

Capitol One, N.A. v Sinnickson

2011 NY Slip Op 32408(U)

August 23, 2011

Sup Ct, Suffolk County

Docket Number: 35042-2010

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 35042-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
 J. S. C.

Original Motion Date: 03-14-2011
 Motion Submit Date: 06-21-2011
 Motion Sequence No.: 001 MG

FINAL
 NON FINAL

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**CAPITOL ONE, N.A., SUCCESSOR BY
 MERGER TO NORTH FORK BANK,**

Plaintiff,

-against-

**THOMAS J. SINNICKSON, FRANCES
 CUOMO, SWEZEY & NEWINS INC.,
 "JOHN DOE # 1 to JOHN DOE # XXX et al,**

Defendants.

_____ X

Attorney for Plaintiff
 Jaspan Schlesinger, LLP
 By: Maria Sideris, Esq.
 300 Garden City Plaza, 5th Fl.
 Garden City, New York 11530

Attorney for Defendants
 Thomas J. Sinnickson, PC
 43 Montauk Highway
 Center Moriches, New York 11934

Court Appointed Referee
 Ellen Savino, Esq.
 425 Broad Hollow Road
 Melville, New York 11747

In this action to foreclose a mortgage on commercial property, the plaintiff, Capital One, N.A., Successor by Merger to North Fork Bank ("Plaintiff"), moves for (1) summary judgment against defendants, (2) the appointment of a referee to compute and report the amount due Plaintiff, and (3) to amend the caption.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is the holder of a Restated Note ("Note") dated March 28, 2007, given by defendants Thomas J. Sinnickson and Frances Cuomo ("Defendants") in the principal amount of \$207,000, secured by a mortgage on the premises located at 43 Montauk Highway Center Moriches, New York. The Note gave the Plaintiff the right to declare the entire unpaid balance due and payable if there was a "failure to pay any amount required by this Note when due, or any other obligation owed to the Bank by the [defendants] or any Guarantor . . ."

nlh

Plaintiff commenced this action on October 7, 2010. The Verified Complaint alleges, among other things, that the Defendants defaulted (1) by failing to timely pay the installment of principal and interest which became due and payable on September 15, 2010. It is also alleged that the Defendants defaulted due to Sinnickson's failure to pay two unsecured loans made by Plaintiff, both of which were guaranteed by Sinnickson. Due to the alleged defaults, Plaintiff elected to declare the entire unpaid balance of the Note immediately due and payable. In addition to foreclosure on the mortgage, Plaintiff seeks to recover reasonable attorneys' fees.

Defendants served a Verified Answer denying the material allegations of the Verified Complaint and asserting an affirmative defense of accord and satisfaction. Defendants allege that all payments on the Note were timely made.

In support of its motion, Plaintiff submits an affidavit of Julie Billelo, Special Assets Officer of the Plaintiff, the pleadings, the Note, a Consolidation, Extension & Modification Agreement dated March 26, 2007 ("Mortgage"), a line of credit agreement between Plaintiff and Thomas J. Sinnickson, P.C. dated February 17, 2006, a line of credit agreement between Plaintiff and Absolute Abstract, Inc. dated February 12, 2003, a spreadsheet purportedly listing the payment history on the Note, and correspondence from Plaintiff's counsel to Defendants.

In her affidavit, Ms. Billelo recounts the history of the Note and Mortgage and states, among other things, that the Defendants defaulted on the Note by failing to timely pay the installment of principal and interest due on September 15, 2010, and that Sinnickson also defaulted by failing to tender payment on the line of credit agreements dated February 17, 2006 and February 13, 2003, which he personally guaranteed. She further states that Sinnickson defaulted on the February 17, 2006 line of credit agreement by failing to tender payment since June 15, 2009, and defaulted on the February 12, 2003 line of credit by failing to tender payment since August 12, 2009. Ms. Billelo states that due to these defaults, Plaintiff elected to declare the entire principal sum and all amounts due to be immediately due and payable. Ms. Billelo acknowledges that Defendants made payments on the Note after acceleration but states that Plaintiff accepted these payments without waiving acceleration, as evidenced in the correspondence sent by Plaintiff's counsel to Defendants subsequent to receipt of post-acceleration payments. According to Ms. Billelo, the unpaid principal balance on the Note as of February 2011 was \$177,419.35. Plaintiff argues that it is entitled to summary judgment because it has demonstrated the Defendants' default on the Note. Additionally, Plaintiff argues that the doctrine of accord and satisfaction, raised by Defendants as an affirmative defense, is not applicable because there has never been a dispute as to the Defendants' liability under the Note or the amount due. Thus, Defendants' partial payments after acceleration do not constitute payment in full in satisfaction of the amount due.

In an affirmation in opposition to Plaintiff's motion, Mr. Sinnickson states that there was no default in payment under the Note and that all payments are current. He states that Plaintiff's own payment history reflects that the September 14, 2010 payment was made. Thus, he claims that Plaintiff has failed to submit any evidence of default. He also claims that Plaintiff failed to submit evidence of the date it elected to accelerate the mortgage loan. Defendants also argue that Plaintiff's motion is premature because there was no determination that Sinnickson defaulted on the line of credit agreements with Plaintiff. Defendants acknowledge that Plaintiff commenced a separate action, *Capital One, N.A. v. Thomas J. Sinnickson, P.C., et al.*, Suffolk County Index No. 16566/10 ("Related Action"), for breach of the line of credit agreements. However, Defendants argue that as of the date of Mr. Sinnickson's affirmation, Plaintiff's motion for summary judgment in that action had not been decided. Finally, Defendants argue that there are issues of fact due to Plaintiff's purported commitment to structure a merger and consolidation agreement with regard to the mortgage and lines of credit. Defendants claim that Plaintiff made misrepresentations regarding merger and consolidation of the debt and that they are entitled to conduct discovery on this issue as this defense depends upon knowledge in the possession of Plaintiff. Notably, Defendants do not specifically deny Plaintiff's allegation that the payment on the Note due September 15, 2010 was not **timely** made nor the allegation that there the line of credit agreements were in default.

In reply, Plaintiff provides a copy of a letter from its counsel to Defendants dated August 11, 2010, among other things, notifying Defendants that the mortgage was in default due to Mr. Sinnickson's failure to make payments on the two lines of credit, and demanding payment of the full amount due under the Note. Plaintiff also provides a copy of a letter from its counsel to Defendants dated August 19, 2010, among other things, declaring the entire principal amount of the Note, together with all other amounts due under the Note, to be immediately due and payable.

Although the parties have not brought it to the Court's attention, the Court takes judicial notice of this Court's (Pastoressa, J.) Order dated July 29, 2011, granting Plaintiff's motion for summary judgment in the Related Action, which states, in relevant part:

Here, the plaintiff established its prima facie entitlement to judgment as a matter of law on its first and sixth causes of action for breach of the credit line agreements on the Sinnickson Note and Abstract Note respectively by tendering admissible evidence of the existence of two lines-of-credit loans and defendants failure to pay under their terms (citations omitted). Specifically, plaintiff

provided copies of the respective line-of-credit agreements for each of the defendants and an affidavit of Marcy McLoone, Assistant Vice President of the plaintiff, whereby she avers that the Sinnickson Note is in default for the defendant [Thomas J. Sinnickson, P.C.'s] failure to pay the amount due on June 15, 2009 and that the Absolute Note is in default for defendant [Absolute Abstract's] failure to pay the amount due on August 12, 2009.

The plaintiff established a prima facie entitlement to judgment as a matter of law on its third and seventh causes of action against Thomas J. Sinnickson for breach of personal guaranties of the Sinnickson Note and the Absolute Note respectively by demonstrating the existence and execution of personal guarantees in connection with the Sinnickson Note and Abstract Note, and his failure to pay the outstanding debts by the contractually agreed upon amounts (citations omitted).

DISCUSSION

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue; however, once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2d Dept 1996]). Speculative and conclusory allegations are insufficient to defeat summary judgment (*see, Boone v. Bender*, 74 AD3d 1111, 1113 [2d Dept 2010]).

“[I]n moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through production of the mortgage, the unpaid note, and evidence of default” (*Rossrock-Fund II, L.P. v. Osborne*, 82 AD3d 737, 737 [2d Dept 2011] quoting *Republic Natl. Bank of N.Y. v. O’Kane*, 308 AD2d 482, 482 [2d Dept. 2003] quoting *Village Bank v. Wild Oaks Holding*, 196 AD2d 812, 812 [2d Dept. 1993]). Here, the plaintiff produced the Note and Mortgage executed by Thomas J. Sinnickson, personally and as attorney-in-fact for Frances Cuomo, as well as evidence of Plaintiff’s default in the form of the affidavit of Julie Billelo, Special Assets Officer of Plaintiff. Ms. Billelo’s affidavit establishes that the Defendants defaulted on the Note by failing to timely pay the installment of principal and

interest due on September 15, 2010, and that Sinnickson also defaulted on the Note by failing to tender payment on the line of credit agreements dated February 17, 2006 and February 13, 2003, which he personally guaranteed. Accordingly, the Plaintiff met its prima facie burden of demonstrating its entitlement to judgment as a matter of law.

In opposition, the Defendants failed to raise a triable issue of fact. Although Mr. Sinnickson states that the September 14, 2010 payment on the Note was made, he does not state when it was made and, therefore, fails to rebut Plaintiff's allegation that said payment was not timely. Additionally, Defendants do not deny Plaintiff's allegation that Sinnickson defaulted on the line of credit agreements. Rather, Defendants claim that there has been no judicial determination of default on the line of credit agreements. However, after Defendants submitted their opposition, this Court (Pastoressa, J.), by Order dated July 29, 2011, determined in the Related Action that Defendants breached the line of credit agreements by failing to pay under their terms. Thus, although not necessary to constitute a default under the Note, there has now been a judicial determination that Defendants defaulted on the line of credit agreements. Said defaults constitute a default under the express terms of the Note at issue in this case. Contrary to Defendants' contention, the Plaintiff submitted evidence that on August 19, 2010, it elected to accelerate by declaring the entire unpaid balance of the Note due and payable. Finally, Defendants contention that there are "issues of fact surrounding Plaintiff's commitment to structure a merger and consolidation agreement to refinance" is conclusory and unsubstantiated. It is undisputed that an agreement to refinance and consolidate Defendants' debt was never actually entered into. Therefore, any "issues" surrounding the proposed restructuring agreement are irrelevant.

Accordingly, it is

ORDERED that Plaintiff's motion (motion sequence #001) is granted, and it is further

ORDERED that this action be and the same is hereby referred to Ellen Savino, Esq., having an office at 425 Broad Hollow Road, Melville, New York 11747, telephone number (631) 755-0101, as Referee to ascertain and compute the amount due to the Plaintiff on the Note and Mortgage set forth in the complaint, and to such of the defendants as are prior encumbrancers of the mortgaged premises, and to examine and report as to whether the mortgaged premises can be sold in parcels and, if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due, and that said Referee report to this Court with all convenient speed, and it is further

ORDERED that pursuant to CPLR 8003(a) and in the discretion of the Court, upon filing

of the Referee’s report, the Referee shall be paid a fee of \$250.00 for the computation stage,

ORDERED that the Referee is subject to the requirements of Rule 36.2(c) of the Chief Judge, and, if the Referee is disqualified from receiving an appointment pursuant to the provision of that rule, the referee shall notify the appointing Judge forthwith, 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, 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 caption of this action is hereby amended by replacing Thomas J. Sinnickson, P.C. in place and stead of John Doe #1, and by striking from the caption the remaining defendants sued as “John Doe No. 1” to ‘John Doe No. XXX’”, all without prejudice to the proceedings heretofore had herein, and it is further

ORDERED that the caption of this action, as amended, shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
CAPITAL ONE, N.A., Successor by Merger to NORTH
FORK BANK,

Plaintiff,

Index No.: 35042/10

-against-

THOMAS J. SINNICKSON, FRANCES CUOMO,
SWEZEY & NEWINS, INC., THOMAS J.
SINNICKSON, P.C.,

Defendants.

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and it is further

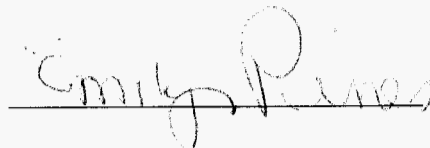
ORDERED that a copy of this Order with Notice of Entry shall be served upon the

designated Referee, the owner of the equity of redemption, any tenants named in this action, and any other party entitled to notice.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: August 23, 2011

Riverhead, New York



EMILY PINES

J. S. C.

FINAL
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