

**Aurora Bank FSB v Country Ford Realty, LLC**

2011 NY Slip Op 33041(U)

November 15, 2011

Supreme Court, Nassau County

Docket Number: 21386/09

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA  
JUSTICE

-----X PART 8

AURORA BANK FSB as Attorney-In-Fact for U.S.  
BANK NATIONAL ASSOCIATION, as Trustee of  
the Lehman Brothers Small Balance Commercial  
Mortgage Pass-Through Certificates, 2006-2,

Plaintiff,

INDEX NO. 21386/09

-against-

MOTION DATE: 10/03/11  
SEQUENCE NO. 001

COUNTRY FORD REALTY, LLC., COUNTRY FORD,  
LTD., VINCENT C. CARUSO, MICHAEL A. CARUSO,  
DAVID JACOBY, JOSEPH T. MARRO, STATE STREET  
BANK and TRUST COMPANY, as Trustee for Registered  
Holders of Merrill Lynch Mortgage Investors, Inc. Mortgage  
Pass-Through Certificates, Serices 1996-C2, and "JOHN  
DOE NO. " through "JOHN DOE NO. 20" inclusive,

Defendants.

-----X

Notice of Motion, Affs. & Exs.....	<u>1</u>
Affirmation in Opposition, Affs. & Exs.....	<u>2</u>
Reply Affidavit & Exs.....	<u>3</u>
Affidavit & Exs .....	<u>4</u>
Affidavit & Exs .....	<u>5</u>

Upon the foregoing papers, plaintiff's motion for an order confirming the Referee's Report of Sale, granting a deficiency judgment in favor of the plaintiff and against defendants Country Ford Realty, LLC, Country Ford LTD, Vincent C. Caruso, Michael A. Caruso, David Jacoby, and Joseph T. Marro, discharging the mortgage lien of the defendant State Street Bank and Trust Company, amending the judgment of foreclosure and sale, and discharging the receiver, is granted.

The following facts are taken from pleadings and submitted papers and do not constitute

findings of fact by this Court.

This is a commercial mortgage foreclosure action. Plaintiff commenced this action to foreclose a mortgage in the original principal amount of \$3,300,000.00, which was entered into on June 28, 2006. The complaint seeks a judgment for the foreclosure and sale of the mortgaged property, a decree adjudging that any and all subsequent and/or subordinate liens and/or encumbrances are forever barred and/or foreclosed, and a deficiency judgment against defendants Country Ford Realty, LLC, Country Ford LTD, Vincent C. Caruso, Michael A. Caruso, David Jacoby, and Joseph T. Marro. Plaintiff alleges that the mortgage entitles the plaintiff to obtain a judgment for any deficiency remaining due to the plaintiff after application of all amounts received by the plaintiff. The mortgage upon the property, known as 3195 Hempstead Turnpike, Levittown, New York, secures the defendant Country Ford Realty, LLC's obligation to make payment pursuant to the terms of a promissory note made on June 28, 2006 by and between the borrower, Country Ford Realty, LLC, and the lender, Lehman's Brother Bank, FSB, in the original amount of \$3,300,000.00. The obligation to pay the amount due under the note was further secured by unconditional and absolute guarantees made by defendants Country Ford LTD, Vincent C. Caruso, Michael A. Caruso, David Jacoby, and Joseph T. Marro.

On December 23, 2009, this Court issued an Order appointing Jonathan Moore as Receiver of Rents and Profits. On October 21, 2010, a Judgment of Foreclosure and Sale was entered in the Nassau County Clerk's Office in the amount of \$4,038,424.30, together with interest from September 30, 2010, plus attorneys' fees in the amount of \$59,492.50 and \$300 as additional costs to plaintiff. Plaintiff contends that costs of \$2,021.00 were also awarded by the Court Clerk. The judgment also states that the plaintiff may recover from Country Ford Realty, LLC for any deficiency resulting from the sale. Plaintiff contends that the judgment inadvertently omits the names of several defendants who are responsible for the deficiency because they guaranteed the obligations of Country Ford Realty, LLC under the note, specifically Country Ford LTD, Vincent C. Caruso, Michael A. Caruso, David Jacoby, and Joseph T. Marro.

Pursuant to the judgment of foreclosure and sale, the property was sold to the plaintiff at public auction on March 8, 2011 for \$2,144,102.30. The Referee's Deed was dated April 1, 2011 and was delivered to plaintiff on or about the same date. Plaintiff submits an affidavit of licensed real estate broker, Andrew Brenner, and a copy of his Broker Price Opinion, in which he opines

that the mortgaged property had a fair and reasonable market value of \$2,540,000 at the time of the foreclosure sale. Based upon same, plaintiff contends that a deficiency judgment be entered jointly and severally against the borrower, Country Ford Realty, LLC, and the guarantors, Country Ford LTD, Vincent C. Caruso, Michael A. Caruso, David Jacoby, and Joseph T. Marro.

Plaintiff contends that defendant State Street Bank and Trust Company holds a mortgage lien on the property in the amount of \$1,420,000.51 which was most recently modified by a Consolidation and Assumption Agreement dated March 25, 1998 and recorded on September 24, 1998 at the Nassau County Clerk's Office. Plaintiff contends that State Bank and Trust Company has been fully paid for the debt secured by the Lien and Assignment of Rents, and, as such, the Lien and the Assignment of Rents do not represent a valid interest in the mortgaged property. State Bank and Trust Company has not submitted any opposition to the plaintiff's application herein.

In support of its motion, plaintiff submits copies of the note, the mortgage, the guarantees, the Judgment of Foreclosure and Sale, the Referee's Report of Sale, the Referee's Deed, the pleadings, and the executed affidavit of licensed real estate broker, Andrew Brenner.

In opposition to plaintiff's motion, defendant David Jacoby argues that he had negotiated a sale of the property to the Salvation Army, as purchaser, for \$3,550,000. Although a contract of sale for the property at issue was never executed, defendant Jacoby contends that but for the intentional interference of the plaintiff and its counsel, the purchase and sale of the property from Country Ford Realty, LLC to the Salvation Army for said amount would have been successfully closed. Defendant Jacoby also contends that as a contract of sale was negotiated for the subject property with a sale price of \$3,550,000, the estimation of the fair market value of the property by Andrew Brenner is incorrect. Defendant Jacoby further argues that he will be prejudiced if the judgment of foreclosure and sale is amended to allow a deficiency judgment against him as a guarantor.

While defendant Jacoby submits the negotiated contract of sale for the property at issue, same was never signed by the seller or the potential purchaser. Accordingly, no valid executed contract of sale existed for the property at issue before the property was sold at auction. A claim of tortious interference with a contract requires (1) the existence of a contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional

procurement of a breach of the contract without justification, (4) actual breach of the contract, and (5) resulting damages. (*Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413 (1996)). While there is evidence that a contract of sale was being negotiated with the Salvation Army for the purchase of the mortgaged property, no contract was ever executed. In addition, defendant Country Ford Realty LLC would not agree to the terms of the contract of sale unless the contract included “a full and unqualified release [by plaintiff Aurora Bank FSB] of Country Ford LTD, Vincent C. Caruso, Michael A. Caruso, David Jacoby, and Joseph T. Marro from their obligations as guarantors of the mortgage.” As Aurora Bank FSB would not approve the sale subject to same, no contract of sale was executed between Country Ford Realty, LLC and the Salvation Army before the property was sold at auction.

In addition, defendant Jacoby failed to submit any admissible evidence that the fair market value of the property was higher than that set forth in the affidavit of Andrew Brenner. Defendant Jacoby does not submit any other appraisal of the property’s value to contradict the opinion of Andrew Brenner as to the worth of the property. While defendant Jacoby submits a copy of the unsigned contract of sale for \$3,550,000 and copies of emails between Andrew Brenner and David Jacoby, along with a letter from the Salvation Army’s counsel to Andrew Brenner, which mention but fail to specify appraisal values, same do not establish that the fair market value of the property was higher than the value as assessed by Andrew Brenner.

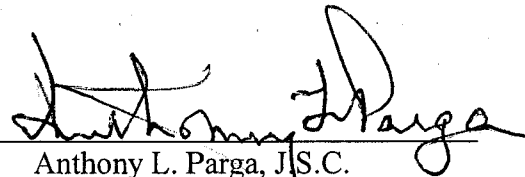
Lastly, a judgment of foreclosure and sale may be amended to include a deficiency against the guarantors of a note where the defendants’ liability arose from the guarantees they executed, not from the amendment of the judgment, where the pleadings requested relief relating to the guarantors’ liability for a deficiency judgment, and where there is no genuine prejudice to the defendant by the amendment. (*See, Pines at Setauket, Inc. v. Retirement Management Group, Inc.*, 246 A.D.2d 528 (2d Dept. 1998); *see also, Poughkeepsie Savings Bank v. Maplewood Land Development Co., Inc.*, 210 A.D.2d 606 (3d Dept. 1994); *Security Pacific Mortgage and Real Estate Services, Inc. v. Herald Center*, 731 F. Supp 605 (SDNY 1990)). There is no evidence in the record before this Court that the defendants were prejudiced by the omission of the deficiency language in the judgment of foreclosure and sale, and defendant Jacoby has failed to set forth sufficient evidence that he would suffer any genuine prejudice as a result of the amendment of the judgment.

Accordingly, the Court hereby confirms the Referee's Report of Sale of Michael C. Walkow, Esq., dated April 26, 2011, and orders the following:

- (1) that a deficiency judgment is awarded in favor of the plaintiff and against defendants Country Ford Realty, LLC, Country Ford LTD, Vincent C. Caruso, Michael A. Caruso, David Jacoby, and Joseph T. Marro, in the amount of \$1,570,563.10, plus interest from September 30, 2010;
- (2) that the mortgage lien of the defendant State Street Bank and Trust Company is hereby discharged, without opposition;
- (3) that the Judgment of Foreclosure and Sale, entered October 21, 2010, is amended to insert the names Country Ford LTD, Vincent C. Caruso, Michael A. Caruso, David Jacoby, and Joseph T. Marro, as defendants from whom plaintiff may obtain a deficiency judgment; and
- (4) that the receiver, Jonathan Moore, is hereby discharged.

Submit deficiency judgment on notice.

Dated: November 15, 2011

  
 Anthony L. Parga, J.S.C.

cc: Abrams, Fensterman, Fensterman, Eisman  
 Greenberg, Formato & Einiger, LLP  
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McGlinchey Stafford PLLC  
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 Albany, NY 12210

Country Ford Realty, LLC  
 210 Gardiners Avenue  
 Levittown, NY 11756

Country Ford Realty, LLC  
 Attn: Vincent C. Caruso  
 1116 Cove Edge Road  
 Syosset, NY 11791

**ENTFRED**  
 NOV 18 2011  
 NASSAU COUNTY  
 COUNTY CLERK'S OFFICE

Country Ford, Ltd.  
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Levittown, NY 11756

Country Ford, Ltd.  
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Syosset, NY 11791

Michael A. Caruso  
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Sag Harbor, NY 11963

Joseph T. Marro  
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