Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

THE COMMUNITY PRESERVATION CORPORATION x

- against -

GOLDEN GATE RESIDENCE, LLC, et al. x

Index Number 32405 2009

Motion Date April 13, 2010

Motion Cal. Number 10

Motion Seq. No. 2

The following papers numbered 1 to 11 read on this motion by defendants Golden Gate Residence, LLC (Golden Gate) and Bahram Kamali pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-7
Answering Affidavits - Exhibits	8-11

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action by filing a copy of the summons and complaint on December 3, 2009, alleging that defendant Kamali, in his capacity as managing member of defendant Golden Gate, executed, acknowledged and delivered a consolidated mortgage on the real property known as 83-30 Kew Gardens Road, Kew Gardens, New York, to it as security for a consolidated and restated note, evidencing a building loan in the original principal amount of $19,700,000.00, plus interest. As additional security for the loan, defendant Kamali, in his capacity as managing member of defendant Golden Gate and in his individual capacity, allegedly executed a guaranty for the repayment (payment guaranty) of

the obligations of defendant Golden Gate under the loan documents up to the "Guaranteed Amount," as defined therein. Defendant Kamali allegedly also personally guaranteed completion of the project, and payment of "the costs, expenses and liabilities" incurred by defendant Golden Gate in connection with the completion of improvements at the property, as well as the taxes and assessments in respect of the premises, and interest and loan fees on the loan. Plaintiff alleges that defendants Golden Gate and Kamali defaulted under the loan documents by failing to pay the outstanding loan indebtedness on April 1, 2009, the mortgage's maturity date. Plaintiff seeks, among other things, appointment of a receiver and foreclosure of the mortgage.

In lieu of answering the complaint, defendants Golden Gate and Kamali move to dismiss the complaint. Defendants Golden Gate and Kamali assert that the complaint fails to state a cause of action insofar as plaintiff has joined a claim for foreclosure with a claim for a legal remedy, in violation of RPAPL 1301(3). Defendants Golden Gate and Kamali argue that RPAPL 1301(3) prohibits the simultaneous prosecution of such claims in the same action without leave of court, and that no such leave of court has been obtained or, is warranted.

In New York, when a mortgagor defaults, a mortgagee must elect between foreclosing on the property or pursuing a legal remedy, and may not prosecute both claims concurrently without leave of court (RPAPL 1301; *see TBS Enterprises, Inc. v Grobe*, 114 AD2d 445 [1985], *appeal denied* 67 NY2d 602 [1986]; *see Wyoming County Bank & Trust Co. v Kiley*, 75 AD2d 477, 480 [1980]). This "election of remedies" rule also applies to actions on the guaranty of a note (*see TBS Enterprises, Inc. v Grobe*, 114 AD2d 445 [1985] *supra*). However, RPAPL 1301 is strictly construed because it is in derogation of the common-law right to pursue the alternate remedies of foreclosure and recovery of the mortgage debt at the same time (*see Dollar Dry Dock Bank v Piping Rock Builders, Inc.*, 181 AD2d 709, 710 [1992]). In keeping with such strict construction, RPAPL 1301(3) has been interpreted to be, by its terms, debt specific (*see Central Trust Co. v Dann*, 85 NY2d 767, 772 [1995]), i.e., for the statute to serve as a bar to simultaneous prosecution of a foreclosure and legal remedy, the separate claims must be for the same mortgage debt.

In the complaint, plaintiff asserts a claim in equity to foreclose the mortgage and adjudicate that defendants Golden Gate and Kamali, as guarantors under the payment guaranty, will be liable in the event a deficiency remains after the foreclosure sale. Such claim is predicated upon the failure to pay the mortgage debt upon maturity. Plaintiff also

asserts a claim[1] against defendant Kamali in his individual capacity to recover under the completion guaranty "all costs, expenses, liabilities or damages stemming from the failure to complete the improvements by the Completion Date" (subparagraph iv of the "WHEREFORE" clause). Although plaintiff alleges in its complaint that the completion guaranty permits recovery of the taxes and assessments in respect of the premises, and the interest and loan fees on the mortgage loan, it makes no demand, in the prayer for relief, for recovery for such items under the completion guaranty (*cf. White v Wielandt*, 259 App Div 676 [1940]). Plaintiff's complaint, as a result, does not violate RPAPL 1301(3).

