

**World Trade Ctr. Small Bus. Recovery Fund, Inc. v
41 Murray St. LLC**

2011 NY Slip Op 34031(U)

June 24, 2011

Sup Ct, New York County

Docket Number: 102216/2011

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 102216/2011
WORLD TRADE CENTER
vs.
41 MURRAY STREET LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 6/23/11
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the application of Plaintiff, World Trade Center Small Business Recovery Fund, Inc. for an order, pursuant to CPLR §3212, striking the Verified Answer of defendants 41 Murray Street LLC, Amarach LLC d/b/a Eamons Irish Pub (Eamons Irish Pub), GADOID Corp., Catherine O'Toole, as Administratrix of the Estate of Seamus O'Toole, Deceased, and Terence Traynor and granting summary judgment on the First, Second and Fourth Causes of Action, is granted in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff as against the defendant Borrower defendants 41 Murray Street LLC and Amarach LLC d/b/a Eamons Irish Pub, on the First Cause of Action in the amount of \$136,581.59 as of February 15, 2011, plus interest from said date at the Default Rate of 10.75% per annum, and all other sums justly due as per the Restated Note, less any amounts paid and credited after acceleration, if any, late charges, and all other sums due as per the Restated Note; and it is further

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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


ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff as against the defendant G.O.T.T. Corp., Seamus O'Toole, Deceased and Terence Traynor, on the Second Cause of Action, in the amount of \$136,581.59 as of February 15, 2011, plus interest from said date at the Default Rate of 10.75% per annum, and all other sums justly due as per the Restated Note; and it is further

ORDERED that an assessment of attorneys' fees and costs incurred in collection in this proceeding to be charged as against all defendants herein shall be held on August 15, 2011 at 10:30 a.m., in Part 35, located at 60 Centre Street, New York, New York, Room 438, before Justice Carol Edmead, and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendants and the Clerk of the Trial Support Office (Room 158) within 20 days of entry, file of a note of issue and a statement of readiness and pay the proper fees, if any, by July 15, 2011 for the assessment hereinabove directed.

This constitutes the decision and order of the court.

Dated 6/24/11

ENTER:  J.S.C.
HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

WORLD TRADE CENTER SMALL BUSINESS
RECOVERY FUND, INC.,

Plaintiff,

-against-

41 MURRAY STREET LLC, AMARACH LLC
d/b/a EAMONS IRISH PUB, G/O.T.T. CORP.,
CATHERINE O'TOOLE, as Administratrix of the
Estate of SEAMUS O'TOOLE, Deceased, and
TERENCE TRAYNOR,

Defendants.

EDMEAD, J.S.C.

Index No. 102216/2011

DECISION/ORDER

MEMORANDUM DECISION

Plaintiff, World Trade Center Small Business Recovery Fund, Inc. (plaintiff) moves for an order, pursuant to CPLR §3212, striking the Verified Answer of defendants 41 Murray Street LLC, Amarach LLC d/b/a Eamons Irish Pub (Eamons Irish Pub), G.O.T.T. Corp., Catherine O'Toole, as Administratrix of the Estate of Seamus O'Toole, Deceased, and Terence Traynor (defendants) and granting summary judgment on the First, Second and Fourth Causes of Action and directing the New York County Clerk to enter judgment accordingly for the relief requested in the Verified Complaint, on the grounds that there are no issues of fact and the plaintiff is entitled to summary judgment as a matter of law.

Background

Defendants operate Eamons Irish Pub located at 41 Murray Street in Manhattan. This property is owned by 41 Murray Street LLC, which Amarach is the actual operating entity for the restaurant and holds the liquor license.

On November 1, 2007, in consideration of a loan in the amount of One Hundred Fifty Thousand (\$150,000.00) Dollars (the Indebtedness) made by plaintiff as lender to 41 Murray Street LLC and Eamons Irish Pub (collectively, the Borrower), jointly and severally, the Borrower duly executed and delivered its Term Note (the Note) in the amount of the Indebtedness, payable to the order of the plaintiff. In the Guaranty Agreement dated November 1, 2007 (the Guaranty), G.O.T.T. Corp, Seamus O'Toole, Deceased, and Terence Traynor (the Guarantors) unconditionally guaranteed the prompt payment and performance of each and every obligation of the Borrower under the Note. By Restated Term Note dated October 1, 2009, the terms of the Note were modified as provided therein (the Restated Note).

