

TD Bank, N.A. v Congregation Birchos Yosef
2013 NY Slip Op 33622(U)
December 12, 2013
Sup Ct, Rockland County
Docket Number: 030988/13
Judge: Gerald E. Loehr
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
TD BANK, N.A.,

Plaintiff,

DECISION AND ORDER
Index No.: 030988/13

-against-

CONGREGATION BIRCHOS YOSEF,
YESHIVA OHR TORAH, COUNTRYWIDE
CARTING LTD., ALL SECURITY AND
COMMUNICATIONS CORP., and NEW
YORK STATE DEPARTMENT OF
TAXATION AND FINANCE,

Defendants.

-----X

LOEHR, J.

The following papers numbered 1-5 were read on Plaintiff's motion for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion - Memorandum of Law - Affirmation - Affidavit - Exhibits	1
Memorandum of Law in Opposition	2
Affirmation in Opposition - Exhibits	3
Reply Affirmation - Exhibit	4
Reply Memorandum of Law	5

Upon the foregoing papers, it appears that Defendant Congregation Birchos Yosef (the

“Congregation”) is a religious corporation organized and existing under the laws of the State of New York. In 2011 the Congregation had an outstanding mortgage debt of approximately \$7.2 million held by three banks on four parcels with a total appraised value of \$13,450,000. That year the Congregation approached Plaintiff seeking to refinance the three existing mortgages and to obtain additional funds for working capital purposes. On or about October 31, 2011, the Board of Trustees of the Congregation passed a Resolution recommending to the Congregation’s membership that it approve a \$7.2million 20-year mortgage loan, and on November 28, 2011, the membership approved same. On November 16, 2011, Plaintiff sent the Congregation a commitment letter offering two credit facilities: a 20 year \$7.2 million Commercial Mortgage Loan and a \$500,000 Line of Credit. On December 19, 2011, the Congregation commenced a proceeding for judicial approval for the mortgaging of its property under Religious Corporation Law § 12(1). While the Petition noted that Plaintiff would, in addition to the \$7.2 million mortgage loan, also be providing a \$500,000 line of credit, the submitted Resolutions were for only the \$7.2 million mortgage loan and the Order, consented to by the Attorney General, approved only a \$7.2 million mortgage. The loan closed on January 27, 2012. The Congregation executed and delivered to Plaintiff, among other documents, a 20-year \$7.2 million Term Note, a \$500,000 Revolving Credit Note and a \$7.7 million Mortgage and Mortgage Consolidation, Modification and Extension Agreement (the “Mortgage”) . In addition, in connection with the closing, the Congregation’s counsel, Ryan Scott Karben, delivered an opinion letter to Plaintiff to the effect that the Congregation “has duly authorized any and all action necessary to carry out and give effect to the transactions contemplated to be performed on its part under the Loan Documents” Plaintiff advanced the Congregation \$7.7 million. In 2013, the Congregation was in default under the Mortgage, and Plaintiff commenced this action to foreclose the Mortgage on February 22, 2013. Having found a purchaser for one of the four parcels, on April 15, 2013, at a duly scheduled and noticed meeting of the Board, at which all Board Members attended, the Congregation Resolved to sell one of mortgaged parcels for \$1 million. On June 24, 2013, the Congregation commenced a proceeding for judicial approval of the sale under Religious Corporation Law § 12(1). In the Petition, the Congregation acknowledged that it was then indebted to Plaintiff under a \$7.7 million Mortgage which was in default. The sale was

approved in an Order dated July 18, 2013.¹ The Congregation having answered the Complaint in this action, the Plaintiff now moves for summary judgment for the appointment of a Referee.

