SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

S.S.G. INC OF N.Y.,

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 07-021636

Plaintiff,

-against-

255 LONG BEACH ROAD CORP., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and "JOHN DOE" and "JANE DOE", said names being fictitious parties intended being fictitious possible tenants or occupants of the premises,

Defendants.

DECISION AND ORDER

Plaintiff, S.S.G. Inc of NY ("SSG") commenced this action to foreclose a mortgage held by the Plaintiff on the property known as 255 Long Beach Road, Island Park, New York. By Stipulation of Facts and accompanying exhibits dated October 24, 2011, this matter was submitted to this Court for determination on December 5, 2011.

The facts pertinent to this Court's decision are summarized as follows:

Defendant 255 Long Beach Road Corp. ("255 LBR") is the owner of the premises located at 251-255 Long Beach Road, Island Park, New York 11558 (the "Premises").

Plaintiff SSG is the mortgagee (the "Mortgagee") under a purchase money mortgage (the "Mortgage") dated August 27, 1999 and recorded on October 12, 1999

and the obligee under a mortgage note (the "Note") dated August 27, 1999. Defendant 255 LBR is the mortgagor (the "Mortgagor") under the Mortgage and the obligor under the Note.

By letter dated October 12, 2007, Michael B. Raphan, an attorney and member of the firm of Ackerman Raphan & Sultzer, attorneys for plaintiff herein, wrote a letter to defendant 255 LBR in its capacity as Mortgagor regarding certain alleged defaults under the Mortgage, namely: the failure to pay real estate taxes and to maintain environmental insurance.

Prior to October 12, 2007 plaintiff personally delivered two letters to defendant 255 LBR, dated October 4, 2007 and October 8, 2007 respectively, concerning alleged defaults. Prior to the October 12, 2007 letter, neither Michael B. Raphan nor anyone else at Ackerman Raphan & Sultzer had interacted with defendant 255 LBR or its principal Ramashwar Ramdass concerning the Mortgage or plaintiff.

Plaintiff filed the summons and verified complaint in this action and a Notice of Pendency on December 4, 2007. Defendant 255 LBR interposed a verified answer on April 23, 2008.

Prior to the commencement of this action, plaintiff, acting through its counsel, obtained a foreclosure search through National Lend Tenure Company, LLC ("National Land"), as agent for Ticor Title Insurance Company ("Ticor").

Plaintiff previously moved for summary judgment in this action, by notice of motion dated May 20, 2008. By order dated April 2, 2009, the Court (Spinola, J.)

denied the motion, holding that plaintiff failed to establish that the default in payment of real estate taxes was willful and that it would be damaged by excusing such a default.

I. Notice of Default

Pursuant to the terms of the Mortgage, and Plaintiff's Complaint (para. 6), the notice of default and demand letter dated October 12, 2007 sent by plaintiff's counsel was pleaded as a necessary condition precedent for commencement of this foreclosure action. The letter states counsel was retained by plaintiff SSG, gives notice of default in the payment of taxes and in obtaining environmental insurance, and demands compliance within thirty (30) days or plaintiff will accelerate the mortgage pursuant to its terms.

Defendant contends this notice is legally insufficient pursuant to Siegel v. Kentucky Fried Chicken, 108 AD2d 218, 220 (2d Dept. 1985), aff'd 67 NY2d 792 (1986). Plaintiff not only disagrees on the law, but points to the two prior handwritten letters from plaintiff to defendant as giving notice of the alleged defaults. The letters stated the nature of the defaults and demanded a cure, although only one letter included the failure to obtain insurance. In the first letter, plaintiff advises defendant that if there is no timely cure, it will retain counsel to commence foreclosure.

The Court notes that Siegel, the cases cited therein, and the cases citing Siegel are all predominantly landlord-tenant summary proceedings. The Court of Appeals holding in Siegel expressly applies by its terms to lease provisions requiring notice of default sent by "the landlord". The Court is only aware of two trial court decisions applying Siegel to a mortgage foreclosure proceeding, Manuf. & Trades Trust Co. v.

Korngold, 162 Misc2d 669 (Sup. Ct. Rockland Co. 1994) and HSBC Mtge. Corp. v. Erneste, 22 Misc.3d 1115(A) (Sup. Ct. Kings Co. 2009).

