

VNB New York Corp. v 47 Lynbrook LLC

2012 NY Slip Op 30207(U)

January 11, 2012

Supreme Court, Nassau County

Docket Number: 018467/2010

Judge: R. Bruce Cozzens

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SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

VNB NEW YORK CORP. ,
Plaintiff(s),

-against-

MOTION #002, 003
INDEX # : 018467/2010
MOTION DATE:
October 11, 2011

47 Lynbrook LLC, Baruch Singer,
Mako Plumbing and Heating, Inc. and JOHN DOE #1
through JOHN DOE #12, the last names being fictitious
and unknown to the 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,

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
Notice of Cross Motion.....	1
Reply Affirmation in Opposition.....	1
Reply Affirmation.....	1
Briefs.....	
Defendant.....	1

Motion by plaintiff, VNB New York Corp. ("VNB") for an Order of this Court, pursuant to CPLR §3212, granting: Summary Judgment against defendants, 47 Lynbrook LLC ("Lynbrook"), Baruch Singer ("Singer"), and Mako Plumbing and Heating, Inc. ("Mako") for: the appointment of a Referee to compute the amount that is due and owing on the Mortgage and Note on which the instant action is brought, and to ascertain whether the mortgaged premises may be sold in one or more parcels; granting a default judgment against the named defendants; and discontinuing the action against the defendants named herein as John Doe #1 through John Doe #12 and amending the caption of the instant action accordingly is granted.

Cross motion by defendants, Lynbrook, and Singer, for an Order of this Court, pursuant to CPLR § 3212, granting Summary Judgment dismissing plaintiffs' deficiency action against defendants or alternatively for leave to amend their answer pursuant to CPLR §3025 (c), is denied

The instant motion arises out of an underlying action to foreclose a commercial mortgage given by defendant mortgagor, Lynbrook, to Liberty Pointe who in turn transferred and/or assigned its interest to plaintiff, VNB. The subject real property encumbered by the mortgage is located at 47 Broadway, in Lynbrook, New York, legally described as Section 37, Block 519, Lots 119 through 124. Plaintiffs filed a Summons and Complaint in this Court in September, 2010 alleging default of the Mortgage, Note and Guaranty by the defendants. In December 2010, defendants moved this Court to dismiss the Complaint, pursuant to CPLR §3211, which was denied in March, 2011. Defendants now move to amend their Verified Answer to assert certain affirmative defenses, in particular, that the execution of a Heter 'Iska agreement was a condition precedent to entering into the Mortgage, Note and Guaranty agreements. As the defendants contend that the evidence uncovered that the Heter 'Iska never actually existed, it is a complete defense to the plaintiff's deficiency claim. It is noted that the defendants do not object to the foreclosure branch of plaintiffs' motion and have offered to deed the encumbered premises to plaintiff in exchange for not seeking a deficiency judgment against them. As of the date of this motion, the plaintiff has not accepted that offer.

Defendant, Mako, has appeared by filing a Notice of Appearance; however it has not answered the underlying complaint nor has it filed opposition to the instant motion.

In January 2002, the Engelstien Family Company, prior owner of the subject premises, mortgaged the real property in the amount of \$700,000 by executing the requisite mortgage and mortgage note to Gotham Bank of New York ("Gotham"). In 2006, Gotham assigned this mortgage to Park National Funding, LLC ("Park").

The Engelstien Family Company transferred all of its rights, title and interest in the subject premises to Lynbrook in January, 2006. In March, 2006, Park assigned the mortgage to Liberty Pointe, and Lynbrook executed and delivered a Gap Note in the amount of \$915,000 to Liberty Pointe. The two mortgages were consolidated pursuant to a Consolidation Modification and Extension Agreement to form a single lien in the amount of \$1,615,000. Lynbrook memorialized this indebtedness by executing a mortgage and note and delivering the same to Liberty Pointe. Defendant, Singer, executed and delivered a guaranty of payment of the indebtedness to Liberty Pointe.

In June 2010, VBN acquired all the rights and interests in the Note, Mortgages and Guaranty resulting from several assignments and/or transfers of these interests after Liberty Pointe went into receivership in March 2010. As such, VBN is current holder of the Mortgage and related documents, and was at the time of the underlying foreclosure action.

The defendants have failed to comply with the terms and provisions as set forth in foregoing instruments, and have therefore defaulted. The amount of \$1,490,806.84 is due and owing as of the maturity date of April 1, 2010.