The Congregation opposes the relief on the grounds that the Mortgage Plaintiff seeks to foreclose is not valid in that it was not approved by the Court. Religious Corporation Law § 12(1) provides that a religious corporation shall not mortgage any of its real property without applying for, and obtaining leave of, the court therefor. The object of the statute is to protect the religious purposes of the corporation and to prevent a dissipation and perversion of the corporate assets (*Bernstein v Friedlander*, 58 Misc2d 492 [Sup Ct, Kings Co 1968]). Plaintiff asserts that the Court, in fact, approved the full \$7.7 million Mortgage because the full loan transaction was set forth in the exhibits to the Petition. Suffice it to say, whether by intention or oversight, the proposed order – consented to by the Attorney General and approved by the Court – only approved the Mortgage to the extent of \$7.2 million. It is therefore only valid as a mortgage and foreclosable to that amount (*Salesian Socy. v Nutmeg Partners*, 271 AD2d 671, 672 [2d Dept 2000]; *Greek Orthpdp Archdiocese of N. & S. Am. v Abrams*, 162 Misc2d 850, 854-55 [Sup Ct, NY Co 1994]; see *Carpenter v The Black Hawk Gold Mining Co.*, 65 NY 43 [1875]; *First Nat. Bank & Trust Co. of Port Chester v New York Title Ins. Co.*, 171 Misc 854, 857 [Sup Ct, West Co [1939]). Thus, as Plaintiff has established by admissible evidence that the Congregation executed and delivered a Mortgage – at least to the extent of \$7.2 million – and that the Congregation has defaulted thereunder, in the absence of contradictory evidence, the Plaintiff is entitled to summary judgment appointing a Referee at least with respect to the \$7.2 million Mortgage.

In addition, Plaintiff seeks to have this Court approve the Mortgage, nunc pro tunc, with respect to the additional \$500,000 Revolving Credit Note. Religious Corporation Law § 12(9) authorizes a mortgagee who has received a mortgage without the authority of a court of competent jurisdiction to apply “upon such notice to such corporation, or its successor, and such other person or persons as may be interested in the property, as the court may prescribe” to confirm to such mortgage (*Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, Of Brooklyn*, 76 AD2d 712, 716 [2d Dept 1980]). Plaintiff’s application to confirm the Mortgage was served on the Congregation, all parties to this action and the Attorney General.

¹ Presumably this was on the consent of the Plaintiff.

Only the Congregation has responded. The Congregation first objects to such confirmation now on the assertion that the Congregation's Board never approved the additional \$500,000 Mortgage. As to that contention, assuming, arguendo, the Board did not formally approve the additional \$500,000 Revolving Credit Mortgage in 2011 – the opinion letter of the Congregation's counsel to the contrary notwithstanding – having applied to the Court in 2013 to sell part of the collateral under the admitted \$7.7 million Mortgage – which was then in default – which application was granted – the Congregation is judicially estopped from denying it had not ratified the Mortgage in full, or that it was in default (*see Putnam County Temple & Jewish Center, Inc.*, 87 AD3d 1118, 1121 [2d Dept 2011]).²

The Congregation next argues that Plaintiff has failed to establish that the additional \$500,000 Mortgage was fair and reasonable and in the best interests of the Congregation (*see id.*). Inasmuch as the Congregation provided Plaintiff with a \$500,000 Mortgage in exchange for \$500,000, the transaction was, prima facie, fair and reasonable, and the burden is on the Congregation to show how it was not (*cf Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc. v Congregation Yetev Lev D'Satmar, Inc.*, 31 AD3d 480, 482-83 [2d Dept 2006]). In support thereof, the Congregation has submitted the Affirmation of its Vice President/Board Member to the effect that the additional \$500,000 Mortgage was unfair because a default thereunder was a default under the \$7.2 million Mortgage. In the absence of evidence that the Congregation did not need the additional \$500,000, or that it could have borrowed it on better terms elsewhere, or an objection by the Attorney General, the Court finds that it was fair and reasonable and in the Congregation's best interests and confirms the additional \$500,000 Mortgage. Settle an Order of Reference.

² As a consequence, the \$500,000 loan could be collected through a surplus money proceeding in this action even if the Mortgage for the additional \$500,000 was not confirmed.

This constitutes the decision and order of the Court.

Dated: New City, New York
December 12, 2013



HON. GERALD E. LOEHR
J.S.C.

MCCARTER & ENGLISH, LLP
Attorneys for Plaintiff
245 Park Avenue
New York, NY 10167

HAYNES AND BOONE, LLP
Attorneys for Defendant Congregation
30 Rockefeller Plaza, 26th Floor
New York, NY 10112

SAVAD CHURGIN
Attorneys for Defendant Yeshiva Ohr Torah
55 Old Turnpike Road, Suite 209
Nauet, NY 10954

JARED M. VIDERS, ESQ.
Attorney for Defendant All Security and Communications Corp.
49 North Airmont Road, Suite 101
Suffern, NY 10901

GARY S. BROWN, ESQ.
Assistant Attorney General
101 East Post Road
White Plains, NY 10601