

**Marie Holdings, Inc. v Biclyn Corp.**

2012 NY Slip Op 30759(U)

March 19, 2012

Sup Ct, New York County

Docket Number: 810052/11

Judge: Alice Schlesinger

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

**IA** PART 16  
PART \_\_\_\_\_

PRESENT: ALICE SCHLESINGER  
*Justice*

Index Number : 810052/2011  
MARIE HOLDINGS, INC.  
vs.  
BICLYN CORP.  
SEQUENCE NUMBER : 001  
JUDGMENT OF FORECLOSURE & SALE

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_


Upon the foregoing papers, it is ordered that this motion ~~to~~ and cross-motion

for summary judgment are denied in accordance with the accompanying memorandum decision.

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

**FILED**  
MAR 28 2012  
NEW YORK COUNTY CLERK'S OFFICE

Dated: MAR 19 2012

  
ALICE SCHLESINGER, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
MARIE HOLDINGS, INC.,

Plaintiff,

Index No. 810052/11  
Motion Seq. Nos. 001& 002

-against-

BICLYN CORP., LYNN O'CONNOR, et al.,

Defendants.  
-----X

SCHLESINGER, J.:

In this foreclosure action regarding commercial property at 132 West 130<sup>th</sup> Street, the plaintiff is moving for summary judgment and an order striking the defendants' counterclaims and appointing a referee to sell the property and calculate the amounts owed to it. Defendants have cross-moved for an order granting them summary judgment or alternatively compelling plaintiff to provide discovery. Finally, in a motion brought by Order to Show Cause, plaintiff is moving to disqualify defendants' lawyer Thomas Torto from further representation. Of course, if the first motion is granted, the third could be moot.

When plaintiff Marie Holdings ("Marie") commenced these proceedings on February 1, 2011, the complaint referenced a note, which it included as Exhibit A, a Guaranty of Payment, which it included as Exhibit B, and a Mortgage for premises known as 132 West 130<sup>th</sup> Street, New York, which it included as Exhibit C. These three documents were all dated October 6, 2009.

The complaint further stated what constituted a default and alleged that the defendant Biclyn Corp. ("Biclyn") had defaulted in failing to pay the advanced principal loan

amount of \$350,810.63 due on October 6, 2010, plus all accrued interest. With regard to the guarantors, Lynn O'Connor, Wilfred O'Connor and Clyde O'Connor, the complaint stated that they had been sent a demand letter on January 4, 2011. A copy of this letter was attached as Exhibit E.

The above constituted the material parts of the First Cause of Action. The Second Cause of Action pointed out that the note and mortgage stated that when a default occurred, Biclyn was also liable for reasonable attorneys' fees. Finally, the "wherefore" clause that concluded the complaint spoke to the guarantors' responsibility to pay any deficiency that may remain after a sale of the mortgaged premises.

The defendants served an Answer which contained thirteen affirmative defenses and two counterclaims. The first counterclaim accused Marie of breach of contract in that it had improperly held back \$399,189.37 after the terms of the Holdback Agreement had been met by the defendants by their payment of taxes, and it demanded this money. The second counterclaim referenced the first and accused Marie of "fraud and deceit". It should be noted also that in defendants' Twelfth Affirmative Defense, they claim that the complaint is barred because it is usurious. Plaintiff then served a Reply.

Between the joining of issue and this dispositive motion by the plaintiff, no discovery has occurred, despite that the defendants requested it, specifically by requesting documents and a deposition.

Plaintiff's motion for summary judgment is accompanied by an affidavit from Thomas Gubitosi, President of Marie. He describes the transaction between his corporation and Biclyn as a "\$750,000 line of credit". He then refers to the mortgage note, Exhibit 2 to his papers, for the interest rates. For the remainder of this statement, he sets

forth his understanding of the agreement. He says that: "Advances from this line of credit were specifically limited to construction costs pursuant to the construction plan that had been submitted by Defendants" (§5). He then relates his explanation to Biclyn's principals and agents at the closing and adds that he indicated in his "subsequent conversations with Bill O'Connor (one of the company's agents and/or principals), the line of credit was a construction loan, through which Marie Holdings would pay invoices directly and Marie Holdings reserved the right to conduct inspections to make sure the work being invoiced was actually completed" (§5). Gubitosi concludes by saying that to his knowledge, Biclyn has not completed any construction or renovation of this property or submitted any invoices. Also, Biclyn missed its April 2010 interest payment (§§ 6 & 7).