Thus, it is not settled law that the Siegel holding strictly construing a notice provision in a lease (see, Siegel, 108 AD2d 818, 821) has any application in a mortgagor/mortgagee relationship nor are the above trial court decisions binding on this Court. QMB Holdings, LLC v. Escava Bros., 11 Misc3d 1060(A) (Sup. Ct. Bronx Co. 2006) at *2; see also, Banditree Inc. v. Calpo Inc., 146 AD2d 74, 76 (1st Dept. 1989); contra, Mavellia v. American Transit Mix, 229 AD2d 1036 (4th Dept. 1996). Moreover, unlike the lease in Siegel, supra, the Mortgage herein requires notice of default in paying taxes to be sent, but does not expressly require "the Mortgagee" to send same nor does it require that notice be in writing (Paragraph 8).

Accordingly, the Court declines to extend the Siegel holding to a default notice sent by an attorney pursuant to the terms of this Mortgage. Further, plaintiff also put defendant on notice of the alleged defaults in two (2) handwritten notes sent prior to counsel's notice.

2. Defaults

Plaintiff alleges defaults in paying real estate taxes and in providing proof of environmental insurance. However, Defendant provided proof in opposing plaintiff's motion for summary judgment that

a. The real estate taxes were brought current by payment on or about July 11, 2008. The president of 255 LBR conceded he had fallen behind in tax payments but they were never "seriously overdue". No explanation was offered for the failure to pay taxes owed prior to October 12, 2007 (the

date of the notice) and the only other reason advanced was that defendant had to retain counsel to defend this action.

b. Environmental insurance was in effect. Plaintiff submitted a cancellation notice as of February 27, 2008 in the motion for summary judgment but did not provide any proof of lack of insurance or any lapse prior to the notice sent on October 12, 2007. Defendant provided proof of storage tank insurance from December 2007 to December 2008.

Since defendant admits it failed to timely pay taxes as required by the Mortgage, plaintiff had the right to accelerate the indebtedness. City of New York v. Kashau, 133 AD2d 205 (2d Dept. 1987). "While a mortgagor may be relieved from its default where it makes a showing of waiver, estoppel, bad faith, fraud, oppressive or unconscionable conduct on the mortgagee's part (see, e.g., Ferlazzo v. Riley, 278 NY 289)..." no such showing was made herein by defendant.

Defendant argues that the failure to timely pay taxes and to maintain environmental insurance are not material breaches of the agreement. Further, defendant argues it made all note payments and plaintiff was not in any way damaged or prejudiced by these failures. Finally, plaintiff's proof of no insurance was insufficient and this claim cannot stand.

An action claiming foreclosure of a mortgage is one sounding in equity. Jamaica Savings Bank V. M.S. Investing Co., 274 NY 215 (1937).

> Speaking generally and broadly, it is the settled law of this jurisdiction that **4 "Stability of contract obligations must not be undermined by judicial sympathy..." Graf v. Hope Building Corporation 254 NY 1 (1930)*. However, it is true with equal force and effect that equity must not and cannot slavishly

and blindly follow the law, *Hedges v. Dixon County 150 US 182, 192 (1893)*. Finally, as decreed by our Court of Appeals in the matter of *Noyes v. Anderson 124 NY 175 (1890) "A party having a legal right shall not be permitted to avail himself of it for the purposes of injustice or oppression..." 124 NY at 179*.

In the matter of *Eastman Kodak Co. v. Schwartz 133 NYS2d 908 (Sup. Ct., New York County, 1954)*, Special Term stated that *"The maxim of "clean hands " fundamentally was conceived in equity jurisprudence to refuse to lend its aid in any manner to one seeking its active interposition who has been guilty of unlawful, unconscionable or inequitable conduct in the matter with relation to which he seeks relief." 133 NYS2d at 925*, citing *First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co. 98 F 2d 416 (8th Cir. 1938), cert. denied 305 US 650, 59 S. Ct. 243, 83 L. Ed. 240 (1938), reh. denied 305 US 676, 59 S Ct. 356 83 L. Ed. 437 (1939); General Excavator Co. v. Keystone Driller Co. 65 F 2d 39 (6th Cir. 1933), cert. granted 289 US 721, 53 S. Ct. 791, 77 L. Ed. 1472 (1933), aff'd 290 US 240, 54 S. Ct. 146, 78 L. Ed. 793 (1934)*.

U.S. Bank Nat. Ass'n v Mathon, 29 Misc 3d 1228(A) (Sup Ct Suff. Co. 2010)(emphasis in original).

Here, there is no proof to find that plaintiff comes before this Court with "unclean hands". Defendant does not allege nor is there any evidence in the record to even suggest that plaintiff has committed any oppressive, unconscionable or inequitable act such that this Court should not permit it to enforce its contractual rights.

Accordingly, plaintiff has established its cause of action to foreclose the mortgage herein due to default in paying taxes.

Submit Order and Judgment on Notice.

Dated: January 25, 2012

STEVEN M. JAEGER, A.J.S.C.

ENTERED
JAN 27 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE