

**Ron King Corp. v R & R Mohring Enters., Inc.**

2011 NY Slip Op 32568(U)

September 26, 2011

Supreme Court, Nassau County

Docket Number: 6366/11

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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RON KING CORP.,  
  
Plaintiff,  
  
- against -

TRIAL/IAS PART 32  
NASSAU COUNTY  
  
Index No.: 6366/11  
Motion Seq. No.: 01  
Motion Date: 08/04/11  
**XXX**

R. & R. MOHRING ENTERPRISES, INC., RICHARD MOHRING, EXETER HOLDING, LTD., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and "JOHN DOE 1-10" and "JANE DOE 1-10" said names being fictitious parties intended being possible tenants, occupants, persons or corporations, if any, having an interest in or lien upon the premises, described in the complaint,

Defendants.

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**The following papers have been read on this motion:**

	Papers Numbered
<u>Notice of Motion, Affirmations and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition, Affidavit in Opposition</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212 , for an order granting it summary judgment and striking the Answer by defendant Richard Mohring ("Mohring"); and moves, pursuant to RPAPL § 1351, for the appointment of a Referee to compute and report the amount due

plaintiff; and moves for an amendment of the caption herein. Defendant Mohring opposes the motion. No other opposition was submitted.

The Verified Complaint (*see* Plaintiff's Affirmation in Support Exhibit D) alleges and plaintiff's proof shows that defendant R. & R. Mohring Enterprises, Inc. ("Enterprises") entered into an agreement with the plaintiff on July 27, 2010, to wit; a Mortgage Note whereby defendant Enterprises promised to pay to the order of the loan holder the principal sum of \$850,000.00 with interest thereon at a rate per annum of 18.00% and a default rate of interest of 24.00%. The loan was payable in full at maturity on August 1, 2011. The Mortgage Note was personally guaranteed by defendant Mohring. *See* Plaintiff's Affirmation in Support Exhibit A. For the purpose of securing payment for the Mortgage Note, defendants Enterprises and Mohring, as mortgagors, executed, acknowledged and delivered to plaintiff, as mortgagee, a certain first priority Mortgage whereby defendants Enterprises and Mohring mortgaged to plaintiff certain real property known as 22 Bayville Avenue, Bayville, New York, 11709 (Section: 29, Block: D, Lots: 10-15 and 21-26). *See* Plaintiff's Affirmation in Support Exhibit B. Said Mortgage was duly recorded in the Office of the Nassau County Clerk on or about September 1, 2010. *See id.* Pursuant to the Mortgage Note and the Mortgage, defendants Enterprises and Mohring were obligated to pay plaintiff monthly Mortgage payments of principal and interest commencing on September 1, 2010, and thereafter on the first day of each month thereafter through and including the maturity date, August 1, 2011. *See* Plaintiff's Affirmation in Support Exhibit A.

The Verified Complaint further alleges that defendants Enterprises and Mohring defaulted under the terms of the Mortgage Note and the Mortgage by failing and omitting to pay plaintiff payments due on October 1, 2010, and each and every month thereafter. Since defendants Enterprises and Mohring's defaults, no payments upon the obligations of said defendants have been made in accordance with the Mortgage Note and the Mortgage. On April 28, 2011, plaintiff elected to declare immediately due and payable the entire unpaid principal

balance, together with interest due thereon and all other sums and amounts due and owing of said defendants to plaintiff.

Plaintiff submits that defendant Mohring appeared in the action on or about June 16, 2011, and submitted a Verified Answer consisting of general denials and no affirmative defenses. Defendant Mohring's Verified Answer did not raise any meritorious defenses, did not produce any documentary evidence to refute plaintiff's allegations that defendants Enterprises and Mohring defaulted under the Mortgage Note and Mortgage and did not raise any triable issues of material fact.

On a motion for summary judgment, the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); *Rebecchi v. Whitmore*, 172 A.D.2d 600, 5687 N.Y.S.2d 423 (2d Dept.1991). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact." *See Gilbert Frank Corp. v. Federal Ins. Co.*, *supra* at 967; *GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965, 498 N.Y.S.2d 786 (1985); *Rebecchi v. Whitmore*, *supra* at 601. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, *supra*. Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. County of Albany*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept.1989).

When a mortgagee produces the mortgage and unpaid note, together with evidence of the mortgagor's default, the mortgagee demonstrates its entitlement to a judgment of foreclosure as a matter of law, thereby shifting the burden to the mortgagor to assert and demonstrate, by competent and admissible evidence, any defense that could properly raise questions of fact to his

or her default. *See United Companies Lending Corp. v. Hingus*, 283 A.D.2d 764, 724 N.Y.S.2d 134 (3d Dept. 2001); *Trustco Bank, Nat. Ass'n v. Labriola*, 246 A.D.2d 735, 667 N.Y.S.2d 450 (3d Dept 1998); *Aurora Loan Services, LLC v. Sattar*, 17 Misc.3d 1109(A), 851 N.Y.S.2d 62 (Kings County Sup. Ct. 2007).

In the instant matter, plaintiff has produced the Mortgage (*see* Plaintiff's Affirmation in Support Exhibit B) and the unpaid Mortgage Note (*see* Plaintiff's Affirmation in Support Exhibit A), together with evidence of the mortgagors' default (*see* Plaintiff's Affirmation in Support Exhibit C) and therefore demonstrated its entitlement to a judgment of foreclosure as a matter of law.

The burden now shifts to defendant Mohring to assert and demonstrate, by competent and admissible evidence, any defense that could properly raise a questions of fact to his default. In opposition to plaintiff's motion, defendant Mohring argues, "[t]he underlying mortgage note, dated July 27, 2010, which was made due and payable on August 1, 2011, provides for interest at the rate of 24.000%, upon borrowers's default. In addition to that stated interest rate, the defendant/borrower also paid to the plaintiff/lender two points (2%) on the principal sum of the loan, (\$850,000.00). Taken together (*i.e.* the stated interest rate of 24% and the two points (2%)) the subject loan becomes usurious, as a matter of law.... Where a lender attempts to collect interest which exceeds 25%, the obligation becomes void, *ab initio*, as criminally usurious.... In the instant case, the effective interest rate on the subject loan exceeds the criminally usury rate of 25% per annum. It is well-settled that 'points' are considered interest on monies advanced, and are thus part of the calculation in determining what the actual, or effective, rate of interest is on a loan. In summary, it is respectfully submitted that the subject obligation should be declared criminally usurious; and, further, that the mortgage note should be declared void, plaintiff enjoined from prosecuting this action, and the note ordered surrendered and cancelled. At the very least, it is respectfully submitted that there are material questions of fact concerning the usurious nature of the underlying obligation, thereby requiring that plaintiff's motion for summary judgment be denied."

In reply, plaintiff argues that “it remains noteworthy to mention that the mortgage being foreclosed is a COMMERCIAL MORTGAGE LOAN made by a sophisticated corporate borrower encumbering a vacant parcel of real property...” Plaintiff adds that, “although Defendant had ample opportunity to do so, Defendant does not dispute defendant R. & R. Mohring Enterprises’ (“R&R”) default under the note and mortgage that are the subject of the instant foreclosure action. Nor does Defendant present any documentary evidence to refute defendant R&R’s default under the note and mortgage by failing and omitting to pay the monthly mortgage payments due on October 1, 2010 and on each and every month thereafter.”

Plaintiff further argues that defendant’s opposition is predicated on the “baseless and unfounded” allegation that the loan that is the subject of the instant foreclosure action is usurious. Plaintiff asserts that the defense of civil usury is not generally available to corporations and it is well established that the criminal usury statutes do not apply to defaulted obligations.

Plaintiff contends that “for the purposes of determining whether the Loan is usurious, the rate of interest on the Loan is calculated by adding 18% (the note rate) plus 2% (the fee paid at closing), for a total of 20% per annum. This sum being less than the criminal rate of 25%, the loan is therefore not usurious. Defendants attempt to confuse the court by adding loan origination fee to the default rate of interest, a rate that defendant was clearly able to avoid being charged had defendant honored its obligations under the note and mortgage.”

The provision in an agreement to pay, after maturity, interest at a higher rate than permitted by the usury laws does not render a contract usurious if made in good faith and without intent to evade the usury laws. The debtor can avoid the higher interest rate by meeting his obligations under the mortgage. The defense of usury does not apply where terms of the mortgage and note impose a rate of interest in excess of the statutory maximum only after default or maturity. *See Miller Planning Corporation with Delta Funding Corporation v. Wells*, 253 A.D.2d 859, 678 N.Y.S.2d 340 (2d Dept. 1998); *Hicki v. Choice Capital Corp.*, 264 A.D.2d 710, 694 N.Y.S.2d 750 (2d Dept. 1999).

Accordingly, defendant Mohring's usury argument in opposition to plaintiff's motion is without merit and he thereby failed to meet his burden to assert and demonstrate, by competent and admissible evidence, any defense that could properly raise a questions of fact to his default. Therefore, plaintiff's motion, pursuant to CPLR § 3212 , for an order granting it summary judgment and striking the Answer by defendant Mohring is hereby **GRANTED**.

Plaintiff's motion, pursuant to RPAPL § 1351, for the appointment of a Referee to compute and report the amount due plaintiff is also hereby **GRANTED**. Accordingly it is

**ORDERED** that this action be and the same hereby is referred to Michael A. Montesano, Fiduciary # 624564, having an office at 40 Glen Street, Glen Cove, New York, 11542 , telephone number (516) 759-8469, as Referee, to ascertain and compute the amount due to plaintiff herein, except for attorney's fees, for principal, interest and other disbursements advanced as provided for in the Mortgage Note and Mortgage upon which this action was brought and to examine and report whether the subject mortgaged premises should be sold in parcels, and to report to the Court with all convenient speed. And it is further

**ORDERED** that, pursuant to CPLR § 8003(a), in the discretion of the Court, a fee of \$350.00 shall be paid to the Referee for the computation stage and upon the filing of his report. And it is further

**ORDERED** that, by accepting this appointment, the Referee appointed herein 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 he is in compliance with Part 36 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 Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief

Judge. And it is further

**ORDERED** that, on filing the Referee's report, plaintiff may move for confirmation of said report and for judgment of foreclosure and sale as prayed for in the Verified Complaint.

Plaintiff's application to amend the caption of the instant action by striking therefrom the defendants sued herein as "John Doe 1 through 10" and "Jane Doe 1 through 10" is hereby

**GRANTED.** And it is further

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

RON KING CORP.,

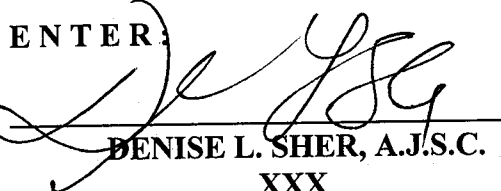
Plaintiff,

- against -

R. & R. MOHRING ENTERPRISES, INC., RICHARD MOHRING, EXETER HOLDING, LTD. and NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Defendants.

This constitutes the Decision and Order of this Court.

ENTER  
  
DENISE L. SHER, A.J.S.C.  
XXX

Dated: Mineola, New York  
September 26, 2011

**ENTERED**  
SEP 28 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE