Flushing Sav. Bank, FSB v Ataraxis Props. Ltd.

2010 NY Slip Op 31416(U)

June 7, 2010

Supreme Court, Suffolk County

Docket Number: 09-36399

Judge: Ralph T. Gazzillo

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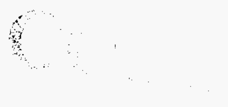
[* 1]

SHORT FORM ORDER

INDEX No. 09-36399

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY



PRESENT:

Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 12-28-09
ADJ. DATE 2-11-10
Mot. Seq. # 002 - MG

FLUSHING SAVINGS BANK, FSB,

Plaintiff,

- against -

ATARAXIS PROPERTIES LTD., CAPLITE HOLDING CORP., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN BISKUP, "JOHN DOE NO. I" to "JOHN DOE NO. XXX," inclusive, the last thirty names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint.

Defendants.

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Upon the following papers numbered 1 to 20 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1- 10; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 11 - 15; Replying Affidavits and supporting papers 16 - 20; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an order granting summary judgment on its complaint, an order of reference appointing a referee to compute, and an amendment of the caption of this action is granted; and it is further

ORDERED that Armand A Racuyo with an office at 1344 Stony Brook Rd Stonybrook NY 11790 is hereby appointed Referee to ascertain and compute the amount due upon the note and mortgage documents which this action was brought to foreclose, and to examine and report whether the mortgaged premises can be sold in parcels; and it is further

ORDERED that pursuant to CPLR 8003 (a) the Referee be paid the statutory fee for the computation of the amount due plaintiff; and it is further

ORDERED that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to, section 36.2 (c) ("Disqualifications from appointment") and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED that the pleadings and papers served and filed in this action be amended by deleting the defendants "John Doe No. I" to "John Doe No. XXX" and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
---X
FLUSHING SAVINGS BANK, FSB,

Plaintiff,

\- against -

ATARAXIS PROPERTIES LTD., CAPLITE HOLDING CORP., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and JOHN BISKUP,

Defendants.
---X

This is an action to foreclose a mortgage on property known as 272-274 West Main Street, Patchogue, New York. The defendant Ataraxis Properties Ltd. (Ataraxis) had obtained a commercial loan from the plaintiff on December 12, 2008 in the sum of $600,000.00 which was secured by a mortgage on said property and personally guaranteed by the defendant John Biskup (Biskup), the president of Ataraxis. Ataraxis defaulted on its loan payments due on May 1, 2009 and thereafter. The plaintiff commenced the instant action on October 5, 2009. Ataraxis and Biskup answered asserting

affirmative defenses that the plaintiff has been paid all sums due pursuant to the terms of the mortgage loan; the plaintiff has not established conditions precedent; the acts of the plaintiff and its agents together with the terms of the mortgage loan documents constitute unfair and deceptive acts or practices and are unconscionable; contributory negligence and lack of business judgment by the plaintiff; failure to state a cause of action; and the plaintiff's claims are barred by the doctrine of unclean hands.

The plaintiff now moves for summary judgment on its complaint, an order of reference appointing a referee to compute, and an amendment of the caption of this action to strike the names of the defendants "John Doe No. I" to "John Doe No. XXX." In support of the motion, the plaintiff submits copies of the subject note, mortgage and guarantee as well as the affidavit of merit dated December 1, 2009 of a vice president of the plaintiff indicating that the plaintiff is the owner and holder of the subject note and mortgage; that Ataraxis and Biskup defaulted on their loan payments due on May 1, 2009 and thereafter; that as a result the plaintiff accelerated the loan; and that Ataraxis and Biskup have failed to pay all sums due under the note and mortgage.

In order to establish prima facie entitlement to summary judgment in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of default (*see*, ***Capstone Business Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*id.* quoting ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997], *lv dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]).

Here, the plaintiff established its entitlement to judgment as a matter of law by submitting the note, mortgage and guarantee, and demonstrating that Ataraxis and Biskup were in default under the terms of the mortgage (*see*, ***Wells Fargo Bank Minnesota Natl. Assn. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007], *lv dismissed* 10 NY3d 791, 857 NYS2d 25 [2008]; *see also*, ***Inland Mtge. Capital Corp. v Realty Equities NM, LLC***, 71 AD3d 1089,___ NYS2d ___ [2d Dept 2010]).

The burden then shifted to Ataraxis and Biskup to raise a triable issue of fact regarding their defenses (*see*, ***Household Finance Realty Corp. of New York v Winn***, 19 AD3d 545, 546, 796 NYS2d 533 [2d Dept 2005]).

In opposition to the motion, Ataraxis and Biskup contend that the instant motion is premature inasmuch as the plaintiff has not responded to their outstanding First Notice to Produce, which information is essential to their opposition and is exclusively within the knowledge and control of the plaintiff. By his affidavit dated January 20, 2010, Biskup indicates that he is the president of Ataraxis, that his defense of payment is based on statements by a loan officer of the plaintiff in October 2009 that any and all arrears with respect to subject mortgage loan were being deducted or paid from a cash reserve of $100,000.00 of the loan proceeds, the status of which Biskup seeks to obtain through discovery. In addition, Biskup informs in his affidavit that there is another action pending which was commenced by he and Ataraxis against his real estate broker and real estate firm alleging various misrepresentations concerning the value and feasibility of commercial rental of the subject property as well as the availability of commercial tenants that induced him to purchase the property. Biskup asserts

that discovery is necessary inasmuch as there is a possibility that said misrepresentations were repeated by the mortgage broker to whom he had been steered by his real estate broker and were knowingly accepted by the plaintiff to generate loan approval and a closing on the subject transaction.

