

MidFirst Bank v 159 W. 24th St. LLC

2010 NY Slip Op 31576(U)

June 21, 2010

Supreme Court, New York County

Docket Number: 107873/09

Judge: Emily Jane Goodman

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6-24-10

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EMILY JANE GOODMAN

PART 17

PRESENT:

Index Number : 107873/2009

MIDFIRST BANK

vs

159 WEST 24TH STREET

Sequence Number : 005

STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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 denied

is decided

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

Dated: 6/24/10

EMILY JANE GOODMAN N.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X

MIDFIRST BANK,

Plaintiff,

Index No. 107873/09

-against-

159 WEST 24th STREET LLC, M&D FIRE DOOR,
JEMINIS ELECTRICAL CONTRACTORS INC.,
ENERGY CONSERVATION AND SUPPLY, INC.,
HARDING STEEL, INC., NORTH SHORE P/S
CO. INC., DAVIS & WARSHOW, INC., FAST
RESPONSE INC., EAMON ROCHE, ERIC GRAY,
JOSHUA SACKS, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD,

and JOHN DOE 1-10, the last ten 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.

-----X

Emily Jane Goodman, J.:

In this motion, plaintiff MidFirst Bank (MidFirst) moves for
summary judgment on its complaint to foreclose on a mortgage.
MidFirst also moves to amend the caption in this action to add a
certain party as a defendant in place of John Doe 1, and to
strike the names John Does 2-10.

I. Background

This action involves three related loans (Loans) made by
MidFirst to defendant 159 West 24th Street LLC (Borrower) in May

2006, and evidenced by three Notes (Notes). Notice of Motion, Ex. 1, Complaint, Ex. B, D, and E. The Loans were made to finance the purchase and development of property located at 159 West 24th Street, known as the Carriage House (the project). The Loans were guaranteed by defendants Eamon Roche, Eric Gray and Joshua Sacks (Guarantors), pursuant to a written Guaranty of Payment (Guaranty). *Id.*, Ex. 12. The Guarantors also entered into a separate "Completion Guaranty." *Id.*, Ex. 13. The Borrowers and Guarantors together will be referred to as "defendants."

MidFirst agreed to two extensions of the maturity date of the Notes, both in 2008. It also agreed to allow Borrowers to obtain two mezzanine loans, in 2007 and 2008. The Notes finally matured on May 1, 2009. Borrowers failed to repay the Notes, amounting, according to MidFirst, to Events of Default under the Notes and Guaranty.

According to MidFirst, previous to the maturity date of the Notes, Borrowers were in default of interest payments in February and March 2009, amounting to Events of Default. Further Events of Default under the Notes allegedly occurred by the attachment to the property of mechanics' liens by the non-Borrower and Guarantor defendants.

The mortgages represented by the Notes also required the Borrowers to keep in force certain policies of insurance on the

property. These policies expired in February 2009, requiring MidFirst to pay premiums allegedly owed by Borrowers. MidFirst claims that this lapse constitutes a further Event of Default. As such, MidFirst claims that Borrowers and Guarantors have defaulted on the Notes in a number of ways.

Defendants were served with default notices (Complaint, Ex. F), and MidFirst declared the entire principle sum of the Loans as due and owing, with interest, a sum it claims amounts to almost \$15 million.

MidFirst petitioned for, and obtained, a Temporary Receiver for the Property, claiming that a Receiver was necessary to protect the property. According to defendants, MidFirst has been neglecting the building, to the building's extreme detriment, while showing the building to prospective buyers. Defendants claim to have obtained an investor willing to invest in the project, but that MidFirst refused to meet with a representative of the investor, choosing instead to continue with the foreclosure, and to show the building to prospective buyers.

This action ensued. The defendants served answers which are substantively similar. Notice of Motion, Exs. 4, 5, 6, 7. Each pleads 10 alleged affirmative defenses: (1) that performance under the transaction documents is "excused under the doctrine of "temporary commercial impracticability"; (2) estoppel; (3) waiver; (4) unclean hands; (5) ratification; (6) failure to

mitigate damages; (7) "wrongful or negligent conduct" on MidFirst's part; (8) set-off and/or recoupment; (9) "acquiescence and consent"; and (10) that defendants have the right to plead further affirmative defenses.

The gist of defendants' affirmative defenses is that, while defendants put their hearts and souls into the completion of the project, as well as significant personal funds, as a response to the "unprecedented global financial crisis" (Aff. of Joralemon, at 3), which sent defendants into a tailspin, MidFirst contrived to pursue an "inequitable strategy to force Borrowers into default so that [MidFirst] could unilaterally seize the building and pursue windfall profits through foreclosure, as the project value far exceeds any outstanding loan balance." *Id.* at 4.

