

**CWCapital Asset Mgt. LLC v Twin Holdings of
Delaware LLC**

2010 NY Slip Op 33662(U)

December 13, 2010

Sup Ct, New York County

Docket Number: 101523/10

Judge: Saliann Scarpulla

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

PRESENT: SCARPULLA
Justice

PART 19

INDEX NO. 101523/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____
CW CAPITAL ASSET MGMT
- v -
TWIN HOLDINGS OF DELAWARE

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}
motion and ~~cross-motion~~ are decided in accordance with accompanying memorandum decision.

This constitutes the Decision of the Court.

Dated: 12/18/10

SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----X

CWCAPITAL ASSET MANAGEMENT LLC,
solely in its capacity as special
servicer for CWCapital Mortgage
Securities IV LLC and Cadim Note Inc.,
as holders,

Index No. 101523/10

Plaintiff,

-against-

TWIN HOLDINGS OF DELAWARE LLC, HERALD
SQUARE OF DELAWARE LLC, PAUL
SOHAYEGH, CITIWIDE ELECTRICAL WIRING,
INC., EMCOR SERVICES NEW YORK/NEW
JERSEY, INC., INTERIOR BUILDING
SERVICES, INC., JONES LANG LASALLE OF
NEW YORK, LLC, f/k/a THE STAUGHIBACH
COMPANY OF NEW YORK, LLC, INTERNATIONAL
BANK OF COMMERCE f/n/a LOCAL OKLAHOMA
BANK, N.A., NEW YORK DEPARTMENT OF
FINANCE, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY
WATERBOARD, NEW YORK CITY DEPARTMENT
OF BUILDINGS and NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,

Defendants.

-----X

Saliann Scarpulla, J.:

In this foreclosure action, plaintiff CWCapital Asset Management LLC, solely in
its capacity as special server for CWCapital Mortgage Securities IV LLC and Cadim Note
Inc., as holders (CWCapital), moves for the appointment of a receiver (Receiver) to,

001,002,003

among other things, accept all rents from the commercial premises owned by defendants Twin Holdings of Delaware LLC and Herald Square of Delaware LLC (together, defendants), located at 29 West 35th Street, New York, New York (premises) (mot. seq. no. 001). Defendants move to dismiss the complaint, pursuant to CPLR 3211 (a) (4) and (7) (mot. seq. no. 002), and for an order substituting Cadim Note, Inc. as plaintiff, as a successor party in interest to CWCcapital (mot. seq. no. 003). Defendants do not oppose this motion.¹

I. Background

This action arises from a loan made to defendants in July 2002. Defendants, as borrowers, executed a Consolidated, Amended and Restated Promissory Note (Note) to CWCcapital LLC, the “original holder” of the Note (Aff. of Kevin Thomson, at 2), memorializing a loan in excess of \$2.9 million. Note, Aff. of Thomson, Ex. D. On the same day, defendants executed a Consolidated, Amended and Restated Mortgage, Assignment of Leases and Rents and Security Agreement in favor of CWCcapital LLC (Mortgage). *Id.*, Ex. E.

Through a series of transactions, the Note and Mortgage were transferred, eventually, to Cadim Note, Inc. (Cadim), the current holder of the Note and Mortgage. According to CWCcapital, CWCcapital is the special server of the loan, endowed with the

¹Defendants also claim to make a motion for an order denying CWCcapital’s motion to appoint a Receiver. However, no notice of motion is presented to the court. Such a motion would, in any event, be a redundancy, as defendants are already opposing CWCcapital’s motion.

exclusive right to bring the present foreclosure action and this motion for the appointment of a Receiver.

The simple premise of the present action is that defendants failed to pay the balance due on the loan on the maturity date of August 9, 2009 (Maturity Date), pursuant to section 1.04 of the Note.² According to section 2.01 of the Note, defendants' alleged failure to pay on the Maturity Date is an event of default under the Note and Mortgage, requiring defendants to repay the full balance due under the Note, and entitling CWCapital to obtain a Receiver to accept all payments of rents from the premises' leased units, pursuant to section 26 of the Mortgage, and Real Property Law (RPL) § 254 (10). This action was commenced by the filing of the summons and complaint in February 2010, seeking recovery of principal, interest and other charges, in the sum total of \$2.8 million.

In March 2009, prior to the commencement of this action, defendants commenced an action in the Supreme Court, Nassau County, entitled *Twin Holdings of Delaware LLC v CWCapital, LLC* (Index No. 005193/09) (the Nassau Action). In the Nassau Action, defendants claim that CWCapital created an artificial event of default under the Note and

²In its papers in support of their motion to obtain a Receiver, CWCapital lists other alleged defaults predating the failure to pay the loan on the Maturity Date. *See* Aff. of Thompson, at 5. However, CWCapital reiterates in its papers in opposition to the motion to dismiss that this action is brought solely as a foreclosure based on defendants' failure to pay on the Maturity Date. *See e.g.*, CWCapital's Memorandum of Law in Opp. to Motion to Dismiss, at 13.