Moving counsel includes three exhibits to his affirmation. Exhibit 1 is a copy of the "property profile" and Exhibit 2 is a copy of the Mortgage Note in "the principal sum of seven hundred fifty thousand and 00/100 (\$750,000.00) dollars." It also states in §9 that "it" [this Note] is secured by the Building Loan Mortgage" and the building is identified by its address, 132 West 130<sup>th</sup> Street. Exhibit 2 also includes a copy of the "Guaranty of Payment" signed by the individual defendants, with attachments relative to the property. Exhibit 3 consists of the pleadings with their attachments.

What is interesting about the motion and the complaint is the things that are omitted. It appears that other documents besides the above-referenced ones were signed on October 6, 2009. It appears also that the defendants, specifically "principal" Wilfred (Bill) O'Connor viewed the transaction with Thomas Gubitosi very differently. Thus, the defendants' cross-motion (and opposition), which includes an affidavit from Bill O'Connor, presents the transaction in a manner dissimilar to the one provided in the moving papers and the affidavit of Thomas Gubitosi.

Mr. O'Connor is the Secretary of Biclyn, a family corporation that owns the building at 132 West 130<sup>th</sup> Street. He explains what Biclyn's needs were in 2009 which compelled its officers to turn to a "hard money lender" like Marie. Mr. O'Connor uses this term to describe plaintiff. It seems that the building, which was vacant, had to be seriously renovated. However, Biclyn also "urgently needed funds to pay off certain liens on the premises, including HPD liens, emergency repair liens and unpaid real estate taxes" (¶3).

Mr. O'Connor agrees that the sum of the loan was \$750,000 for a one-year term at 15% per annum with an additional loan origination fee ("points") of \$45,000. But he disagrees strongly with Mr. Gubitosi's depiction of the loan as a line of credit. He says the loan was never intended to be that. Rather, "the entire \$750,000 was supposed to be disbursed at the mortgage closing held on October 6, 2009." He continues (¶5):

Biclyn intended to use the entire amount of the loan to pay the aforesaid liens and other expenses, and use the balance for construction and renovation of the premises. Upon the renovation and renting of the apartments in the building, Biclyn would be in a position to re-finance the mortgage with a conventional lender on much more favorable terms than those imposed on us by plaintiff as a hard money lender.

Mr. O'Connor explains that the position of the plaintiff on October 6 took him unawares. He said it was the first time he heard that he would not be given the full \$750,000 that day. He says the plaintiff wanted proof that Biclyn had filed all taxes due before giving him the balance of the money or \$399,189.37. Therefore, a Holdback Agreement was executed by Lynn O'Connor, Biclyn's President. This document, attached as Exhibit A and never referred to by plaintiff, states that defendants understood and agreed "that Marie Holdings, Inc. will not make any further advances under the building

loan mortgage and agreement, after the advances made on this date until Biclyn Corp. files all open corporate tax returns (2004-2009) and pays all taxes due thereunder." Mr. O'Connor states he understood this to mean that the balance would be paid once Biclyn presented proof it had paid all taxes.

It did do this and so informed plaintiff in a letter by its attorney to plaintiff's attorney dated October 22, 2009, with copies of checks to taxing authorities and a letter from their attorneys saying the tax obligations had been met. But "despite Biclyn's full compliance with the Holdback Agreement, plaintiff arbitrarily failed and refused ... to disburse the balance of the loan proceeds ..." (§§ 11 & 12).

As to the way Mr. Gubitosi characterizes the money to be advanced "from the line of credit" and limited to construction costs, this "is untrue". Again, Mr. O'Connor contends that plaintiff knew that virtually all of the money advanced on October 6 would be used to satisfy liens and "not for non-construction renovation purposes" (§8).

Mr. O'Connor then, similar to what his attorney does in his affirmation, explains their 12<sup>th</sup> Affirmative Defense, the one sounding in usury. He adds the 15% monthly interest amount of \$4,385.13 to the \$45,000 origination fee divided by 12 or \$3750 per month and arrives at \$8,135.13. This amount multiplied by 12 months comes to \$97,621.56. If you divide this by the amount actually disbursed \$350,810.63, you get a usurious rate of 28%.

