

10 Connor Lane v C. Connor Lane Assoc., LLC

2011 NY Slip Op 31439(U)

May 10, 2011

Sup Ct, Suffolk County

Docket Number: 19024-10

Judge: Daniel Martin

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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY**

INDEX NO.: 19024-10

PRESENT:
HON. DANIEL MARTIN
_____ x

Motion Date: 10/19/10
Submitted: 11/23/11
Motion Sequence No.: 01 -MG
02 -MD

10 CONNOR LANE,

Plaintiff,

-against-

**C. CONNOR LANE ASSOCIATES,
LLC. *Et al.*,**

Defendants.
_____ x

PLAINTIFFS' ATTY:
Michael A. Markowitz, PC.
1553 Broadway
Hewlett, NY 11557

DEFENDANTS' ATTYS:
Christine Malafi, Esq.,
Suffolk Cty. Attorney
100 Veterans Memorial Highway
P.O. Box 6100
Hauppauge, NY 11788

Schrier, Fiscella & Sussman, LLC.
825 East Gate Boulevard
Garden City, NY 11530

The following named papers have been read on this motion:

Order to Show Cause/Notice of Motion	X
Cross-Motion	X
Answering Affidavits	X
Replying Affidavits	X

ORDERED that this motion by the plaintiff for leave to enter a default judgment as against the defendant Connor Lane Associates, LLC; an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321; leave to amend the caption of the summons and complaint pursuant to CPLR 3025 (b); appointment of a receiver pursuant to Real Property Actions and Proceedings Law § 1325; and an order directing the defendant C. Connor Lane Associates, LLC to turn over to the receiver all leases, agreements and memoranda relating to the rental of the mortgaged premises and the rents and profits received is determined herein; and it is further

ORDERED that this cross motion by the defendant C. Connor Lane Associates, LLC for an order extending its time to appear and answer and compelling the plaintiff to accept its answer is denied; and it is further

ORDERED that PAUL G. COSTELLO with an office

at 1 SPRUCE ST. SMITHTON N.Y. is hereby appointed Referee to ascertain and compute the amount due upon the note and mortgage documents which this action was brought to foreclose, and to examine and report whether the mortgaged premises can be sold in parcels; and it is further

ORDERED that pursuant to CPLR 8003 (a) the Referee be paid the statutory fee for the computation of the amount due plaintiff; and it is further

ORDERED that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to, section 36.2 (c) (“Disqualifications from appointment”) and section 36.2 (d) (“Limitations on appointments based upon compensation”); and it is further

ORDERED that the pleadings and papers served and filed in this action be amended by deleting the defendants “Does 1 through 10” and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
10 CONNOR LANE CORP.,

Plaintiff,

- against -

C. CONNOR LANE ASSOCIATES, LLC and
CHERYL JOHNSTON and WILLIAM
JOHNSTON. and COUNTY OF SUFFOLK and
REGULATOR INC. a/k/a REGULATOR TOWING
INCORPORATED a/k/a REGULATOR AUTO
BODY, INC.,

Defendants.

-----X

This is an action to foreclose a mortgage on commercial property known as 10 Connor Lane, Deer Park, New York. The defendant C. Connor Lane Associates, LLC (C. Connor Lane), by its member Cheryl Johnston, executed a promissory note dated November 21, 2008 agreeing to pay the principal sum of \$1,260,000.00 at the rate of seven percent per year in return for a loan received from the plaintiff, 10 Connor Lane Corp. To secure said note, the defendant C. Connor Lane executed a mortgage of the same date on the subject property. The defendant C. Connor Lane defaulted on its monthly payment of principal and interest in the sum of \$11,325.24 on January 1, 2010 and each month thereafter. The plaintiff sent the defendant C. Connor Lane a letter of default dated March 9, 2010. The defendant failed to cure its default.

The plaintiff commenced the instant action on May 21, 2010. The plaintiff served a copy of the summons, complaint and notice of pendency on the named defendants as well as on a tenant of the premises, Regulator Towing, Inc., also known as Regulator Inc., and Regulator Auto Body, Inc. The County of Suffolk was the only defendant to serve an answer. In response to service of a motion to dismiss this action by the defendants C. Connor Lane, Cheryl Johnston and William Johnston, the plaintiff voluntarily discontinued the action, without prejudice, as against the defendants Cheryl Johnston and William Johnston by stipulation dated September 16, 2010. Said motion to dismiss was never filed.