According to defendants, as to their initial position, Liberty Pointe and the defendant Singer entered into a Heter 'Iska Agreement which precluded VBN from its ability to enter a deficiency judgment against Singer and Lynbrook. The relevant provisions of the mortgage are set forth herein:

- (a) This instrument, and any Loan Document which does not itself expressly identify the law that is to apply to it, shall be governed by the laws to the jurisdiction in this the Land is located...
- (b) Borrower agrees that any controversy arising under or in relation to the Note, this Instrument, or any other Loan Document may be litigated in the Property Jurisdiction. The state and federal courts and authorities with jurisdiction in the Property Jurisdiction shall have jurisdiction over all controversies that shall arise under or in relation to the Note, any security for the Indebtedness, or any other Loan Document. Borrower irrevocably consents to service, jurisdiction, and venue of such courts for any such litigation and waives any other venue to which it might be entitled by virtue of domicile, habitual residence or otherwise...
- (c) Heter 'Iska: The Board of Director of the Bank is committed to the operation of the Bank 's business in accordance with Jewish Law and that all transactions in which the Bank engages shall be in accordance with such Jewish law. **To ensure compliance with Jewish law, the Bank has entered into a Heter 'Iska...** (emphasis added) Nothing in this paragraph shall affect the jurisdiction of the courts of the state where the Premises is located or affect the application of civil law as provided in this Section..." (see Notice of Motion, Exhibit E).

Defendants argue that the Heter 'Iska is a condition precedent to the subject Mortgage, Note and Guaranty and the defendants would not have entered into such agreements without a Heter 'Iska agreement. Based on the failure to comply with the condition precedent, the agreements cannot be enforced and the plaintiff cannot establish a right to a deficiency judgment. Defendants submit sworn affidavits from Baruch Singer and attorney, David Galanter, as evidence.

Plaintiff argues that the Heter 'Iska argument , as proffered by the defendants, is a "red herring" and even if the Heter 'Iska agreement were located, it would have no bearing on the issue at hand as set forth by the terms of the Mortgage. Additionally, neither the Note or the Guaranty make any reference to the Heter 'Iska and any defense regarding this instrument, is therefore inapplicable. Further, any motion by defendants to amend its verified answer to the complaint, must be denied as such conduct is not only dilatory but also prejudicial as the defendants waited until the plaintiff set forth its arguments in the motion before seeking to amend its pleadings.

Plaintiff submits copies of the following documents as evidence: pleadings of the underlying foreclosure action; Consolidation, Modification and Extension Agreement; Amended and Restated Note; Amended and Restated Mortgage Assignment of Rents and Security Agreement; Guaranty; Extension Agreement; Purchase and Assumption Agreement;

title and Nassau County Clerk documentation referencing assignment of mortgages; a supporting New York County Supreme Court decision, *Jedwab v. Brite Candle and et al*, Index No. 601900/2006 ; and Notice of Default which was issued to defendants in May, 2010.

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 (*Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 [1988]; *Rebecchi v. Whitmore*, 172 A.D.2d 600 [2nd 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 (*Frank Corp. v. Federal Ins. Co.*, *supra*, at 967; *GTF Mktg. v. Colonial Aluminum Sales*, 66 N.Y.2d 965 [1985]; *Rebecchi v. Whitmore*, *supra* at 601). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see, 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 (*Barr v. County of Albany*, 50 N.Y.2d 247 [1980]; *Daliendo v. Johnson*, 147 A.D.2d 312, 317 [2nd Dept.1987]).

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 a question of fact to his or her default. (*United Companies Lending Corporation v. Hingus*, 283 AD2d 764 [3rd Dept 2001]; *Trustco Bank v. Labriola*, 246 AD2d 735 [3rd Dept 1998], *Aurora Loan Services, LLC v. Sattar*, 851 NYS2d 62 [2007]).

Based on the evidence submitted, the plaintiff has established its entitlement to Summary Judgment. Further, defendants do not dispute the foregoing facts regarding the indebtedness and the ensuing default, but instead assert defenses as to whether a deficiency claim can be enforced against them under the Mortgage, Note and Guaranty.

Here, the defendants initially argued that Jewish Law does not support the entry of a deficiency judgment pursuant to the Heter 'Iska. Now, it seeks to argue that the Heter 'Iska did not exist. This Court notes that the foregoing position has been set forth by all the parties. However, the Heter 'Iska provision in the Mortgage documentation clearly indicates its existence at the time the Mortgage and the related documents were executed. The issue then becomes, what impact does such an agreement have on the plaintiff's rights to enforce the terms and provisions of the mortgage.

Hetter Isske" or "heter 'iska" was a device developed in the 12th to 14th centuries to overcome the biblical prohibition against charging interest by one Jew to another and was **patterned upon agreement of partnership or joint venture (emphasis added)** wherein the lender would supply the money and the "borrower" or working partner had complete freedom to use the capital and he guaranteed the investment against loss and guaranteed a minimum return (*see Leibovici v Rawicki*, 57 Misc2d 141 [N.Y.City Civ.Ct. 1968]).

The impact of the Heter 'Iska was noted in the seminal case, *Arnav Indus., Inc. Empl. Retirement Trust v Westside Realty Assoc.*, 180 AD2d 463 (1st Dept. 1992). The court noted that the Heter 'Iska constituted "merely a compliance in form with Hebraic law", and that a partnership is not created thereby (see also *Barclay Commerce Corp. v. Finkelstein*, 11 AD2d 327 [1st Dept. 1960]). In the instant matter, there exists no separate shtar iska or partnership agreement which can be asserted to vary the terms of the mortgage (see *Arnav Indus., Inc. Empl. Retirement Trust v Westside Realty Assoc.*).

Furthermore, the explicit language of the mortgage clearly disavows any such intent to substitute the relevant laws with that of the Jewish Law. The mortgage provides in relevant part:

"... The state and federal courts and authorities with jurisdiction in the Property Jurisdiction shall have jurisdiction over all controversies that shall arise under or in relation to the Note, any security for the Indebtedness, or any other Loan Document..."(See Notice of Motion, Exhibit E. ¶30 (b)

and

"Nothing in this paragraph shall affect the jurisdiction of the courts of the state where the Premises is located or affect the application of civil law as provided in this Section... (See Notice of Motion, Exhibit E. ¶30[c]). It is clear that the parties intended to be bound by the civil laws of the appropriate jurisdiction and a contract must be construed according to the expressed intent of the parties (see *Ditmars-31' St. Development Corp. v. Punia*, 17 AD2d 357 [2nd Dept. 1962]).

In sum, a Heter Iska agreement does not alter the clear civil law terms of a note and a mortgage. Accordingly, the terms of such an agreement are not grounds for overturning foreclosure judgments (*Arnav Industries, Inc.*, 180 AD2d at 464).

As to whether the defendants should be allowed to amend their answer to assert certain affirmative defenses, pursuant to CPLR 3025, a court shall freely grant a party leave to amend his pleading upon such terms as may be just, "absent prejudice or surprise resulting directly from the delay" (*McCaskey, Davies & Assoc. v. New York City Health & Hosps. Corp.*, 59 NY2d 755). The defendants seek relief under CPLR § 3025 (c) which provides in relevant part that "... [t]he court may permit pleadings to be amended before or after judgment to conform them to the evidence..." Whether to grant or deny leave to amend an answer is a matter of judicial discretion to be determined on a case by case basis (Siegel, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR 3025:4, p. 476).

However, a court hearing a motion for leave to amend pleadings will not examine merits of proposed amendment unless insufficiency or lack of merit is clear and free from doubt; in cases where proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit. In such cases, leave to amend should be denied (see *Mackenzie v Croce*, 54 AD3d 825 [2nd Dept 2008], *Ricca v. Valenti*, 24 AD3d 647 [2nd Dept. 2005]).

It may reasonably be inferred that defendants were possessed of the data underlying the defenses it now seeks to introduce, either at the time of joinder of issue, or at the latest, defendant knew or should have been cognizant of such facts as they were actual parties to the transaction. In sum, such defenses could readily have been pleaded earlier, either in the original answer or by a more prompt application to amend that answer.

This Court notes that the plaintiff has not indicated and/or shown any surprise or undue prejudice that would generally preclude this Court's granting the defendants leave to assert the affirmative defense that the failure of complying with a condition precedent is a complete defense to a deficiency claim. This is underscored by the plaintiff's contention that the Heter 'Iska did not exist. However, this Court can still deny this motion on the basis that defendants' proposed amendments are without merit.

Here, notwithstanding both parties' position that no Heter'Iska existed, this Court has determined, based on the evidence that such agreement did indeed exist (see *Leibovici v Rawicki*, 57 Misc.2d 141 [NY City Civ.Ct. 1968]). The plaintiffs' position is understandable as it acquired the Mortgage and related documents from another institution. Further, defendants alleged that they entered into the Heter 'Iska with Liberty Pointe. In addition, defendants' argument that the agreement never existed arises simply because they are unable to locate it. In light of the foregoing, it is noted that the Summons and Complaint was filed in September 2010, the defendants answered in March 2011, the defendants moved this Court to dismiss the complaint in December, 2010 for failure to state a cause of action based on plaintiffs' **failure to consider the impact of the Heter 'Iska** (emphasis added), and the Court denied that motion in March, 2011. After the plaintiff filed the instant motion in June, 2011, the defendants, in August 2011, now seek to amend their answer. As the evidence and relevant case law indicates that the Heter 'Iska has no impact on defendants' obligation under the Mortgage, Note and Guaranty, the defendants are now employing the statutory device as provided by CPLR §3025 (c) to set forth an alternative factual scenario and an affirmative defense that is congruent with those facts.

It would be therefore be improvident of this Court to permit the defendants to conform its pleadings to the "proof" when such proof indicates a position that is clearly contradictory to what defendants now allege. Based on the foregoing, the Court determines that such action is dilatory and the proposed amendments are without merit.

As such, the plaintiffs' motion is granted, and the defendants' cross-motion is denied.
Submit Order of Reference on notice.

Dated:

JAN 11 2012

ENTERED

JAN 19 2012

J.S.C.

NASSAU COUNTY
COUNTY CLERK'S OFFICE