Mortgage, by miscalculating a Minimum Debt Service Coverage Ratio (Ratio) required under section 1.12 of the Note, causing CWCapital to demand that defendants pay a Balancing Prepayment of over \$5 million, a payment defendants claim was not due. In the Nassau Action, defendants alleged that CWCapital “put[] itself in a position to misappropriate for itself [defendants’] ownership interest in [defendants’] valuable building, which [defendants] are in the process of renovating and tenanting with triple A tenants, all at a great cost and expense of [defendants].” First Amended Complaint (Complaint) in Nassau Action, ¶ 1.

In the Nassau action, defendants seek (1) specific performance “directing [CWCapital] to acknowledge that the Loan is in Balance” (*id.*, ¶ 94); (2) a judicial declaration that “the Loan is in Balance and in compliance with the Minimum Performance Criteria [MPC] and a declaration that [CWCapital] failed to provide adequate notice pursuant to the Note” (*id.*, ¶ 102); and (3) injunctive relief enjoining CWCapital “from taking any action to declare the Loan is in default or that an Event of Default has occurred or that [defendants] are not in compliance with the MPC under the Ratio and/or from taking any action under the Default letter, including ... requiring [defendants] to make a Balancing Payment” *Id.*, ¶ 106. The Nassau Complaint also seeks damages for breach of contract, breach of fiduciary duty, “impracticability of performance and frustration of purpose” (*id.*, ¶ 22), tortious interference with contract,

and fraud. All of the causes of action are concerned with CWCapital's alleged "wrongfull determination that the Loan was not in Balance." *Id.*, ¶ 135.

Several motions were made in the Nassau Action. In summary, Honorable Justice Stephen A. Bucaria (1) denied defendants' application for a preliminary injunction directing CWCapital to continue to fund the loan (Aff. of Edward A. Smith, Ex. A., Nassau County order dated January 19, 2010); and (2) dismissed defendants' causes of action for breach of the implied covenant of good faith and fair dealing; a permanent injunction; breach of fiduciary duty; tortious interference with contract; and interference with prospective contractual rights, while retaining defendants' causes of action for breaches of contract, specific performance, and fraud. *Id.*

In further motions, Justice Bucaria denied a motion to consolidate the present action with the Nassau Action; denied leave to transfer venue to New York; and denied defendants' motion to amend their complaint. Justice Bucaria also lifted the stay of the present action which he had earlier imposed. Supplemental Aff. of Smith, Ex. B, Nassau County order dated May 10, 2010. Finally, in an order dated August 3, 2010, Justice Bucaria ordered that the Nassau Action be transferred to this county, to be considered, it is presumed, in conjunction with the present action.

II. Present Motions

CWCapital moves for an order appointing a Receiver, on the ground that the appointment of a Receiver is countenanced, without further showing of necessity, under

the terms of the Note and RPL § 254 (10), and further, that a Receiver is warranted because defendants are, allegedly, mismanaging the property. Defendants seek dismissal of this action under CPLR 3211 (a) (4), claiming that the Nassau Action is a prior pending action based on the same facts and law as in the present action, and that “the prior pending Nassau Action is a complete defense to this action, and the issue of whether a default occurred has been pending since March, 2009.” *Aff. of Michael Leon*, ¶ 7. CWCcapital, in rebuttal, argues that defendants are collaterally estopped from bringing this argument, based on Justice Bucaria’s determination that the actions are so dissimilar as to be unfit for consolidation.

Defendants further seek to dismiss the complaint on the ground that the action is without merit, pursuant to CPLR 3211 (a) (7), in that defendants are not in default of the Note, because CWCcapital wrongfully refused to allow defendants to exercise their contractual option to extend the maturity date of the Note, which would vitiate any alleged default, and that CWCcapital’s breaches of the loan documents, as set forth in the Nassau Action, relieve defendants from further performance under the Note and Mortgage.

Defendants further argue that CWCcapital is barred from bringing an action for foreclosure because, allegedly, defendants have continued to collect rents, which are being placed in a third-party lockbox, and continue to make regular payments to CWCcapital, which apparently continues to accept them. As such, defendants maintain

that, as a result of CWCapital's acceptance of payments, CWCapital has waived its right to claim a default. Defendants characterize CWCapital as a "malicious lender who is intent to acquire the Building following Defendants' extraordinary efforts to successfully market and ultimately lease most of the 12 floors of commercial space in the Building." Aff. of Leon, ¶ 6. CWCapital claims that it cannot waive this right, pursuant to the terms of the Note.

