

US Bank Natl. Assn. v Lucky Star - Deer Park, LLC

2013 NY Slip Op 30316(U)

February 5, 2013

Sup Ct, Suffolk County

Docket Number: 20712/2012

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

P R E S E N T :



Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12/28/12
ADJ. DATES 01/18/13
Mot. Seq. # 001- MG
Settle - Order of Reference

| | | |
|--|---|---------------------------------|
| -----X | | |
| US BANK NATIONAL ASSOCIATION, as | : | CAHN & CAHN, LLP |
| TRUSTEE for the Registered Holders of ML- | : | Attorneys for the Plaintiff |
| CFC Commercial Mortgage Trust 2007-5 | : | 22 High St. Suite 3 |
| Commercial Mortgage Pass-Through Certificates, | : | Huntington, NY 11743 |
| Series 2007-5, By and Through its SPECIAL | : | |
| SERVICER, CAPITAL ASSETS | : | CERTILMAN, BALIN, et al., |
| MANAGEMENT, LLC | : | Attorneys for the Defendants |
| | : | Lucky Star and Kyaw, a/k/a Wu |
| Plaintiff | : | 90 Merrick Avenue |
| | : | East Meadow, NY 11554 |
| -against- | : | |
| | : | |
| LUCKY STAR - DEER PARK, LLC, MYINT J. | : | PRYOR & CASHMAN, LLP |
| KYAW, a/k/a Jeffrey Wu, SHANGHAI | : | Attorneys for Shanghai Bank |
| COMMERCIAL BANK, LTD., WORKERS' | : | 7 Times Square |
| COMPENSATION BOARD OF STATE OF NEW | : | New York, NY 10036-7311 |
| YORK and John Doe and XYZ Corps, unknowns. | : | |
| | : | Lynn M. Dicerbo, Esq. |
| Defendants | : | Attorney for Workers Comp Board |
| | : | 328 State Street |
| | : | Schenectady, NY 12305 |
| -----X | | |

Upon the following papers numbered 1 to 11 read on this motion for summary judgment, deletion of parties and the appointment of a referee to compute; Notice of Motion and supporting papers 1 3; 4-5; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 6-7; Reply papers 8-9; Other 10-11 (Memo of Law in Support of Motion); ~~(and after hearing counsel in support and opposed to the motion,~~ it is

ORDERED that this motion (#001) by the plaintiff for, in effect, accelerated judgments against all defendants on the plaintiff's first cause of action, the appointment of a referee to compute and other incidental relief is considered under CPLR 3212, 3215 and RPAPL 1321 and is granted; and it is further

ORDERED that the second cause of action set forth in the plaintiff's complaint for relief against the guarantor defendant is severed from the first cause of action sounding in foreclosure.

Plaintiff, CW Capital Asset Management, LLC, as special servicer of the Trustee plaintiff set forth in the caption, commenced this action on July 11, 2012 to foreclose a February 8, 2007 mortgage given by the property owner and borrower defendant, Lucky Star - Deer Park, LLC (hereinafter "mortgagor defendant"). The mortgage was given to the original lender as security for an Amended and Restated Promissory Note in the amount of \$10,000,000.00 executed by the borrower on February 8, 2007. Also executed on that date by such defendant was a Consolidation, Spreader and Modification Agreement wherein the lender and the mortgagor defendant agreed to combine and consolidate certain existing mortgages with the February 8, 2007 mortgage to form a single first lien in the amount of \$10,000,000.00. This Agreement, together with the mortgage and the mortgagor's written Assignment of Leases and Profits, were filed in the office of the County Clerk on March 19, 2007.

Other loan documents executed on February 8, 2007 included a Loan Agreement and other security instruments by the mortgagor defendant and a Guaranty of Recourse obligations which was executed by defendant, Myint J. Kyaw a/k/a Jeffrey Wu (hereinafter defendant "Wu"). The obligations so guaranteed by defendant Wu were defined as the Recourse Liabilities in the note and the upon the occurrence of a Full Recourse Event, the full amount of the indebtedness.

In the complaint served and filed herein, the plaintiff asserts two causes of action against the mortgagor and guarantor defendants who allegedly defaulted in making the loan's maturity payment on February 8, 2012. A judgment foreclosing the lien of the subject mortgage, the extinguishment of all subordinate interests of the defendants in the premises and an award of reasonable counsel fees is demanded in the first cause of action. In the second cause of action, the plaintiff seeks to hold defendant Wu liable under the terms of his written guaranty for the legal fees and costs incurred by the plaintiff in the collection of its loan. A joint answer to the complaint was filed by the mortgagor and guarantor defendants, in which they advance the following affirmative defenses: failure to observe conditions precedent; unclean hands/estoppel; a defense based on documentary evidence; lack of standing and/or capacity to sue; waiver, modification and election of remedies; and culpable conduct of other parties. The remaining known defendants listed in the caption appeared without answering the complaint.