He concludes his affidavit by acknowledging that his corporation has not completed or renovated the building since October 6, 2009, but he blames this on the plaintiff's "failure and refusal" to disburse the balance of the loan (§13).

A reply affirmation by plaintiff's counsel characterizes defendants' opposition "as a knowingly false affidavit, which is contradicted by the express terms of the parties' agreement, the correspondence between the parties, Defendants' own exhibits, and all

available documentary evidence" (¶3). But the documentary evidence had never surfaced before this Reply. And notably one of those documents, arguably a significant one also allegedly signed on October 6, 2009, is a Building Loan Contract that purports to set out a schedule of construction payments. It is signed by Gubitosi and Lynn O'Connor.

Again for the first time in Reply, Mr. Gubitosi, in a second affidavit "in further support" of the motion "and in opposition" to defendant's cross-motion, explains this document. He describes this additional agreement as being "clear and unambiguous on its face" (¶6). He gives no explanation why it was not produced earlier, assuming its importance. Also, he offers no explanation for why this significant document is not referenced by any of the actual loan documents and why it was not mentioned in the complaint at all.

Mr. Gubitosi also supplies other documents, again for the first time, which he asserts support his position. They are equivocal or self-serving at best. But the tale does not end here. With the consent of counsel for plaintiff, defendants were permitted to submit additional reply papers, which they did.<sup>1</sup>

In this final Reply, Mr. O'Connor submits another affidavit. He again insists that this was a "straight mortgage loan" not a "building loan" and in this regard says that Mr. Gubitosi knew of the family's circumstances and Bicllyn's inability to produce any income until the building was restored. With regard to the new document, the Building Loan Contract and the schedule of payments contained within it, he says this was "literally made up by plaintiff's attorney, and is fictitious and has no bearing with reality" (¶5). He points

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<sup>1</sup>In fact, a factual affirmation by counsel Thomas Torto in those papers gave rise to yet another motion, for Mr. Torto to be disqualified.

out that some of the items were left blank and where numbers were given, they were never the basis of any discussion — although his sister did sign it.

Finally, he refers to a meeting “in April or May 2010” between himself and Mr. Gubitosi. This meeting took place at the building and Mr. O'Connor says he introduced Mr. Gubitosi to his contractor and showed him what had been so far accomplished. He states Mr. Gubitosi inspected the building and “said he was satisfied and that he would fund the entire balance of the loan proceeds” (¶19).

It is absolutely clear that this controversy is not amenable to dispositive motions by either side. It is not straightforward, and counsel for the plaintiff is wrong when he says “there are no questions of material fact” (¶12). In fact, there are documents that keep appearing from both sides and the principals contest what those documents represent and what each side's obligations were. And as pointed out earlier, no depositions have occurred and no discovery has been exchanged.

As to the defenses, plaintiff correctly states that the complaint contains only one substantive cause of action sounding in foreclosure. Therefore, dismissal is not warranted based on a purported failure to elect remedies in violation of RPAPL §1301(3). With regard to the affirmative defense of usury, counsel for plaintiff argues there was no usurious rate when you consider the total amount of the loan to be \$750,000 and not simply the original money advanced. Discovery is necessary here as well. Therefore, both the motion and cross-motion for summary judgment are denied.

Finally, plaintiff's motion to disqualify Thomas Torto is denied as well. The plaintiff has failed to show that Mr. Torto is a witness whose testimony is strictly necessary or that he will be called as a witness by either side. *Broadwhite Assoc. v. Truong*, 237 AD2d 162

[\*9]  
(First Dep't 1997). Wilfred O'Connor was present at the closing and can provide the same testimony.

Accordingly, it is hereby

ORDERED that plaintiff's motion and defendants' cross-motion for summary judgment are denied; and it is further

ORDERED that plaintiff's motion to disqualify Thomas Torto, Esq. as counsel for the defendants is denied; and it is further

ORDERED that counsel shall appear in Room 222 at 9:30 a.m. on April 25, 2012 to enter into a preliminary conference order and set a timetable for the completion of discovery.

Dated: March 19, 2012

MAR 19 2012

  
J.S.C.

ALICE SCHLESINGER

FILED

MAR 26 2012

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