CWCapital's motion to substitute Cadim Note Inc. for CWCapital is granted without opposition.

III. Discussion

The motion to dismiss the action naturally precedes the motion for the appointment of a Referee. On a motion to dismiss pursuant to CPLR 3211, the court must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Sokoloff v Harriman Estates Development Corp.*, 96 N.Y.2d 409, 414 (2001); *see also Leon v Martinez*, 84 N.Y.2d 83 (1994). A motion brought pursuant to CPLR 3211 (a) (1) "may be granted where 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Held v Kaufman*, 91 N.Y.2d 425, 430-431 (1998), quoting *Leon v Martinez*, 84 N.Y.2d at 88; *Foster v Kovner*, 44 A.D.3d 23, 28 (1st Dep't 2007)

(“[t]he documentary evidence must resolve all factual issues and dispose of the plaintiff’s claim as a matter of law”).

Dismissal is warranted under CPLR 3211 (a) (4) when “there is another action pending between the same parties for the same cause of action in a court of any state of the United States; the court need not dismiss on this ground but may make such order as justice requires” “Pursuant to CPLR 3211 (a) (4), a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending between the same parties for the same cause of action.” *Cherico, Cherico & Associates v Midollo*, 67 A.D.3d 622, 622 (2nd Dep’t 2009), citing *Whitney v Whitney*, 57 N.Y.2d 731, 732 (1982).

Dismissal under CPLR 3211 (a) (4) may follow if there is “a substantial identity of the parties and causes of action.” *Cherico, Cherico & Associates v Midollo*, 67 A.D.3d at 622; *see also Montalvo v Air Dock Systems*, 37 A.D.3d 567 (2nd Dep’t 2007). The “precise legal theories” need not be present in both actions (*id.*), as long as the two actions are “sufficiently similar” (*Cherico, Cherico & Associates v Midollo*, 67 A.D.3d at 622, quoting *Montalvo v Air Dock Systems*, 37 A.D.3d at 567) and the relief sought is “the same or substantially the same.” *Liebert v TIAA-CREF*, 34 A.D.3d 756, 757 (2nd Dep’t 2006). “The critical element is that both suits arise out of the same subject matter or series of alleged wrongs [interior quotation marks and citations omitted].” *Cherico*,

Cherico & Associates v Midollo, 67 A.D.3d at 622; *see also White Light Products v On the Scene Products*, 231 A.D.2d 90 (1st Dep't 1997).

In the Nassau Action, Justice Bucaria found that there were “no common questions of law or fact,” between the Nassau Action and the present action, as pursuant to CPLR 602, rendering consolidation of the actions improper. Supplemental Aff. of Smith, Ex. B, at 4. This was so because the Nassau Action “appears to relate to [CWCcapital’s] conduct prior to [defendants’] alleged default on the maturity date” (*id.*), while the present action deals with defendants’ post-maturity actions.

CWCcapital claims that this finding collaterally estops defendants from arguing here that the Nassau Action is a prior pending action. “Collateral estoppel applies when (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits.” *Alamo v McDaniel*, 44 A.D.3d 149, 153 (1st Dep't 2007); *see also Ryan v New York Telephone Company*, 62 N.Y.2d 494 (1984). The doctrine of collateral estoppel, “so necessary to conserve judicial resources by discouraging redundant litigation, is grounded on the premise that once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again.” *Gramatan Home Investors Corporation v Lopez*, 46 NY2d 481, 485 (1979).

Defendants object to the application of collateral estoppel to the present action, on the ground that Justice Bucaria's determination that the two actions are fundamentally dissimilar was not a final judgment on the merits, which, defendants claim, is a prerequisite for the application of collateral estoppel.

Although courts have held that “[b]oth the doctrines of *res judicata* and collateral estoppel have as their prerequisites the entry of a judgment,” (See *Peterson v Forkey*, 50 AD2d 774, 774 (1st Dep’t 1975); see also *People v Evans*, 94 N.Y.2d 499,502 (2000) (“*res judicata* and collateral estoppel generally deal with preclusion after judgment”)), it is often phrased that collateral estoppel may be based on an “*order or final judgment*.” See e.g., *Towne v Asadourian*, 277 A.D.2d 800, 801 (3rd Dep’t 2000); *Gallo v Teplitz Tri-State Recycling, Inc.*, 254 A.D.2d 253 (2nd Dep’t 1998). Thus, CWCcapital argues that an order before final judgment may suffice to have collateral estoppel effect.

