

Smithtown v Mineta Props. Inc.

2011 NY Slip Op 30698(U)

March 16, 2011

Sup Ct, NY County

Docket Number: 115633/09

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

PRESENT: _____ J.S.C.

PART 11

Justice

Index Number : 115633/2009
BANK OF SMITHTOWN
 VS.
MINETTA PROPERTIES INC.
 SEQUENCE NUMBER : 003
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 determined in accordance with the annexed decision.*

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

Dated: March 16, 2011


HON. JOAN A. MADDEN ^{J.S.C.}

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: PART 11

-----X
BANK OF SMITHTOWN,

INDEX NO. 115633/09

Plaintiff,

-against-

MINETTA PROPERTIES INC., SAFRA NATIONAL BANK OF NEW YORK, 9 MINETTA LANE, LLC, NINE MINETTA PROPERTY, LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, SIGNATURE PROPERTY NEW YORK INC. a/k/a SIGNATURE PROPERTIES N.Y., LLC, THOMAS GUSS, "JOHN DOE ONE" to and included "JOHN DOE FIVE" the last five names being fictitious and unknown to plaintiff(s), the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint, known as 9 MINETTA STREET, NEW YORK, NEW YORK,

Defendants.
-----X

JOAN A. MADDEN, J.:

This is an action to foreclosure a consolidated mortgage in the amount of \$4.2 million on an investment property located at 9 Minetta Lane in Manhattan. Plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment, an order pursuant to CPLR 3211 dismissing the answer, and an order pursuant to CPLR 4301 and CPLR 4311 appointing a Referee to compute. Defendant mortgagor Minetta Properties Inc. (hereinafter "Minetta") opposes the motion.

In moving for summary judgment in a mortgage foreclosure action, plaintiff establishes a prima facie right to foreclose by producing the mortgage, the assignment, if any, the unpaid note

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and evidence of default. See CitiFinancial Co. (DE) v. McKinney, 27 AD3d 224 (1st Dept 2006); LPP Mortgage, Ltd v. Card Corp, 17 AD3d 103 (1st Dept), lv app den, 6 NY3d 702 (2005); Hypo Holdings, Inc v. Chalasani, 280 AD2d 386 (1st Dept), lv app den 96 NY2d 717 (2001). Once plaintiff satisfies that burden, it is incumbent on the party opposing foreclosure to come forward with evidence sufficient to raise a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff. See Nassau Trust Co. v. Montrose Concrete Products Corp., 56 NY2d 175, reargmt den 57 NY2d 674 (1982); CitiFinancial Co. (DE) v. McKinney, *supra*; MaHopac National Bank v. Baisley, 244 AD2d 466 (2nd Dept 1997), lv app dism 91 NY2d 1003 (1998).

Here, plaintiff has established its prima facie entitlement to judgment as a matter of law by uncontested proof of the note, the mortgage, the mortgage consolidation and modification agreements, the assignments and defendant Minetta's default. See CitiFinancial Co. (DE) v. McKinney, *supra*; LPP Mortgage, Ltd v. Card Corp, *supra*; Hypo Holdings, Inc v. Chalasani, *supra*. In opposing the motion, defendant Minetta does not deny that money is owed or that it has defaulted on the mortgage. Rather, defendant Minetta submits an affidavit of its Vice President, Thomas Guss, asserting that material issues of fact exist as to its affirmative defenses of bad faith and fraud, and that summary judgment is premature since plaintiff has "refused" to submit to discovery.

Defendant's assertions are without merit, as the affidavits and supporting documents do not provide a sufficient evidentiary basis to raise a material issue of fact as to the defenses of bad faith or fraud. Guss acknowledges that he is a licensed real estate broker and President of New

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York Residence, Inc., “a real estate brokerage and services firm,” that employs approximately 30 agents and manages investment properties for clients, including the subject property which is “owned in part by an individual *investor* residing in Austria, and it was for this reason that New York Residences, under my personal direction as *co-investor*, came in charge of the management and operation of the property [emphasis added].” Guss further acknowledges that a master tenant, Signature Properties, controlled approximately 90% of the building under a master lease, and that defendant relied on 100% of the master tenant’s rent to cover the operating expenses and mortgage payments for the property. It is not disputed that at some time in or before June 2009, the master tenant defaulted on its payment of rent, and at or about that time defendant Minetta defaulted on its mortgage.¹

While defendant asserts that the “loan” is “permeated” by plaintiff’s alleged bad faith and fraud, defendant does not allege any misconduct in connection with the procurement of the mortgage or the underlying mortgage transactions. The facts as alleged are limited to the parties’ negotiations after defendant defaulted on the mortgage. Essentially, defendant alleges that plaintiff never intended to modify the loan and forebear from foreclosing on the mortgage, but rather negotiated with defendant in bad faith, by breaching its agreement to apply defendant’s \$152,000 payment to interest and principal, by refusing to consent to the termination of the master lease, by interfering with defendant’s attempt to sell the property out right, by “shopping the loan” at a discount, and by seeking a court order appointing a receiver.

¹Although defendant submits two emails from August 2009 indicating that the mortgage payments for April, May and June 2009 were due and owing, the complaint alleges that defendant failed to make the mortgage payment due on July 1, 2009, and each month thereafter.

Even if, as defendant alleges, plaintiff applied the \$152,000 payment to real estate taxes, that fact alone does not indicate bad faith or fraud on plaintiff's part, since defendant, in any event, was obligated under the mortgage to pay the taxes, and plaintiff paid the taxes when defendant failed to do so. Moreover, based on the August 18, 2009 e-mails between defendant's counsel and plaintiff's representative, Ronald James, it appears that plaintiff may have applied at least a portion of the \$152,000 payment to the mortgage payments for April, May and June 2009, with the balance applied "to satisfy a partial recovery of the tax monies Bank of Smithtown paid out."