Defendants essentially believe that MidFirst had an equitable duty to continue to work with defendants to complete the project, by forgiving their defaults in payment,¹ and by allowing defendants to obtain further financing. This duty allegedly arose from MidFirst's course of conduct during the duration of the project of cooperating with defendants in obtaining extensions and further financing. Defendants believe that MidFirst created, by its actions prior to defendants' defaults, an expectation and a right on defendants' part to

¹Defendants never raise or discuss the other alleged Events of Default.

receive further cooperation, aid, and forbearance from MidFirst. Thus arise the equitable affirmative defenses of waiver, estoppel, unclean hands and ratification.

Further, by pleading the "doctrine of temporary commercial impracticability," defendants claim that the "global financial crisis" exempts them from performance under the transactional documents, because events beyond their control contributed to their inability to pay interest and principle on the Notes.

II. Discussion

MidFirst evidences a right to summary judgment by making "a prima facie case for a right to payment by proof of [the Notes] and the debtor's failure to make the payments called for therein." *Cicconi v McGinn, Smith & Co., Inc.*, 35 AD3d 292, 292 (1st Dept 2006); see also *Bonds Financial, Inc. v Kestrel Technologies, LLC*, 48 AD3d 230 (1st Dept 2008). Similarly, MidFirst, by presentation of the Guaranty, and of defendants' failure to pay thereon, has made out a prima facie right to payment under the Guaranty. See *Superior Fidelity Assurance, Ltd. v Schwartz*, 69 AD3d 924 (2d Dept 2010).

Defendants characterize MidFirst's action after defendants' default as a "scheme" to steal the building from defendants (Aff. of Joralemon, at 5), and they insist that MidFirst's conduct was "oppressive or unjust" (*id.* at 9) and "immoral and unconscionable" (*id.*), so as to justify the crafting of relief,

[*7]

by this court, of "an equitable resolution that would permit the Bank to be paid in full while allowing Borrowers to complete the Carriage House." *Id.* at 10. Defendants maintain that discovery is needed to flesh out their affirmative defenses because, presumably, there remains information essential to defendants' defenses which resides solely in MidFirst's possession.

The court is not persuaded. First, defendants' reliance on the so-called doctrine of "temporary commercial impracticability" is misplaced. To the extent that this defense is actually one for impossibility of performance (as MidFirst suggests), defendants' defense fails. In order to plead impossibility of performance, defendants must allege that an intervening event has caused the "'destruction of the subject matter of the contract or the means of performance'" making performance "'objectively impossible [citation omitted].'" *Warner v Kaplan*, 71 AD3d 1, 5 (1st Dept 2009). However, "impossibility occasioned by financial hardship does not excuse performance of a contract." *Urban Archaeology Ltd. v 207 East 57th Street LLC*, 68 AD3d 562, 562 (1st Dept 2009); see also *DiScipio v Sullivan*, 30 AD3d 660 (3d Dept 2006). Defendants cannot plead impossibility of performance merely because they encountered financial hardship which made it impossible for them to meet their burden under the Notes.

Some courts have recently discussed a doctrine of "temporary commercial impracticability" in situations involving extreme and

unforeseen financial hardships in the context of very complex financial transactions (see *Hoosier Energy Rural Electric Cooperative v John Hancock Life Insurance Company*, 588 F Supp 2d 919 [SD Indiana 2008], superseded, 2008 WL 5216027²), or an extreme and unforeseeable change in circumstances. See *Bush v Protravel International, Inc.*, 192 Misc 2d 743 (Civ Ct, Richmond County 2002). Under this doctrine, parties may be temporarily excused from performance under a contract if "unexpectedly and radically changed conditions render the judicial enforcement of certain promises of little or no utility" under "sufficiently extreme circumstances." *Hoosier Energy Rural Electric Cooperative v John Hancock Life Insurance Company*, 588 F Supp 2d at 931.

To the extent that "temporary commercial impracticability" is separable from the common defense of impossibility of performance, this court finds the doctrine inapplicable here. In *Hoosier Energy Rural Electric Cooperative v John Hancock Life Insurance Company* (588 F Supp 2d 919, *supra*), the court was clear that the doctrine would only apply in situations involving complex matters and unforeseen circumstances. The *Hoosier* court also found the contract therein to be illegal. Such is not the case here, involving, as it does, only a simple note and mortgage

²The decision was superseded only as to the question of injunction security.

transaction.

In *Bush v Protravel International, Inc.* (192 Misc 2d 743, *supra*), the court held that parties trying to cancel travel tickets after the terrorist attacks of September 11, 2001 could be excused from performing under the contract, because of the extraordinary situation which arose after that occurrence, which allegedly defeated the parties' attempts to cancel the trip due to the alleged disruption of telephone service between the attacks and September 27, 2001. In *Bush*, the court was clear to point out the extreme and unforeseeable circumstances which contributed to the parties' inability to perform under the agreement with their travel agents.

The present action does not involve a complex financial transaction, or an event of such unforeseeability as might render performance temporarily impracticable. Defendants were in financial difficulties before their final default, as witnessed by the extensions of time which they had already received from MidFirst, and the additional financing they required. Thus, their failure to perform cannot be fully attributable to the downturn in the economy. Further, the economic meltdown, while perhaps unprecedented, was not completely unforeseeable, and this court finds that defendants' defense of "temporary commercial impracticability" is, essentially, merely a claim of financial impossibility "occasioned by financial hardship," which does not

excuse performance. See *Urban Archaeology Ltd. v 207 East 57th Street LLC*, 68 AD3d at 562.

The equitable defenses of waiver, estoppel, unclean hands, ratification, and the vague claim of "acquiescence and consent" must also be stricken. A waiver involves "the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable." *Nassau Trust Co. v Montrose Concrete Products Corp.*, 56 NY2d 175, 184 (1982); see also *Matter of Lamberti v Angiolillo*, __AD3d__, 2010 NY Slip Op 03846 (1st Dept 2010). Waiver "should not be lightly presumed." *Braddock v Braddock*, 60 AD3d 84, 92 (1st Dept 2009).

There is no basis for a claim that MidFirst's prior, and apparently good-faith efforts to work with defendants in order to avoid a default was an intentional abandonment of its right to collect under the Notes on their maturity. Therefore, there has been no waiver.

There is no ground to estop MidFirst from collecting on the Notes. Estoppel "rests upon the word or deed of one party upon which another rightfully relies, and so relying changes his position to his injury [internal quotation marks and citations omitted]." *Nassau Trust Co. v Montrose Concrete Products Corp.*, 56 NY2d at 184; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Management, L.P.*, 7 NY3d 96 (2006). Defendants cannot point to any words or deeds on MidFirst's part which would

reasonably justify defendants' belief that MidFirst would not seek to collect upon the Notes on their final maturity date. Upon making the second extension of the maturity date of the Notes, MidFirst informed defendants that there would be no more extensions, which bars any claim that defendants had been misled to their detriment by MidFirst. To make such a finding would only serve to chill efforts on behalf of financial institutions to work through times of financial distress with their debtors, an untenable result.

As a result of the foregoing, there is no validity to defendants' affirmative defenses of unclean hands, "acquiescence and consent," or ratification. Also, there is no evidence that MidFirst acted wrongfully in seeking to enforce its contractual rights, requiring the dismissal of defendants' affirmative defenses of negligence or wrongful conduct.

The affirmative defenses of failure to mitigate damages³ and set-off and recoupment do not deal with MidFirst's liability, but only to the amount of recovery to which MidFirst might be entitled upon the reference of MidFirst's damages. They are therefore stricken. And, of course, there is no affirmative defense of a right to plead further affirmative defenses.

³The court in the case of *HSBC Bank USA v Picarelli* (23 Misc 3d 1135[A], 2009 NY Slip Op 51107[U], *3 [Sup Ct, NY County 2009]), held that "[m]itigation of damages is not an affirmative defense to an action to foreclose a mortgage."

Defendants plead that they need discovery to flesh out their affirmative defenses. However, since defendants' affirmative defenses are based on acts or words that MidFirst allegedly directed at defendants, allegedly causing them to rely on MidFirst's good graces, defendants would necessarily be the parties in possession of this information, which is not known only to MidFirst, such as might allow the motion to be denied under CPLR 3212 (f).

In conclusion, defendants' affirmative defenses must be dismissed in their entirety, and MidFirst's motion for summary judgment is granted.

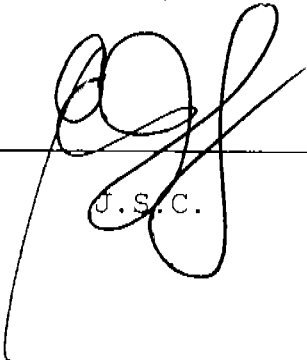
MidFirst's request to add P.C. Richard & Son Long Island Corporation as a party defendant is denied. No grounds upon which to bring this party into this action have been set forth. The matter is simply not discussed. The request to dismiss John Does 2-10 is, however, granted.

Accordingly, the part of MidFirst Bank's motion which seeks summary judgment on its action to foreclose the mortgage is granted, while its request to add P.C. Richard & Son Long Island Corporation as a party defendant in place of John Doe 1 is denied. John Does 2-10 are deleted from the caption.

Settle Order.

Dated: June 21, 2010

ENTER:



J.S.C.