The Restated Note provides, in relevant part, that upon the Borrower's breach of any of the covenants or agreements contained therein, the plaintiff could, without notice or demand, require immediate payment of all amounts due and owing under the Restated Note, and collect all amounts owing thereunder.

The Borrower is in default in the terms of the Restated Note by failing to make the payments due September 1, 2010 and each and every month thereafter.

By letter dated February 9, 2011, the plaintiff duly advised the Borrower that the plaintiff was therein accelerating the principal balance of the Restated Note and that the principal balance, plus all interest, late charges and other fees due thereunder, were immediately due and payable.

The instant action ensued.

Plaintiff's Contentions

Defendants' Answer does not allege payment or partial payment of the Indebtedness as an affirmative defense, and the plaintiff's servicing agent states unequivocally that the Borrower

defaulted on September 1, 2010 and that its default continues. The defendants' admission of their "various payment delinquencies" justifies the plaintiff's acceleration of the principal balance due, which the plaintiff accomplished by notice dated February 9, 2011.

The Answer's one Affirmative Defense consists of two allegations: (1) the defendants claim that their undisputed defaults "are due to market forces and events beyond the defendants' immediate control, including the untimely death of Seamus O'Toole"; and (2) the defendants claim that they have "pursued efforts to restructure the debt with New York Business Development Corp."

The death of Mr. O'Toole does not excuse the default. Further the lender is under no obligation to refinance or restructure a debt. And, the New York Business Development Corp. (NYBDC) is not the lender herein and is not a party to this action.

Since the inception of the Indebtedness in 2007, defendant Catherine O'Toole, wife of guarantor Seamus O'Toole, has had an active role in running the Borrower's business with defendant Terence Traynor, as well as the business known as Eamons Bar, which is owned and/or operated in Brooklyn by defendant G.O.T.T. Corp.

Catherine O'Toole was appointed Administratrix of the Estate of Seamus O'Toole, Deceased on December 12, 2008. This was approximately one year after the Borrower executed and delivered the Note, and one year before the Borrower modified the terms of the loan. Clearly Ms. O'Toole has had an active role in the Borrower's business interests, and moreover Mr. O'Toole's death would not constitute a defense to this cation.

Defendants' Opposition

Contrary to the plaintiff's antiseptic recitation of the facts, there are just and valid reasons for the prior defaults which defendants were in the process of completing a restructuring when the action was abruptly filed. Completely ignored by the motion is the fact that the parties agreed in principle as of January 25, 2011 that the loan would be modified. Because documents exist corroborating the modification, entry of a judgment is premature and wholly inappropriate at this time. In fact, the emails and correspondence exchanged between the parties serves to crystalize that issues of fact exist as to whether plaintiff remains obligated to pursue a restructuring with defendants and waived the right to seek immediate enforcement of the note and guarantees.

In connection with the acquisition of the restaurant, which occurred in 2007, defendants qualified for financing offered to local businesses through NYBDC. Specifically, NYBDC originated two loans: (a) mortgage loan in the sum of \$1,125,000 made by NYBDC; and (b) operating loan in the amount of \$150,000 made by the plaintiff, which is the subject of this litigation.

Shortly after defendants acquired the restaurant in 2007, they began to encounter business difficulties. Like many downtown establishments, the restaurant was negatively impacted by the financial crisis. Historically, the financial industry was a major source of the restaurant's patronage.

Defendants were able to make regular payments on account of its loans from September of 2007 to December of 2009. During the intervening period of time, however, sales at the restaurant declined, and defendants were forced to seek out another restaurant operator in the wake of the untimely death of Seamus O'Toole, who died on September 6, 2008. Mr. O'Toole

was a leading restaurateur and his passing left a great void in the day-to-day operation of the restaurant. Following Mr. O'Toole's death, Mr. Traynor along with Ms. O'Toole, assumed a greater role in running the restaurant.

Beginning in 2009, Mr. Traynor sought out a voluntary restructuring of the existing loans and dealt on a regular basis with Mr. Michael Zihal, a senior vice president of NYBDC. Over a period of several months, Mr. Zihal and Mr. Traynor discussed modification of both loans. Said loan was modified on September 28, 2009. Defendants honored the initial modification for approximately a year's time, but the economy failed to improve. Defendants subsequently again became delinquent in various payments beginning in or about June of last year. Additionally, Mr. Traynor suffered a severe head injury which caused him to be out of work for the better part of three months.

Mr. Traynor returned to the restaurant in the fall of 2010 and resumed discussions on a second modification with Mr. Zihal covering both loans. Ultimately, the defendants and Mr. Zihal came to an agreement in principle on a new modification by letter dated January 25, 2011. While the letter was not formally signed as of the date that plaintiff commenced suit on February 22, 2011, it nevertheless reflects the parties' basic agreement on essential points.

Mr. Zihal's email to Mr. Traynor of January 25, 2011 confirms that the various restructurings which were interrelated were acceptable to the plaintiff.

Defendants were still reviewing the January 25, 2011 modification when plaintiff abruptly commenced this lawsuit without any prior notice that the restructuring and modification had been rescinded

While defendants received another notice of default in early February 2011, defendants

understood that this was a formality and would not prevent implementation of the promised modification.

Defendants remain prepared to implement the modification and have accumulated approximately \$60,000. To pay down various arrears on the operating and the mortgage loan.

Plaintiff's Reply

By affidavit from Mr. Zihal, plaintiff asserts that neither the Traynor affidavit nor the defendants' Memorandum of Law dispute the fact that, as a matter of law, the lender's *prima facie* case is met by providing the instrument being enforced and proof of the defendants' default thereunder.

Rather than denying their executing and delivering the loan documents, or denying their defaults thereunder, the defendants rely upon a letter which Mr. Zihal signed on January 25, 2011, approximately one month before this suit was commenced, and defendants characterize said letter as an "agreement in principle on a new modification."

Mr. Zihal asserts that the first paragraph of his letter references the defendants' default and unequivocally accelerates the principal balance due, which facts are never addressed in the Traynor affidavit. Mr. Zihal further states that the top of page "2" states that any proposed forbearance of the lender's rights will be subject to approval by the World Trade Center Fund Committee. Said approval was never obtained. The same sentence states that any forbearance will be reduced to a written Forbearance Stipulation, which was never created. Page "2" continues that, in the event the loan was restructured, the defendants would perform certain acts and make certain payments. The defendants were not willing to accept these proposed terms and conditions, such that NYBDC could not seek the required approvals from the World Trade

Center Fund Committee to document the proposed terms.

The top of the third page (mistakenly identified as page 2) requires the defendants to countersign the letter on or before January 27, 2011, i.e., within two (2) days. The defendants never signed the letter, a fact admitted at paragraph "13" of the Traynor affidavit. Said page further states that upon receipt of a fully executed copy, plaintiff would "seek the required approval" from World Trade Center Fund Committee, which approval was never received.

Mr. Zihal states, in summary that he prepared the subject letter for settlement purposes and without prejudice to the plaintiff's rights, which letter the defendants never signed. Without the signed letter, there was nothing for the World Trade Center Fund Committee to approve or reject, and no Forbearance Stipulation to be drafted.

The defendants are attempting to use the letter to create an "agreement in principle" out of thin air, while continuing to ignore their contractual obligations.

As proof that they "relied" upon the January 25, 2011 letter, the Traynor affidavit states that the defendants paid their January, 2011 real estate taxes, as if they had given up a valuable right as consideration. Payment of real estate taxes, however, is an obligation of all owners of real property.

Finally the final numbered paragraph of the Traynor affidavit states that the plaintiff "remains obligated to carry forward on the restructuring proposal and execute the January 25, 2011 modification letter." Mr. Zihal states that his is the only signature on the letter; the defendants' time to execute and return same expired, by its terms, on January 27, 2011.

Discussion

CPLR 3212: Summary Judgment

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman* at 563; *Prudential Securities Inc. v Rovello*, 262 AD2d 172, 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562).

The defendant “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

Plaintiff has met its burden of entitlement to summary judgment. Plaintiff established a *prima facie* case through proof of the note, guaranty and the defendants’ default.

By virtue of the defendants’ admitted defaults, plaintiff established entitlement to judgment on the First Cause of Action for the sum of \$136,581.59 from the Borrower as of February 15, 2011 with interest at the contract rate thereafter.

By virtue of the defendants’ admitted defaults, plaintiff established entitlement to judgment on the Second Cause of Action against the Guarantors, by virtue of their unconditionally guaranteeing the prompt payment and performance of the Borrower’s obligations under the Restated Note.

By virtue of the defendants’ admitted defaults, plaintiff established entitlement to judgment on the Fourth Cause of Action for judgment against defendants for the legal fees and costs incurred herein.

In opposing the motion, defendants do not deny that money is owed or that they have

defaulted on the debt. Rather, defendants submit an affidavit asserting that material issues of fact exist as to waiver and/or estoppel.

Waiver is defined as “the voluntary and intentional relinquishment of a known right and may be accomplished by express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage” *Nassau Trust Company v Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 451 N.Y.S.2d 663, 436 N.E.2d 1265 (1982) *See also Steven Dice v Inwood Hills Condominium*, 237 A.D.2d 403, 655 N.Y.S.2d 562 (2nd Dept.1997).

Equitable estoppel is defined as “[t]he doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had” (Black's Law Dictionary 538 [6th ed 1990]). Under this theory, a party is “precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct” (Black's Law Dictionary 538 [6th ed 1990]).

Defendants are unable to rely on the defense of “waiver” and/or equitable estoppel herein.

The January 25, 2011 letter makes it abundantly clear that

- the defendants are in default and unequivocally accelerates the principal balance due;
- any proposed forbearance of the lender's rights will be subject to approval by the World Trade Center Fund Committee;
- Said approval was never obtained;
- defendants never signed the letter;
- defendants' time to execute and return same expired, by its terms, on January 27,

2011; and

- paying real estate taxes herein does not support a claim of equitable estoppel.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the application of Plaintiff, World Trade Center Small Business Recovery Fund, Inc. for an order, pursuant to CPLR §3212, striking the Verified Answer of defendants 41 Murray Street LLC, Amarach LLC d/b/a Eamons Irish Pub (Eamons Irish Pub), G.O.T.T. Corp., Catherine O'Toole, as Administratrix of the Estate of Seamus O'Toole, Deceased, and Terence Traynor and granting summary judgment on the First, Second and Fourth Causes of Action, is granted in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff as against the defendant Borrower defendants 41 Murray Street LLC and Amarach LLC d/b/a Eamons Irish Pub, on the First Cause of Action in the amount of \$136,581.59 as of February 15, 2011, plus interest from said date at the Default Rate of 10.75% per annum, and all other sums justly due as per the Restated Note, less any amounts paid and credited after acceleration, if any, late charges, and all other sums due as per the Restated Note; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff as against the defendant G.O.T.T. Corp., Seamus O'Toole, Deceased and Terence Traynor, on the Second Cause of Action, in the amount of \$136,581.59 as of February 15, 2011, plus interest from said date at the Default Rate of 10.75% per annum, and all other sums justly due as per the Restated Note; and it is further


ORDERED that an assessment of attorneys' fees and costs incurred in collection in

this proceeding to be charged as against all defendants herein shall be held on August 15, 2011 at 10:30 a.m., in Part 35, located at 60 Centre Street, New York, New York, Room 438, before Justice Carol Edmead, and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendants and the Clerk of the Trial Support Office (Room 158) within 20 days of entry, file of a note of issue and a statement of readiness and pay the proper fees, if any, by July 15, 2011 for the assessment hereinabove directed.

This constitutes the decision and order of the court.

Dated: June 24, 2011


Carol Robinson Edmead, J.S.C.
HON. CAROL EDMEAD