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SHORT FORM ORDER

INDEX No. 10-15350

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 9-1-10
ADJ. DATE 6-2-11
Mot. Seq. # 001 - MD

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IDM CAPITAL FUNDING, LLC,

Plaintiff,

- against -

HALF HOLLOW ESTATES, LLC
THE PHEN GROUP, LLC
EUGENE FERNANDEZ, AS TRUSTEE OF THE EUGENE FERNANDEZ REVOCABLE LIVING TRUST U/A/D/ 11/18/04
LAKE AVENUE PROPERTIES, LLC
GLOBAL HOME II, LLC
OLDFIELD PROPERTIES, LLC
HORESEBLOCK ROAD PROPERTIES, LLC
C.A.S.S. HOLDINGS, LLC
DEBRA FERNANDEZ
EUGENIO FERNANDEZ
RICHARD WEINSTEIN
FRANK WIGLEY
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE
THALER AND GERTLER LLP
"JOHN DOE NO. 1" TO "JOHN DOE NO. XXX," inclusive, the last thirty names being fictitious and unknown to plaintiff, 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,

Defendants.

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Attorneys for Defendants Half Hollow Estates, LLC, The Phen Group, LLC, Eugene Fernandez, As Trustee of the Eugene Fernandez Revocable Living Trust U/A/D 11/18/04, Lake Avenue Properties, LLC, Global Home II, LLC, Oldfield Properties, LLC, Horseblock Road Properties, LLC, C.A.S.S. Holdings, LLC, Debra Fernandez, Eugenio Fernandez, Richard Weinstein
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THALER & GERTLER, LLP
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Upon the following papers numbered 1 to 32 read on this motion for an order of reference ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21 ; Notice of Cross Motion and supporting papers __ ; Answering Affidavits and supporting papers 22 - 25; 26 - 30 ; Replying Affidavits and supporting papers 31 - 32 ; Other __ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff for an order of default against the non-appearing defendants, an order granting summary judgment on its complaint on the issue of liability and striking the answers of the appearing defendants, an order of reference appointing a referee to compute, and an amendment of the caption of this action is denied.

This is an action to foreclose a mortgage on commercial property. Plaintiff allegedly extended loans in the outstanding principal amount of $12,800,000.00 to defendants The Global Home Group, LLC ("Global Home Group"), The Phen Group, LLC ("Phen Group"), Eugene Fernandez, as Trustee of the Eugene Fernandez Revocable Living Trust U/A/D 11/18/04 ("Trust"), Oldfield Properties, LLC ("Oldfield"), Lake Avenue Properties, LLC ("Lake Avenue"), Global Home II, LLC ("Global Home II"), Half Hollow Estates, LLC ("Half Hollow"), and Horseblock Road Properties, LLC ("Horseblock") that are the subject of this action and two other related actions. Said loans were made pursuant to a Loan Agreement dated August 4, 2006, which was amended by a "First Amendment to Loan Agreement" dated March 22, 2007. The loan agreements were further amended by an "Amended and Restated Master Loan Agreement," dated February 25, 2009, between plaintiff and the borrower defendants Global Home Group, Phen Group, Trust, Oldfield, Lake Avenue, Global Home II, Half Hollow, and Horseblock ("borrower defendants") and the guarantor defendants Horse Block, C.A.S.S. Holdings, LLC ("CASS"), JPEC Land Development, LLC ("JPEC"), Debra Fernandez, Eugenio Fernandez and Richard Weinstein ("guarantor defendants"). Plaintiff has commenced three separate foreclosure actions with respect to mortgages obtained through these agreements, *JDM Capital Funding, LLC v Half Hollow Estates, LLC* under Index Number 15350/2010, *JDM Capital Funding, LLC v Horseblock Road Properties, LLC* under Index Number 15351/2010, and *JDM Capital Funding, LLC v Old Field Properties, LLC* under Index Number 15352/2010.

In the instant action, plaintiff seeks to foreclose a mortgage, assignment of rents and security agreement ("mortgage") dated March 27, 2007, securing a promissory note dated March 22, 2007, that it owns and holds for the sum of $4,950,000.00. The mortgage and note were executed in plaintiff's favor by Eugene Fernandez, as manager of defendant Half Hollow. The mortgage was filed in the Office of the Suffolk County Clerk on May 21, 2007. The mortgage is on property known as Westfarms Drive, Dix Hills, New York a/k/a MacKenzie Court, Melville, New York. The mortgage was modified by a "Mortgage Modification Agreement," dated February 25, 2009, and filed on April 23, 2009 in the Office of the Suffolk County Clerk. Said modification agreement was executed on behalf of plaintiff by Dennis Diczok ("Diczok"), as Managing Director of New Stream Capital, LLC, manager of plaintiff, and by Eugene Fernandez as manager of defendant Global Home Group as sole member of defendant Half Hollow.

Defendant Half Hollow allegedly defaulted on its payments due on May 1, 2009 and thereafter. The borrower and guarantor defendants allegedly failed to cure the default and plaintiff elected to accelerate the loan. Plaintiff subsequently commenced the instant action for a judgment of

foreclosure against the borrower and guarantor defendants, the New York State Department of Taxation and Finance for possible unpaid franchise taxes, Frank Wigley as a subordinate mortgagee, and Thaler & Gertler, LLP as subordinate judgment holder.

The borrower and guarantor defendants served an answer denying, among other things, their default. They also asserted affirmative defenses including, that the global economic collapse of 2008 to 2009 was a "force majeure" that none of the parties to the subject agreements could reasonably have anticipated and which excused defendants' performance of their obligations under said agreements; and that plaintiff failed to negotiate with defendants in good faith to most fairly mitigate each party's damages. Some of their other affirmative defenses were failure to state a cause of action, unclean hands, and the doctrines of waiver, estoppel and laches. Defendant Thaler & Gertler, LLP ("T & G") served its answer admitting that it holds judgment as against certain defendants in this action and seeking surplus monies from a mortgage foreclosure sale of the mortgaged premises.

Plaintiff now moves for an order of default against the non-appearing defendants, summary judgment on its complaint on the issue of liability and striking the answers of the appearing defendants, an order of reference appointing a referee to compute, and an amendment of the caption of this action deleting defendants "John Doe No. I" to "John Doe No. XXX."

In order to establish *prima facie* entitlement to summary judgment in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of default (*see* ***Capstone Business Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*id.* quoting ***Mahopac Natl. Bank v Baisley***, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997], *lv dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]).

Plaintiff's submissions in support of its motion include the promissory note, mortgage, mortgage modification agreement, the amended and restated master loan agreement of February 25, 2009, the summons and complaint, the aforementioned answers, and affidavits of service of the summons and complaint. In addition, plaintiff submitted the affidavit dated August 5, 2010 of Diczok, as plaintiff's vice president, succinctly stating that due to default in payment beginning with the payment due on May 1, 2009 the mortgage debt was accelerated by plaintiff; the mortgage debt remains in default; and there is presently due and owing to plaintiff $2,500,000 plus interest.

Here, plaintiff met its *prima facie* burden by submitting the loan and guarantee documents, mortgage documents, and the affidavit of merit to establish that the borrower and guarantor defendants were in default (*see* ***Wells Fargo Bank Minnesota Natl. Assn. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007], *lv dismissed* 10 NY3d 791, 857 NYS2d 25 [2008]; *see also* ***Inland Mtge. Capital Corp. v Realty Equities NM, LLC***, 71 AD3d 1089, 900 NYS2d 79 [2d Dept 2010]).

The burden then shifted to the borrower and guarantor defendants to raise a triable issue of fact regarding their defenses (*see* ***Household Fin. Realty Corp. of New York v Winn***, 19 AD3d 545, 546, 796 NYS2d 533 [2d Dept 2005]).

In opposition to the motion, the borrower and guarantor defendants challenge the validity of the promissory note by arguing that its face amount exceeds the actual amount lent to defendant borrowers. They submit the affidavit dated October 19, 2010 of Eugene Fernandez ("Fernandez") indicating that he is an individual defendant in this action as well as the managing member of defendants Horseblock, JPEC, CASS, Phen Group, Oldfield, Lake Avenue, Global II, and Half Hollow. Fernandez explains that in 2006, defendants requested financing from plaintiff in the sum of $15 million for development of real estate in Suffolk County and that plaintiff agreed to lend $10 million at 12 percent annual interest but that in the summer of 2006 about one week before the scheduled closing plaintiff informed defendants of new terms. According to Fernandez, the new terms were that defendants would be required to enter a credit facility comprised of seven separate notes and mortgages to the borrower defendants that provided for up to the sum of $15 million even though plaintiff would advance only $10 million; defendants would be required to post collateral in excess of $15 million; defendants would be required to pay fees on the sum of $15 million even though plaintiff would not advance more than $10 million; and the interest rate would be 13 percent. Fernandez states that, "[d]efendants had no choice but to agree to JDM's new and oppressive terms because we had already made arrangements concerning the use of the loan proceeds, including retiring more than $6 million in debt to Defendants' prior lender."

Fernandez further explains in his affidavit that in the Spring of 2007 defendants requested an additional $4.95 million in financing from plaintiff under the 2006 loan agreement, plaintiff refused, and instead agreed to lend only $3.3 million under the First Amended Loan Agreement and required defendant Half Hollow to provide the $4.95 million note and mortgage on the subject Dix Hills property. Fernandez points out that as of March 22, 2007 only $13.3 million had been advanced to defendants under a $19.95 million facility and plaintiff held a mortgage security of $22.7 million. He adds that after lengthy negotiations in January and February 2009 for plaintiff to provide additional financing to defendants to carry the mortgaged properties, the parties entered into the Amended and Restated Master Loan Agreement of February 25, 2009 which provided for an additional $4.5 million loan secured by a note and another mortgage on defendants' properties as well as a cross-collateralization agreement. According to Fernandez, after the 2009 Agreement, the plaintiff had extended $17.3 million secured by mortgages and notes in excess of $27 million. Fernandez argues that plaintiff's repeated refusal to extend additional credit under the existing lines and insistence of further collateral and notes made it impossible for defendants to obtain financing from other sources and was designed to enrich plaintiff at defendants' expense and was unconscionable. He further argues that plaintiff has failed to account for and provide a detailed computation to defendants and the Court of the loan payments defendants have made to plaintiff.

T & G indicates in its opposition to the motion that it adopts and incorporates by reference any arguments and papers submitted by its codefendants in opposition to plaintiff's motion.

By its reply, plaintiff fails to address the allegations of the borrower and guarantor defendants that the amounts actually lent to defendant borrowers was much less than the amounts reflected in the promissory notes and fails to detail the funds that were actually lent and any sums that were repaid by defendant Half Hollow prior to default. Instead, plaintiff contends that none of the arguments of the borrower and guarantor defendants specifically relate to the Half Hollow mortgage, only to the Horseblock Road mortgage in the related proceeding, and that the answer of T & G does not refute the default or offer any defenses such that plaintiff is entitled to summary judgment.

A mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation (*see* ***FGB Realty Advisors, Inc. v Parisi***, 265 AD2d 297, 298, 696 NYS2d 207 [2d Dept 1999]). Whether a contract or a contract clause is unconscionable is to be decided by the court against the background of the contract's commercial setting, purpose and effect (*see* ***Wilson Trading Corp. v David Ferguson, Ltd.***, 23 NY2d 398, 403, 297 NYS2d 108 [1968]). An unconscionable contract is one which is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms (***Gillman v Chase Manhattan Bank***, 73 NY2d 1, 10, 537 NYS2d 787 [1988] [internal quotations and citations omitted]). A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made, for example, some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party (*id.* [internal quotations and citations omitted]).

"A transaction is usurious under civil law when it imposes an annual interest rate exceeding 16% (*see* General Obligations Law § 5–501 [1]; Banking Law § 14–a [1]), and is usurious under criminal law when it imposes an annual interest rate exceeding 25% (*see* Penal Law §§ 190.40, 190.42)" (***Abir v Malky, Inc.***, 59 AD3d 646, 649, 873 NYS2d 350 [2d Dept 2009]). A usurious contract is void and relieves the borrower of the obligation to repay principal and interest thereon (*see* General Obligations Law § 5–511; *id.*; *see also* ***Venables v Sagona***, 85 AD3d 904, 925 NYS2d 578, 580 [2d Dept 2011]).

Here, the borrower and guarantor defendants have raised issues of fact including, whether the alleged agreements to extend loans in return for required promissory notes with face amounts far greater than the actual loan sums received were unconscionable and rendered the promissory notes, including the subject note, usurious, and whether the promissory notes and mortgages extended in this complex series of loan transactions are valid (*see* ***Zanfini v Chandler***, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]; ***Gendot Assoc., Inc. v Kaufold***, 56 AD3d 421, 424, 866 NYS2d 361 [2d Dept 2008]; *see also* ***Lugli v Johnston***, 78 AD3d 1133, 912 NYS2d 108 [2d Dept 2010]).

Accordingly, the instant motion is denied.

Dated: August 16, 2011

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION