Citibank, N.A. v NIB Assoc., LLC

2011 NY Slip Op 31064(U)

March 7, 2011

Supreme Court, Queens County

Docket Number: 4171/10

Judge: Orin R. Kitzes

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

x

CITIBANK, N.A.,

- against -

NIB ASSOCIATES, LLC, et al.

x

INDEX NO. 4171/10

MOTION SEQ. NO.: 2
MOTION CAL NO.: 9
MOTION DATE: 11/3/10

BY: KITZES, J.
DATE: March 7, 2011

Plaintiff moves (1) pursuant to CPLR 3212 for summary judgment in its favor on its causes of action for foreclosure, (2) to strike the answer of defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch, including the affirmative defenses asserted therein, (3) pursuant to CPLR 3215 and RPAPL 1321 for leave to enter a default judgment against defendant Richard C. Ferguson, (4) for leave to appoint a referee to compute the amounts due under the loan documents, and (5) for leave to amend the caption by deleting reference to defendants "John Doe Nos. 1-100." Defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch oppose the motion and cross-move (1) pursuant to CPLR 3025 for leave to amend their answer as proposed to assert counterclaims based upon fraud in the inducement with respect to the $3.2 million mortgage loan, negligence, breach of fiduciary duty, and negligent and fraudulent misrepresentation, and additional affirmative defenses based upon lack of standing, lack of capacity, election of remedies, fraudulent inducement, statute of frauds and statute of limitations, (2) pursuant to CPLR 3211(a)(3) to dismiss the complaint based upon lack of capacity, and (3) pursuant to RPAPL 1301 to dismiss the fourth and sixth causes of action based upon election of remedies.

Plaintiff commenced this action for foreclosure of three separate mortgages given by defendant NIB Associates, LLC (NIB), on the real property known as 48-05 Metropolitan Avenue, New York, New York, a/k/a Block 2611, Lot 1001, together with an undivided 50% interest in the common elements, in Block 2611, Lot 460 on the Tax Map of the City of New York, Queens County, and to recover a judgment against defendants MIB Industries, Inc. (MIB), Benjamin Mutzen, Issac Mutzen and Nathan Hirsch, as guarantors, in the event a deficiency remains after sale of the subject premises. Plaintiff alleges in its complaint that the subject mortgages are (1) a consolidated mortgage dated December 28, 2006 (the Consolidated Mortgage), securing a note executed by defendant NIB in the principal amount of $3.2 million (the December 28, 2006 Note), payable with interest, (2) a credit line mortgage and security agreement dated December 28, 2006 (the Credit Line Mortgage), securing a credit note (Credit Note) executed by defendant NIB in the maximum principal amount of $1 million, payable with interest, and (3) a mortgage dated August 27, 2008 (the August 27, 2008 Mortgage), as amended by an "Assumption and Release of Note and Modification of Mortgage and Security Agreement" dated September 15, 2009 (the Amended Mortgage and Modification Agreement), securing a note dated August 27, 2008 executed by defendant NIB, as amended (the Amended Note), in the principal amount of $1 million, payable with interest.

Plaintiff also alleges that as further security for the December 28, 2006 Mortgage, defendants MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch executed and delivered to plaintiff, a guaranty also dated December 28, 2006 (December 28, 2006 Guaranty), guaranteeing payment of certain of NIB's obligations. It is alleged that defendants MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch executed and delivered to plaintiff a guaranty dated August 27, 2008, guaranteeing payment of certain of NIB's obligations, including NIB's payments on the December 28, 2006 Note and the Credit Note, and NIB's guaranty of MIB's payments on the Amended Note. Plaintiff also alleges that the Modification Agreement modified and corrected the loan documentation to reflect the

intention of the parties "that MIB [Industries, Inc.] sign the [August 27, 2008 Note] and NIB execute a guaranty which was to be secured by the [August 27, 2008] Mortgage." The Modification Agreement allegedly provides that defendant MIB agreed to be bound by the terms of the August 27, 2008 Note as though MIB had originally made, executed and delivered such note. The Modification Agreement allegedly also releases defendant NIB from all obligations under the August 27, 2008 Note as a direct signer on condition that defendants NIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch execute and deliver a guaranty (the August 27, 2008 Guaranty) guaranteeing the obligations of MIB to plaintiff.

Plaintiff also alleges that defendant MIB defaulted under the terms of the Amended Note and December 28, 2006 Guaranty, by failing to pay the monthly installment of principal and interest due as of April 2009, defendant NIB defaulted under the terms of the December 28, 2006 Note, Consolidated Mortgage, Credit Note, Credit Line Mortgage, the Amended Mortgage and Modification Agreement, and August 27, 2008 Guaranty by failing to pay the monthly mortgage installment due as of April 2009, and defendants Issac Mutzen, Benjamin Mutzen and Nathan Hirsch defaulted under the terms of the December 28, 2006 Guaranty and the August 27, 2008 Guaranty. Plaintiff further alleges it advised defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch that events of default had occurred under the mortgages and other loan documents, and demanded they cure the default on or before August 31, 2009. When defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch failed to cure the default by August 31, 2009, plaintiff brought suit. Plaintiff further alleges that defendant Richard C. Ferguson is a holder of a mechanic's lien against the subject premises, which is subject and subordinate to the mortgages being foreclosed in this action.

Defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch served a single, collective answer with affirmative defenses. Defendant Richard C. Ferguson failed to appear, answer or otherwise respond to the complaint within the time prescribed by law, and has defaulted in the action.

Plaintiff has determined that "John Doe Nos. 1-100" are not necessary party defendants. That branch of the motion for leave to amend the caption deleting reference to the John Doe defendants is granted.

With respect to that branch of the cross motion by NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch to dismiss the complaint pursuant to CPLR 3211(a)(3) based upon lack of capacity to sue, they failed to raise alleged lack of capacity as an affirmative defense in their answer or in a timely motion to dismiss the complaint (*see* CPLR 3211[e]). To the extent defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch cross-move to amend their answer to assert such a defense, the proposed amendment is patently lacking in merit. According to the affidavit dated October 25, 2010 of Bruce Hall, a vice-president of plaintiff, plaintiff is a national banking association with offices in Long Island City, New York, which transacts business in New York. Pursuant to the "National Bank Act" (12 USC § 21 *et seq.*), plaintiff, as a national banking association, is authorized to exercise certain enumerated powers including "[t]o sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons" (12 USC § 24 [Fourth] and "all such incidental powers as shall be necessary to carry on the business of banking" (12 USC § 24 [Seventh]) (*see Mercantile Nat. Bank at Dallas v Langdeau*, 371 US 555 [1963]). As a national banking association under federal law, plaintiff is exempt from the New York registration requirement (*see* Banking Law § 641[1]). Thus, those branches of the cross motion to dismiss the complaint based upon lack of capacity to sue, and for leave to amend the answer to assert lack of capacity as an affirmative defense are denied.

To the degree NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch seek to dismiss the fourth and sixth causes of action against them based upon election of remedies, they did not raise such a defense in their answer or in a timely motion to dismiss those claims (*see* CPLR 3211[e]). To the extent they cross move to amend their answer to assert such an affirmative defense, the first, second and third causes of action are for

foreclosure, and the sixth cause of action seeks a deficiency judgment against the guarantors in the event a deficiency remains after sale of the subject premises (*see TBS Enterprises, Inc. v Grobe*, 114 AD2d 445 [1985]).

Plaintiff alleges in the fourth cause of action that the guarantors are liable for all amounts owed by defendant NIB to plaintiff, and that plaintiff is "entitled to a judgment therefor." Such cause of action is denominated in the complaint as an "ALTERNATIVE COUNT," and plaintiff makes no claim in its prayer for relief for recovery of such a money judgment against the guarantors. Nor has plaintiff sought such relief in its notice of motion and supporting papers herein (*cf. White v Wielandt*, 259 AD 676 [1949]). Under such circumstances, the language in the fourth cause of action regarding entitlement to "judgment" cannot serve as a predicate to a finding that plaintiff has violated RPAPL 1301 by simultaneously prosecuting the causes of action for foreclosure and for money damages against the guarantors (*cf. White v Wielandt*, 259 AD 676 [1949]). The proposed eighth affirmative defense based upon election of remedies pursuant to RPAPL 1301, consequently, is devoid of merit. Those branches of the cross motion to dismiss the fourth and sixth causes of action asserted against the guarantors, and for leave to amend their answer to assert the proposed eighth affirmative defense are denied.

