

GE Commercial Fin. Bus. Prop. Corp. v Ross Network, Inc.
2012 NY Slip Op 30701(U)
March 5, 2012
Supreme Court, Nassau County
Docket Number: 010089-11
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

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**GE COMMERCIAL FINANCE BUSINESS
PROPERTY CORPORATION,**

Plaintiff,

-against-

**TRIAL/IAS PART: 16
NASSAU COUNTY**

**Index No: 010089-11
Motion Seq. No: 1
Submission Date: 2/2/12**

**ROSS NETWORK, INC., PAUL R. ROSENBLIT,
JAY E. SCHARF, THOMAS M. WHITE,
CENTURY CAPITAL COMPANY, LLC,
DYN Aire SERVICE CORP., NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,
NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION,
NU-MERIT ELECTRICAL SUPPLY CO. INC.,
REMCOL INC d/b/a JANCO PRESS, and JOHN
DOE #1 through JOHN DOE #10 (said John Doe
defendants being fictitious, it being intended to name
all other parties who may have some interest in or
lien upon the premises sought to be foreclosed),**

Defendants.
-----x

Papers Read on this Motion:

Notice of Motion, Affidavit in Support, Affirmation in Support and Exhibits....x

This matter is before the court on the motion filed by Plaintiff GE Commercial Finance Business Property Corporation ("GE" or "Plaintiff") on January 18, 2012 and submitted on February 2, 2012. For the reasons set forth below, the Court grants the motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order 1) pursuant to CPLR § 3215 and New York Real Property Actions and Proceedings Law (“RPAPL”) § 1321, declaring the Defendants Ross Network, Inc. (“Ross Network” or “Borrower”), Paul R. Rosenblit (“Rosenblit”), Jay E. Scharf (“Scharf”), Thomas M. White (“White”), Century Capital Company, LLC (“Century Capital”), Dynaire Service Corp. (“Dynaire”), New York State Department of Taxation and Finance, New York State Department of Labor Unemployment Insurance Division, Nu-Merit Electrical Supply Co. Inc. (“Nu-Merit”) and Remcol Inc. d/b/a Janco Press (“Remcol”), to be in default with respect to this action and granting Plaintiff judgment by default against the Defendants for all of the relief requested in the Verified Complaint (“Complaint”); b) pursuant to RPAPL § 1321, appointing a referee to ascertain and compute the amount due upon the note and the mortgage being foreclosed in this action and to determine whether the mortgaged premises can be sold in parcels; and c) amending the caption in the above-entitled action to delete the names of the “John Doe” Defendants.

B. The Parties’ History

The Complaint (Ex. 1 to Benko Aff. in Supp.) is verified by Steven Benko (“Benko”) who attests that 1) he is an officer of Plaintiff; 2) he is authorized to verify the Complaint; and 3) the Complaint is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief and, as to those matters, he believes them to be true. Plaintiff also filed a Notice of Pendency regarding the property at issue (*id.* at Ex. 2).

The Complaint alleges as follows:

GE brings this action to foreclose on a mortgage (“Mortgage”), as Mortgagee under the Mortgage. Ross Network is the Mortgagor under the Mortgage. Rosenblit, Scharf and White are the guarantors (“Guarantors”) of the Mortgage. Century Capital is a named Defendant because, upon information and belief, it is the holder of a Blanket Second Mortgage on the mortgaged premises (“Mortgaged Premises”) which consists of real property located in the Village of Freeport, County of Nassau, State of New York, known as 8 Maple Place and 27 St. Johns Place, Freeport, New York 11520. Dynaire is a named Defendant because, on or about August 20,

2010, Dynaire filed a notice of mechanic's lien against a portion of the Mortgaged Premises in the amount of \$126,788.16, which lien is subject to and subordinate to the lien of the Mortgage. Defendants New York State Department of Taxation and Finance ("Tax Department"), New York State Department of Labor Unemployment Insurance Division ("Labor Department"), Nu-Merit and Remcol are named Defendants because they are judgment creditors of the Mortgagor.

On or about October 25, 2004, Ross Network, for good and valuable consideration, executed and delivered to Plaintiff a Second Amended and Restated Promissory Note to evidence its obligations to Plaintiff for a loan ("Loan") in the principal amount of \$2,550,000.00 (together with any amendments and/or modifications, the "Note") (Ex. A to Compl.). Pursuant to the terms of the Note, Ross Network promised to pay monthly installments of principal and interest until November 1, 2018.

Pursuant to a Loan and Mortgage Modification Agreement between the Borrower, Guarantors and Plaintiff dated October 25, 2004 ("Modification Agreement") (Ex. B to Compl.), the liens of certain existing mortgages were modified, extended and consolidated into a single first mortgage lien on the Mortgaged Premises as security for payment of the Note. The Modification Agreement was duly recorded, and the required mortgage recording tax was paid. As per the Modification Agreement, the Borrower and Plaintiff agreed that the terms of certain existing mortgages were consolidated, modified and extended pursuant to the Second Amended and Restated Credit Line Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing dated as of October 25, 2004, which served as security for payment of the Note. The Mortgage consists of the Second Amended and Restated Credit Line Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing, together with any amendments and or modifications. Pursuant to the Mortgage (Compl. at Ex. C), Ross Network irrevocably mortgaged to Mortgagee/Plaintiff, with power of sale, all of Ross Network's right, title and interest in the Mortgaged Premises. The Mortgage was duly recorded, and the mortgage tax paid

To induce Plaintiff to make the Loan evidenced by the Note and secured by the Mortgage, Guarantors guaranteed to Plaintiff the full payment of all amounts due and owing from the Borrower to Plaintiff under the Note and Mortgage. The amounts due and owing include

attorney's fees, expenses and costs incurred by Plaintiff in enforcing its rights under the Note and Mortgage. Plaintiff is the sole, true and lawful owner and holder of the Note and Mortgage.

The Mortgage provides that the Borrower's filing of a voluntary petition in bankruptcy is an Event of Default under the Mortgage. Upon such an Event of Default, Plaintiff may institute foreclosure proceedings and sell the Mortgaged Premises. The Mortgage also provides that the filing of a petition against the Borrower seeking reorganization, liquidation or similar relief under any existing law is an Event of Default triggering Plaintiff's right to institute foreclosure proceedings and sell the Mortgaged Premises.

On July 21, 2010, an involuntary petition under Chapter 7 of Title 11 of the United States Code ("Bankruptcy Code") was commenced against the Borrower in the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"), which was assigned Case Number 10-13929. By motion dated August 30, 2010, the Borrower moved to convert the involuntary case to a case under Chapter 11 of the Bankruptcy Code, and the Bankruptcy Court approved that conversion on September 27, 2010. On October 14, 2010, the Borrower moved to convert the Chapter 11 case to a case under Chapter 7 of the Bankruptcy Code and the Bankruptcy Court approved that conversion on October 28, 2010. An Interim Chapter 7 Trustee ("Trustee") was appointed in the Bankruptcy Court on October 29, 2010.

By reason of these Bankruptcy Court proceedings, one or more Events of Default have occurred under the Note and Mortgage. Pursuant to the Note and Mortgage, upon the occurrence of an Event of Default, Plaintiff may declare the entire amount of principal and interest due immediately due and payable. In addition, pursuant to the Mortgage, Borrower is responsible for all costs and expenses, including attorney's fees and costs, incurred by Plaintiff in enforcing its rights under the Mortgage. As of February 11, 2001, Borrower was indebted to Plaintiff for the aggregate amount of \$1,769,145.43, not including legal and appraisal fees incurred in connection with the Bankruptcy matter, consisting of principal, unpaid interest, late fees, customer loan services fees and a processing fee. The Mortgage also authorizes Plaintiff, in the event of Default, to have a receiver appointed.

On or about February 14, 2011, Plaintiff filed a motion in the Bankruptcy Court to lift the automatic stay provision of the Bankruptcy Code ("Motion"), to permit Plaintiff to commence

this foreclosure action. The Trustee consented to the Motion and on March 17, 2011, the Bankruptcy Court issued an Order (Ex. D to Compl.) vacating and terminating the stay provided by the Bankruptcy Code and permitting Plaintiff to commence this foreclosure action.

To protect its security, Plaintiff may, during the pendency of this action, be compelled to pay sums for insurance premiums, taxes, assessments and other charges affecting the Mortgaged Premises. Plaintiff requests that any sums paid, together with interest at the default rate set forth in the Note and Mortgage from the date of such payments, as well as Plaintiff's costs and expenses including reasonable attorney's fees, be added to Plaintiff's claim as secured by the Mortgage, and be adjudged a valid lien on the Mortgaged Premises such that Plaintiff be paid such sums out of the proceeds of the sale of the Mortgaged Premises.

The Defendants have, claim to have or may claim to have some interest in or lien upon the Mortgaged Premises or some part thereof, which interest or lien, if any, accrued subsequent to, and is subject and subordinate to, the lien of Plaintiff's Mortgages.

No other action or proceeding has been commenced for the foreclosure of the Mortgage, or for recovery of the sums secured by the Note and Mortgage. In the event that Plaintiff possesses any other lien against the Mortgaged Premises either by way of judgment, junior mortgage or otherwise, Plaintiff requests that such other lien(s) not be merged in Plaintiff's causes of action herein, but that Plaintiff be permitted to enforce said other lien(s) and/or seek determination of priority thereof in any independent action(s) or proceeding(s) including, without limitation, any surplus money proceedings.

Plaintiff requests an Order, *inter alia*, 1) granting a judgment of foreclosure; 2) directing that the Mortgaged Premises may be decreed to be sold and that the monies from that sale be brought into Court; 3) directing that Plaintiff be paid the amount due on the Note and Mortgage, with interest, late charges, attorney's fees, costs, allowances and disbursements; and 4) appointing a Receiver. The specific relief requested by Plaintiff is set forth on pages 8-9 of the Complaint.

In his Affidavit in Support, Benko affirms the truth of the allegations in the Complaint regarding the Note, Mortgage, Bankruptcy action, Defendants' default and the sums owed by Borrower under the Note as of February 11, 2011. Benko also affirms that, as of September 21,

2011, Plaintiff's total attorney's fees and costs related to the Bankruptcy action and the instant action totaled \$27,559.94.

Benko submits that Plaintiff is entitled to judgment by default against the Defendants. Plaintiff requests that the Court, pursuant to RPAPL § 1321, appoint a referee and direct the referee to 1) ascertain and compute the amounts due Plaintiff on the Note and Mortgage, including principal, interest, late fees, administrative costs, water and sewer rents, any applicable taxes, insurance premiums, reasonable attorney's fees and any other charges on the Note and the Mortgage; and 2) to examine and report whether the Mortgaged Premises can be sold in one or more parcels.

In his Affirmation in Support, Plaintiff's counsel provides Affidavits of Service reflecting the service of the Notice of Pendency, and Summons and Complaint on Defendants Ross Network, Rosenblit, Scharf, White, Century Capital, Dynaire, Tax Department, Labor Department, Nu-Merit and Remcol (Exs. A-J to Lynch Aff. in Supp.). In addition, Plaintiff served Defendants Ross Network, Rosenblit, Scharf, White, Century Capital, Dynaire, Tax Department, Labor Department, Nu-Merit and Remcol with an additional copy of the Notice of Pendency, and Summons and Complaint, pursuant to CPLR § 3215, and Plaintiff provides a copy of its Affidavit of Additional Mailing under CPLR § 3215 (*id.* at Ex. K). Plaintiff's counsel affirms, further, that based on a search of publicly available information as to military status (*see* Lynch Aff. in Supp. at Ex. L), neither Defendant Rosenblit, Scharf or White is a person in the military service as defined in the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. Plaintiff's counsel affirms that Plaintiff has not received a notice of appearance, answer or motion in response to the Complaint from any of the Defendants, no Defendant has requested or been granted an extension of time, and their time to appear, answer or move with respect to the Complaint has now expired.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment by default against the Defendants for all of the relief requested in the Complaint by establishing an Event of Default under the Note and Mortgage whose terms authorize Plaintiff, *inter alia*, to 1) declare all outstanding indebtedness, together with accrued interest, due immediately due and payable;

