

GE Bus. Fin. Servs., Inc. v 166 W. 75th St., LLC

2011 NY Slip Op 33000(U)

November 11, 2011

Supreme Court, New York County

Docket Number: 601624/09

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

GE Business Financial Services, Inc.
f/k/a Merrill Lynch Capital
New West 75th Street LLC

INDEX NO. 1001624/09
MOTION DATE 5/25/11
MOTION SEQ. NO. 070

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

NOV 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/10/11

[Signature], J.S.C.
SALIANN SCARPULLA

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
GE BUSINESS FINANCIAL SERVICES, INC., f/k/a
MERRILL LYNCH CAPITAL,

Plaintiff,

- against -

166 WEST 75th STREET, LLC, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,
NEW YORK CITY DEPARTMENT OF FINANCE,
NEW YORK CITY DIVISION OF HOUSING AND
COMMUNITY RENEWAL OFFICE OF RENT
ADMINISTRATION, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY CRIMINAL COURT and JOHN DOES 1-500, the
last five hundred 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.

-----X

For Plaintiff:
Katten, Muchin, Rosenman, LLP
575 Madison Ave.
New York, NY 10022

For Defendant 166 West 75th Street,
LLC:
Kriss & Feuerstein, LLP
360 Lexington Ave., 12th Floor
New York, NY 10017

New York State Department of
Taxation and Finance
Building 9
W.A. Harriman Campus
Albany, NY 12227

New York City Environmental
Control Board
66 John Street
10th Floor, Window 5
New York, NY 10038

New York City Department of
Finance
66 John St., 3rd Floor
New York, NY 10038-3735

New York State Division of
Housing and Community Renewal,
Office of Rent Administration
25 Beaver St., 25th Floor
New York, NY 10004

New York City Criminal Court
100 Centre St.
New York, NY 10013

Index No.: 601624/09
Motion Sequence No.: 010
Submission Date: 5/25/11

DECISION AND ORDER

FILED

NOV 16 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

Papers considered in review of this motion for summary judgment:

- Notice of Motion.....1
- Aff in Opp.....2
- Reply Aff.....3

HON. SALIANN SCARPULLA, J.:

In this action for foreclosure, the plaintiff, GE Business Financial Services, Inc. (“GE Business” or “lender”) f/k/a Merrill Lynch Capital (“Merrill”), moves for summary judgment with respect to its foreclosure claim against defendant 166 West 75th Street, LLC (“166 West 75th”) and for the appointment of a referee to determine the amounts due to lender. GE Business also moves for default judgment against defendants New York State Department of Taxation and Finance (“NYS T&F”), New York City Department of Finance (“NYC Finance”), New York City Division of Housing and Community Renewal Office of Rent Administration (“NYC DHCR”), New York City Environmental Control Board (“NYC ECB”), and New York City Criminal Court (“NYCCC”) (hereinafter referred to collectively as “Govt. Defendants”). Finally, GE Business moves to amend the case caption to remove John Does #1-500, inclusive.

As alleged in the verified complaint, 166 West 75th owns a sixteen story residential apartment building located at 166 West 75th Street, New York, New York. To purchase the property, 166 West 75th obtained mortgage financing from Merrill. Merrill and 166 West 75th entered into a Loan Agreement dated July 9, 2007, for a loan in the amount of \$35,882,529. Together with the Loan Agreement, 166 West 75th also executed and delivered to Merrill a Consolidated, Amended and Restated Promissory Note in the amount of \$35,882,529 (the “Note”). To secure repayment of the Note, 166 West 75th executed a Mortgage and Security Agreement and an Assignment of Leases and Rents.

By its terms, the loan was designed to allocate certain funding amounts for specific purposes, including: (1) an initial funding amount, specified for acquiring the property;

(2) a holdback for the costs of buying-out or relocating the tenants and-occupants of single room occupancy (“SRO”) units at the property; (3) a holdback for capital improvements to the property, including but not limited to renovations to the apartment units previously occupied by SRO tenants; and (4) a holdback for interest on the loan to be paid to Merrill.

GE Business commenced this action seeking to foreclose its mortgage lien in or about May, 2009. In its verified complaint, GE Business alleges that pursuant to the Loan Agreement and Note, 166 West 75th was to make payment of accrued interest on the loan on the first day of each month, beginning on August 1, 2007, and that failure to make any payments within five (5) days after the amount was due would constitute an “Event of Default.” Upon an Event of Default, the lender was afforded a variety of remedies under the loan documents, including the right to accelerate the Note by declaring all amount owing there under immediately due and payable and the right to foreclose on the mortgaged property.

GE Business further alleges that an Event of Default occurred when 166 West 75th failed to make a payment for \$173,299.32 in accrued interest on February 1, 2009, and the Accrued Interest Reserve lacked sufficient funds to cover the amount due. GE Business alleges that another event of default occurred on March 1, 2009 when another interest payment was missed, and again there were insufficient funds in the Accrued Interest Reserve to pay the interest.

166 West 75th does not dispute that the loan payments were not made. Instead, 166 West 75th claims that GE Business’ calculations were inaccurate and that GE Business

failed to provide 166 West-75th with further loan disbursements to complete the necessary construction, foreclosing the possibility that 166 West 75th would be able to make the scheduled payments.

On a previous motion, this Court dismissed 166 West 75th's affirmative defenses and counterclaims based upon GE Business' alleged miscalculations and failure to fund. Nevertheless, Ge Business argues again these dismissed affirmative defenses in opposition to summary judgment. With respect to that part of GE Business' motion in which it seeks a default judgment, the Govt. Defendants have not answered or appeared, nor have they opposed this motion. Additionally, there is no opposition to the motion to amend the complaint.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

"A mortgagee establishes a *prima facie* case for foreclosure by production of the mortgage documents and proof of default." *Bank Leumi Trust Co. v. Lightning Park*, 215 A.D.2d 246, 247 (1st Dep't 1995). Here, GE Business has made a *prima facie* showing of entitlement to judgment. GE Business has submitted Loan Agreement by which 166 West 75th borrowed up to \$35,882,529.00 from lender, which was secured by a mortgage

[* 6] .
on the real property at 164/168 west 75th Street, New York, NY. In addition, GE Business submitted the Note which was executed as evidence of 166 West 75th's indebtedness; as well as the Mortgage and Security Agreement.

The Loan Agreement provides that 166 West 75th is to make monthly payments of accrued interest on the Loan on the first day of each month, and that failure to make the monthly payment within five (5) days after it is due constitutes an Event of Default. Similarly, the mortgage authorizes the lender, upon the occurrence of an Event of Default, to accelerate payment of the entire amount outstanding, and declaring the Note, and all amounts owed under the Loan Agreement and the Mortgage, immediately due and payable.

In addition, section 9.1 of the Loan Agreement provides that "Borrower unconditionally agrees to pay . . . (h) all court costs, reasonable legal fees and disbursements relating to" attempts by GE Business to enforce its rights in the case of an Event of Default. Similarly, Section 11.1 of the Mortgage provides that "Borrower [] agrees to pay or reimburse Lender for all costs, expenses and other advances which may be incurred by Lender in any effort to enforce any terms of this Security Instrument or to protect the rights under this Security Instrument or the other Loan Documents . . . including reasonable attorneys' fees and other legal costs. . . ." 166 West 75th does not challenge the construction or plain meaning of any of these provisions.

As GE Business has provided the clear and unambiguous loan documents, its other burden is to provide undisputed proof of the events of default. *See Deutsche Bank Natl. Trust Co. v. Gordon*, 2011 NY Slip Op 3670, 1 (1st Dep't 2011) ("By submitting proof of

the existence of a mortgage and of default, plaintiff . . . established a prima facie case for foreclosure”). As evidence of the Events of Default – the missed monthly payments for February 1, 2009 and March 1, 2009 – GE Business submits the affidavit of Elizabeth Madzula, an asset manager for GE Business (“Madzula.”), who states that after each event of default, 166 West 75th was notified by letter, copies of which are submitted, that an event of default occurred. Then, by letter dated March 27, 2009, a copy of which is submitted, GE Business notified 166 West 75th that BE Business elected to accelerate the maturity date of the loan, pursuant to Section 8.2(b) of the loan agreement. The affidavit and accompanying letters, combined with the fact that 166 West 75th does not claim to have made the payments, establishes proof of the default.

The burden now shifts to 166 West 75th to demonstrate the existence of a triable issue of fact.¹ In opposition to the motion, 166 West 75th simply reiterates the allegations of its affirmative defenses and counterclaims -- that GE Business’ failure to disburse loan funds and incorrect payment calculations are the reason for the default. These counterclaims and affirmative defenses have already been dismissed (*See* Motion Sequence No.: 003) and, under the “law of the case” doctrine, these claims may not be resurrected to oppose GE Business’ summary judgment motion. *See People v. Evans*, 94 N.Y.2d 499, 504 (2000); *RPG Consulting, Inc. v Zormati*, 82 A.D.3d 739, 740 (2d Dept. 2011) (“The doctrine ‘applies only to legal determinations that were necessarily resolved

¹ In its reply papers, GE Business also argues that 166 West 75th’s opposition papers were not timely, and should be rejected. As there is a strong preference to resolve cases on the merits, the Court has considered the opposition papers.

[* 8]

on the merits in the prior decision' [. . .] and to the same questions presented in the same case") (internal citations omitted).² Therefore, the Court grants GE Business' motion for summary judgment as against 166 West 75th.

GE Business also moves for default judgment against the Govt. Defendants. An application for a default judgment is governed by CPLR 3215 which requires: proof of service of the summons, including a complaint or CPLR 305 (b) notice, proof of the claim and proof of the default. CPLR 3215 (f); *see also* Siegel, *New York Practice*, sec. 295 (4th ed. 2005). A party's failure to file a responsive pleading does not give rise to a mandatory ministerial duty for the court to enter a default judgment. *See PDQ Aluminum Products Corp. v. Bilmus*, 864 N.Y.S.2d 681, 683 (2d Dept. 2008), *citing Gagen v. Kipany Prods.*, 289 A.D.2d 844 (3rd Dept. 2001). Rather, plaintiff must support its motion with the necessary conforming affidavits. *See PDQ Aluminum Products Corp.*, 864 N.Y.S.2d at 683.

Here, GE Business submitted a copy of the summons and verified complaint as well as affidavits of service demonstrating service on each of the Govt. Defendants in this action. GE Business also submitted affidavits of service demonstrating its service of this motion on the Govt. Defendants. The Govt. Defendants failed to appear in this action,

² I also note that, in opposition to the summary judgment motion, 166 West 75th submits only the affidavit of William Fulton, Director of L&B Realty Advisors, LLP, "the asset manager of 166 West 75th Street, LLC." Mr. Fulton's affidavit was executed in Dallas, Texas. Pursuant to CPLR 2309(c), affidavits sworn and notarized outside of New York must be accompanied by a certificate of conformity. 166 West 75th has failed to submit a certificate of conformity along with Mr. Fulton's affidavit. *See Ford Motor Credit Co. v. Prestige Gown Cleaning Service, Inc.*, 193 Misc.2d 262 (Civ. Ct., Queens Co. 2002).

answer the complaint, or oppose this motion for default judgment. Because GE Business has met its burden of showing proof of service, the Court grants GE Business' motion for default judgment against the Govt. Defendants.

In addition, the Court grants GE Business' unopposed request to amend the caption to remove defendants John Does #1-500.

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by plaintiff GE Business Financial Services, Inc., f/k/a Merrill Lynch Capital on its mortgage foreclosure claim as against defendant 166 West 75th Street, LLC, and for the appointment of a referee to determine the amount due under the Note is granted; and it is further

ORDERED that the motion for default judgment by plaintiff GE Business Financial Services, Inc., f/k/a Merrill Lynch Capital as against defendants New York State Department of Taxation and Finance, New York City Department of Finance, New York City Division of Housing and Community Renewal Office of Rent Administration, New York City Environmental Control Board, and New York City Criminal Court, and to amend the caption of the action to remove the John Doe defendants, is also granted.

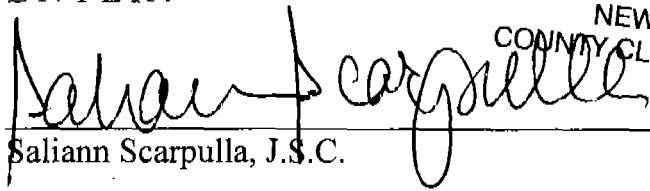
Settle order.

Dated: New York, New York
November 11, 2011

FILED

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Saliann Scarpulla, J.S.C.

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