In reply, the plaintiff points out that Ataraxis and Biskup did not deny their default in loan payments or prove payment; that the purpose of the cash reserve and the plaintiff's ability to apply the cash reserve as it did are clearly indicated in the Cash Collateral Agreement executed by the defendant Biskup as president of Ataraxis; and that the plaintiff is not a party to the action of Biskup and Ataraxis against their real estate broker and the allegations of the complaint of said action indicate that the lender as well as Biskup were the innocent recipients of the real estate broker's misrepresentations. In addition, the vice president of the plaintiff who was the loan officer who spoke to Biskup explains by affidavit dated February 8, 2010 that contrary to Biskup's assertions, he informed Biskup that the $100,000.00 in the cash collateral account might be debited to pay down the principal balance due on the note, not the arrears, and that on or about December 2, 2009 the plaintiff debited the entire amount in the account to reduce the principal balance on the note from $597,764.97 to $497,764.97 and that Biskup was apprised of this by letter. He also indicates that he is familiar with Biskup's mortgage broker and real estate broker and that the plaintiff's relationship with both was simply that of a standard bank/mortgage broker relationship with no knowledge of their deception of Biskup.

The terms of the Cash Collateral Agreement executed by Biskup in his capacity as president of Ataraxis provide that Biskup was to deposit $100,000.00 in an account as additional security and if an event of default occurred then the plaintiff could apply the balance of said account to payment of the "Obligations," meaning, all indebtedness, obligations and liabilities of Biskup to the plaintiff arising under said agreement or the note or mortgage.

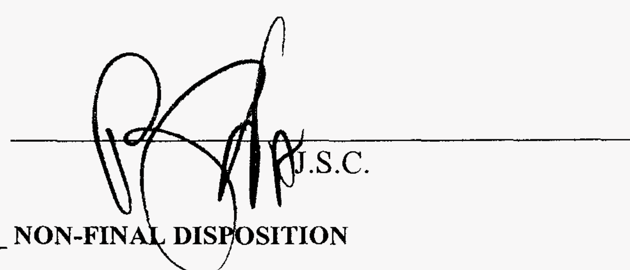
Here, Biskup did not deny that he executed the loan documents or that he failed to make the required loan payments due on May 1, 2009 and thereafter. Biskup stated in his affidavit that the plaintiff withheld or reserved $100,000.00 from the loan proceeds and placed it into the cash collateral account. The express terms of the Cash Collateral Agreement allowed the plaintiff to apply the account contents to pay all of Biskup's obligations upon default, leaving it to the plaintiff's discretion how said cash collateral would be applied amongst the accelerated loan principal, interest and arrears. Contrary to Biskup's contentions, even if the $100,000.00 held in the account was applied solely to satisfy Biskup's arrears, it would not constitute payment by Biskup and Biskup would nevertheless still be in default under the terms of the loan agreements (*see generally*, ***Moncreiffe Corp. v Heung***, 293 AD2d 324, 740 NYS2d 321[1st Dept 2002]). In addition, Biskup failed to demonstrate that he had an "absence of meaningful choice" at the time he entered into the loan agreements and that the agreements' terms were "unreasonably favorable to" the plaintiff (*see*, ***Gillman v Chase Manhattan Bank, N.A.***, 73 NY2d 1, 10, 537 NYS2d 787 [1988]; ***Southwell v Middleton***, 67 AD3d 666, 669, 890 NYS2d 57 [2d Dept 2009]). Notably, although Biskup alleged deception and high pressured tactics by his real estate broker to induce him to enter into a contract to purchase the property, he made no allegations in this action or in the action against his real estate broker that the plaintiff or its employees participated in such conduct to induce him to enter into the loan agreements (*see*, ***Gillman v Chase Manhattan Bank, N.A.***, 73 NY2d at 11). Moreover, Biskup's complaint in the action against his real estate broker revealed that his previous application for a loan was turned down by another lender due to issues concerning the fair market value

of the subject property and that the plaintiff herein also had reservations inasmuch as it required a commitment from "Checkers" or another nationally recognized tenant before it would proceed with the loan transaction. Thus, the submissions in opposition to the motion failed to indicate that the plaintiff engaged in any inequitable conduct and the Court finds that the affirmative defenses lack merit (*see*, ***Butler v Catinella***, 58 AD3d 145, 151, 868 NYS2d 101 [2d Dept 2008]).

Furthermore, the motion for summary judgment is not premature inasmuch as Ataraxis and Biskup have failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence; their hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis for denying the motion (*see*, ***Conte v Frelen Assocs., LLC***, 51 AD3d 620, 621, 858 NYS2d 258 [2d Dept 2008]).

Accordingly, the instant motion is granted and the answer is dismissed.

Dated: 6/7/10



J.S.C.

_____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION