Horizons Invs. Corp. v Brecevich
2011 NY Slip Op 32182(U)
July 13, 2011
Sup Ct, NY County
Docket Number: 114600/09
Judge: Joan A. Madden
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SCANNED ON 7/18/2011
[* 1]

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

PRESENT: HON. JOAN A. MADDEN **PART 11**
Justice

Horizons Investors Corp,
Plaintiff,

- v -

Breecevich,

Defendant.

INDEX NO.: 114600/09
MOTION DATE:
MOTION CAL. NO. 001
MOTION SEQ. NO.

The following papers, numbered 1 to _____ were read on this motion to/for __________

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that the this motion is determined in accordance with the annexed decision. Settle order on notice.

FILED
JUL 18 2011
NEW YORK COUNTY CLERK'S OFFICE

Dated: July 13, 2011

[signature]
J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

---X

HORIZONS INVESTORS CORP.,

Plaintiff,

INDEX NO. 114600/09

-against-

JOHN BRECEVICH, a/k/a GIOVANNI BRECEVICH, ROSEMARY BRECEVICH & WARMINSTER INVESTMENT CORP., & NYC ENVIRONMENTAL CONTROL BOARD, & "JOHN DOE" (Said name being fictitious, it being the intention of the Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporation or entities if any having or claiming interest or lien upon the mortgaged premises),

Defendants.

---X

FILED
JUL 18 2011
NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

This is an action to foreclose a consolidated mortgage dated March 15, 2007, in the amount of $1,175,000 on building located at 2283 First Avenue, New York, NY.[1] Plaintiff mortgagee Horizons Investors Corp. (Horizons) moves for: 1) an order pursuant to CPLR 3211(b) striking the answer of defendants John Brecevich a/k/a Giovanni Brecevich and Rosemary Brecevich; 2) an order pursuant to CPLR 3212 granting plaintiff summary judgment; 3) an order amending the caption to remove "John Doe" from the title of this action; and 4) an order pursuant to CPLR 4301 and CPLR 4311 appointing a Referee to compute. Defendants John Brecevich and Rosemary Brecevich oppose the motion and cross-move for: 1) an order

[1]In May 2006, defendant John Brecevich obtained a loan in the amount of $825,000 from Peter Weiss, secured by a mortgage on the property. In March 2007, Brecevich refinanced that mortgage with plaintiff (through an assignment), borrowed an additional $350,000 from plaintiff, and executed the instant consolidated note and mortgage in the total amount of $1,175,000.

pursuant to CPLR 3211(a)(7) dismissing the complaint for failure to state a cause of action; 2) an order pursuant to CPLR 3408 setting this matter down for a mandatory settlement conference; 3) an order pursuant to DR § 5-105 disqualifying plaintiff's counsel and law firm; and 4) an order pursuant to CPLR 3025 granting leave to amend the answer.

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 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, and the default by defendant John Brecevich. See CitiFinancial Co. (DE) v. McKinney, supra; LPP Mortgage, Ltd v. Card Corp, supra; Hypo Holdings, Inc v. Chalasani, supra. In opposing the motion and cross-moving to dismiss the complaint and for other relief, defendants do not deny that money is owed or that defendant John Brecevich, as mortgagor, defaulted on the mortgage by not making any of the payments that

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became due and owing commencing June 1, 2007. Rather, defendants argue that the underlying loan is usurious as the complaint seeks interest at the rate of 24% and the $25,500 fee paid to the mortgage broker, Noble Mortgage, Inc.,"is merely a cover for usury since the mortgage broker for this loan, Cesar Fernandez, is the cousin and agent of Benito Fernandez, Plaintiff's principal."[2] Defendants also argue that issues of fact exist as to the amount of the actual loan, alleging that plaintiff "advanced" only $1,000,000, but is seeking to collect the $1,175,000 amount listed in the mortgage and note, which is an "inflated amount" intended to "conceal" the usurious interest rate. Defendants further argue that plaintiff has not complied with the mandatory notice and pleading requirements of RPAPL §§ 1302, 1303 and 1304, they are entitled to a mandatory settlement conference, and summary judgment is premature.

None of defendants arguments is sufficient to raise a genuine issue of material fact as to a bona fide defense. First as to the usury defense, the note provides for interest at the rate of 14%, and on default the interest rate increases to 19% with an additional late charge of 5%, for a total default rate of interest of 24%. At 24% the default rate of interest is valid and enforceable, since the defense of usury does not apply where the terms of the mortgage and note impose an interest rate in excess of the statutory minimum only after default or maturity. See Eikenberry v. Adriondack Spring Water Co. Inc., 65 NY2d 125 (1985); Hicki v. Choice Capital Corp, 264 AD2d 710 (2nd Dept 1999); Miller Planning Corp v. Wells, 253 AD2d 859 (2nd Dept 1998);

[2]Defendants also allege that "Eric V. Ladson, one of the attorneys allegedly involved in the transaction, is the alter ego of Cesar Fernandez and operates out of 2298 First Avenue, New York, New York, which is the same address as Noble Mortgage, Inc and Cesar Fernandez." It is not entirely clear how that allegation relates to defendants' usury defense. However, in his affidavit, Cesar Fernandez, the principal of Noble Mortgage, states that attorney Ladson represented John Brecevich at the closing.

Bloom v. Trepmal Construction Corp., 29 AD2d 951 (2nd Dept), aff'd 23 NY2d 730 (1968).