Defendants Golden Gate and Kamali also argue that the complaint should be dismissed based upon a defense premised upon documentary evidence. Defendants Golden Gate and Kamali assert plaintiff cannot establish that it properly served, prior to commencement of suit, a notice of election to cancel the extension of the maturity date pursuant to paragraph 17(c) of the note, and a written demand for payment pursuant to section 3.3 of the mortgage. Defendants Golden Gate and Kamali assert the required notice of election and demand for payment, which were served by plaintiff, were defective with respect to the manner in which they were served and as to whom they were served. Defendants Golden Gate and Kamali claim that to the extent plaintiff served a notice of election and demand for payment by letter dated March 25, 2009, and a demand for payment by letter dated November 3, 2009, such letters were not served in accordance with section 4.2 of the mortgage. Defendants Golden Gate and Kamali argue that under section 4.2 of the mortgage, requisite notices, including any notice of election to cancel and demand for payment, must be served by personal delivery or sent by certified mail, return receipt requested, or by reputable overnight courier, upon defendant Golden Gate, along with a copy to Rothkrug, Rothkrug, Weinberg & Spector LLP (the Rothkrug Firm), defendant Golden Gate's transactional counsel. Defendants Golden Gate and Kamali assert the March 25, 2009 letter was served by facsimile transmission on March 26, 2009, and subsequently on April 27, 2009 by email, to the attention of Jackie Kamali, a representative of defendant Golden Gate, and the November 3, 2009 letter was sent by email to Jackie Kamali. Defendants Golden Gate and Kamali also assert plaintiff failed to serve either letter upon the Rothkrug Firm. They offer the affidavits of Jackie Kamali and Adam Rothkrug, Esq. in support of their motion.

The mortgage provides that the mortgagor pay to the mortgagee the sums and due and owing pursuant to the restated note. Under the restated note, the maturity date was set for April 1, 2009, but was subject to automatic extension as follows:

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[1] The complaint does not contain separately denominated causes of action.

> 17. Extension Provisions. The Maturity Date shall be subject to extension for up to three (3) consecutive periods of six (6) months each (each, an "**Extension Period**"), upon and subject to the provisions of this Paragraph 17, as follows;
>
> > (a) In the event that the Completion Conditions are not satisfied by the Maturity Date originally set forth in this Note, then, without limiting any other rights of [plaintiff] under this Note or the Loan Documents, including, without limitation, any rights of [plaintiff] arising on account of the failure by Maker to satisfy the Completion Conditions or on account of the occurrence of an Event of Default, (I) the Maturity Date shall automatically be extended for a period of six (6) calendar months . . . .

Under the mortgage note, however, plaintiff reserved for itself the right to cancel any extension of the maturity date, by written notice to defendant Golden Gate as follows:

> > Notwithstanding any provision to the contrary contained in this Paragraph 17, [plaintiff] reserves the right to cancel, by written notice to Maker, any extension of the Maturity Date provided for in this Paragraph 17 upon the occurrence and during the continuation of any Event of Default under the Loan Documents, including, without limitation, any Event of Default arising on account of the failure by Maker to satisfy the Completion Conditions or on account of the failure of this Note to be repaid in full as of the original Maturity Date set forth herein (any such notice, an "**Extension Cancellation Notice**"), and in the event of any such cancellation, the outstanding principal balance of this Note shall immediately become due and payable and interest on the outstanding principal balance of this Note shall accrue . . . ."

(emphasis in the original).

Section 13 of the note provides:

> > "13. Notices. Any notice, demand or request relating to any matter . . . in this Note shall be in writing and shall be given as provided in the Mortgage."

Section 4.2 of the mortgage, in relevant part, provides that:

> "All notices and/or consents, hereunder shall be in writing and shall be deemed to have been sufficiently given or served for all purposes when delivered in person or sent by certified mail, return receipt requested, or by reputable overnight courier, to any party hereto at its address above stated ...; and in the case of the Mortgagor, with a copy to Rothkrug, Rothkrug, Weinberg & Spector LLP [the Rothkrug Firm] . . . ."

Section 3.3. of the mortgage requires plaintiff, upon defendant Golden Gate's failure to pay the outstanding mortgage debt at maturity, to provide a written demand for payment as a condition precedent to bringing an action for foreclosure. Section 3.3 of the mortgage, in pertinent part, states:

> "(a) In the case an Event of Default shall have happened and be continuing, then, *upon written demand* of the Mortgagee, the Mortgagor will pay to the Mortgagee the whole amount which then shall have become due and payable on the Restated Note, for principal or interest or both, as the case may be . . . . In the event the Mortgagor shall fail forthwith to pay such amounts *upon such demand*, the Mortgagee shall be entitled and empowered to institute such actions or proceedings at law or in equity... for the collection of the sums so due and unpaid, and may prosecute any such action or proceedings to judgment or final decree . . . ."

(emphasis supplied).

Plaintiff makes no claim it was excused from serving a notice of election pursuant to section 17(c) of the note to cancel any automatic extension of the maturity date on the ground that completion conditions were satisfied. Nor does plaintiff deny section 3.3 of the mortgage requires service of a written demand for payment of the outstanding mortgage debt prior to commencement of any foreclosure action. Rather, plaintiff asserts that it was not required to provide written notice of its election to cancel any extension of the maturity date, or written demand for payment, because defendants Golden Gate and Kamali, in section 6 of the payment guaranty, waived all notices and demands.

Plaintiff, however, has failed to demonstrate the waiver provision in section 6 of the payment guaranty governs notices and demands made in relation to the mortgage. Section 6 provides that defendants Golden Gate and Kamali waive "presentment of payment, demand, protest, notice of protest and dishonor, notices of default and all other notices of every kind and description . . . ." It is clear that the provision relates to notices and demands made under the payment guaranty itself, and makes no mention of the mortgage. Plaintiff also has failed to demonstrate the waiver provision in the payment guaranty was otherwise incorporated into the mortgage.[2] Thus, contrary to plaintiff's assertion, plaintiff was required to provide a notice to elect to cancel any extension of the maturity date to the extent the completion conditions were not satisfied by the original maturity date, and a written demand of payment prior to commencement of suit.

Plaintiff alternatively asserts that it met such conditions when it served the March 25, 2009 letter, advising defendant Golden Gate, there would be no "additional" extension of the maturity date of April 1, 2009, and "the outstanding principal balance, plus all other sums due in accordance with the applicable Loan Documents," would become "due and payable in full on April 1, 2009." Plaintiff argues section 4.2 of the mortgage does not require strict compliance with the methods of service set forth therein, and hence, substantial compliance is sufficient. It contends that it substantially complied with such service provision, when serving the March 25, 2009 letter, and defendant Golden Gate actually received such letter. In support of such assertion, it offers the affidavit of Dianna Look, its senior vice-president and director of loan servicing, indicating she sent the letter to defendant Golden Gate and Jackie Kamali by facsimile and certified mail, return receipt requested on March 25, 2009, and a copy of a signed return receipt.

Plaintiff also asserts it sent, as a courtesy, the letter dated November 3, 2009, advising defendant Golden Gate that it had a final opportunity to satisfy the loan, and unless payment was made within 10 days, it would exercise its legal remedies, including institution of a foreclosure action. Plaintiff admits it lacks proof that either the March 25, 2009 letter or the

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[2] In addition, the waiver provision found in the payment guaranty cannot be considered to constitute a written waiver, in accordance with the requirement pursuant to section 4.3 of the mortgage ("[w]henver in this Mortgage the giving of notice by mail or otherwise is required, the giving of such notice may be waived in writing by the person or persons entitled to receive such notice"). To do so, would render the "written demand" condition precedent found in section 3.3 of the mortgage meaningless. Such a construction must be avoided whenever interpreting contracts (*see generally Lobacz v Lobacz*, 72 AD3d 653, 654-655 [2010]).

November 3, 2009 letter was sent to the Rothkrug Firm, or that it served the November 3, 2009 letter upon defendant Golden Gate in any manner other than by email.

To the extent plaintiff relies upon the service of the March 25, 2009 letter to serve as a written demand for payment, under section 3.3 of the mortgage, plaintiff was required to make written demand *after* the happening and continuation of the event of default, and before commencement of the action. The March 25, 2009 letter, however, was served before April 1, 2009, the alleged date of the event of default. Consequently, the March 25, 2009 letter did not fulfill the condition requiring written demand for payment as a precedent to suit.

Furthermore, the March 25, 2009 letter did not serve to satisfy the notice of election to cancel provision because it was defectively served. The mortgage does not simply provide that any notice required under the mortgage to be provided to the mortgagor be made in writing. Rather, it sets forth, in section 4.2 of the mortgage, certain methods of service of such written notice, which are of the type reasonably calculated to guarantee receipt. The parties to the mortgage deemed those methods to be sufficient if utilized by the mortgagee, to serve the mortgagor. Even assuming the specified methods were not meant to be exclusive, it is clear, based upon their inclusion, the contracting parties intended that any alternative method used by the mortgagee be at least equivalent in nature, i.e. reasonably calculated to guarantee receipt, as opposed to reasonably calculated to apprise the intended recipient of notice. The mortgage, for example, includes no express provision allowing the use of email or fax, methods normally not considered reasonably calculated to guarantee receipt (*cf. Hollow v Hollow*, 193 Misc 2d 691 [Sup Ct, Oswego County 2002]); *Snyder v Alternate Energy Inc.*, 19 Misc 3d 954, [NY Civ Ct 2008]), for service of requisite notices. If the parties to the mortgage had desired to include such a method, or any other electronic method, as an acceptable means by which to provide notice, they could have done so, but did not. Notably, plaintiff could have utilized one of the methods deemed sufficient under section 4.2 of the mortgage to serve both defendant Golden Gate and the Rothkrug Firm with a copy of the notice of election and demand for payment, thereby obviating any argument. It instead chose to use a method which was less in kind than those set forth therein.

In addition, it is clear from the specific mention in section 4.2 of the Rothkrug Firm, including the Firm's address, that the parties intended any notice or demand required to be served, be also served upon the mortgagor's counsel. Notwithstanding whether defendant Golden Gate was served with a copy of the March 25, 2009 letter by certified mail, receipt requested, plaintiff makes no claim that it provided any copy of the March 25, 2009 or November 3, 2009 letters to the Rothkrug Firm.

To the extent the March 25, 2009 and November 3, 2009 letters were not sent in compliance with section 4.2, defendants Golden Gate and Kamali were entitled to treat them as nullities, and their failure to object to their method of service at the time of receipt, cannot be considered a waiver by them of the service defects. Again, if plaintiff had followed its own preferred "fail safe" method provided for in section 4.2, and additionally served a copy upon the Rothkrug Firm, defendant Golden Gate's counsel could have objected immediately to the method of service on its client's behalf. In any event, defendants Golden Gate and Kamali have properly objected to the service of the notice of election to cancel and the written demand for payment herein, by means of this motion to dismiss.

The motion to dismiss the complaint by defendants Golden Gate and Kamali is granted only to the extent of dismissing the claims against defendants Golden Gate and Kamali to foreclose the mortgage and adjudicate that such defendants are liable in the event of a deficiency remaining after the foreclosure sale.

Dated: June 29, 2010

AUGUSTUS C. AGATE, J.S.C.