

Anna Louise Realty Corp. v Grahel Assoc. LLC

2010 NY Slip Op 32770(U)

September 16, 2010

Supreme Court, Queens County

Docket Number: 32972/09

Judge: Orin R. Kitzes

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.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

ANNA LOUISE REALTY CORP.

X

INDEX NO. 32972/09

MOTION CAL. NO. 3

- against -

MOTION SEQ. NO. 1

GRAHEL ASSOCIATES LLC, et al., etc.

BY: KITZES, J.

X

DATED: SEPTEMBER 16, 2010

Plaintiff commenced this action seeking to foreclose first and second mortgages given by defendant Grahel Associates LLC (Grahel) on March 18, 2008 on the real property known as 151-13 through 151-21 6th Road, Whitestone, New York and designated as Block 4487, Lots 151 and 148, and recover against defendant Richard Grace for any deficiency. Plaintiff alleges that the first mortgage served as security for payment of the indebtedness of defendant Grahel pursuant to a note in the principal amount of \$700,000.00, plus interest. Plaintiff also alleges that the second mortgage was formed pursuant to a consolidation and modification agreement, and consisted of the consolidation of a note secured by a mortgage in the principal amount of \$2,000,000.00, plus interest, in favor of Brooklyn Federal Savings Bank, and assigned through a series of assignments to plaintiff, and another note secured by a mortgage in the principal amount of \$1,701,635.49, plus interest, in favor of plaintiff. The consolidated mortgage lien was in the principal amount of \$3,300,000.00, plus interest, and was evidenced by a consolidated note. The maturity date for both the first mortgage and second mortgages was March 19, 2009. Defendant Grace guaranteed the payment and performance of Grahel's obligations under the subject mortgages pursuant to guarantees dated March 18, 2008. In its complaint, plaintiff

alleges that defendants Grahel and Grace defaulted under the terms of the mortgages by failing to make payments as required under the loan documents and by failing to pay the balance due upon maturity after notice and demand. Plaintiff also alleges a cause of action for foreclosure against defendant St. Paul Fire and Marine Insurance Company (St. Paul) as a subordinate mortgage holder.

Defendants Grahel and Grace served a joint answer denying certain allegations of the complaint, asserting various affirmative defenses, and interposing counterclaims. They allege, among other things, that plaintiff entered into purchase and sale agreements with defendant Grahel pursuant to which portions of Lots 148 and 151 were to be subdivided and reapportioned, and defendant Grahel was to sell to plaintiff a certain portion of the mortgaged premises. They also allege that in connection with the purchase and sale agreements, Grahel granted plaintiff the right to take possession and lease to certain tenants a portion of the subject premises in advance of closing. They further allege that plaintiff installed tenants at the property, and collected rents from them, but refuses to apply such rents to the mortgage debt. In addition, they allege plaintiff and its tenants caused the subject property to be damaged.

Plaintiff served a reply to the counterclaims of defendants Grahel and Grace denying the allegations of the counterclaims, and asserting various affirmative defenses.

Defendant St. Paul served an answer denying certain allegations of complaint and admitting others, and asserting an affirmative defense denominated as a “first affirmative defense.” Plaintiff served Double N Contracting a/k/a Namow, Inc. (Double N) s/h/i/a defendant “John Doe #1,” with process. Double N has not appeared in the action or answered the complaint. Plaintiff did not serve defendants “John Doe #2” through “John Doe #10” with process, because it determined they are unnecessary parties to this action.

Plaintiff moves for summary judgment in its favor against defendants Grahel and Grace, to strike the answer, affirmative defenses and counterclaims of defendants Grahel and Grace, to strike the answer and affirmative defense of defendant St. Paul, for leave to

amend the caption substituting Double N in place and stead of defendant “John Doe #1” and deleting “John Doe #2” to “John Doe #10” as party defendants, and for leave to appoint a referee to compute the sums due and owing plaintiff.

Defendants Grahel and Grace oppose that branch of the motion by plaintiff for summary judgment against them.

With respect to that branch of the motion to strike the answer and affirmative defenses of defendant St. Paul, defendant St. Paul has agreed, pursuant to a written stipulation entered into with plaintiff, to withdraw its first affirmative defense without prejudice, and to deem its answer a “non-contesting” answer for the purpose of the action. Under such circumstances, that branch of the motion by plaintiff to strike the affirmative defenses asserted by defendant St. Paul is denied as moot and that branch of the motion by plaintiff to strike the answer of defendant St. Paul is denied.

That branch of the motion by plaintiff for leave to amend the caption to add Double N as a named party defendant and delete references to “John Doe #2” to “John Doe #10” defendants is granted.

On a motion for summary judgment in a foreclosure action, a plaintiff must make a prima facie showing by producing the mortgage, the unpaid note, bond or obligation, consolidation agreement and the evidence of default (*see Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856 [2009]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002]; *IMC Mtge. Co. v Griggs*, 289 AD2d 294 [2001]; *Paterson v Rodney*, 285 AD2d 453 [2001]).

In support of the motion for summary judgment against defendants Grahel and Grace, plaintiff offers a copy of the pleadings, affidavits of service, a copy of the mortgages, underlying notes, guarantees, consolidation and modification agreement, notice of default and demand for payment, and an affidavit of Robert P. Linekin, the president of plaintiff, indicating, among other things, that under the purchase and sale agreements, payments for the first and second mortgages were suspended and stayed until the termination of the agreements by plaintiff by letter dated September 15, 2009. Mr. Linekin attests that upon

termination of the purchase and sale agreements, plaintiff notified defendants Grahel and Grace that the entire principal balance became due and payable as of September 18, 2009, and that contract interest payments from August 18, 2008 through September 15, 2009, were due and owing, and demanded payment of such balance and interest by September 19, 2009. Mr. Linekin also attests that defendants Grahel and Grace failed and refused to pay in accordance with the notice and demand, and is in default in payment of the mortgage debt.

These submissions establish plaintiff's prima facie entitlement to summary judgment as against defendants Grahel and Grace (*see Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856 [2009], *supra*; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002], *supra*; *IMC Mtge. Co. v Griggs*, 289 AD2d 294 [2001], *supra*; *Paterson v Rodney*, 285 AD2d 453 [2001], *supra*). The burden shifts to defendants Grahel and Grace to raise a triable issue of fact regarding their defenses (*see Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282 [2005]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2002], *supra*; *First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2000]).

To the extent defendants Grahel and Grace assert discovery is necessary, they have failed to demonstrate how discovery may reveal the existence of a triable issue of fact regarding any of their affirmative defenses, which would warrant the denial of summary judgment (*see JP Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662 [2009]).

With respect to the first affirmative defense based upon the doctrine of unclean hands, defendants Grahel and Grace assert plaintiff improperly refuses to apply the rents it collected from tenants at the property to the mortgage debt. Under the terms of the mortgages, the rents of the mortgage premises constitute additional security for the mortgage indebtedness, and the mortgagee is assigned the rents and has the right, in an exercise of self-help, to collect them and apply them to the mortgage indebtedness (*see* sections 2.14[a] and 3.1.[II] in both mortgages). Likewise, under the terms of the mortgages, the mortgagee is obligated to apply the collected rents upon an event of default first to the payment of the principal and interest thereon, and second to any other indebtedness and sums required to be

paid by the mortgagor. Although the addenda to the purchase and sale agreements permitted plaintiff, as the prospective purchaser, and its tenants, to take possession of the premises upon execution of the agreements, nothing in the purchase and sale agreements or the addenda to the agreements, permits plaintiff, as the prospective purchaser, to refuse to apply the collected rent to the mortgage debt. Under such circumstances, the rents collected by plaintiff from its tenants at the subject premises must be applied to the mortgage debt.

On the other hand, defendants Grahel and Grace do not allege that the rents collected by plaintiff are sufficient to pay off their entire mortgage debt. A dispute as to the exact amount owed by the mortgagor to the mortgagee does not preclude the granting of summary judgment as to liability (*see Layden v Boccio*, 253 AD2d 540 [1998]), and any such dispute may be resolved after a reference pursuant to RPAPL 1321 (*see Crest/Good Mfg. Co. v Baumann*, 160 AD2d 831 [1990]).

To the degree defendants Grahel and Grace assert plaintiff interfered with the subdivision process, in an effort to cause payment defaults, they assert that the architectural firm retained by plaintiff took an inordinate amount of time to perform its assigned tasks. Defendants Grahel and Grace, however, have failed to demonstrate the manner in which the architectural firm's delays are attributable to plaintiff. Instead, defendant Grace admits that Linekin responded to Grace's complaints, by acting as an intermediary, which resulted in the architectural firm's expediting the process. That branch of the motion by plaintiff to strike the first affirmative defense asserted by defendants Grahel and Grace is granted.

As a second affirmative defense, defendants Grahel and Grace assert that plaintiff accepted payments after the date of the alleged default, and thus the mortgage has not been accelerated and plaintiff is barred from foreclosing on the mortgages. Plaintiff denies having accepted any payments after the alleged default, and defendants Grahel and Grace have failed to submit any evidence tending to establish the merits of this defense (*see Charter One Bank, FSB v Houston*, 300 AD2d 429 [2002]; *Bank of Tokyo-Mitsubishi Trust Co. v Meredith Ave. Assoc.*, 256 AD2d 532 [1998]). Under such circumstances, that branch

of the motion by plaintiff to strike the second affirmative defense asserted by defendants Grahel and Grace is granted.

As a third affirmative defense, defendants Grahel and Grace assert the complaint fails to state a cause of action. Defendants Grahel and Grace have not cross moved to dismiss the complaint on this ground (*see Butler v Catinella*, 58 AD3d 145, 151 [2008]), and in any event, plaintiff has established its prima facie entitlement to summary judgment. Therefore, the third affirmative defense is surplusage, and the branch of the motion by plaintiff to strike such defense of defendants Grahel and Grace is denied as moot.

As a fourth affirmative defense, defendants Grahel and Grace assert usury only with respect to the first mortgage. In opposition to the motion, however, defendants Grahel and Grace now contend that both mortgages, when considered together as one loan transaction, are violative of the civil and criminal usury laws, and that the “corporate form”¹ of Grahel was used by plaintiff to conceal the alleged usurious loan transaction insofar as the loans were made in substantial part for personal, and not “corporate” purposes of defendant Grace.² Defendants Grahel and Grace assert that plaintiff advanced only \$3.3 million in loan proceeds out of the total \$4 million “loan facility,” and charged 2.5 discount points relative to the mortgage loans. They additionally assert that plaintiff also charged interest in the amount of 1.9% per annum on those funds never advanced. Defendants Grahel and Grace also assert that in connection with the purchase and sale agreements, Grahel granted plaintiff the right to take possession and lease to certain tenants a portion of the subject premises in

1

Plaintiff is a limited liability company and as such is a hybrid entity, which has features of the corporate form and the partnership form, but not all of such features (*see Rich, Practice Commentaries, McKinney’s Cons Laws of NY, Book 32A, Limited Liability Company Law, 2005 Pamphlet, at 4-6*).

2

Defendants Grace and Grahel make no request for leave to amend their answer to add such allegations to their fourth affirmative defense (*cf. Hammelburger v Foursome Inn Corp.*, 54 NY2d 580 [1981]).

advance of closing. They allege that plaintiff installed two tenants at the property, and collected in excess of \$319,000.00 in rents from October 2008 through March 2010 from one of them, and may have collected rent from the other tenant. Plaintiff allegedly refuses to apply such rents to the mortgage debt. Defendants Grahel and Grace argue that by taking into account the monies actually advanced, the points and interest charged, and the rents not credited, the resulting annualized interest rate of the loan facility exceeds 25% per annum, a criminally usurious rate.

Even assuming for the purpose of this motion that defendants Grahel and Grace properly may assert usury as a defense with respect to both mortgage loans as one loan transaction (*see* CPLR 3018[b]; *cf.* *Long Island Bank v Boynton*, 105 NY 656 [1887]; *Lipedes v Liverpool & London & Globe Ins. Co.*, 184 App Div 332 [1918], *affd* 229 NY 201 [1920]; *Schreiner v Feichtmayr*, 234 NYS2d 631 [1962]), “[t]he maximum interest rate permissible on a loan is 16% per annum, and any interest rate in excess of that amount is usurious (*see* General Obligations Law § 5-501 [1]; Banking Law § 14-a [1]; *Matias v Arango*, 289 AD2d 459, 460 [2001])” (*O’Donovan v Galinski*, 62 AD3d 769 [2009]). Nevertheless, a limited liability company is not entitled to impose a defense based upon civil usury in any action, except for a limited liability company which has as its principal asset a one or two family dwelling (*see* Limited Liability Company Law § 1104[a]).³

In addition, General Obligations Law § 5-501(1), does not apply to loans in principal amounts of \$250,000.00 or more, except where secured primarily by a one or two family residence. Loans in principal amounts above \$250,000.00, therefore, are not subject to the voiding provision of the *civil* usury statute, regardless of the rate of interest (*see*

3

Limited Liability Company Law § 1104 does not, however, prohibit the imposition of a defense of criminal usury by a limited liability company (*see* Limited Liability Company § 1104[c]).

General Obligations Law § 5-501[6][a]; *see also* Block and Steiner, *Voiding Criminally Usurious Loans under the Civil Usury Law*, NYLJ, July 17, 2002, at 5, col 2).

The stated principal amounts of the subject mortgages each exceed \$250,000.00. Even assuming the actual amount advanced from the subject mortgage loans was only \$3,300,000.00, or the loans were made to defendant Grahel as a subterfuge to disguise the true nature of the transaction, such amount also exceeds the monetary cutoff for the application of the civil usury statute. Defendants Grahel and Grace make no claim that Grahel owns a one or two family dwelling as its principal asset (*see* Limited Liability Company Law § 1104[a]), or that either mortgage is secured by a one or two family residence (*see* General Obligations Law § 5-501[1]). Under such circumstances, the subject mortgages do not violate the civil usury laws.

Under New York's criminal usury statutes, any lender that knowingly collects usurious interest, defined as a rate greater than 25% per annum on nonexempt loans, commits a felony (*see* Penal Law §§ 190.40, 190.42). The criminal usury statutes, however, do not apply to loans in excess of \$2.5 million that are issued in one or more installments pursuant to a written agreement (*see* General Obligations Law § 5-501[6][b]; *AJW Partners LLC v Itronics Inc.*, 68 AD3d 567 [2009]).

The stated principal amount of the second mortgage exceeds \$2.5 million, and hence, defendants Grahel and Grace may not assert criminal usury as a defense with respect to such mortgage (*see* General Obligations Law § 5-501[6][b]).

With respect to the first mortgage, that mortgage refers to the payment and interest terms found in the underlying note. That note provides a contract rate of interest, at a variable rate, in the amount of 3% per annum above the prime rate of interest (as published by the Wall Street Journal) with a minimum interest rate of 10.75% per annum, and an involuntary (default) rate of interest of 18% per annum. Defendants Grahel and Grace make no claim that the contract variable rate of interest ever exceeded 25% per annum at anytime prior to the loan's maturity. The note contains a savings clause (paragraph no. 8) which, by

its terms, serves as a cap on the charges for interest, so that no payment would exceed the variable legal rate (*see Norstar Bank v Pickard & Anderson*, 140 AD2d 1002, 1003 [1988]; *cf. Simsbury Fund v New St. Louis Assoc.*, 204 AD2d 182 [1994]). Clearly, the stated default rate of interest is less than 25% per annum. Defendants Grahel and Grace, therefore, have failed to demonstrate criminal usury with respect to the first mortgage.

Furthermore, to the extent defendants Grahel and Grace contend that the subject mortgages must be viewed as a single loan transaction, and only \$3.3 million was advanced, such alleged advanced amount also exceeds \$2.5 million. Consequently, the subject mortgages do not violate the criminal usury laws (*see General Obligations Law* § 5-501[6][b]).

That branch of the motion by plaintiff to strike the fourth affirmative defense asserted by defendants Grahel and Grace is granted.

With respect to the fifth affirmative defense and first counterclaim, defendants Grahel and Grace assert that they are entitled to payment of rent or use and occupancy of plaintiff and its tenants at the premises, and they are entitled to a setoff in the amount of such unpaid rents and charges for use and occupancy. As a sixth affirmative defense and second counterclaim, defendants Grahel and Grace assert that plaintiff and its tenants caused damage to structures on the property, left debris there, and caused a New York City Building Department summons to be issued with respect to the premises.

Defendants Grahel and Grace validly waived, in the loan documents, all setoffs, except for the defense of payment (*see Quest Commercial, LLC v Rovner*, 35 AD3d 576 [2006]; *Bank of Suffolk County v Kite*, 49 NY2d 827, 828 [1980]; *PGA Mktg. v Windsor Plumbing Supply*, 124 AD2d 576, 577 [1986]). In addition, defendants Grahel and Grace have failed to demonstrate entitlement to payment of rent from plaintiff or its tenants pursuant to the purchase and sale agreements, or the addenda to the agreements. The purchase and sale agreements and the addenda thereto are silent on the issue. The

submissions of defendants Grahel and Grace fail to demonstrate structural damage to the property.

That branch of the motion by plaintiff to strike the fifth and sixth affirmative defenses and the first and second counterclaims asserted by defendants Grahel and Grace is granted.

Because defendants Grahel and Grace have failed to come forward with any evidence showing the existence of a triable issue of fact with respect to any defense, plaintiff is entitled to summary judgment as against them (*see Fed. Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558 [1997]; *DiNardo v Patcam Serv. Station*, 228 AD2d 543 [1996]). That branch of the motion by plaintiff for summary judgment as against defendant Grahel and Grace is granted.

That branch of the motion by plaintiff for leave to appoint a referee is granted.
Settle order.

J.S.C.