2) collect from Defendants attorney's fees and costs incurred by Plaintiff in enforcing its rights under the Note and Mortgage; 3) institute foreclosure proceedings and sell the Mortgaged Premises; and 4) have a receiver appointed. Plaintiff has also established that it served Defendants with the Summons and Complaint, and Notice of Pendency, Defendants have failed to appear or move in this action, and their time to do so has expired.

RULING OF THE COURT

A. Default Judgment

On a motion for leave to enter a default judgment pursuant to CPLR § 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing. *Atlantic Casualty Ins. Co. v. RJNJ Services, Inc.*, 89 A.D.3d 649, 651 (2d Dept. 2011), citing CPLR § 3215(f) and *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

B. Foreclosure

In an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default. *Wells Fargo v. Webster*, 61 A.D.3d 856, 856 (2d Dept. 2009), citing *Republic Natl. Bank of N.Y. v. O'Kane*, 308 A.D.2d 482, 482 (2d Dept. 2003), quoting *Village Bank v. Wild Oaks Holding*, 196 A.D.2d 812, 812 (2d Dept. 1993).

C. Appointment of Referee

Real Property Actions and Proceedings Law ("RPAPL") § 1361(2) provides that the Supreme Court, by reference or otherwise, shall ascertain the amount due to any claimants and the priority of any liens for purposes of the distribution of surplus money. *American Holdings Invest Corp. v. Josey*, 2010 N.Y. App. Div. LEXIS 2457 (2d Dept. 2010). A referee may inquire into and determine all questions of law and fact, and every question tending to show the equities of the claimant, to decide to whom surplus money belongs. *Id.*, quoting *Wilcox v. Drought*, 36 Misc. 351, 352-353 (Sup. Ct. N.Y. County, 1901), *aff'd*, 71 App. Div. 402 (1st Dept. 1902).

D. Deficiency Judgment

RPAPL § 1371, titled “ Deficiency judgment,” provides, in pertinent part, as follows:

1. If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained in such judgment, the amount thereof to be determined by the court as herein provided.

2. Simultaneously with the making of a motion for an order confirming the sale, provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher.

E. Application of these Principles to the Instant Action

The Court concludes that Plaintiff has demonstrated its entitlement to judgment for the relief demanded in the Complaint by 1) establishing its service of the Complaint on Defendants, and their failure to appear in this action; and 2) demonstrating its right to judgment by establishing that Plaintiff is the holder and owner of the Mortgage and Note, which Plaintiff has produced, and demonstrating that there has been an Event of Default entitling Plaintiff to the requested relief pursuant to the Mortgage and Note. The Court also grants Plaintiff's application to amend the caption to delete the “John Doe” Defendants.

The Court directs Plaintiff to submit judgment on notice, as well as proposed orders, on notice, with respect to the appointment of a Referee and other relief granted herein.

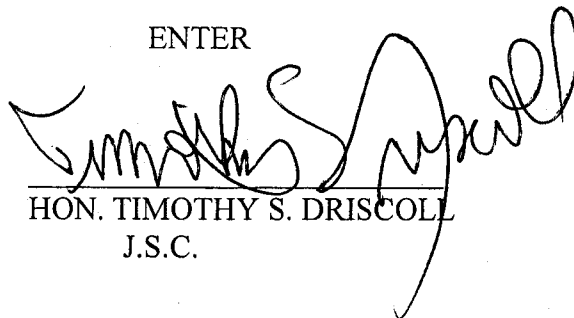
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Submit judgment and orders on ten (10) days notice.

DATED: Mineola, NY
March 5, 2012

ENTER

A handwritten signature in black ink, appearing to read 'Timothy S. Driscoll', is written over a horizontal line.

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

MAR 14 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**