

JDM Capital Funding, LLC v Old Field Props., LLC
2011 NY Slip Op 32472(U)
August 16, 2011
Sup Ct, Suffolk County
Docket Number: 10-15352
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

0014

P R E S E N T:

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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JDM CAPITAL FUNDING, LLC,

Plaintiff,

- against -

OLD FIELD PROPERTIES, LLC,
JOYCE E. MANCINI LIVING TRUST,
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,
HALF HOLLOW ESTATES, LLC,
HORSEBLOCK ROAD PROPERTIES, LLC,
C.A.S.S. HOLDINGS, LLC,
JPEC LAND DEVELOPMENT, LLC,
DEBRA FERNANDEZ,
EUGENIO FERNANDEZ,
RICHARD WEINSTEIN,
NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE,
THALER & 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.

$$\text{-----}X$$

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Joyce E. Mancini Living Trust, The Phen Group,
LLC, Eugene Fernandez, Lake Avenue Properties,
LLC, Global Home II, LLC, Half Hollow Estates,
LLC, Horseblock Road Properties, LLC, C.A.S.S.
Holdings, LLC, JPEC Land Development, LLC,
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KA/K

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Upon the following papers numbered 1 to 31 read on this motion for an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 21 - 24; 25 - 29; Replying Affidavits and supporting papers 30 - 31; 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 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 three mortgages 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”), Old Field Properties, LLC (“Old Field”), 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, JPEC Land Development, LLC, 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 first mortgage dated August 4, 2006 securing a note allegedly in the sum of \$1,849,000.00, a second mortgage dated October 8, 2008 securing a second note allegedly in the sum of \$200,000.00, and a third mortgage dated November 26, 2008 securing a third note allegedly in the sum of \$150,000.00, all executed by defendant Old Field in favor of plaintiff. All three mortgages are secured by property located in Hauppauge, New York and were modified by Mortgage Modification Agreements dated February 25, 2009 and filed in the Suffolk County Clerk’s Office on April 23, 2009.

Defendant Old Field 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, Joyce E. Mancini Living Trust 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 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 notes, mortgages, mortgage modification agreements, the amended 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, indicating that plaintiff is the owner and holder of the subject notes secured by mortgages which were modified by the Mortgage Modification Agreements. Diczok states in his affidavit that due to default in payment beginning with the payment due on May 1, 2009, all three mortgage debts were accelerated by plaintiff; the mortgage debts remain in default; and there is presently due and owing to plaintiff on the first mortgage loan the sum of \$1,849,000.00 plus interest, on the second mortgage loan the sum of \$200,000.00 plus interest, and on the third mortgage loan the sum of \$150,000.00 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 notes by arguing that their face amounts exceed the actual amounts 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. He states that, "Defendants 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 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, with 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 note and fails to detail the funds that were actually lent and the sums that were repaid by defendant Old Field prior to default. Instead, plaintiff contends that none of the arguments of the borrower and guarantor defendants specifically relate to the Old Field mortgages, only to the Horseblock Road mortgages 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, 696 NYS2d 207 [2d Dept 1999]). Whether a contract or 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

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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 usurious, and whether the promissory notes and mortgages extended in this complex series of loan transactions are valid (*see Zanfina 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