

Mayer v Abri Props., LLC
2012 NY Slip Op 33119(U)
December 20, 2012
Supreme Court, Suffolk County
Docket Number: 15914/2012
Judge: Thomas F. Whelan
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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL PART 45 - SUFFOLK COUNTY**

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/19/12
ADJ. DATES 12/7/12
Mot. Seq. # 001- MG; Submit Order

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MICHELE M. MAYER as Trustee of the	:	PINKS, ARBEIT & NEMETH, ESQS.
RONALD J. MAYER AND PATRICIA M.	:	Attys. For Plaintiff
MAYER FAMILY TRUST,	:	140 Fell Ct.
	:	Hauppauge, NY 11788
	:	
Plaintiff,	:	ELLIOT F. BLOOM, PC
	:	Attys. For Defendant J. Dalene
-against-	:	2 Hillside Ave.
	:	Williston Park, NY 11596
ABRI PROPERTIES, LLC, STANLEY DALENE,	:	
JOANNE DALENE, CLIFF WOOLLEY a/k/a	:	BEN CARTER, ESQ.
CLIFFORD WOOLEY, SANDRA WOOLLEY,	:	Atty. For Defs. Woolley
SDC CONSTRUCTION, INC., a/k/a SDC	:	220 Roanoke Ave.
CONSTRUCTION CORP., ET ALS,	:	Riverhead, NY 11901
	:	
Defendants.	:	LAZER, APTHEKER, ROSELLA
	:	Attys. For Def. Capitol One
	:	225 Old Country Rd.
	:	Melville, NY 11747
-----X		

Upon the following papers numbered 1 to 8 read on this motion for accelerated judgments and appointment of a referee to compute; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 5-6; Replying Affidavits and supporting papers 7-8; Other _____; (and after hearing counsel in support and opposed to the motion, it is

ORDERED that this motion (#001) by the plaintiff for accelerated judgments against the defendants, the appointment of a referee to compute and other incidental relief is considered under CPLR 3212, 3215 and RPAPL 1321 and is granted.

Dr

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The plaintiff commenced this action to foreclose a 1,000,000.00 mortgage loan given to Ronald J. Mayer, now deceased by the corporate defendant, Abri Properties, LLC on July 5, 2007, which was evidenced by a promissory note executed on that date by such defendant. As security for the loan, the Dalene defendants mortgaged their residential real property located at 180 Water Hole Road, East Hampton and the Woolley defendants mortgaged their residential real property known as 70 Bridies Path, Southampton, New York. The mortgage indenture executed by the Dalene and Woolley defendants on July 5, 2007, in favor of the now deceased mortgagee, recites that each of the two mortgages given therein are second to and subordinate to first mortgages then existing on each of the mortgaged parcels.

The July 5, 2007 mortgage loan to the corporate defendant was further secured by a July 5, 2007 Unconditional Guaranty of Payment executed by defendants, Stanley Dalene, Clifford Woolley and SDC Construction, by its president, Stanely Dalene. A second, separate Unconditional Guaranty of Payment dated July 5, 2007, was executed by defendants, Joanne Dalene and Sandra Woolley. Each of these written guarantees authorized the lender to renew, compromise, extend, accelerate or otherwise change the time of payment or the terms of the indebtedness without notice to th guarantors and without affecting the guaranty obligations set forth therein. Each written guaranty also included full and broad waivers of all defenses the guarantors or the borrower might possess. By an undated writing effective July 5, 2009, as amended by writing dated September 17, 2009, the mortgagee and the corporate defendant, together with two of its five guarantors, namely, Stanley Dalene and Clifford Woolley, modified and extended until July 5, 2010, the maturity date of the loan that was originally fixed as July 4, 2008, which had been previously extended in writing to July 5, 2009. Modification of interest due and the payment of certain fees were also included. Copies of all of the foregoing loan documents are attached to the plaintiff's moving papers with the exception of the 2009 modification agreement that is referenced in the Note Extension and Modification Agreement of July 5, 2009, as amended September 17, 2009.

