

**Bank of Smithtown v 415 W. 150 LLC**

2011 NY Slip Op 31211(U)

May 5, 2011

Supreme Court, New York County

Docket Number: 117868/09

Judge: Judith J. Gische

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

PRESENT:           GISCHE            
Justice

PART 10

BANK OF SMITHTOWN

INDEX NO. 117868/09

415 WEST 150, LLC, ET AL.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 08

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.

**FILED**

MAY 06 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/5/11

J. GISCHE  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 10**

-----X  
BANK OF SMITHTOWN,

Plaintiff,

-against-

415 WEST 150 LLC, STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE,  
DAVID DIAMOND, MJM CONSTRUCTION  
SERVICES LLC, OUTERBRIDGE PLUMBING  
GROUP LLC, MAGNUSSON ARCHITECTURE  
& PLANNING, PC AMERITRANS CAPITAL  
CORP. and JOHN DOE 1 TO 25,

Defendants.  
-----X

**Decision/Order**

Index No.: 117868/09

Seq. Nos. : 008

Present:

Hon. Judith J. Gische  
J.S.C.

**FILED**

**MAY 06 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Pltf's osc (2221 w/ JMR affirm, JMR affirm, exhs.....	1
JMS affirm in opp, exhs.....	2
ACP affirm in opp, exhs.....	3

In this action, plaintiff sought to foreclose on three separate mortgages collateralized by the property located at 415 West 150<sup>th</sup> Street, New York, New York (the "property") and executed by Defendants 415 West 150 LLC and David Diamond (collectively herein referred to as the "Diamond Defendants"). The defaults occurred when plaintiff refused to debit a "soft-cost" project loan governed by a Project Loan Agreement from which all interest payments under the mortgages were paid.

MJM Construction Services LLC ("MJM") is a contractor who filed a lien on the

property.

The Diamond Defendants now move to reargue their opposition to plaintiff's motion for summary judgment, their motion to amend their answer and to remove a proceeding commenced by MJM in Supreme Court, Albany County and consolidate it with the instant action. Plaintiff and MJM oppose the motion. None of the other named parties to this action have answered or otherwise appeared in this action.

In their prior motions, plaintiff sought, *inter alia*, summary judgment on the three mortgages as a result of the 415's failure to make an interest payment due in August 2009. The Diamond Defendants acknowledged that they were "technically in default" and their opposition to the motion attempted to raise triable factual disputes concerning plaintiff's alleged acts of bad faith. On January 3, 2011, the court, *inter alia*, denied the Diamond Defendants' motion to amend their answer and granted plaintiff's motion for summary judgment (the "prior decision"). The court found that plaintiff had established a *prima facie* case of entitlement to foreclosure and the Diamond Defendants had otherwise failed to raise an issue of fact.

The Diamond Defendants now argue that the court misapprehended "the fact that the project loan agreement and the project loan mortgage, being part of the same transaction, must be read in tandem." The Diamond Defendants contend that plaintiff should have debited the project loan in August 2009 because a mechanic's lien filed against the property did not ripen into an event of default until 45 days after notice of the filing of such lien.

The Diamond Defendants also argue that the court awarded summary judgment to plaintiff based upon an alleged default that was not pled in the complaint as a basis

for foreclosure. Specifically, the Diamond Defendants maintain that the "sole evidence of default set forth in Plaintiff's motion for summary judgment was Defendant 415's failure to pay the various notes upon their maturity in February 2010."

A motion to reargue is addressed to the discretion of the court and is intended to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any principle of law (CPLR § 2221 [d] [2]). An unsuccessful party may not use a motion to reargue in order to assume a different position inconsistent with that taken on the original motion (Foley v. Roche, 68 AD2d 558 [1st Dept 1979]). Further, an unsuccessful party may not move to reargue the very same questions previously decided against him or her (Pro Brokerage, Inc. v. Home Ins. Co., 99 AD2d 971 [1st Dept 1984]).

Here, it appears that each of these arguments was contained in the Diamond Defendant's reply affirmation by Jeffrey M. Rosenberg, Esq., dated October 27, 2010. Since the court did not specifically address these arguments, the court hereby grants reargument and will, in turn, consider each.

#### Basis For Default - Mechanic's Lien

MJM filed a mechanic's lien in the amount of \$2,430,494.40 on August 13, 2009. Under Article IV, Section 1 of the Project Loan Mortgage, the filing of a lien for the performance of work or supply of materials is considered an event of default. Under Section 2, plaintiff is permitted to declare the indebtedness evidenced by the Project Loan Note, together with all sums required to be paid under the Mortgage immediately due and payable. The Diamond Defendants argue that because the Mortgage contains a 45-day cure period in the event of a default thereunder, that cure period was

somehow applicable to an event of default under the Project Loan Agreement.

Therefore, the Diamond Defendants maintain that because 415's time to cure had not expired by the date which the court found it to have defaulted under the Project Loan Agreement, there are issues of fact as to this default. This argument is rejected.

