Bank of Smithtown v 3783 Realty Corp.
2011 NY Slip Op 32243(U)
July 21, 2011
Supreme Court, Suffolk County
Docket Number: 27613-10
Judge: Elizabeth H. Emerson
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[* 1]

SHORT FORM ORDER

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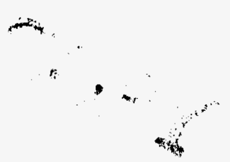
NO.: 27613-10

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY



PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 11-24-10; 1-4-11
SUBMITTED: 5-12-11
MOTION NO.: 003-MOT D; ACAP
004-MOT D

BANK OF SMITHTOWN,

Plaintiff,

-against-

3783 REALTY CORP., U.S. SMALL BUSINESS ADMINISTRATION, NEW YORK STATE DEPT OF TAXATION AND FINANCE, COMMISSIONER OF TAXATION AND FINANCE CIVIL ENFORCEMENT CO ATC, TROY & TROY, P.C., JAMES J. TROY, EDWARD J. TROY, JOSEPH B. TROY, WILLIAM J. TROY "JOHN DOE ONE" to and including "JOHN DOE TEN" the last ten names being fictitious and unknown to the 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 382 ROSEVALE AVENUE, RONKONKOMA, NEW YORK,

Defendants.

JEFFREY B. HULSE, ESQ.
Attorney for Plaintiff
295 North Country Road
Sound Beach, New York 11789

THE LAW OFFICES OF EDWARD J. TROY
Attorneys for Defendant Edward J. Troy
44 Broadway
Greenlawn, New York 11740

TROY & TROY, P.C., Pro Se and
Attorneys for James Troy, Joseph Troy and William Troy, and 3783 Realty Corp.
382 Rosevale Avenue
Lake Ronkonkoma, New York 11779

Upon the following papers numbered 1-48 read on these motions for summary judgment and to compel ; Notice of Motion and supporting papers 1-21; 33-41 ; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 22-30; 31; 42-45; 47 ; Replying Affidavits and supporting papers 32; 46; 48 ; it is,

ORDERED that the branches of the motion by the plaintiff which are for an order granting summary judgment in its favor, appointing a referee to compute, and amending the caption are granted; and it is further

ORDERED that the motion by the plaintiff is otherwise denied; and it is further

ORDERED that Linda Morrison, Esq.,with an office at 350 Veterans Memorial Highway, Commack, New York 11725, telephone number 631-232-1818, is hereby appointed referee to ascertain and compute the amount due the plaintiff for principal, interest, real estate taxes, and other disbursements provided for by statute and in the note and mortgage upon which this action is based, and to examine and report on whether the mortgaged premises can be sold in parcels; and it is further

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

ORDERED that the caption is amended by deleting therefrom the names of the defendants "John Doe One" through "John Doe Ten.;" and it is further

ORDERED that the cross motion by the defendant Edward J. Troy for an order of default on his cross claims against the defendants James Troy; Joseph Troy; William Troy; Troy & Troy, P.C.; and 3783 Realty Corp. is granted as to the defendant 3783 Realty Corp. only; and it is further

ORDERED that an assessment of damages against the defendant 3783 Realty Corp. is reserved until final disposition of the action; and it is further

ORDERED that the defendant Edward J. Troy is directed to serve a copy of this order on the defendant 3783 Realty Corp.; and it is further

ORDERED that the branch of the motion by the defendant Edward J. Troy which is for summary judgment on his sixth cross claim for contractual indemnification against the defendants 3783 Realty Corp. and Troy & Troy, P.C., is granted as to the defendant Troy & Troy, P.C., only, on the condition that the defendant Edward J. Troy is liable to the plaintiff bank for any deficiency after the mortgaged premises is sold ; and it is further

ORDERED that the motion and cross motion by the defendant Edward J. Troy are otherwise denied.

This is an action to foreclose a mortgage on real property owned by the defendant 3783 Realty Corp. and leased to the defendant Troy & Troy, P.C. ("Troy & Troy"), a law firm of which the defendants James, Edward, Joseph and William Troy (the "Troy defendants") were the

members.[1] Troy & Troy and the Troy defendants personally guaranteed payment of 3783 Realty Corp.'s obligation to the plaintiff bank, which now moves, inter alia, for summary judgment and the appointment of a referee. The Troy defendants oppose the motion, and Edward Troy separately moves for an order compelling discovery and for summary judgment against 3783 Realty Corp. and Troy & Troy on his sixth cross claim for contractual indemnification. Edward Troy also cross moves for an order of default on his cross claims against 3783 Realty Corp., Troy & Troy, James Troy, Joseph Troy, and William Troy.

It is well settled that, in moving for summary judgment in an action to foreclose a mortgage, the plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (*see*, **Republic Natl. Bank of N.Y. v O'Kane**, 308 AD2d 482; **Village Bank v Wild Oaks Holding**, 196 AD2d 812). When the plaintiff has done so, it is incumbent upon the defendant to produce evidentiary proof in admissible form sufficient to require a trial of his defenses (*see*, **Republic Natl. Bank of N.Y. v O'Kane**, *supra* at 482).

The court finds that the plaintiff has established, prima facie, its entitlement to judgment as a matter of law and that the Troy defendants have failed to raise a triable issue of fact in opposition thereto. The guarantees executed by the Troy defendants provide, in pertinent part, as follows:

> Guarantor waives protest, demand for payment, notice of default or nonpayment to or on Guarantor, Borrower or any other party liable for or upon any of said Obligations or Liabilities or Collateral Security. This guarantee shall be a continuing, absolute and unconditional guarantee of payment regardless of the validity, regularity or enforceability of any of said Obligations or purported Obligations or the fact that a security interest or lien in any of the Collateral Security may not be granted to, conveyed to, or created in favor of the Bank or that Collateral Security may be subject to equities or defenses or claims in favor of others or may be invalid or defective in any way and for any reason including any action, or failure to act, by Bank.

In view of the foregoing, the court finds that the Troy defendants may not raise as defenses any lack of notice by the plaintiff bank, any failure to act by the bank, or any misapplication of payments by the bank.

The Troy defendants contend that, because the plaintiff bank has been or will be

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[1] The defendant Edward Troy was bought out by the other three Troy defendants and is no longer a member of Troy & Troy.

acquired by another financial institution, it lacks standing to maintain this action. The record reveals that, at the time of the commencement of this action, the plaintiff was the lawful holder of the promissory note, the mortgage, and the guarantees that are the subject of this action. Thus, it had standing to bring this action (*see*, **Mortgage Elec. Registration Sys., Inc. v Coakley**, 41 ADd3d 674; **First Trust Natl. Assn. v Meisels**, 234 AD2d 414). Moreover, Banking Law §602, which governs the effects of a merger, provides that the receiving bank shall be considered the same business and corporate entity as the bank that merged into it and that all of the property, rights, and powers of the merged bank shall vest in the receiving bank (*see*, **Ladino v Bank of America**, 52 AD3d 571, 572). Banking Law § 602 also provides that a pending action to which the merged bank is a party shall not be deemed to have abated or discontinued by reason of the merger and may be prosecuted to final judgment in the same manner as if the merger had not occurred. Alternatively, the receiving bank may be substituted as a party to such action (*see*, Banking Law § 602 [4]). Thus, even if the plaintiff bank has been acquired by another bank, no assignment is necessary (*see*, **Ladino v Bank of America**, *supra* at 572-573), and the plaintiff bank may continue to prosecute this action with or without a substitution of parties.

Finally, the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during discovery is not enough to deny the motion (*see*, **Lightfoot v City of New York**, 279 AD2d 457, 458; **Hess v Schwartz**, 7 Misc 3d 1011[A] [and cases cited therein]). Accordingly, the branches of the motion by the plaintiff which are for an order granting summary judgment in its favor, appointing a referee to compute, and amending the caption are granted; and the branch of the motion by the defendant Edward Troy which is for an order compelling discovery is denied.

Edward Troy moves for summary judgment on his sixth cross claim for contractual indemnification against the defendants 3783 Realty Corp. and Troy & Troy. A motion for summary judgment may not be made before issue has been joined (*see*, CPLR 3212 [a]), and the rule is strictly applied (*see*, **City of Rochester v Chiarella**, 65 NY2d 92, 101). The record reflects that the defendants James Troy, Joseph Troy, William Troy, and Troy & Troy served an answer to Edward Troy's cross claims. 3783 Realty Corp. did not join in their answer or separately answer the cross claims. Therefore, issue has not been joined with 3783 Realty Corp., and the court is powerless to grant summary judgment against it (*see*, **Grosman v Lawrence Handprints - NJ**, 90 AD2d 95, 98).

The court finds that Edward Troy is entitled to conditional summary judgment on his sixth cross-claim for contractual indemnification against Troy & Troy. Generally, a party seeking indemnity must be held liable to the plaintiff before he can recover from a third party (*see*, 21 Carmody-Wait 2d § 123.98). However, when a claim for indemnification is based on an express contract to indemnify against loss, a conditional judgment may be entered (*see*, **Martinez v Fiore**, 90 AD2d 483). In a proceeding for the dissolution of Troy & Troy, Edward Troy entered into a stipulation of settlement, which was so-ordered by the court and provided, in pertinent part, as follows:

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> [Troy & Troy] and 3783 Realty Corp. shall jointly and severally indemnify Edward Troy for any liability he hereafter may incur by reason of his having provided an individual personal guarantee of (a) any debt or liability of [Troy & Troy] or (b) any mortgage or lien currently recorded or filed against the Property.

The "Property" was defined as 382 Rosevale Avenue, Lake Ronkonkoma, New York, which is the same property that is the subject of this action. Moreover, the mortgage on such property pre-dates the stipulation of settlement in the dissolution proceeding.

The court finds that Edward Troy has established as a matter of law his entitlement to indemnification from Troy & Troy. When the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms (*see*, **W.W.W. Assocs. v Gianconieri**, 77 NY2d 157, 162; **Automotive Mgmt. Group v SRB Mgmt. Co.,** 239 AD2d 450; **Matter of Ajar**, 237 AD2d 597). In the absence of any ambiguity, there are only documents to interpret, and the issue is one of law to be determined by the court (*see*, **Automotive Mgmt. Group v SRB Mgmt. Co.,** *supra*). The court finds that the stipulation of settlement is not reasonably susceptible to more than one interpretation and is, therefore, unambiguous (*see*, **Chimart Assoc. v Paul** 66, NY2d 570). It clearly requires Troy & Troy to indemnify Edward Troy for any liability that he may incur after the date of the stipulation by reason of having personally guaranteed the mortgage on the property that is the subject of this action. Contrary to the contentions of the defendant James Troy,[2] the word "hereafter" does not refer to subsequent mortgages on the property. Accordingly, the court finds that Troy & Troy is liable to Edward Troy for contractual indemnification on the condition that he is liable to the plaintiff bank for any deficiency after the mortgaged premises is sold.

Finally, in his affidavit in opposition to the plaintiff's motion for summary judgment, Edward Troy cross moves for an order of default on his cross claims on the ground that the answer by the defendants James Troy, Joseph Troy, William Troy, and Troy & Troy was rejected by him as untimely and unverified.[3] The record reveals that Edward Troy served his answer by mail on September 10, 2010. The answer contained cross claims against James Troy, Joseph Troy, William Troy, Troy & Troy, and 3783 Realty Corp. Service by mail is complete upon proper posting and gives the party served five additional days within which to act (CPLR 2101[b][2]). James Troy, Joseph Troy, William Troy, and Troy & Troy served an answer to the

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[2]James Troy, in his affidavit in opposition to Edward Troy's motion states that the affidavit is submitted on behalf of himself, William Troy, Joseph Troy, Troy & Troy, and 3783 Realty Corp.

[3]Although Edward Troy did not include a formal notice of cross motion for such relief (*see*, CPLR 2215), it was opposed by James Troy on behalf of himself, William Troy, and Joseph Troy. Since they were aware of the cross motion and submitted opposition to it, they were not unduly prejudiced by the lack of service of a notice of cross motion (*see*, **Fugazy v Fugazy**, 44 AD3d 613, 614).

cross claims by mail on October 6, 2010, a mere 26 days later. Edward Troy does not contend, nor is there any evidence in the record, that he was prejudiced by their purported delay in answering the cross claims or the lack of verification of the answer. Accordingly, the cross motion for an order of default is denied as to the defendants James Troy, Joseph Troy, William Troy, and Troy & Troy.

The defendant 3783 Realty Corp. did not join in the answer served by the defendants James Troy, Joseph Troy, William Troy, and Troy & Troy, and the papers submitted do not contain an answer to the cross claims by 3783 Realty Corp. It is, therefore, in default. Thus, Edward Troy's cross motion for an order of default on his cross claims is granted against the defendant 3783 Realty Corp. Since the extent of 3783 Realty Corp.'s liability to Edward Troy cannot be determined at this time, an assessment of damages is reserved until final disposition of the action (*see*, CPLR 3215[d]).

HON. ELIZABETH HAZLITT EMERSON

DATED: July 21, 2011

J. S.C.