The mortgagee died in October of 2010, a domiciliary of Florida. He allegedly left a will by which he named his wife, Patricia M. Mayer, as personal representative of his estate. In such capacity, Patricia M. Mayer executed, on February 15, 2012, an assignment of the subject note and mortgage to the plaintiff, Michelle M. Mayer, in her capacity as trustee of the Ronald J. Mayer and Patricia M. Mayer Family Trust [hereinafter "Mayer Family Trust"]. In such capacity, the plaintiff commenced this action to foreclose the subject mortgage and for other relief as the corporate defendant allegedly failed to make payment in accordance with the terms of the loan documents. The February 15, 2012 assignment of the subject note and mortgage in favor of the plaintiff was recorded in the office of the County Clerk on May 9, 2012. The instant action was commenced by filing on May 23, 2012.

Issue was joined by service of a joint answer by mortgagor/guarantor defendants, Woolley dated June 20, 2012. It contains three affirmative defenses including, fraud in the inducement; usury and the purported discharge of the Woolleys' guaranty obligations by reason of the modification of the

corporate borrowers's note payment obligation without the consent of guarantor, Sandra Woolley. A joint answer dated July 15, 2012 was separately served on behalf of the corporate borrower, Abri Properties, LLC, the mortgagor/guarantor defendants, Stanley and Joanne Dalene, and the corporate guarantor defendant, SDS Construction, Inc. However, the plaintiff rejected this answer as untimely except as to defendant, Joanne Dalene.

By the instant motion, the plaintiff seeks summary judgement against answering defendants, Woolley and defendant, Joanne Dalene, and, in effect, default judgments against the remaining defendants with respect to the plaintiff's pleaded demands for a judgment of foreclosure and sale and on her claim for a deficiency judgment against the corporate borrower and the five guarantor defendants. The plaintiff further seeks an order dropping as party defendants, the unknown defendants listed in the caption and the appointment of a referee to compute amounts due under the loan documents. The motion has been opposed only by the Woolley defendants who therein assert only one of their pleaded affirmative defenses, namely, fraud in the inducement. For the reasons stated the below, the plaintiff's motion is granted.

The moving papers established the plaintiff's entitlement to summary judgment on its complaint to the extent it asserts claims against the answering defendant as such moving papers included copies of the mortgage, the unpaid note, the extension agreement of July of 2009 and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; *HSBC Bank v Shwartz*, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; *Countrywide Home Loans v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]; *J.P. Morgan Chase Bank v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Wells Fargo Bank Minnesota v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; *Ocwen Fed. Bank FSB v Miller*, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]). The moving papers further established the plaintiff's entitlement to summary judgment on her pleaded demands for a deficiency judgment against the answering guarantor defendants by the production of the written guarantees signed by the answering guarantor defendants, the other loan documents listed above and proof of defaults in payment by the corporate borrower/note obligor and the guarantors (*see Baron Assoc., LLC v Garcia Group Enter.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]).

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact effecting a rebuttal of the plaintiff's prima facie showing or in support of the legal defense available to them (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021 907 NYS2d 22 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, NA v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, *supra*). Notably, self-serving and conclusory allegations do not raise

issues of fact and do not require plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; *Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts, as alleged in the movants' papers, may be deemed admitted by the unresponsive party as there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *Argent Mtge. Co., LLC v Meutesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]).

Here, the court is without receipt of opposing papers from answering defendant Joanne Stanley. The plaintiff's prima facie showing of its entitlement to summary judgment on her complaint against this answering defendant was thus not controverted (*see Flagstar Bank v Bellafigiore*, 94 AD3d 1044, *supra*). The failure to oppose this motion coupled with the plaintiff's prima facie showing of a lack of merit in the affirmative defenses set forth in the answer of Joanne Stanley warrants the dismissal of such defenses pursuant to CPLR 3212 (*see* CPLR 3212; 3211[b]; *Gonzalez v Woodbourne Arboretum, Inc.*, 100 AD3d 694, 2012 WL 5503596 [2d Dept 2012]; *Argent Mtge. Co., LLC v Meutesana*, 79 AD3d 1079, *supra*). The plaintiff's motion for summary judgment on her claims for foreclosure and sale and for an award a deficiency judgment is thus granted with respect to defendant, Joanne Dalene.