The plaintiff now moves for an order: (1) awarding it "summary judgment against the defendants that have responded to the complaint and striking the answers and dismissing the affirmative defenses of those defendants on the grounds that there are no triable issues of fact and there is no merit as a matter of law to those defenses;" (2) deleting as party defendants, the unknown defendants; and (3) appointing a referee to compute amounts due under the subject mortgage and such other relief as the court deems proper. The answering defendants oppose by service of an affirmation in opposition by their counsel. Therein, counsel argues that the servicer plaintiff lacks capacity to sue; that the maturity date of the loan was extended or implicitly extended by settlement negotiations; the plaintiff has unclean hands and should be estopped from enforcing the loan documents as written; that new funding is imminent; and that a summary determination of the guarantor's liability is premature due to the existence of factual issues. In the papers served in reply, the plaintiff withdrew any perceived demands for summary judgment on its second cause of action against defendant Wu for breach of his written guaranty of the specified obligations of the corporate mortgagor. The motion, now expressly limited to the plaintiff's first cause of action against the defendants, is considered under CPLR 1003, 3212, 3215 and RPAPL 1321 and is granted for the reasons stated below.

“Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact” (*Zanfini v Chandler*, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010], quoting *HSBC Bank USA v Merrill*, 37 AD3d 899, 900, 830 NYS2d 598 [2d Dept 2010]; see *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]). Where, as here, an answer served includes the defense of standing or lack of capacity to sue, the plaintiff must further establish its standing to succeed on a motion for summary judgment (see *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]).

Here, the moving papers established the plaintiff's entitlement to summary judgment on its first cause of action to the extent it asserts claims against the answering defendants as such papers included copies of the mortgage, the unpaid note, the Consolidation, Spreader and Modification Agreement and the other loan documents executed on February 8, 2007 together with due evidence of a default under the terms thereof secured by the mortgage (see CPLR 3212; RPAPL § 1321; *Neighborhood Hous. Serv. of New York City v Hawkins*, 97 AD3d 554, 947 NYS2d 321 [2d Dept 2012]; *Baron Assoc., LLC v Garcia Group Enter.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Citibank, N.A. v Van Brunt Prop., LLC*, 95 AD3d 1158, *supra*; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]; *Swedbank, AB v Hale Ave. Borrower, LLC.*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]). The moving papers further established, prima facie, that the Trustee plaintiff is the owner of the note and mortgage at issue and was so on the date of the commencement of this action and that the duly identified plaintiff servicer is authorized to prosecute this action on behalf of the Trustee plaintiff. The servicer plaintiff thus established that it has standing and/or the capacity to sue (see *CW Capital Asset Mgt., LLC v Great Neck*, 99 AD3d 850, 953 NYS2d 89 [2d Dept 2012]; *Wells Fargo Bank Minn, NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2008]). The moving papers also included sufficient proof to establish that the remaining affirmative defenses set forth in the answer of the defendants are subject to dismissal due to their unmeritorious nature (see *State Bank of Albany v Fioravanti*, 51 NY2d 638, 435 NYS2d 947 [1980]; *Jo-Ann Homes v Dworetz*, 25 NY2d 112, 302 NYS2d 799 [1969]; *Signature Bank v Epstein*, 95 AD3d 1199, 945 NYS2d 347 [2d Dept 2012]).

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of some legal defense asserted in the answer or otherwise available to the answering defendants (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]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *J.P. Morgan Chase Bank, NA v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). 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 movant's papers may be deemed admitted 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]; *see also Madeline D'Anthony Enter., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). A review of the opposing papers submitted by the answering 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 and sale and insufficient to demonstrate any bona fide defense to such claim.

The first defense asserted in the opposing papers amplifies the defendants' pleaded defense that the plaintiff servicer lacks standing or the capacity to sue on behalf of the Trustee plaintiff. This defense is, however, without merit. RPAPL §1302 and §1304 expressly permit authorized agents including loan servicers to commence and prosecute mortgage foreclosure actions and appellate case authorities have repeatedly rejected claims that loan servicers, properly identified as such, lack standing or the capacity to sue on behalf of Trustees of trusts funded by securitized mortgages (*see CWCapital Asset Mgt., LLC v Great Neck*, 99 AD3d 850, *supra*; *Wells Fargo Bank, NA v Edwards*, 95 AD3d 692, 945 NYS2d 44 [1st Dept 2012]; *CWCapital Asset Mgt. LLC v Charney-FPG 114 41st St., LLC*, 84 AD3d 506, 506, 923 NYS2d 453 [1st Dept 2011]; *Fairbanks Capital Corp. v Nagel*, 289 AD2d 99, 100, 735 NYS2d 13 [1st Dept 2001]; *Flushing Preferred Funding Corp. v Patricola Realty*, 36 Misc3d 1240(A), 2012 WL 3984476 [Sup. Ct. Suffolk County 2012]; *see also Bank of America, N.A. v 3301 Atlantic, LLC*, 2012 WL 2529196 [ED NY 2012]). The defendants' opposing papers raised no questions of fact on the issue and thus failed to rebut the plaintiff's prima facie showing that it has the requisite standing to prosecute this action.

Asserted next in the opposing affirmation of defendants' counsel are claims that an award of summary judgment against the guarantor defendant on the second cause of action is precluded by questions of fact. However, these claims and arguments were rendered academic by the plaintiff's withdrawal, without prejudice, of any demands for summary judgment on its second cause of action which relates solely to the written guaranty of defendant Wu.

Defendants' counsel next asserts an unpleaded defense that there is no default on the part of the mortgagor defendant because the maturity date of the loan was the subject of extensive settlement negotiations between the parties. However, the settlement negotiations relied upon by the defendants do not furnish them with a defense to the plaintiff's first cause of action in which it demands the remedy of foreclosure of its lien and all subsequent interests of the defendants (*see Community Preservation Corp. v Bridgewater*, 89 AD3d 784, 932 NYS2d 378 [2d Dept 2011]; *Mellon v Izmirligil*, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; *Maspeth Fed. Sav. & Loan Assoc. v McGown*, 77 AD3d 889, 909 NYS2d 403 [2d Dept 2010]).

Counsel's further claims that the plaintiff should be estopped from pursuing its remedy of foreclosure and sale due to its failure to extend the loan maturity date or to otherwise forbear its remedies, its bad faith and unclean hands are equally lacking in merit. A foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payment (*see Graf v Hope Bldg. Corp.*, 254 NY 1, 4-5, 171 NE 884 [1930]; *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 2012 WL 6699200 [1st Dept 2012]; *JP Morgan Chase Bank, Natl. Assn. v Ilardo*, 36 Misc3d 359, 940 NYS2d 829 [Sup. Ct. Suffolk County 2012]). Consequently, a failure to modify or forbear does not constitute bad faith (*see Connecticut Natl. Bank v Peach Lake Plaza*, 204 AD2d 909, 612 NYS2d

494 [3d Dept 1994]. Nor does it give rise to an application of the doctrine of unclean hands which has long been recognized as not providing a valid defense to a foreclosure action (see *Jo-Ann Homes v Dworetz*, 25 NY2d 112, *supra*; cf., *Connecticut Natl. Bank v Peach Lake Plaza*, 204 AD2d 909, *supra*).

Modification of mortgages and/or forbearance agreements are subject to our statute of frauds and, accordingly, must be in writing to be enforceable (see GOL §5-703[4]). A resort to parol evidence by a defendant asserting the existence of any purported modification or forbearance agreement is generally precluded (see *Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 689 NYS2d 674 [1999]; *Martini v Rogers*, 6 AD3d 404, 774 NYS2d 378 [2d Dept 2004]). A second statute of frauds applies where, as here, a mortgage or guarantee is unambiguous and contains a clause prohibiting amendment other than in writing. These contracts fall within the contemplation of GOL §15-301(1) and alleged oral modifications of such contracts are ineffective to preclude enforcement thereof or other contractual remedies available to the plaintiff (see GOL §15-301[1]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *B. Reitman Blacktop, Inc. v Missirlian*, 52 AD3d 752, 860 NYS2d 211 [2d Dept 2008]; *Wasserman v Harriman*, 234 AD2d 596, 651 NYS2d 620 [2d Dept 1996]; *Bank of Smithtown v Boglino*, 254 AD2d 319, 678 NYS2d 640 [2d Dept 1998]; *FGH Realty Credit Corp. v VRD Realty Corp.*, 231 AD2d 489, 647 NYS2d 229 [2d Dept 1996]; *Can-Am Dev. Corp. v Meldor Dev. Corp.*, 214 AD2d 695, 625 NYS2d 600 [2d Dept 1995]; see also *Lehman Bros. Holdings Inc. v Walji*, 2011 WL 1842838 [S.D.N.Y. 2011]). Here, there are no allegations that any purported modification of the maturity date of the loan nor a promise to forbear on the part of the plaintiff was reduced to a writing or is otherwise enforceable without a writing under the part-performance doctrine (see GOL §5-703[4]).