Defendants also assert that the broker's fee was "merely a cover for usury," because the broker and plaintiff's principal are allegedly cousins. A borrower, however, may pay reasonable expenses attendant on a loan without rendering the loan usurious. See Lloyd Capital Corp v. Pat Henchar, Inc., 80 NY2d 124 (1992). In view of the affidavits from plaintiff's principal Benito R. Fernandez, and the mortgage brokers' principal Cesar Fernandez, Esq., stating that they are not cousins and have no familial relationship, defendants have not made a sufficient showing to raise an issue of fact as to whether the mortgage broker's fee was a pretext for higher interest. See id.

Second, defendant John Brecevich submits an affidavit that "[a]lthough the note and mortgage which I have been shown say that the principal amount is $1,175,000, the actual amount loaned was only $1,000,000." Notwithstanding the foregoing statement, John Brecevich does not deny that his signature appears on both the note and mortgage, which as he acknowledges are for a loan in the amount of $1,175,000. "It is the well-settled law of this State that "a mortgagor is bound by the terms of his contract as made and cannot be relieved from his default, if one exists, in the absence of waiver by the mortgagee, or estoppel, or bad faith, fraud, oppression or unconscionable conduct on the latter's part.'" Citidress II v. 207 Second Avenue Realty Corp., 21 AD3d 774, 777 (1st Dept 2005) (quoting Nassau Trust co. v. Montrose Concrete Products Corp, supra at 183). Here, defendants's allegations are not sufficient to raise a material issue of fact as to any such wrongdoing.

Third, defendants argue that since John Brecevich has resided in the building since 2002 and the building is a "three family home with no commercial space," the property is "improved

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by a one to four family dwelling," and the mortgage is a "home loan" within the meaning RPAPL §§ 1302, 1303 and 1304, and CPLR 3408; those provisions mandate certain pleading and notice requirements, as well as a settlement conference. In response, plaintiff asserts that the official documents on file with the City of New York establish that the building is a mixed-use residential and commercial building, and that defendants illegally converted the first floor storefront to a residential space. Defendants admit that the first floor is now used as a residence and argue that their "actual use" of the property as "three family home" is controlling.

Defendants do not dispute that the certificate of occupancy states that the property "may be used as a business and residence," and describes the use of the first story as "store" and the use of the second to fourth stories as "tenement." Notably, the documents filed with the City Register in connection with the instant mortgage, which are dated March 15, 2007, and include the Mortgage, the Assignment of Mortgage, and the Consolidation, Extension and Modification Agreement, list the "property type" as "4-6 Family with Store/Office." Moreover, the records of the Department of Buildings (DOB) indicate that after the March 15, 2007 date of the mortgage, two complaints were received on July 16, 2007, regarding "illegal conversion of store on ground level into an apartment," and "2 apartments on the third floor have been illegally converted into 1 apartment." With respect to the "illegal conversion" of the first floor store, DOB issued a violation that the occupancy was contrary to the certificate of occupancy, and as to the illegal conversion of the third floor, DOB issued a stop work order that is still in effect. Also, the record, including the public records of the City Register, indicates that defendant John Brecevich

is a sophisticated business man,[3] who has apparently owned the building directly or through an entity since 1985, and has used it as security to obtain two previous loans for $825,000 in 2006 and $500,000 in 2003.[4] Based on the foregoing, plaintiff has made a sufficient showing that the provisions of RPAPL §§ 1302, 1303 and 1304, and CPLR 3408, are not applicable to circumstances of the instant mortgage. See

Finally, defendants argue that summary judgment is premature, alleging that they are seeking to obtain the "closing file" from their former attorney, which will demonstrate the "amount actually loaned." In light of the determination above rejecting defendants' argument as to the amount loaned, the absence of discovery does not require denial of plaintiff's motion, as defendants fail 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).

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[3]In his affidavit, Benito R. Fernandez, plaintiff's principal, states that he "first came to know John Brecevich several years ago when Cesar Fernandez, Esq., referred him and his partner, Frank Brija who own and operate Patsy's Restaurant in East Harlem, to me, to explore the possibility of them renting space to operate a restaurant in Albany, New York, in one of my facilities. . . .He introduced us for the possibility to do business in the future which culminated in this commercial loan for a commercial mixed-used property that is one building removed from Patsy's Restaurant. John Brecevich documented his ownership in 2293 First Avenue and the business (Patsy's Restaurant), to substantiate this loan. Patsy's is located at 2287 First Avenue."

[4]On July 24, 2003, John Brecevich obtained a $500,000 loan from Option One Mortgage Corp., secured by a mortgage on the property, recorded on May 21, 2004; the recording document lists the "property type" as "4-6 family with store/office." On May 5, 2006, John Brecevich obtained a $825,000 loan from Peter Weiss, secured by a mortgage on the property recorded on July 7, 2006; curiously, the recording document lists the "property type" as "dwelling only – 6 family."

Based on the foregoing, plaintiff's motion is granted, and plaintiff is entitled to summary judgment, amendment of the caption, dismissal of the answer and the appointment of a Referee to compute. In light of this conclusion, defendants' cross-motion is denied in its entirety as without merit. Settle order on notice including a copy of this decision.

FILED

JUL 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

DATED: July 13, 2011

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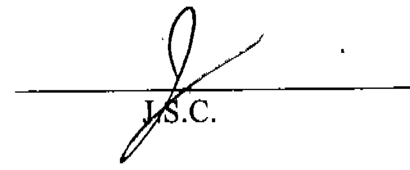

J.S.C.