A review of the opposing papers submitted by the Woolley defendants reveals that the same were insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure due to a failure of proof on the part of the plaintiff or the existence of facts giving rise to any bona fide defenses belonging to the Wolleys (*see* CPLR 3211[e]). The opposing papers submitted by the Woolley defendants failed to include any allegations or proof in support of their Second Affirmative defense of discharge of their guaranty obligations due to an unconsented to modification of underlying principal note obligation or in support of their Third and last asserted affirmative defense of usury. Instead, the Woolley defendants attempt to rebut the plaintiff's prima facie showing of her entitlement to summary judgment by the advancement of allegations that are offered solely in support of the Wolleys' First affirmative defense which sounds in fraudulent inducement. The fraudulent conduct complained of consists of misrepresentations as to limitations on the risk of loss the Wolleys were allegedly subject to under the terms of their written guarantees. Such misrepresentations were alleged uttered by Mr. Wolley's co-defendant and business associate, Stanley Dalene, and/or the attorney who prepared the loan documents and purportedly acted as the transactional attorney for the corporate borrower, Mr. Dalene and the deceased mortgagee. These claims are, however, insufficient for the reasons stated below.

It is axiomatic that the elements of an allegation of claims of fraud are a misrepresentation or a material omission of fact which was false and known to be false by an adverse party, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the

misrepresentation or material omission, and injury (see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147 [2009]). In addition, CPLR 3016(b), requires that the circumstances underlying a claim or defense based on fraud be stated “in detail” (CPLR 3016[b]; see *Stein v Doukas*, 98 AD3d 1024, 951 NYS2d 173 [2d Dept 2012]). Where a writing contains terms that contradict or differ in meaningful ways from the representations purportedly relied upon by the allegedly defrauded party, there is no justifiable reliance (see *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 918 NYS2d 423 [1st Dept 2011]; *Urstadt Biddle Prop., Inc. v Excelsior*, 65 AD3d 1135, 885 NYS2d 510 [2d Dept 2009]; *McMorrow v Dime Sav. Bank of Williamsburgh*, 48 AD3d 646, 852 NYS2d 345 [2d Dept 2008]). Allegations that the reliant party failed to read the subject writing, the terms of which negate the purported misrepresentation, are usually unavailing since such party is presumed to have read the writing and thus, in general, not predicate its fraud claim upon a failure to do so (see *Patterson v Somerset Inv. Corp.*, 96 AD3d 817, 946 NYS2d 217 [2d Dept 2012]; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 861 NYS2d 280 [1st Dept 2008]; *Lewin Chevrolet-Geo-Oldsmobile Inc. v Bender*, 225 AD2d 916, 639 NYS2d 180 [3d Dept 1996]).

In the mortgage foreclosure arena, it is clear that a mortgagor may be relieved from his default under a mortgage upon a showing of waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct by the mortgagee is clear (see *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 451 NYS2d 663 [1982]). However, fraud even of this type is no defense where it was not committed against the mortgagor or where it concerns a fraud related to actions by others not connected with the mortgagee (see *Deutsche Bank Nat. Trust Co. v. Gordon*, 84 AD3d 443, 922 NYS2d 66 [1st Dept 2011]; *Delta Funding Corp. v Yaede*, 268 AD2d 554, 702 NYS2d 854 [2d Dept 2000]; *Prudential Ins. Co. of America v Kelly*, 174 AD2d 717, 571 NYS2d 761 [2d Dept 1991]; *Marine Midland Bank v Fillippo*, 276 AD2d 601, 714 NYS2d 906 [2d Dept 2000]). Moreover, a mortgage may not be set aside solely because the underlying transaction was tainted by a fraudulent representation (see *Joanne Homes v Dworetz*, 25 NY2d 112, 302 NYS2d 799 [1969]). It is thus apparent that something more than a mere tainting of the underlying transaction by reason of a misrepresentation must be established in order for the court to deny an established remedy of foreclosure and sale upon equitable grounds.

Here, the conclusory allegations of purported misrepresentations of fact regarding limitations upon the Wolleys’ personal exposure to liability under the terms of their written guarantee and/or the mortgage executed by them are devoid of the type of specific factual averments necessary to support a fraud defense that are imposed by CPLR 3016, including the element of justifiable reliance. Moreover, there are no allegations of any fraudulent conduct on the part of the mortgagee and nothing in the record other than pure fancy, conjecture and speculation, that any alleged misrepresentation made by Dalene and/or his attorney may be imputed to the now deceased mortgagee (see *Joanne Homes v Dworetz*, 25 NY2d 112, *supra*; *Deutsche Bank Nat. Trust Co. v. Gordon*, 84 AD3d 443, *supra*; *Delta Funding Corp. v Yaede*, 268 AD2d 554, *supra*; *Prudential Ins. Co. of America v Kelly*, 174 AD2d

717, *supra*; *Marine Midland Bank v Fillippo*, 276 AD2d 601, *supra*). Finally, the Woolley defendants' admission that they failed to read the mortgage, guarantees and other loan documents executed on July 5, 2007 reveals a lack of merit in their claims of fraudulent inducement (*see Patterson v Somerset Inv. Corp.*, 96 AD3d 817, *supra*; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, *supra*). The Woolleys' opposing papers were thus insufficient to rebut the plaintiff's prima facie showing of her entitlement to the summary judgment demanded by her.

The court thus finds that the plaintiff is entitled to summary judgment on its complaint against each of the answering defendants and a dismissal of each affirmative defense set forth in their answers pursuant to CPLR 3212 (*see* CPLR 3212; 3211[b]; *Gonzalez v Woodbourne Arboretum, Inc.*, 100 AD3d 694, *supra*; *Mazzei v Kyriacou*, 98 AD3d 1088, 951 NYS2d 557 [2d Dept 2012]). The plaintiff's demands for summary judgment against such defendants are thus granted.

Those portions of the instant motion wherein the plaintiff seeks an order dropping as party defendants the unknown defendants listed in the caption and an amendment of the caption to reflect same are granted. All future proceedings shall be captioned accordingly.

The moving papers further established the defaults in answering on the part of defendants, Abri Properties, LLC, Stanley Dalene, SDC Construction, Inc., and the remaining corporate defendants listed in the caption, none of whom served answers to the plaintiff's complaint. Accordingly, the defaults in answering of all such defendants are hereby fixed and determined. Since the plaintiff has been awarded summary judgment against the answering defendants listed above and has established a default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see* RPAPL § 1321; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Perla v Real Prop. Holdings, LLC*, 23 Misc3d 697, 874 NYS2d 873 [Sup Ct. Kings County 2009]).

The moving papers further established that no conference of the type mandated by the Laws of 2008, Ch. 472 § 3-a as amended by the Laws of 2009 Ch. 507 § 10 or by CPLR 3408 nor service of any of the specialized statutory home loan notices were required in this action since the loan at issue is not a "home loan" as that term is defined in § 1304 of the Real Property Actions and Proceedings Law [RPL]. Under these circumstances, the plaintiff is now entitled to the issuance of an order of reference due to the accelerated judgments awarded to the plaintiff against the defendants on this motion.

Since no proposed order appointing a referee to compute was attached to the moving papers by the plaintiff, the court grants this motion subject to the plaintiff's submission, upon a copy of this memo decision and order, of a proposed order appointing a referee to compute amounts due under the terms

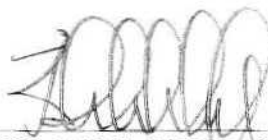
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of the subject mortgage. Such order shall provide, in blank, for the court's designation of the referee and shall include all of the usual provisions regarding compliance with the rules imposing duties upon appointees who accept such appointments under 22 NYCRR Part 36. The proposed order shall also reference the papers submitted on this motion, the granting thereof by the court in this memo decision and order and the material terms thereof.

Submit proposed order appointing a referee to compute, upon a copy of this memo decision and order.

DATED: _____

12/20/12



THOMAS F. WHELAN, J.S.C.