MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

X

WACHOVIA BANK, N.A.

- against -

VESTA 50 LLC, et al.

X

INDEX NO. 2820/10

MOTION SEQ. NO. 1
MOTION CAL NO.: 45
MOTION DATE: 10/6/10

BY: KITZES, J.
DATED: January 11, 2011

Plaintiff Wachovia Bank, N.A. has moved for, inter alia, summary judgment on its complaint against defendant Vesta 50 LLC.

Plaintiff Wachovia lent money to defendant Vesta for the construction of a condominium to be located at 19-80 Steinway Street, Astoria, New York. Defendant Vesta intended to construct a building with 65 residential units, 30,000 square feet of retail space, and parking areas for more than 200 cars. On or about March 26, 2007, the defendant borrower duly executed and delivered to the plaintiff lender notes evidencing its debt in the sum of up to $38,400,000. The borrower used a loan evidenced by an acquisition loan note in the amount of $5,306,000 to finance the acquisition of the property intended to be developed; the borrower used loans in the amount of $659,496 and $1,694,000 evidenced by a project loan note and restated project loan note respectively to finance certain pre-development costs; and the borrower used a loan in the amount of $30,740,000 evidenced by a building loan note to finance certain construction costs. Pursuant to the notes, the defendant borrower promised to repay the plaintiff lender the outstanding principal due on April 1, 2009.

As security for the repayment of the loans, the plaintiff lender required the execution and delivery of (1) an acquisition loan mortgage, (2) a project loan mortgage, (3) a project loan mortgage modification agreement, (4) a building loan mortgage, (5) a building

loan agreement, (6) a supplemental project loan agreement, and (7) a guarantee of repayment of, inter alia, principal to the extent of $9,600,000 executed by defendant Stephen J. Berini, defendant Mark S.Blau, and defendant Marsha Latessa. The building loan note provided that its maturity date was "subject to the possible extension thereof pursuant to the terms and provisions of the Loan Agreement." The building loan agreement required all modifications to be in writing. On or about April 13, 2007, the plaintiff lender recorded the acquisition loan mortgage, the project loan mortgage, and the building loan mortgage in the Office of the City Register, Queens County.

The construction project encountered difficulties such as porous soil which increased the time and costs of foundation work. Vesta also anticipated that the financial crisis which struck the nation in the fall of 2008 would cause the future sale of condominium units to slow down. Vesta expected that there would be a delay in the completion of construction and in the sale of the condominium units. Defendant Stephen J Berini, a principal of Vesta, alleges that he met with Duane Mutti, a representative of Wachovia, in September 2008 and that Mutti stated that "Vesta should go forward with construction in the expectation that we would receive an extension of the Maturity Date and that funding would continue." However, according to Vesta, the plaintiff lender refused to comply with a funding request made in December 2008, and, in or about January, 2009, Wachovia allegedly began to demand extensive additional financial information, including matters that the borrower had no obligation to disclose, documents which did not exist, and documents already in the bank's possession. On the other hand, the plaintiff lender asserts that the building loan agreement required the borrower to provide all "[c]urrent Financial Statements and other financial data as Lender shall reasonably require ***." The lender allegedly made its requests for information at a time when progress on the project had stalled.

Defendant Vesta alleges that through September, 2008, plaintiff Wachovia complied with funding requests as made by the borrower. However, according to Vesta, the banking crisis which gripped the nation in the fall of 2008 caused Wachovia to begin merger

discussions with Citigroup and Wells Fargo. The defendant borrower alleges that the banking crisis gave the plaintiff bank a motive to tighten credit toward it.

The defendant borrower, which had completed about one half of the project, failed to repay the loans on April 1, 2009, and the plaintiff lender declared an event of default. The defendant borrower alleges that it had discussions with the plaintiff lender between the fall of 2008 and the spring of 2009 regarding an extension of the maturity date of the notes. According to the defendant borrower, the plaintiff made representations that it would extend the maturity date, but subsequently failed to do so. However, the plaintiff lender sent the defendant borrower a letter agreement dated May 8, 2009 which reads in relevant part: "We have had discussions and other communications with you or your representatives in connection with the possible extension and/or restructuring of the Loan ***. In connection with any such discussions, you and we hereby agree that: 1. None of the discussions among you and us or our respective representatives relating to a possible extension and/or restructuring shall be binding upon you or us; it being expressly understood and agreed that any binding arrangement between you and us must be in definitive documentation ***. *** 5. You hereby release and waive any and all claims, of any kind or nature, which you may have against us arising out of any discussions between you and us." Both the defendant borrower and defendant lender signed the letter agreement. The defendant borrower alleges that the plaintiff lender fraudulently induced it into signing the letter agreement by representing that it would extend the maturity date of the loan.

Following the execution of the letter agreement, the parties met on May 28, 2009 to discuss a possible modification of the terms of the loan. The parties could not reach an agreement concerning a modification, and the plaintiff lender filed this foreclosure action on or about February 2, 2010. The plaintiff alleges that as of May 28, 2010, the defendant borrower owed the principal sum of $23,108,690.80 plus interest. The plaintiff also alleges that the defendant guarantors defaulted on their obligation to pay, inter alia, principal in the amount of $9,600,000.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324.) Plaintiff Wachovia successfully carried this burden. In an action to foreclose on a mortgage, a mortgagee establishes a prima facie right to relief by producing evidence of a note, a mortgage, and the mortgagor's default. (*See*, *Ronald Zanfini*, v *Chandler*, ___ AD3d ___, ___ NYS2d ___, 2010 WL 5186601; *HSBC Bank USA v Merrill*, 37 AD3d 899; *LaSalle Bank N.A. v Kosarovich*, 31 AD3d 904.)

The burden on this motion for summary judgment shifted to the defendant mortgagor (1) to produce evidence showing that there is an issue of fact which must be tried (*see*, *Alvarez v Prospect Hospital, supra*; *Ronald Zanfini* v *Chandler*, *supra*; *HSBC Bank USA v Merrill*, *supra*) or (2) to demonstrate the existence of a defense warranting the denial of summary judgment (*see, Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347), or (3) to demonstrate the need for discovery. (*See*, *Valdivia v Consolidated Resistance Co. of America*, *Inc.*, 54 AD3d 753.) Defendant Vesta failed to carry this burden.

Vesta's claim that Wachovia breached a new agreement to extend the maturity dates of the notes lacks merit. A claim of such a new agreement is barred by the letter dated May 8, 2009 signed by the parties. Moreover, the borrower's allegation that the lender fraudulently induced it into signing the letter dated May 8, 2009 by false representations that the maturity dates of the notes had already been extended contradicts the terms of the letter. A claim of fraudulent inducement cannot be successfully asserted where a contract's express terms contradict the plaintiff's allegations that he executed the contract in reliance upon particular oral misrepresentations. (*See*, *A-Pix, Inc. v SGE Entertainment Corp.*, 222 AD2d 387; *LaBarbera v Marino*, 192 AD2d 697.) In the case at bar, the letter agreement specifically provided in substance that the parties' discussions relating to a possible extension and/or restructuring would not be binding until reduced to a formal document.

In regard to the issue of good faith, "[i]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance ***." (*Dalton v Educational Testing Service,* 87 NY2d 384, 389; *511 West 232nd Owners Corp. v Jennifer Realty Co.;* 98 NY2d 144.) Vesta argues that Wachovia denied it a full and fair opportunity to obtain an extension of the maturity date of the loan in violation of the implied covenant of good faith and fair dealing. In the case at bar, the building loan note provided that its maturity date was "subject to the possible extension thereof pursuant to the terms and provisions of the Loan Agreement." This clause gave Wachovia discretion in extending the due date of the loan. While a lender must act in good faith, or, stated otherwise, in a reasonable manner when exercising its discretion (*see*, *Canterbury Realty and Equipment Corp. v Poughkeepsie Sav. Bank;* 135 AD2d 102), defendant Vesta failed to raise an issue of fact concerning whether the plaintiff lender acted in good faith. Surmise, suspicion, and conjecture do not suffice to defeat a motion for summary judgment (*see*, *Nelson v Cunningham Associates, L.P.*, 77 AD3d 638), and, in the case at bar, the defendant borrower's opposition to the instant motion rests on surmise, suspicion, and conjecture concerning the possible effect the banking crisis of 2008-2009 had on its relationship with Wachovia. Moreover, how the plaintiff bank possibly gained by pushing the defendant borrower into default eludes the court. Although the defendant borrower requested discovery, a party cannot have the determination of a summary judgment motion postponed upon the mere speculation and hope that discovery will reveal facts supporting a cause of action or defense. (*See*, *Keeley v Tracy*, 301 AD2d 502; *Baron v Newman*, 300 AD2d 267; *Hampton Living*, Inc. *v Carltun on the Park, Ltd.*, 286 AD2d 664; *Romeo v City of New York*, 261 AD2d 379.

Accordingly, the motion is granted.

Settle order.

J.S.C.