

Ridgewood Sav. Bank v 99 Hawthorne LLC
201F NY Slip Op 3H ĩ (U)
May 3, 201F
Supreme Court, Nassau County
Docket Number: 21360-09
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
RIDGEWOOD SAVINGS BANK,

Plaintiff,

-against-

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 21360-09
Motion Seq. No: 3
Submission Date: 4/29/11**

**99 HAWTHORNE LLC;
STATE OF NEW YORK DEPARTMENT OF
TAXATION AND FINANCE,
"JOHN DOE NO. I" 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.

-----x

Papers Read on this Motion:

- Notice of Motion, Affidavit of Merit/in Support,**
- Affidavit of Regularity/in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affidavit in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Reply Affidavit.....X**
- Memorandum of Law in Reply.....X**

This matter is before the court on the motion by Plaintiff Ridgewood Savings Bank ("Plaintiff" or "Ridgewood"), filed on February 28, 2011 and submitted on April 5, 2011. For the reasons set forth below, the Court grants Plaintiff's motion for summary judgment in its favor on its claims and against Defendant 99 Hawthorne LLC on its counterclaims, to amend the

caption to strike the remaining Defendants sued herein as "John Doe No. I" to "John Doe No. XXX" and to appoint a referee.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3215 for default judgment against the non-appearing Defendants and pursuant to CPLR § 3212 for summary judgment against the appearing Defendants, 1) striking the Amended Answer of Defendant 99 Hawthorne LLC ("Hawthorne" or "Mortgagor") and dismissing its counterclaims; 2) granting Plaintiff the relief requested in its Verified Complaint ("Complaint") (Ex. E to McCarthy Aff. in Supp.); 3) appointing a referee to compute the amount due under the subject mortgage; and 4) amending the caption.

Hawthorne opposes Plaintiff's motion.

B. The Parties' History

This lawsuit concerns the foreclosure of real property ("Property") located at 99 West Hawthorne Avenue, Valley Stream, New York. Gregory Hrycak ("Hrycak"), a Vice President of Ridgewood, provides an Affidavit in Support based on facts of which he states he has knowledge or which are contained within documents in the custody and control of Ridgewood. Hrycak affirms as follows.

Ridgewood is the holder of a note ("Note") and first mortgage ("Mortgage") executed by Hawthorne and delivered to Ridgewood (Ex. A to Hrycak Aff. in Supp.), which is secured by the Property. The Mortgage was modified by a Mortgage Modification Agreement (*id.* at Ex. B) dated January 26, 2009 and recorded March 26, 2009.

On September 2, 2009, due to Mortgagor's failure to tender the required monthly payments due August 1, 2009 and thereafter, Ridgewood accelerated the mortgage debt pursuant to the terms and conditions of the Mortgage. By letter dated September 2, 2009 (*id.* at Ex. C), Ridgewood provided Mortgagor with formal notice that the loan ("Loan") was in default due to Mortgagor's non-payment, and advised Mortgagor that if payment of the full amount due was not tendered within thirty (30) days, Ridgewood would pursue its rights under the loan documents, including foreclosure and sale of the Property. There is currently due and owing

\$2,118,988.81 in principal, plus interest and disbursements advanced by Ridgewood on behalf of Mortgagor. The Mortgage remains in default.

The parties' relationship began sometime in January 2003. At that time, a mortgage broker ("Broker") contacted Ridgewood regarding Hawthorne's interest in securing financing for purchase of the Property. As reflected by the documentation from the State of New York, Department of State (Ex. D to Hrycak Aff. in Supp.), Hawthorne is a limited liability company whose members are PL Hawthorne LLC and the Friedman Family L.P. The managing member of Hawthorne is PL Hawthorne LLC, whose members in turn are Philip Pilevsky ("Philip"), Michael Pilevsky ("Michael"), Seth Pilevsky ("Seth") and Sheila Levine ("Sheila"). The Property, an office building with approximately thirty nine office units, is managed by Philips International Holding Corp. ("Philips International"), a real estate development and management company founded by Philip.

Ridgewood conducted an appraisal which reflected that the value of the Property was \$3,460,000.00. On or about March 4, 2003, Ridgewood issued a loan commitment and on April 9, 2003, the closing took place and the Loan proceeds were disbursed. Hawthorne was represented throughout this process by the Broker and an attorney. Hawthorne made the required payments for the next five years.

In or about April of 2008, Hawthorne contacted Ridgewood regarding its interest in converting the Property from rental offices to commercial condominiums ("Conversion"). As the Mortgage payments were then current, Ridgewood agreed to the necessary modification of the Mortgage to allow for the Conversion. Ridgewood never discussed or agreed to suspending Hawthorne's payment obligations during the Conversion process.

The modification closed in or around January 26, 2009 and, other than the required changes to accomplish the Conversion, did not alter the terms of the original Mortgage and Note. Hawthorne continued to make its payments in a timely fashion.

In or about June of 2009, the Broker asked Ridgewood to provide mortgage relief to Hawthorne in light of its financial difficulties attributable to vacancies at the Property and high real estate taxes. A meeting ("Meeting") was held on August 19, 2009 that was attended by Hrycak, Anthony Simeone ("Simeone"), Ridgewood's Managing Officer of Commercial Real Estate, Peter Boger ("Boger"), a representative of Ridgewood, Michael and the Broker. At the

Meeting, Michael advised Ridgewood of cash flow issues at the Property due to the vacancies and high taxes. Michael advised Ridgewood that he intended to list the Property for sale and, if he could not sell it, to list individual condominium units for sale. Michael asked Ridgewood to reduce the debt service on the Loan, but did not specify the nature of the relief he sought. Michael also advised Ridgewood that he had been using personal funds to make the Loan payments, but would not continue to do so and, therefore, Hawthorne might be unable to make its August 2009 payment. Hawthorne did not make the August 2009 payment or any payments thereafter.

Ridgewood advised Michael that it would consider his request if he provided certain information, and Michael agreed to provide the information upon the signing of a formal Pre-Settlement Agreement (“Agreement”). Ridgewood signed the Agreement. Nevertheless, neither Michael nor anyone affiliated with Hawthorne provided the requested information until October of 2009. Nor were the required payments made.

Another meeting (“Second Meeting”) was held on December 18, 2009 which was attended by the Broker, Philip, Michael, Seth, Hrycak, Simeone and Boger. At the Second Meeting, Philip proposed two options. He suggested that Ridgewood finance the purchase of another piece of property, at a higher loan to value ratio than Ridgewood typically agreed to, and provide the Loan to Hawthorne at Ridgewood’s cost of funds. If Ridgewood agreed, Hawthorne would satisfy the Loan. The second option was to demolish the Property and build a drive-thru bank branch or similar structure at the Property. Ridgewood rejected these suggestions, and pursued the instant foreclosure action (“Instant Action”).

In its Amended Answer and Counterclaim (“Answer”) (Ex. H to McCarthy Aff. in Supp.), Hawthorne 1) denies, or denies knowledge or information sufficient to form a belief as to the truth of, the allegations in the Complaint; and 2) refers the Court to the original documents at issue. Hawthorne asserts eleven (11) affirmative defenses and two (2) counterclaims. They are: 1) the purported acceleration of amounts due under the Mortgage and Note was defective and failed to provide the required basis for the Instant Action; 2) the Complaint fails to state a cause of action; 3) Plaintiff failed to join necessary and/or indispensable parties; 4) Plaintiff is equitably estopped from seeking relief against Hawthorne; 5) Plaintiff failed to comply with the notice requirements prior to filing the Instant Action; 6) (Sixth Affirmative Defense and First

Counterclaim) Plaintiff agreed to a purported Conversion Agreement, to help alleviate Hawthorne's difficulties in making the required payments, on which Hawthorne reasonably relied in expending funds related to the Conversion, and Plaintiff subsequently breached that Conversion Agreement; 7) (Seventh Affirmative Defense/Second Counterclaim) in further violation of the Conversion Agreement, Plaintiff sought the appointment of a receiver with knowledge that the appointment would adversely affect the Property and Hawthorne's ability to pursue the Conversion; 8) Plaintiff breached its obligation to act in good faith; 9) the Instant Action is barred by the doctrine of laches; 10) due to its alleged breach of the Conversion Agreement and bad faith, Plaintiff is equitably estopped from foreclosing the Mortgage; and 11) Plaintiff fraudulently induced Hawthorne's reasonable reliance with respect to the Conversion Agreement with the intent to obtain ownership of the Property.

In her Affirmation in Support, Plaintiff's counsel affirms that all necessary party defendants have been served with the Summons and Complaint, or voluntarily appeared through counsel, and provides copies of the relevant affidavits of service (Ex. K to McCarthy Aff. in Supp.). Plaintiff requests that the caption of the Instant Action be amended by striking therefrom the remaining defendants sued as "John Doe."

Plaintiff's counsel provides deposition testimony of Michael and Philip that, Plaintiff submits, undermines Defendants' allegations regarding the Conversion Agreement. Relevant portions of that testimony (Exs. L and M to McCarthy Aff. in Supp.) are set forth on pages 9-13 of counsel's Affirmation in Support.

In his Affidavit in Opposition, Michael submits that Ridgewood and Hawthorne "together developed an 'exit strategy'" revolving around the Conversion (Michael Aff. in Opp. at ¶ 3). After Ridgewood purportedly consented to the Conversion, Hawthorne's attorneys began the Conversion process which included the retention of an architect/engineer to draw floor plans and environmental experts to test and report on any relevant environmental conditions. In August of 2008, Hawthorne provided Ridgewood with a copy of a preliminary prospectus that Hawthorne had submitted to the New York State Department of Law. Hawthorne incurred expenses of approximately \$150,000 in connection with the proposed Conversion. The modification to the Mortgage was executed in January of 2009. To maximize the marketability

of full-floor units, and with Plaintiff's consent, Hawthorne did not seek new tenants for vacancies or renew expiring leases.

Michael submits that Ridgewood has neglected to provide certain documentation allegedly demonstrating its bad faith, including a handwritten "history" of the Loan (Ex. 5 to Michael Aff. in Opp.) which inexplicably contains no entries during the period from March 31, 2008 through February 2009 when the Conversion was being discussed but contains detailed entries for an earlier period when Hawthorne was making its payments in a timely fashion. Michael notes that the amendment executed in January of 2009 contained no deadline by which the Conversion process had to be completed or sufficient proceeds realized to pay off the Mortgage.

Michael outlines additional conduct of Ridgewood's representatives allegedly demonstrating that they intentionally misled Hawthorne. He also affirms that 1) Hawthorne never received Ridgewood's September 2, 2009 letter which was apparently sent to a prior address of Hawthorne; 2) according to the Receiver previously appointed by the Court, the Building has the same 82% occupancy rate it had when the Instant Action was commenced; and 3) Plaintiff presented a misleading appraisal of the Property. Michael also submits that the Court may not grant Plaintiff's motion in light of its failure to join the tenants of the Property as parties in this action.

In his Reply Affidavit, Hrycak characterizes Hawthorne's opposition papers as a "desperate attempt...to avoid the consequences of its actions" that "should not be countenanced by this Court" (Hrycak Reply Aff. at ¶ 2). Hrycak submits that Michael's Affidavit in Opposition provides no support for Hawthorne's claim that there was a Conversion Agreement. Hrycak notes that Michael fails to provide details regarding who discussed the alleged Conversion plan and when Ridgewood allegedly consented to Hawthorne's proposal.

Hrycak also submits that Ridgewood's lack of communication with Hawthorne following its submission of its prospectus is of no evidentiary value. Hrycak notes that Ridgewood is a mortgage lender, not a property developer, and was not involved in Hawthorne's plans regarding the Property. The Bank left the strategy of the proposed development to Defendants, experienced property developers, and its only concern was the payment of the Mortgage and the adequacy of the Property that was security for the Loan. Hrycak also submits that the loan

history provided by Michael is of no significance, both because there are no requirements regarding when entries are made, and because the absence of entries between 2008 and 2009 is attributable to the fact that Ridgewood's counsel, and not its bank staff, handled the documentation related to the modification.

Hrycak also disputes Hawthorne's allegations regarding Ridgewood's bad faith, noting that Ridgewood agreed to the Meeting at the Broker's request. When Defendant failed to provide documentation following the Meeting, Ridgewood commenced the Instant Action. Hrycak also denies Hawthorne's suggestion that Ridgewood is interested in taking back the Property and reaping a windfall, and affirms that "[t]he last thing Ridgewood wants is to own this property" (Hrycak Reply Aff. at ¶ 22). He further asserts that in the last five years, Ridgewood has taken back only one commercial property through foreclosure. Moreover, he states that Ridgewood's rejection of Philip's proposals at the Second Meeting was a prudent business decision.

Hrycak also denies Michael's claims that Ridgewood manipulated appraisals, and notes that Ridgewood's appraisals are prepared by outside third-party appraisers. Hrycak submits that Michael's claims, *e.g.*, regarding the significance of the Bank failing to conduct a formal engineers inspection, are unworthy of consideration. Given that Hawthorne was in control of the Property in September of 2009, and the Instant Action had not yet been commenced, it was the responsibility of Hawthorne, not Ridgewood, to ensure the integrity of the Property.

C. The Parties' Positions

Ridgewood submits that it has demonstrated its right to the requested relief by providing proof of the Mortgage, Note and other Loan documents, and establishing Hawthorne's failure to make the required payments. Ridgewood disputes that it entered into any Conversion Agreement, and submits that its willingness to discuss Mortgagor's financial difficulties and attempt to reach a resolution in no way affected Ridgewood's right to pursue the Instant Action. Ridgewood also contends that the general denials in the Answer are insufficient as a matter of law to raise an issue of fact and defeat Ridgewood's right to summary judgment. Ridgewood submits, further, that the "factually unsupported, conclusory and boilerplate affirmative defenses" (McCarthy Aff. in Supp. at ¶ 24) fail to raise a triable issue of material fact.

Moreover, Defendants have provided no proof in support of their counterclaims related to the purported Conversion Agreement.

Hawthorne opposes Ridgewood's motion submitting, *inter alia*, that 1) Plaintiff's failure to join the Property's tenants as parties requires denial of its motion; 2) summary judgment is inappropriate in light of the material questions of fact raised regarding the alleged Conversion Agreement; 3) the Court should deny Plaintiff's motion in light of Ridgewood's alleged breach of its obligation to deal fairly and in good faith with Hawthorne; and 4) in light of Plaintiff's alleged breach of its obligations and duties to Hawthorne, the Court should deny its application for the equitable remedy of foreclosure.

In reply, Plaintiff submits, *inter alia*, that 1) the tenants are necessary, but not indispensable parties, who need not be joined in this foreclosure action, particularly in light of the absence of evidence that any omitted tenant's lease would have impaired the value of the Property if left to survive the foreclosure and the fact that keeping the tenancies in place may increase the value of the Property; 2) the duty of good faith and fair dealing did not obligate Ridgewood to further modify the Mortgage; and 3) Hawthorne has failed to establish a clear and unambiguous promise on which it relied, as required to invoke the doctrine of estoppel.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations

will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Relevant Foreclosure Principles

A plaintiff in a mortgage foreclosure action establishes a *prima facie* case for summary judgment by submission of the mortgage, the mortgage note and evidence of default. *Countrywide Home Loans, Inc. v. Delphonse*, 64 A.D.3d 624 (2d Dept. 2009); *Washington Mut. Bank FA v. O'Connor*, 63 A.D.3d 832 (2d Dept. 2009); *Yildiz v. Vural Management Corp.*, 61 A.D.3d 970 (2d Dept. 2009); *Wells Fargo Bank Minnesota, Nat. Assn., v. Mastropaolo*, 42 A.D.3d 239 (2d Dept. 2007); *Daniel Perla Associates, LP v. 101 Kent Associates, Inc.*, 40 A.D.3d 677 (2d Dept. 2007).

A tenant is not an indispensable party to a foreclosure action, and the failure to name a tenant does not render the judgment of foreclosure and sale defective. *NYCTL 1998-2 Trust v. Michael Holdings, Inc.*, 77 A.D.3d 805, 806 (2d Dept. 2010). *Accord G.C.M. Corp. v. 382 Van Duzer Corp.*, 249 A.D.2d 264 (2d Dept. 1998).

The Home Equity Theft Prevention Act ("HETPA") requires the foreclosing party in a *residential* mortgage foreclosure action to deliver statutory-specific notice to the homeowner, together with the summons and complaint [emphasis added]. *First National Bank of Chicago v. Silver*, 73 A.D.3d 162, 165 (2d Dept. 2010), citing RPAPL § 1303(1). RPAPL § 1303 requires the foreclosing party in a residential mortgage foreclosure to provide specific notice to a homeowner in order to proceed with a foreclosure action. *Id.* at n. 2.

C. Other Relevant Principles

The elements of estoppel are, with respect to the party estopped: 1) conduct that amounts to a false representation or concealment of material facts; 2) intention that such conduct will be acted upon by the other party; and 3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: 1) lack of knowledge of the true facts, 2) reliance upon the conduct of the party, and 3) a prejudicial change in his position. *Id.* at 577, citing *Airco Alloys Div. V. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 81-82 (4th Department 1980). A mortgage lender may be estopped from asserting rights under a mortgage to prevent a fraud or injustice to the person against whom enforcement is sought, who in justifiable reliance upon the lender's

words or conduct has been misled to his detriment. *First Union v. Tecklenburg*, 2 A.D.3d 575, 576-577 (2d Dept. 2003).

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995). The implied covenant of good faith and fair dealing embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Moran v. Erik*, 11 N.Y.3d 452, 456 (2008), citing *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002), quoting *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (additional citations omitted). The implied covenant of good faith and fair dealing will not impose an obligation that would be inconsistent with the terms of the contract. *Adams v. Washington Group, LLC*, 42 A.D.3d 475, 476 (2d Dept. 2007), citing, *inter alia*, *Horn v. New York Times*, 100 N.Y.2d 85, 93 (2003).

Defenses which merely plead conclusions of law without supporting facts are insufficient and should be stricken. *Petracca v. Petracca*, 305 A.D.2d 566, 567 (2d Dept. 2003); *Fireman's Fund Ins. Co. v. Farrell*, 57 A.D.3d 721 (2d Dept. 2008).

D. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion based on its conclusion that Plaintiff has demonstrated its right to the requested relief by its submission of the Mortgage, Note and evidence of Hawthorne's default, and Hawthorne has not defeated Plaintiff's entitlement to summary judgment.

The Court concludes that Hawthorne has not provided sufficient facts to defeat Plaintiff's entitlement to judgment for reasons including the following 1) the statutory notice procedures to which Hawthorne apparently refers are applicable to residential foreclosure proceedings and thus inapposite to the matter at bar; 2) the duty of good faith and fair dealing did not obligate Plaintiff to agree to the requested modification; 3) Hawthorne has produced no signed agreement reflecting Hawthorne's acknowledgment of any "Conversion Agreement;" 4) the members of Hawthorne, experienced business people, could not reasonably have concluded that Plaintiff agreed to suspend Hawthorne's Mortgage payment obligations absent a written acknowledgment by Ridgewood to that effect; 5) the unreasonableness of Hawthorne's purported reliance is further supported by Michael's proposal that Ridgewood extend additional money to Hawthorne,

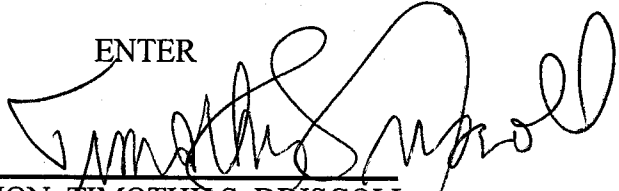
which was already experiencing difficulties meeting its Mortgage obligations, to purchase another piece of property; and 6) the tenants are not indispensable parties to this foreclosure action.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Settle judgment on ten days' notice.

DATED: Mineola, NY
May 3, 2011

ENTER

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAY 09 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**