With respect to the defendant's remaining allegations, the record shows that in June 2009, defendant initiated a meeting with plaintiff to discuss a possible modification of the mortgage, so as to avoid foreclosure. The parties continued such discussions via email over the next several months, but never reached an agreement. Notably, the e-mail correspondence annexed to defendant's opposition papers, shows that in September 2009, defendant's counsel attempted to initiate a follow-up meeting with plaintiff's representative, Ronald James, and plaintiff's Chief Lending Officer, Robert Anrig. On September 2, 2009, James wrote to Guss, requesting certain information including an updated rent roll, the building's expenses and "where you are in the litigation of the tenant." James also wrote that he had spoken to Bob Anrig, who had asked "if you [Guss] were bringing any monies to the table for payment" and "[i]f the answer is no further monies will be brought to the table within the next month, he wants me to commence a foreclosure." On September 16, 2009, James received the requested information from Guss, and responded to defendant's counsel as follows:

Bob and I are not against a meeting, but what are we going to talk about? Is Mr. Guss going to make mortgage payments? Is Mr. Guss going to pay the taxes/water lien the bank paid for? Is the tenant going to pay in the near future to

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make the building cash flow to sustain either the regular or modified payment? As far as the benefit of not starting a foreclosure, what is it? I have to be honest and say that I think it is the only sensible solution for the bank at this time. The account is serious delinquent for payments and tax/lien monies and the building doesn't [have] cash flow. I don't see any near term solution for Mr. Guss's problem. Asking the bank to modify a seriously delinquent loan is not going to happen.

It appears that the parties did have another meeting for settlement purposes, but did not reach an agreement. Meanwhile, on November 5, 2009, plaintiff commenced the instant action to foreclose the mortgage. On November 16, 2009, Guss wrote a letter Anrig, seeking "to arrive at a mutually beneficial result," that would avoid a foreclosure and "maintain a good and continuing relationship with the Bank." In the letter, Guss outlined a proposal that called for Signature to surrender the master lease; defendant to relet the apartments at market rents; defendant to make and keep current on taxes and other City charges; plaintiff to add all current outstanding payments accruing through March 2010 to the principal amount of the loan; defendant to pay, for 36 months, half of the monthly mortgage payments with the shortfall added to the principal; and defendant to offer the building for sale at market rate. According to Guss, plaintiff "refused" the foregoing proposal without explanation." Although Guss also asserts that defendant was unable "to get the master tenant out," at oral argument defendant's counsel informed the court that defendant had secured a judgment of possession against the master tenant.

Based on the foregoing, where defendant is a sophisticated real estate investor and the \$4.2 million loan was secured by a mortgage on an investment property, defendant's allegations that plaintiff proceeded in bad faith and engaged in fraud are not supported by the record. See Prudential Securities Credit Corp, LLC v. Teevee Toons, Inc., 5 AD3d 226 (1st Dept 2004); Heller Financial, Inc. v. Apple Tree Realty Assocs, 238 AD2d 198 (1st Dept), lv app disp 90 NY2d 889 (1997); EBC

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Amro Asset Management Ltd v. Kaiser, 256 AD2d 161 (1st Dept 1998); Resolution Trust Corp. v. J.I. Sopher & Co., Inc., 1995 WL 489697 (S.D.N.Y. 1995). A promise or agreement to negotiate “cannot be equated with a promise to finalize an agreement on a restructured mortgage.”

Massachusetts Mutual Life Insurance Co. V. Gramercy Twins Assocs, 199 AD2d 214, 217 (1st Dept 1993). Here, as in Massachusetts Mutual Life Insurance, the parties had nothing more than an agreement to agree to negotiate, and the record neither shows nor suggests that plaintiff waived its right to commence a foreclosure. Id. To the contrary, “[i]t was at all times within plaintiff’s power to cease negotiations.” Id. As the First Department determined, “[a]ll that plaintiff promised defendant was an opportunity to negotiate a settlement. The bargain was fulfilled. The record lacks evidence that plaintiff proceeded in bad faith. . . . The fact that those negotiations ultimately failed is not significant, as plaintiff never, even according to defendant’s allegations, promised unconditionally to restructure the mortgage – a promise which in any event would have been so commercially foolhardy as to be incredible on its face.” Id. at 217 -218. Rather, the instances of bad faith alleged by defendant, “show nothing more than commercially reasonable conduct on the part of a lender seeking to recover as much of its loan as possible.” Prudential Securities Credit Corp. LLC v. Teevee Toons, Inc., supra at 227.

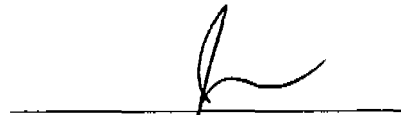
Finally, defendant Minetta argues that summary judgment is premature, since plaintiff did not respond to defendant’s discovery demands. Defendant’s argument is without merit. The absence of discovery does not require denial of plaintiff’s motion, as defendant Minetta fails to show that facts essential to oppose the motion are in plaintiff’s exclusive knowledge, or that discovery might lead to facts relevant to a viable defense. See Woods v. 126 Riverside Drive Corp, 64 AD3d 422, 423 (1st Dept 2009), lv app den 14 NY3d 704 (2010); Duane Morris LLP v. Astor Holdings, Inc., 61 AD3d

418 (1st Dept 2009).

The court therefore concludes that plaintiff's motion is granted in its entirety, and plaintiff is entitled to summary judgment, dismissal of the answer and the appointment of a Referee to compute. Settle order on notice including a copy of this decision.

DATED: March 16 2011

ENTER:



J.S.C.