Also rejected as unmeritorious is defense counsel's claim that "new funding is imminent". A mortgagor's hope that he or she might be able to arrange for a more advantageous third-party sale to obviate foreclosure is simply not a defense and thus does not impair the mortgagee's pursuit of its contractual remedy (see *Bank of New York v Agenor*, 305 AD2d 438, 758 NYS2d 817 [2d Dept 2003]). The court finds this rule to be equally applicable to a mortgagor's attempt to arrange for alternative third-party financing in an effort to avoid a foreclosure sale.

Finally, the court rejects the defendants' suggestion that the remedy of foreclosure and sale is simply too harsh and should thus be denied by the court under the circumstances of this case, including the good faith efforts on the part of the answering defendants to negotiate a settlement, to secure alternate financing and to maintain the property by, among other things, keeping the property's rent roll profitable. While the judiciary has recognized that the remedy of foreclosure may result in the loss of one's home, "[w]hen a default is undisputed, the court (cannot) abrogate the right of foreclosure and sale ... which is incorporated in the contract and on the strength of which (the creditor) lent his money" (*Home Loan Inv. Bank, F.S.B. v Goodness and Mercy*, 2011 WL 1701795 [ED NY 2011] quoting *United States v Victory Hwy. Vil., Inc.*, 662 F.2d 488, 494 [8th Cir.1981], quoting *United States v Sylacauga Prop., Inc.*, 323 F.2d 487, 491 [5th Cir.1963]; see also *United States v Flaherty*, 172 F.3d 39, 1999 WL 66153 [2d Cir.1999]). Here, the loss of a home is not implicated, as this action concerns claims for the foreclosure of a commercial mortgage loan. Even if this action involved a home loan,

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the Second Department's recent reiteration of the long standing rule that "the stability of contract obligations must not be undermined by judicial sympathy" casts serious doubt upon the efficacy of any "harshness" defense (*Emigrant Mtge. Co., Inc. v Fisher*, 90 AD3d 823, 935 NYS2d 313 [2d Dept. 2011] quoting *First Nat'l. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630, 638, 290 NYS2d 721 [1968], quoting *Graf v Hope Bldg. Corp.*, 254 NY 1, 4-5, *supra*).

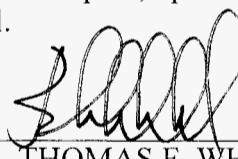
The affirmative defenses set forth in the answer of the defendants that were not raised in opposition to this motion, including, purported failures of conditions precedent, documentary proof and culpable conduct of others, are subject to dismissal in light of the plaintiff's prima facie showing that they lack merit. The court thus finds that the plaintiff is entitled to an award of summary judgment dismissing all of the affirmative defenses set forth in the answer of the defendants in so far as applicable to the first cause of action set forth in the complaint. The plaintiff is further awarded summary judgment on its first cause of action against all defendants. Those portions of this motion wherein the plaintiff seeks such relief are thus granted. The second cause of action against the guarantor defendant, which was not targeted by the plaintiff on this motion as presently constituted, is hereby severed and continued. The judgment of foreclosure and sale shall include a provision reflecting the severance of the second cause of action herein directed.

Those portions of the instant motion wherein the plaintiff seeks an order dropping, as party defendants, the unknown defendants listed in the caption is granted. Also granted is an amendment of the caption to reflect the deletion of the unknown defendants as parties.

The moving papers also included defaults in answering on the part of the remaining defendants, neither of whom served answers to the plaintiff's complaint. Accordingly, the defaults of all such defendants are hereby fixed and determined. Since the plaintiff has been awarded summary judgment on its first cause of action against answering defendants and has established a default in answering by the remaining defendants with respect to such cause, 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]; *LaSalle Bank, NA v Pace*, 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd*, 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]).

The plaintiff shall settle an order appointing a referee to compute, upon a copy of this order, on not less than fifteen (15) days notice to defendant's counsel.

Dated: February 5, 2013



THOMAS F. WHELAN, J.S.C.