In the present circumstance, the Appellate Division, First Department, leans towards the requirement of a final judgment in the prior action, a circumstance not here present. See *Peterson v Forkey*, 50 A.D.2d 774, *supra*. Hence, Justice Bucaria's order denying consolidation, not being a final judgment, does not collaterally estop defendants from arguing that the Nassau Action is a prior pending action, having arisen “out of the same subject matter or series of alleged wrongs [interior quotation marks and citations omitted].” *Cherico, Cherico & Associates v Midollo*, 67 A.D.3d at 622.

The matter does not rest there, however, as this court finds Justice Bucaria's determination of the matter persuasive, if not precedential. The gist of defendants' prior action regards their pre-maturity date rights under the Note, wherein they seek a declaration that they are not required to pay the Balancing Prepayment under section 1.2 of the Note, due to CWCapital's miscalculation of the Debt Service Coverage Ratio. While this dispute held sway in the Nassau Action, the Maturity Date of the loan passed, leaving defendants in default under a different provision of the loan documents. As such, this court finds that the Nassau Action is not a prior pending action, and the present action will not be dismissed on this ground.

This court further finds that the action is not subject to dismissal under CPLR 3211 (a) (7), as CWCapital has pleaded allegations sufficient to support its claim that defendants are in default. While defendants argue that CWCapital is barred from pursuing the present action for default based on the doctrine of waiver, having continued to accept payments up to the present date, the loan documents prevent waiver on this basis.

Section 4.03 of the Note provides that:

[n]o failure to accelerate the debt evidenced hereby by reason of default hereunder, acceptance of a partial or past due payment, or indulgences granted from time to time shall be construed (i) as a novation of this Note or as a reinstatement of the indebtedness evidenced hereby or as a waiver of such right of acceleration or of the right of the Lender thereafter to insist upon strict compliance with the terms of this Note, or (ii) to prevent the exercise of such right of acceleration or any other right granted hereunder or by any applicable laws.

CWCapital construes this language to mean that it has not waived defendants' default merely by accepting payments from them on the loan, or allowing rents to be collected in a third-party lock box. Defendants, on the other hand, insist that this language only means that CWCapital has not waived its right to accelerate payments, but does not provide that CWCapital has not waived its right to foreclose. This is a difference without a distinction, because foreclosure is the aftermath of a default in paying accelerated payments. As such, the no-waiver language in the Note allows CWCapital to accept payments on the Note without waiving its right to foreclose.

Having found support for CWCapital's action in the record, CWCapital's motion for the appointment of a Receiver comes into play. Under RPL § 254, entitled "Construction of the clauses and covenants in mortgages and bonds or notes,"

In mortgages of real property, and in bonds and notes secured thereby or in assignments of mortgages and bonds and mortgages and notes, or in agreements to extend or to modify the terms of mortgages and bonds and mortgages and notes, the following or similar clauses and covenants must be construed as follows:

(10) *Mortgagee entitled to appointment of receiver.* A covenant "that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver," must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness.

Section 26 (vii) in the Note allows for the appointment of a Receiver “without notice and without regard for the adequacy of the security for the Debt” in the event of a default. Consequently, pursuant to RPL § 254 (1), CWCcapital is entitled to have a Receiver appointed following defendants’ default in payment of the balance due on the loan on the Maturity Date. See *Maspeth Federal Savings and Loan Association v McGown*, ___ A.D.3d ___, 2010 NY Slip Op 07721, *1 (2nd Dep’t 2010) (where mortgage provision specifically authorizes the appointment of a receiver upon application of the mortgagee in a foreclosure action, mortgagee is entitled to appointment of a receiver “without notice and without regard to the adequacy of the security” under RPL § 254 [10]); *Naar v I.J. Litwak & Co., Inc.*, 260 A.D.2d 613 (2nd Dep’t 1999) (same); *Febbraro v Febbraro*, 70 A.D.2d 584 (2nd Dep’t 1997)(same).

In accordance with the foregoing, defendants’ motion to dismiss is denied, plaintiff’s motion to appoint a Receiver of rents and other applicable duties is granted, and plaintiff’s motion to substitute Cadim Note Inc. for CWCcapital is granted without opposition. The parties are directed to settle an order to reflect the foregoing, and to provide for the amendment of the caption to be brought to the attention of the Clerk of the Court.³

³ CWCcapital has suggested to the court that James David Kuhn of Newmark Knight Frank, be appointed as its Receiver. However, according to defendants, Mr. Kuhn has a history of litigation with defendants, which puts a cloud on his impartiality. Accordingly, the Court will appoint a receiver with no connection to either party. The parties, in settling this order, shall leave blank the name of the Receiver to be appointed.

Settle Order.

Dated: December 13, 2010

ENTER:

Saliann Scarpulla
Saliann Scarpulla, J.S.C.