The plaintiff now moves for leave to enter a default judgment as against the defendant C. Connor Lane, for an order of reference, and for leave to amend the caption of the summons and complaint to replace the defendant "Does 1 through 10" with "Regulator Inc. a/k/a Regulator Towing Incorporated a/k/a Regulator Auto Body, Inc." In addition, the plaintiff moves for the appointment of a receiver pursuant to paragraph 38 of the mortgage to collect all rents and to use said rents for the payment of taxes and insurance on the subject premises. The plaintiff asserts that the defendant C. Connor Lane is presently leasing the premises to Regulator Inc. a/k/a Regulator Towing Incorporated a/k/a Regulator Auto Body, Inc. (Regulator) and receiving rents from Regulator and not applying said rental payments to the outstanding amounts due to the plaintiff. The plaintiff also requests an order directing the defendant C. Connor Lane to turn over to the receiver all leases, agreements and memoranda relating to the rental of the mortgaged premises and the rents and profits received.

In support of the motion, the plaintiff submits, among other things, the note and mortgage, the notice of default letter, the summons and complaint, the affirmation of additional notice of default to the defendants C. Connor Lane, Cheryl Johnston, and William Johnston, the answer of the defendant County of Suffolk, and the stipulation of voluntary discontinuance.

The defendant C. Connor Lane now cross-moves for an order extending its time to appear and answer and compelling the plaintiff to accept its answer on the grounds that its delay is minimal, will not result in any prejudice to the plaintiff, and was due to good faith reliance on ongoing negotiations regarding a possible restructuring of the note and mortgage following the discontinuance of the action against the individual defendants. The defendant C. Connor Lane contends that its default has resulted from the plaintiff's bad faith interference with its ability to rent the premises by intentionally representing to potential tenants that the current owner could no longer manage the premises and that the building was going into foreclosure. In addition, the defendant C. Connor Lane opposes the plaintiff's motion on the grounds that the plaintiff has come to the Court with unclean hands seeking to capitalize on the \$290,000.00 down payment paid by the defendant and that the circumstances do not warrant the appointment of a receiver.

The submissions in support of the cross motion include an affidavit from the defendant Cheryl Johnston, managing member of the defendant C. Connor Lane, indicating that by stipulation the parties had agreed to extend the time for the defendant C. Connor Lane to answer to August 6, 2010, that the motion to dismiss was never filed because its main purpose was fulfilled by the voluntary discontinuance against the individual defendants, and that the defendant C. Connor Lane was under the belief that the service of the motion to dismiss tolled the time required for interposition of an answer. The submissions also include a copy of the stipulation extending the time

to answer and a copy of the proposed answer dated October 29, 2010 alleging affirmative defenses of improper service, the action is barred by champerty, the complaint fails to state a cause of action, the plaintiff failed to satisfy conditions precedent under the terms of the mortgages, notes and consolidation agreements prior to the commencement of this action, the plaintiff has refused to exercise good faith in its refusal to “work out default”, the plaintiff has failed to act equitably, and duress and unconscionability.

In reply, the plaintiff contends that even though the defendant C. Connor Lane may have a reasonable excuse for its default in answering, it has no defense to this foreclosure action rendering the submission of an answer meaningless. The plaintiff also contends that the appointment of a receiver is necessary inasmuch as the defendant C. Connor Lane failed to pay real estate taxes on the property resulting in tax liens of over \$50,000.00, failed to obtain insurance for the building pursuant to the mortgage, and the defendant William Johnston represented during settlement negotiations that there were no tenants. The plaintiff adds that the defendant C. Connor Lane has refused to provide a copy of the lease agreement with the tenant Regulator.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003] quoting *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812, 812, 601 NYS2d 940 [2d Dept 1993]).

Here, the plaintiff produced the note and mortgage executed by the mortgagor, as well as evidence of nonpayment (see *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 1080, 915 NYS2d 591 [2d Dept 2010]; *Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d at 482). Thus, it was incumbent upon the defendant C. Connor Lane to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (see *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d at 1080). Such defenses include waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct by the plaintiff (see *Capstone Business Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010]; *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997], *lv dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]).

A defendant who seeks to successfully oppose a motion for leave to enter a default judgment based on the failure to timely serve an answer and seeks leave to extend the time to appear or to compel acceptance of an untimely answer must provide a reasonable excuse for the default and for the delay and show a potentially meritorious defense (see *Deutsche Bank Natl. Trust Co. v Rudman*, 80 AD3d 651, 652, 914 NYS2d 672 [2d Dept 2011]; *May v Hartsdale Manor Owners Corp.*, 73 AD3d 713, 900 NYS2d 359 [2d Dept 2010]).

Here, even if the ongoing negotiations with the plaintiff’s attorneys could be deemed an appearance, the defendant C. Connor Lane nevertheless defaulted in this action by failing to serve an answer (see *U.S. Bank Nat. Assn. v Slavinski*, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]). The belief that the service of the motion to dismiss, that was never filed, tolled the time required for interposition of an answer does not constitute a reasonable excuse for the default (see *id.*).

In any event, the defendant C. Connor Lane failed to demonstrate that any of the defenses raised in its proposed answer were potentially meritorious (see *Cochran Inv. Co., Inc. v Jackson*,

38 AD3d 704, 705, 834 NYS2d 198 [2d Dept 2007]; *see also Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 211, 842 NYS2d 1 [1st Dept 2007], *lv to appeal dismissed* 10 NY3d 741, 853 NYS2d 283 [2008]). Notably, the submissions of the defendant C. Connor Lane failed to show that the plaintiff wrongfully caused its default or some other condition precedent that led to acceleration of the debt (*see Red Tulip, LLC v Neiva*, 44 AD3d at 211). In addition, the plaintiff was entitled to pursue foreclosure rather than refinancing such that its refusal to “work out default” did not constitute bad faith (*see id.* at 212). Also, the defendant Cheryl Johnston failed to demonstrate that she had an “absence of meaningful choice” at the time that she entered into the loan agreements and that the agreements’ terms were so “unreasonably favorable to” the plaintiff as to render the note and mortgage unconscionable (*see, Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10, 537 NYS2d 787 [1988]; *Southwell v Middleton*, 67 AD3d 666, 669, 890 NYS2d 57 [2d Dept 2009]). Moreover, there is no indication that the plaintiff engaged in any inequitable conduct or that the note and mortgage had been executed under duress (*see, Gould v McBride*, 29 NY2d 768, 326 NYS2d 565 [1971]; *Butler v Catinella*, 58 AD3d 145, 151, 868 NYS2d 101 [2d Dept 2008]). Furthermore, the defendant C. Connor Lane failed to demonstrate that the defense of champerty applied to the subject circumstances (*see SB Schwartz & Co., Inc. v Levine*, 82 AD3d 742, 918 NYS2d 171 [2d Dept 2011]).

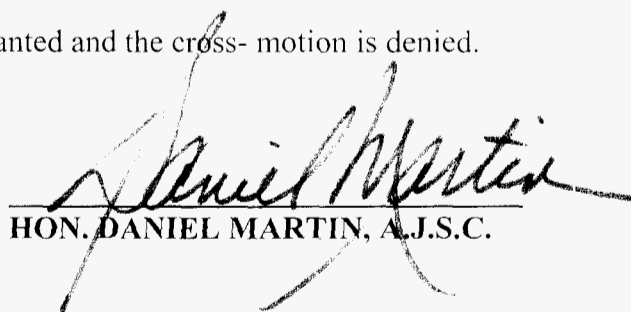
Based on the foregoing, the motion for leave to enter a default judgment as against the defendant C. Connor Lane and for an order of reference is granted (*see HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). In addition, the cross motion by the defendant C. Connor Lane for an order extending its time to appear and answer and compelling the plaintiff to accept its answer is denied (*see id.*).

Finally, the subject mortgage agreement, under paragraph 38, specifically authorizes the appointment of a receiver upon application by the mortgagee in any action to foreclose the mortgage. Therefore, the plaintiff, as mortgagee, is entitled to the appointment of a receiver without notice and without regard to the adequacy of the security (*see Real Property Law § 254 [10]; Real Property Actions and Proceedings Law § 1325 [1]; Maspeth Federal Sav. and Loan Assn. v McGown*, 77 AD3d 889, 889, 909 NYS2d 403 [2d Dept 2010]; *Naar v Litwak & Co.*, 260 AD2d 613, 614, 688 NYS2d 698 [2d Dept 1999]; *Febbraro v Febbraro*, 70 AD2d 584, 585, 416 NYS2d 59 [2d Dept 1979]). Therefore, the plaintiff’s request for the appointment of a receiver is granted and a temporary receiver will be selected from the list established by the Chief Administrator of the Courts pursuant to 22 NYCRR Part 36. The plaintiff is directed to submit an order appointing a temporary receiver in this mortgage foreclosure action pursuant to Real Property Actions and Proceedings Law § 1325. Once an order appointing a temporary receiver is entered, the defendant C. Connor Lane will be directed to turn over to the receiver all leases, agreements and memoranda relating to the rental of the mortgaged premises and the rents received

Accordingly, the instant motion is granted and the cross-motion is denied.

So Ordered.

Dated: May 10, 2011
Riverhead, NY


HON. DANIEL MARTIN, A.J.S.C.