failing to pay the 2008 and 2009 real estate taxes affecting the mortgaged premises when such taxes became due.

Plaintiff commenced this action on July 14, 2009, with the filing of a Summons and Verified Complaint and a Notice of Pendency. Plaintiff contends that since the filing of the Notice of Pendency, the Verified Complaint in this action has not been amended by adding new parties to the action, or so as to affect other property not described in the Verified Complaint, or so as to extend the claims of plaintiff as against the mortgaged premises. Plaintiff indicates that all defendants have defaulted herein with the exception of defendant U.S. SMALL BUSINESS ADMINISTRATION, which filed a notice of appearance, and defendants HFK PROPERTY MGMT LLC, GFK FOOD CORP. d/b/a FOUR

SEASONS DELI & CAFÉ, and GEORGE F. KING, who interposed a Verified Answer dated August 5, 2009.

Plaintiff now moves for an Order striking defendants' Verified Answer and granting summary judgment, appointing a referee to compute the sums due and owing to plaintiff, and amending the caption herein, *nunc pro tunc*, to delete references to the "JOHN DOE" defendants. Plaintiff argues that defendants' Answer does not contain a counterclaim, and that defendants' single affirmative defense, to wit: that plaintiff did not notify defendants pursuant to paragraph "17"¹ of the Mortgage of plaintiff's election to accelerate the entire balance of the debt, is factually incorrect and not a defense to this suit. Plaintiff, in its Verified Complaint, alleges that plaintiff elected to declare the entire unpaid principal balance of the indebtedness, plus the accrued interest and all other amounts secured by the Mortgage, immediately due and payable by letter dated June 1, 2009. In support of the motion, plaintiff has submitted, among other things, the Note and Mortgage, the pleadings, and an affidavit of Michael Zihal, senior vice president of plaintiff.

In opposition, defendants HFK PROPERTY MGMT LLC, GFK FOOD CORP. d/b/a FOUR SEASONS DELI & CAFÉ, and GEORGE F. KING argue that summary judgment should not be granted as there remain material questions of fact in this action. While defendants do not dispute the existence of the Note and Mortgage or HFK's default thereunder, defendants contend that plaintiff failed to properly notify HFK, pursuant to paragraph "24" of the Mortgage, of its election to accelerate the entire balance of the debt. Defendants allege that paragraph "24" requires that the acceleration letter was to be delivered by hand, by overnight courier, or by registered or certified mail, return receipt requested, which it was not. In addition, defendants allege that there are two tenants with possessory rights in the premises who have not been named in the complaint. As such, defendants seek a denial of the motion.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may

¹ Although the affirmative defense references paragraph "17" of the Mortgage, the Court notes that paragraph "17" does not concern the issuance of notices thereunder. Paragraph "24" of the Mortgage governs the method of issuing notices thereunder in certain circumstances, and is the paragraph relied upon by defendants in opposition to the instant motion.

grant judgment to a party as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law (see e.g. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). Plaintiff has established *prima facie* entitlement to summary judgment through the production of the Note and Mortgage, and proof in admissible form of HFK's default thereunder (*Daniel Perla Assoc., LP v 101 Kent Assoc., Inc.*, 40 AD3d 677 [2007]; *Gro-Wit Capital, Ltd. v Obigor, LLC*, 33 AD3d 859 [2006]; *Marine Midland Bank v Fillippo*, 276 AD2d 601 [2000]; *Marine Midland Bank, N.A. v Freedom Road Realty Associates*, 203 AD2d 538 [1994]). The burden then shifted to defendants to establish, by competent evidence in admissible form, the existence of material issues of fact that would warrant a trial of this action. Accordingly, defendants were required to assert any defenses which would raise a question of fact about their default under the mortgage (see *LBV Props. v Greenport Dev. Co.*, 188 AD2d 588 [1992]; *Metropolitan Distrib. Servs. v DiLascio*, 176 AD2d 312 [1991]), such as "waiver by the mortgagee, or estoppel, or bad faith, fraud, oppressive or unconscionable conduct on the latter's part" (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175 [1982], quoting *Ferlazzo v Riley*, 278 NY 289 [1938]).

Here, the Court finds that plaintiff made a *prima facie* showing of its entitlement to summary judgment by submitting the Note, Mortgage, and evidence of default, and that defendants' opposition does not raise a triable issue of fact. With respect to defendants' argument of improper notice, the Court notes

that paragraph "16" of the Mortgage provides that in the event of a default thereunder, plaintiff may declare the entire debt to be immediately due and payable "without presentment, demand, protest or notice of any kind." With respect to defendants' argument concerning the tenants at the premises with possessory interests, plaintiff indicates that it chose not to serve these tenants so as not to "cut off their interests" when it commenced this action. While such tenants may be necessary parties herein, their absence is not a defense to summary judgment and merely leaves their rights unaffected by a judgment of foreclosure and sale (*see Ridge Realty LLC v Goldman*, 263 AD2d 22 [1999]; *Marine Midland Bank, N. A. v Freedom Rd. Realty Assocs.*, 203 AD2d 538, *supra*).

Accordingly, plaintiff's motion for an Order granting summary judgment in favor of plaintiff, for a reference to compute the amounts due plaintiff, and to amend the caption to delete references to the "JOHN DOE" defendants, is **GRANTED** in its entirety.

The foregoing constitutes the decision and Order of the Court.

SUBMIT ORDER OF REFERENCE ON NOTICE (*see* CPLR 4311)

Dated: May 13, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court