Nowhere in the Project Loan Agreement is there a period for 415 to cure its default thereunder with regards to the filing of a mechanic's lien on the property. Article IV of the Project Loan Agreement, by its own terms, permits plaintiff to accelerate the loan under that agreement, which if not satisfied by 415 when an advance is requested, in turn permits plaintiff to suspend its obligation to make further advances on the loan to satisfy 415's interest payment obligations on the Mortgage. Plaintiff established 415's default under the Project Loan Agreement by showing that a mechanic's lien was filed, which permitted plaintiff to refuse to debit 415's Mortgage payment from the Project Loan, thereby resulting in 415's default under the Mortgage. The Diamond Defendants' arguments do not rebut this showing.

#### Unpleaded Cause of Action

Equally unavailing is the Diamond Defendants' remaining contention concerning the fact that the mortgages matured after the instant action was filed. In the complaint, which was filed on December 16, 2009, plaintiff alleges three grounds for default under the Mortgage: [1] failure to make the payment "due on August 24, 2009 and thereafter"; [2] failure to pay late charges; and [3] "permitting the filing of four mechanics liens against the [property] contrary to the provisions of the Mortgage. For the reasons already stated herein, plaintiff established 415's default under the Mortgage on August 24, 2009. This is not a case of an "unpleaded cause of action" as the Diamond

Defendants contend. Once 415 defaulted under the Mortgage, plaintiff was entitled to foreclose on the property.

Even if this was an unpleaded cause of action, while the general rule is that a party cannot obtain summary judgment on an unpleaded cause of action (Cohen v. City Co. of New York, 283 NY 112 [1940]), summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and the opposing party has not been misled, to its prejudice (Weinstock v. Handler, 254 AD2d 165 [1<sup>st</sup> Dept 1999]). Thus, as with a trial, the pleadings may be deemed amended to comply with the proof (Weinstock v. Handler, 254 AD2d at 166). Plaintiff established on the prior motion that 415 failed to make the payment due on August 24, 2009, and **every payment thereafter**. This fact is still not in dispute.

#### Remaining Issues

Insofar as the Diamond Defendants spent the balance of their opposition to the prior motion on the purported issue of plaintiff's "complicity, negligence and bad faith", these arguments were properly rejected by the court in the prior decision. The Diamond Defendants argued that plaintiff should have disregarded the Project Loan Agreement, and specifically, the various provisions of Article IV thereunder, and instead should have continued to withdraw from the Project Loan to cover 415's interest payments on the mortgage until "the proceeds were developed from the sale of the condominium units." Martin Weise, manager of 415, claimed in his affidavit that plaintiff, Bradley Rock Jr.<sup>1</sup>, and 415's loan officer "made these explicit acknowledgments to [Mr. Weise] and

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<sup>1</sup>It is unclear from Mr. Weise's affidavit whether Bradley Rock Jr. is somehow affiliated with plaintiff or was 415's loan officer. However, the result does not impact the court's decision.

agreed to wait until the sale of the units for the Bank to get repaid." As proof of this modification to the operative agreements between the parties, Mr. Weise claims that plaintiff had waived other defaults by 415 as the project progressed. Mr. Weise also claims that plaintiff failed to follow proper accounting and credit procedures and "was fully aware" that the Diamond Defendants did not have the cash equity to satisfy its obligations under the operative agreements.

Fraud, as distinguished from fraudulent inducement, is not a defense in an action to foreclose a mortgage (see Jo Ann Homes at Bellmore v. Dworetz, 25 NY2d 112 ; Dyke v. Peck, 279 AD2d 841 [3d Dept 2001]). So any so-called evidence of the plaintiff's waiver of the defendant's defaults during the operative duration of the subject agreements cannot raise a triable issue of fact in this foreclosure.

However, the Diamond Defendants do allege fraudulent inducement, which can be a defense in a foreclosure action. They claim, amorphously, that 415 was not qualified to undertake the obligations in the subject agreements, and that plaintiff knew that, but nonetheless induced them to enter into these agreements based upon the representation that plaintiff would waive 415's defaults until actual condominium units were sold. First, the barebones offer of proof in Mr. Weise's self-serving affidavit do not raise a triable issue of fact. Moreover, the Diamond Defendants have not made any showing that their purported reliance on plaintiff's misrepresentations was justifiable. These were business entities who entered into an arms-length transaction. The terms of the agreements were clear, 415's obligations thereunder were clear, and the Diamond Defendant's contentions are contrary to the merger and integration clauses contained in the subject agreements.

As for the Diamond Defendants' request to reargue that portion of their motion to amend the answer, that is denied. Since the court adhered to its prior grant of summary judgment to plaintiff, the court implicitly finds that the Diamond Defendants do not have any defenses or crossclaims to the foreclosure, and MJM still has a claim to any surplus which may be realized after the foreclosure.

Finally, since this action is otherwise resolved, the court will not revive it by removing MJM's action under the lien law from Albany Supreme Court.

Accordingly, the Diamond Defendants motion to reargue is granted, and upon granting reargument, the court adheres to its prior order; the motion is otherwise denied.

**CONCLUSION**

In accordance herewith, it is hereby:

**ORDERED** that plaintiff's motion to reargue is granted and upon reargument, the court adheres to its prior determination; and it is further

**ORDERED** that the motion is otherwise denied.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York  
May 3, 2011

**FILED**

**MAY 06 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.