

Paradigm Credit Corp. v Zimmerman

2013 NY Slip Op 31915(U)

July 23, 2013

Sup Ct, NY County

Docket Number: 653646/12

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JOAN A. MADDEN

PRESENT: J.S.C. Justice

PART 1/1

Index Number : 653646/2012
PARADIGM CREDIT CORP.
vs
ZIMMERMAN, LAURENCE
Sequence Number : 001
STRIKE ANSWER

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 is determined in accordance with the annexed decision and order.

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

Dated: July 23, 2013

[Signature], 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: PART 11

-----X
PARADIGM CREDIT CORP and DENNIS HERMAN,

INDEX NO. 653646/12

Plaintiffs.

-against-

LAURENCE ZIMMERMAN and KIMBERLY
ZIMMERMAN,

Defendants.

-----X
JOAN A. MADDEN, J.:

In this action to enforce a personal guaranty, plaintiffs are moving for an order pursuant to CPLR 3212 granting summary judgment against answering defendant Laurence Zimmerman and striking his answer and all affirmative defenses.¹

This is an action to enforce an irrevocable and unconditional present and continuing guaranty of payment given jointly and severally by defendants Laurence Zimmerman and Kimberly J. Zimmerman, which guaranteed all amounts due and owing under a consolidated mortgage note dated August 20, 2007 in the principal amount of \$2,000,000. Non-party LKZ Ventures LLC, is the mortgagor and owner of the property located in Southampton, New York. Plaintiffs allege the mortgagor has not made any payments since December 2011, which was applied to the March 2011 payment due on April 1, 2011, and that as of January 15, 2013, the sum of \$2,897,333.31 is due and owing on the consolidated note, with additional interest continuing to accrue. Plaintiffs argue they are entitled to summary judgment since the guaranty

¹Plaintiffs are not moving for any relief against defendant Kimberly Zimmerman, who is has defaulted in appearing and answering. While plaintiffs state that they have “separately applied for a default judgment” against her, the court’s computer records contain no indication that a default judgment has been issued.

indisputably exists and is unconditional and irrevocable, and given defendants' undisputed default on the guaranty. Plaintiffs also assert that under the explicit terms of the guaranty, the guarantors waived their right to assert any defenses in any matter arising out of the guaranty, and in any event the defenses raised by Laurence Zimmerman are without merit.

In opposition, defendant Laurence Zimmerman submits a 2-page affidavit and a 2½ page attorney's affirmation. He argues that plaintiff is "attempting by summary judgment to effectively deny the rights created by the Federal and State governments to protect borrowers who have defaulted on their mortgage payments," and asserts that he is seeking "a modification of this Mortgage so that I can keep my home." His attorney asks the court "to invoke its inherent powers of equity and examine the plight of two neighbors who have both defaulted on their mortgage payments." He argues that under New York law, the holder of a mortgage can either foreclose on the mortgage or sue on the note, which is "inherently unfair," since the homeowner cannot modify the mortgage if the lender chooses to sue on the note. Requesting a 30-day adjournment to complete his research, defendant's counsel explains that he has looked at more than 2,000 cases and has found nothing to support his legal theory, and for that reason he has not submitted a memorandum of law. In reply, plaintiffs object to giving defendant Laurence Zimmerman any additional time.

Plaintiffs' motion is granted to the extent of liability, and an inquest and assessment shall be held as to the amount of damages, including reasonable attorney's fees. Where as here, the guaranty is clear and unambiguous on its face, and by its language, is an absolute and unconditional present and continuing guaranty of payment with waiver of all defenses, defendant is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement. See

CitiBank, N.A. v. Plapinger, 66 NY2d 90 (1985); National Westminster Bank USA v. Sardi's Inc., 174 AD2d 470, 471 (1st Dept 1991). In opposing plaintiff's motion, defendant Laurence Zimmerman does not deny that money is owed, that the mortgagor defaulted on the mortgage, or that he personally executed a present and continuing unconditional guaranty of the consolidated mortgage debt. He merely asserts that he should be given an opportunity to modify the mortgage or sell the property, which according to plaintiffs has an appraised value of \$17 million. It appears that the underlying mortgage is a second mortgage, which explains why plaintiffs are seeking relief under the guaranty, as opposed to foreclosing on the property.

In the absence of an issue of fact as to a viable defense to the guaranty, plaintiffs are entitled to partial summary judgment on the issue of liability and an inquest shall be held as to the amount due and owing under the guaranty, including reasonable attorney's fees. Defendant Laurence Zimmerman is entitled to participate in the inquest, and the parties are directed to appear for a pre-inquest conference on August 15, 2013 at 2:30 p.m. At the pre-inquest conference, defendant Laurence Zimmerman shall provide the contract of sale for the mortgaged property and the closing date, and shall be prepared to show a willingness to agree to pay plaintiffs from the proceeds of the sale. Defendant Laurence Zimmerman shall also provide documentary evidence showing that co-defendant Kimberly Zimmerman has agreed to the sale of the property or has signed over to defendant Laurence Zimmerman her rights to the property as part of the divorce proceedings or otherwise.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment against defendant Laurence Zimmerman is granted to the extent of liability and an inquest and assessment of damages,

including reasonable attorney's fees, shall be held before this court; and it is further

ORDERED that the complaint is severed and shall continue as against defaulting defendant Kimberly J. Zimmerman; and it is further

ORDERED that on or before July 15, 2013, plaintiffs shall serve a copy of this order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial Support Office (Room 158), and shall pay the proper fees, if any, and said Clerk shall place this matter on this court's conference calendar for a pre-inquest conference on August ~~15~~²², 2013 at 2:30 p.m.; and it is further

ORDERED that the parties are directed to appear for a pre-inquest conference on August 15, 2013 at 2:30 pm, in Part 11, Room 351, 60 Centre Street.

DATED ~~July 15~~^{July 23}, 2013

ENTER:



J.S.C.