To the degree defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch move for leave to amend their answer to assert affirmative defenses based upon lack of standing, statute of frauds and statute of limitations, they have failed to allege any facts to support of such defenses, and as a consequence, such defenses are palpably insufficient (*see* CPLR 3013; *Rosicki, Rosicki and Associates, P.C. v Cochems*, 59 AD3d 512 [2009]; see also *see Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [1971], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145 [2008]). The branch of the cross motion for leave to assert the proposed affirmative defenses based upon based upon lack of standing, statute of frauds and statute of limitations is denied.

To the extent defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch cross-move to assert a proposed affirmative defense and counterclaims based upon fraudulent inducement, the elements of a claim for fraud are: (1) misrepresentation or a material omission of fact which was false and known to be false by the defendant; (2) that the misrepresentation was made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Cash v Titan Financial Services, Inc.*, 58 AD3d 785, 788 [2009]).

Defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch allege that at a time when they were able to manage their financial obligations to plaintiff and other "institutions," plaintiff solicited and convinced them, through high pressure tactics, to finance a real estate development project in Brooklyn, New York, by means of the Consolidated Mortgage loan. Defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch also allege plaintiff knowingly and negligently misrepresented to them that the Consolidated Mortgage loan was within their ability to repay, so to induce them into entering into the mortgage transaction. According to defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch, plaintiff, in doing so, took advantage of their limited business experience, and violated their trust in plaintiff as their financial advisor. Defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch allege plaintiff knew from the outset that they would not be able to repay the loan, and intended to acquire the property in foreclosure.

Generally, a representation by a lender that a borrower can afford to repay a prospective loan is an expression of opinion of present or future expectations, which is not actionable and cannot form the basis for an affirmative defense (*see Goldman v Strough Real Estate, Inc.*, 2 AD3d 677 [2003]; *Crossland Sav., F.S.B. v SOI Dev. Corp.*, 166 AD2d 495 [1990]; *cf.* Banking Law § 6-l [prohibits a lender or mortgage broker from making or arranging a "high-cost home loan" (as defined therein) without due regard to the

borrower's repayment ability]). Furthermore, the legal relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower or its guarantors (*see Standard Federal Bank v Healy*, 7 AD3d 610, 612 [2004]; *see also Walts v First Union Mtge. Corp.*, 259 AD2d 322 [1999]; *Bank Leumi Trust Co. of N.Y. v Block 3102 Corp.*, 180 AD2d 588, 589 [1992]).

In this instance, defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch do not claim that the subject mortgage is a mortgage subject to the provisions of Banking Law § 6-l, or allege facts which would tend to show a closer degree of trust between them and plaintiff than the ordinary borrower-lender relationship. Under such circumstances, that branch of the cross motion by defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch for leave to amend their answer to assert affirmative defenses and counterclaims based upon fraud and breach of fiduciary duty is denied.

To the degree defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch cross-move to assert proposed counterclaims based upon negligence and negligent misrepresentation, the proposed counterclaims are defective. The relationships between plaintiff and defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch are contractual ones, and a claim upon a negligently performed contract does not state a claim in the absence of a breach of a fiduciary duty. Again, defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch have failed to allege or demonstrate any special or fiduciary relationship existed between them and plaintiff to support a claim based upon negligent misrepresentation (*see Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487 [2004]). That branch of the cross motion by defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch for leave to amend their answer to assert a counterclaim based upon negligence and negligent misrepresentation is denied.

It is well established that the 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 Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiff has submitted, among other things, evidentiary proof of proper service of the summons and complaint upon defendants except for the John Doe defendants, a copy of the pleadings, notes, subject mortgages, loan agreement and guaranties, a copy of a notice of default, an affirmation of regularity of its counsel, and the affidavit dated September 16, 2010 of Mr. Hall. These submissions establish plaintiff's prima facie case to summary judgment on the first, second and third causes of action for foreclosure as against defendant NIB (*see East New York Savings Bank v Carlinde Realty Corp.*, 54 AD2d 574 [1976], *affd* 42 NY2d 905 [1977]). The burden shifts to defendant NIB to raise a triable issue of fact regarding its defenses (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704 [2007]; *First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2000]).

As a first affirmative defense, defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch assert the complaint fails to state a cause of action. Defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch do not cross move to dismiss the complaint on this ground (*see Butler v Catinella*, 58 AD3d 145, 151 [2008], *supra*), and in any event, plaintiff has established its prima facie entitlement to summary judgment against defendant NIB on the causes of action for foreclosure. In addition, the complaint states a cause of action to adjudicate defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch to be liable under the December 28, 2006 and August 27, 2008 Guaranties in the event a deficiency remains after the foreclosure sale.

Therefore, the first affirmative defense is surplusage, and the branch of the motion by plaintiff to strike such defense in the answer of defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch is denied as moot.

The affirmative defenses based upon the doctrine of unclean hands (second affirmative defense) and waiver, laches and estoppel (fourth affirmative defense), asserted by defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch in their

answer are unsupported by any allegations or proof (*see Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [1971], *supra*, *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145 [2008], *supra*).

The third affirmative defense asserted by defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch is based upon failure to mitigate damages. Mitigation of damages is not an affirmative defense to an action to foreclose a mortgage. Any dispute as to the exact amount owed plaintiff pursuant to the subject mortgages and notes may be resolved after a reference pursuant to RPAPL 1321 (*see Crest/Good Mfg. Co., v Baumann*, 160 AD2d 831 [1990]). The existence of such dispute does not preclude the granting of summary judgment as to liability (*see Layden v Boccio,* 253 AD2d 540 [1998]).

The fifth affirmative defense asserted by defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch is based upon their claim that any damages suffered by plaintiff are the proximate result of culpable conduct or action of plaintiff. Such claim does not constitute a defense to this mortgage foreclosure action. The concept of apportioning culpable conduct is one related to tort. Since the claims asserted by plaintiff in this case sound in breach of loan agreements, as opposed to tortious conduct, an affirmative defense based on a notion of culpable conduct is unavailable herein (*see* CPLR 1401; *Pilweski v Solymosy*, 266 AD2d 83 [1999]; *Nastro Contracting Inc. v Agusta*, 217 AD2d 874 [1995]; *Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc.*, 173 AD2d 1004 [1991]; *Castleton Holding Corp. v Forde*, 15 Misc 3d 1111[A] [2007]).

The sixth affirmative defense asserted by defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch in their answer, purportedly reserves their right to assert further affirmative defenses. Such alleged reservation of rights does not constitute an affirmative defense. Furthermore, a defendant may amend its answer to assert an affirmative defense not previously raised, within 20 days after service of the answer without leave of court (CPLR 3025[a]). Thereafter, a defendant is obligated to obtain the consent

of the other parties or the leave of court to amend the answer in the event it seeks to assert an affirmative defense not previously raised (CPLR 3025[b]).

That branch of the motion by plaintiff to dismiss the second, third, fourth, fifth and sixth affirmative defenses asserted by defendants NIB, MIB, Issac Mutzen, Benjamin Mutzen and Nathan Hirsch in their answer is granted.

Defendant NIB has failed to come forward with any evidence showing the existence of a triable issue of fact with respect to any defense to the causes of action for foreclosure. Defendant NIB also has failed to demonstrate the manner in which discovery might reveal the existence of a triable issue of fact in relation to its defenses, warranting the denial of summary judgment of the foreclosure claims (*see JP Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662 [2009]). Plaintiff, therefore, is entitled to summary judgment in its favor against defendant NIB on the causes of action for foreclosure *(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 in its favor against defendant NIB on the causes of action for foreclosure is granted.

That branch of the motion seeking leave to enter a default judgment against defendant Ferguson is granted.

That branch of the motion for leave to appoint a referee is granted (RPAPL 1321).

Settle order.

J.S.C.