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

PRESENT: HON. JUDITH J. GISCHE Justice PART 10

TD Bank N.A.

-v-

158 Wooster Street LLC

INDEX NO. 113019/09

MOTION DATE

MOTION SEQ. NO. 001

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

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

JUL 09 2010

Dated: July 9, 2010

HON. JUDITH J. GISCHE J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE

☒ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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TD Bank, N.A.,

Plaintiff (s),

-against-

158 Wooster Street, LLC, Adrian Stroie, James Mooney, William Fegan, and "John Doe 1-5,"

Defendant (s).

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DECISION/ ORDER
Index No.: 113019-2009
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
TD Bank n/m (3212) w/ KVJ affid, MG affirm, exhs	1
Defs' opp w/WF, PRS, BCC affids, exhs	2
TD Bank reply w/MG affirm, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action for foreclose a commercial mortgage. Defendant 158 Wooster Street, LLC ("LLC" or "mortgagor") is the mortgagor and the individually named persons are members of the LLC and guarantors of the mortgage. Hereinafter, the mortgagor and guarantors are collectively referred to as the "defendants," unless otherwise provided. Issue has been joined and presently before the court is defendants' pre-note of issue motion for summary judgment. Since issue has been joined, summary judgment relief is available (CPLR 3212[a]; Myung Chun v. North American Mortgage

Co., 285 A.D.2d 42 [1st Dept 2001]). The court's decision and order is as follows:

Arguments

The LLC borrowed money from the bank's predecessor in interest, Commerce Bank, N.A., pursuant to a loan and security agreement dated April 4, 2008 in the amount of $5,440,000. The loan documents consist of several documents dated as of April 4, 2008. They include: the loan and security agreement, the note, an ISDA Master Agreement ("swap agreement") and an assignment of leases and rents. The individually named defendants personally guaranteed the loan, which is secured by a lien on real property known as 160 Wooster Street, Comerica Unit 1, New York, New York 10012 ("the premises").

The LLC was to have paid interest only during the first 12 months of the loan and then, starting in the 13th month, it was to pay principal and interest until 2018. However, the LLC defaulted in making the monthly payments due for June 1, July 1 and August 1, 2009. After notifying the mortgagor and guarantors in writing of the default (notice dated August 5, 2009), the bank accelerated the payments due. According to that notice, the total sum due was $5,326,976.81 as of August 5, 2009.

The bank served the LLC with another notice, also dated August 5, 2009. That notice advised the LLC that it had defaulted under section 5 [a][vi] of the swap agreement and therefore, August 10, 2009 was being designated as the "early termination date" pursuant to section 6 [a] of the swap.

The bank claims that it has proved its *prima facie* case and summary judgment is warranted because it has established the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendants' default in payment (Witelson v.

Jamaica Estates Holding Corp. I, 40 A.D.3d 284 [1st Dept 2007]; Campaign v. Barba, 23 A.D.3d 327 [2nd Dept 2005]). The bank claims further that each of the defenses asserted by the defendants are insufficient, as a matter of law, to defeat the claims against them and that the counterclaims for fraud, negligent misrepresentation, for an accounting, breach of contract and unjust enrichment have no basis in fact or law and, in any event, the defendants expressly waived in the loan documents the right to assert counterclaims.

The swap agreement provides that it is the "master agreement" governing all the transactions between the bank and the parties, and it also provides that "all transactions are entered into in reliance of . . .this Master Agreement . . ." The swap agreement was confirmed by a "swap transaction confirmation" also dated April 4, 2008. Other documents that were exchanged between the parties include: a swap agreement opinion letter by LLC's attorney, Craig Meltzer, Esq. and an interest rate swap product disclosure form. The confirmation authorizes the bank to debit the LLC's account to pay the mortgage (p. 3, "payments to commerce bank") and the disclosure form explains what a swap is and how it works, providing the pros and cons of the arrangement, including the cost of early termination either through the choice of the borrower, or by defaulting in making payments.

In opposition to the bank's motion, defendants provide the sworn affidavit of B. Cristina Chidu ("Chidu"). Chidu identifies herself as the financial director of Tribach Holdings, a non-party. According to Chidu, Tribach Holdings is the manager of the LLC. Chidu contends that although she is not a signatory to any of the loan documents, including the swap or "master" agreement, she was present at the closing

of the mortgage, and despite her "repeated attempts to get accurate and timely information" the bank has refused to explain to her how calculations under the swap are made. Chidu also refers to conversations she had about the swap and interest rates, and claims that she was told one thing about the interest rate when, in actuality, the interest is something else. One of these conversations took place with an unidentified person on a speaker phone at the closing. Chidu also relates that the "swap" was "very costly" and that when the LLC realized how expensive it was and tried to "unwind" it, they were stonewalled. Chidu opines that the bank charged too much to "unwind" the swap ($181,000) and admits the LLC could not keep up with the payments. Chidu states the bank unilaterally applied $213,900 of the LLC's cash collateral to repay the principal on the mortgage, when it should have applied it differently to bring the borrower current on its obligations.

William Fegan, a named defendant, states that the bank is trying to "steamroll its way into a foreclosure proceeding" by refusing to address the most basic questions. Thus Fegan states that there has been no discovery in this action, but defendants need discovery to independently ascertain whether the banks calculations are correct. Fegan claims that the property is just starting to be profitable (the LLC has a tenant for the unit) and the LLC can become current on the payments due, if only the bank would forebear on enforcing the note. The LLC's attorney states in his own affirmation that the bank is trying to foreclose on the commercial unit by using an "unfair, deceptive, and factually murky derivative interest rate swap agreement . . ." The attorney compares this case to one recently decided in North Carolina involving a different bank,

different mortgagors and different loan documents.

In reply, the bank argues that Chidu is a non-party, she does not have personal knowledge of the agreements and, in any event, her sworn affidavit is self-serving and fails to raise a genuine issue of fact. Prior to defendants' default, Chidu corresponded with plaintiff by email, asking how much it would cost to unwind the swap; those letters have been provided to the court.

The Law

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 [1st Dept 2003]).

On a motion for summary judgment, it is for the court to decide any issues of law that are raised (Hindes v. Weisz, 303 A.D.2d 459 [2nd Dept 2003]).

Discussion

The bank has established the existence of all the loan documents, including the mortgage and mortgage note, ownership of the mortgage, and the defendants' default in payment (Witelson v. Jamaica Estates Holding Corp. I, *supra*; Campaign v. Barba,

supra). These constitute a *prima face* case for foreclosure.

For the reasons that follow, defendants have not raised material issues of fact that require a trial of this action.

First, defendants' claims, that the bank has engaged in "shady practices" and that such tactics should not be countenanced by this court, are bald assertions without any support in this record. The court is not persuaded that this case has similar facts to one in North Carolina or that this case should be decided the same way. The case at bar involves a completely different bank, different defendants, different agreement, different facts. Furthermore, this is a motion for summary judgment, whereas the motion before the North Carolina court was for a preliminary injunction. The decision by the judge in the North Carolina action is neither binding on this court nor persuasive authority.

The gravamen of defendants' arguments are that they are surprised, disappointed, confused and alarmed that it cost so much to unwind the swap and, therefore, there is something inherently unfair in these transactions which have now caused them to be in danger of losing their valuable commercial unit. Defendants also contend that the very serious nature of their agreements with the bank was buried under mountains of boilerplate and that although the LLC had requested a "simple mortgage loan" the bank "caused" them to enter into an unneccessarily complex financial arrangement. They also claim that unnamed employees gave them misinformation or bad advice which turned out to be flatly contradicted by, or not contained at all in, the written loan documents.

As a general rule, the signer of a written agreement is conclusively bound by its terms unless there is showing of fraud, duress, or some other wrongful act on part of any party to contract (State Bank of India, New York Branch v. Patel, 167 A.D.2d 242 [1st Dept 1990]). Where a claim of unconscionability is raised, the contract formation process must be examined to see whether there was a lack of meaningful choice (Gillman v. Chase Manhattan Bank, N.A., 73 N.Y.2d 1 [1988]). The court also considers the size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power (Gillman v. Chase Manhattan Bank, N.A., 73 NY2d at 11 [*internal citations omitted*]).

This was a mortgage for $5,440,000. The LLC's own attorney rendered an opinion regarding the swap agreement addressed to the bank. The opinion letter states among other things that: "the provisions of this agreement are sufficient to create, in favor of the Lender, a valid security interest in all right, title and interest of Borrower in those items and types of Collateral granted to the Lender . . ." and that the "Lender shall have a perfected security interest in the collateral . . ." Furthermore the "Guaranty Agreement has been executed and delivered by guarantors and constitutes the legal, valid and binding obligation of the Guarantors..."

Defendants' arguments, that foreclosure is a extreme and unfair measure because the bank could have applied payments different and the property is just starting to become profitable, do not state effective legal defenses against plaintiffs

claims or raise the existence of a factual issue requiring a trial of this action (Zuckerman v. City of New York, *supra* at 562).

In any event, defendants signed documents which contain a waiver of defenses and counterclaims. Such waivers are routinely enforced by the courts (Red Tulip, LLC v. Neiva, 44 A.D.3d 204 [1st Dept 2007]).

Defendants have, at best, established that they overextended themselves and could not keep up with the loan payments. Although they claim the bank unilaterally unwound the swap, the swap agreement contains an early termination clause, allowing the bank to terminate the agreement and accelerate payments in the event of a default (section 5[a][vi and 6[a] of swap agreement). Defendants have not denied, nor is it disputed, that they executed all of the documents identified by the bank in its motion. Section 6 [e][i] contains the formula to be applied in calculating the early termination fee. Furthermore, the swap disclosure form explains most of the intricacies of the swap and notified the LLC that its obligation to pay under the swap is independent from those under the note and mortgage. It also states that the collateral for the loan also collateralizes the swap.

The bank has proved that it had the sole discretion to apply payments made. The bank has also established that it applied the $309,127.63 cash collateral that it held and credited the defendants for that sum. The bank has also established that it is entitled to an early termination fee. According to section 6[e][I], the swap is calculated as:

> "the excess, if a positive number, of (A) the sum of the Settlement Amount (determined by the Non-defaulting Party) in respect of the Terminated Transactions and the Unpaid Amounts owing to the No-defaulting Party over (B) the Unpaid Amounts owing to the Defaulting Party..."

Although the bank has established the formula to be applied, the bank has not proved how it calculated the termination fee ($181,500). Thus, while terms are defined in the swap, they have not been quantified. Therefore, the court orders that there be hearing on damages before a special referee who shall hear and report back to the court what termination fee is due under the swap agreement. The disputed issue of certain credits as already decided in this case, however, is the law of the case and the special referee shall make his/her recommendations consistent therewith.

Since the bank has also established that it is entitled to foreclose on the property held as collateral , a referee pursuant to RPAPL 1321 must be appointed to ascertain and compute the amounts due and owing to the bank. The court hereby names and appoints Michael P. Tempesta, Esq., having an office at 39 Broadway, Ste 2420, New York, New York 10006-3003, tel: (212) 742-3800 as the referee to compute and directs that the bank submit an order, on notice, appointing Attorney Tempesta.

The court will also order expedited discovery in this matter, solely on the issue referred to the Special Referee. Demands for documents shall be served no later than Ten (10) Days after the bank serves defendant with Notice of Entry of this Order. Responses to the demands are due no later than Thirty (30) Days after receipt.

The bank shall serve the office of the special referee with a copy of this order so the issue framed can be heard.

Conclusion

The bank's motion for summary judgment is granted on the issue of liability. The court has also decided in the bank's favor the issue of whether certain payments made were properly applied. The court otherwise directs a hearing on damages only on the

calculation of the termination fee. The court also directs the bank to present an order on notice appointing Michael P. Tempesta, Esq. as the referee to compute under the mortgage.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
July 9, 2010

So Ordered;

Hon. Judith J. Gische, JSC