

Aronoff v Ania

2014 NY Slip Op 30831(U)

January 7, 2014

Supreme Court, Suffolk County

Docket Number: 13-649

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 4-30-13
ADJ. DATE _____
Mot. Seq. # 001 - MG

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MICHAEL S. ARONOFF,

Plaintiff,

- against -

TWOMEY, LATHAM, SHEA, KELLEY,
DUBIN & QUARTARARO, LLP
Attorney for Plaintiff
33 West Second Street
Port Office Box 9398
Riverhead, New York 11901

JOHN ANIA, ALEXA ANIA a/k/a ALEXA
LARGOZA, ALEXIM HOLDINGS, LLC,
BRIARCLIFF LANDSCAPE, INC. and "JOHN
DOE " Nos. "1" through "5", inclusive, the names
of the last 5 defendants being fictitious, the true
names of said defendants being unknown to the
plaintiff it being intended to designate fee owners,
tenants, or occupants of the mortgaged premises
and/or persons or parties having or claiming an
interest in or a lien upon the mortgaged premises,
if the aforesaid individual defendants be dead,
their heirs at law, next of kin, distributees,
executors, administrators, trustees, committees
devisees, legatees, and the assignees, lienors,
creditors and successors in interest of them, and
generally all persons having or claiming under, by,
through, or against the said defendants named as a
class, of any right, title or interest in or lien upon
the premises described in the complaint herein,

Defendants.

WILLIAM F. BATES, ESQ.
Attorney for Defendants
Ania and Alexim
120 Court Street
Riverhead, New York 11901

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; ~~Notice of Cross Motion and supporting papers _____~~; Answering Affidavits and supporting papers 11 - 17; Replying Affidavits and supporting papers 18 - 19; ~~Other _____~~; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is hereby

ORDERED that this motion by plaintiff Michael S. Aronoff (Aronoff), pursuant to CPLR 3212 for summary judgment on his verified complaint, to strike the combined answer of defendants John Ania, Alexa Ania a/k/a Alexa Largoza and Alexim Holdings, LLC and for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that plaintiff is directed to forthwith submit a proposed order of reference in conformity with the foregoing order and decision, on notice to defense counsel.

This is an action to foreclose a private, second mortgage lien on premises known as 232 Millstone Road, Bridgehampton, New York. On November 30, 2007, defendants Alexim Holdings, LLC by John Ania (borrower defendant) and John Ania and Alexa Ania a/k/a Alexa Largoza (guarantor defendants) executed a note in favor of private lender Aronoff agreeing to pay the sum of \$200,000.00 at the interest rate of 12% per year. On November 30, 2007, guarantor defendants and borrower defendant executed a mortgage in the principal sum of \$200,000.00 on the subject property. The mortgage was recorded on January 4, 2008 with the Suffolk County Clerk's Office. In addition, on November 30, 2007, guarantor defendant John Ania executed a guaranty agreement whereby defendant guaranteed Alexim Holding's obligations under the note. On December 14, 2008, borrower defendant executed a loan extension and modification agreement (EMA) whereby, *inter alia*, the principal amount of the mortgage was reduced to \$175,000.00 and the maturity date was extended to November 30, 2009. The EMA was recorded on February 4, 2009 with the Suffolk County Clerk's Office. In conjunction with the EMA, on December 15, 2008 borrower defendant and guarantor defendants executed a restated note which provided an interest rate of 12% per year before maturity or acceleration and, after November 30, 2009, an interest rate of 24% or, the maximum amount permitted by law until the loan is paid in full.

Although demand for payment was made by plaintiff Aronoff, borrower defendant and guarantor defendants defaulted on their mortgage loan by failing to make the required payments. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on January 4, 2013. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms of the restated note, mortgage, EMA and guarantees by failing to make the required payments of principal, interest and late charges. Borrower defendant and guarantee defendants interposed a combined answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on May 10, 2013 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendants failed to comply with the terms of the restated note, mortgage, EMA and guarantees and, that defendants' general denial and unsupported affirmative defenses raised no issues of fact for trial. In support of its motion, plaintiff submits among other things: the sworn affidavit of plaintiff Aronoff; the affirmation of Kathryn Dalli, Esq. in support of the instant motion; the pleadings; the note, mortgage, EMA and restated note; notices pursuant to RPAPL §§ 1320 and 1303; affidavits of service for the summons and complaint; and, an affidavit of service for the instant summary judgment motion. Defendants oppose the summary judgment motion.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (Republic Natl. Bank of N.Y. v O'Kane, 308 AD2d 482 [2d Dept 2003]; see Argent Mtge. Co., LLC v Mentasana, 79 AD3d 1079 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (see Washington Mut. Bank v Valencia, 92 AD3d 774 [2d Dept 2012]). Here, plaintiff produced the note, mortgage, guarantees, EMA and restated note, as well as evidence of defendants' nonpayment, thereby establishing a prima facie case as a matter of law (see Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo, 42 AD3d 239 [2d Dept 2007]). Plaintiff Aronoff avers that defendants failed to comply with the terms of the restated note by failing to make the required payments; that plaintiff demanded payment; that the default has not been cured; and, that plaintiff is not a private banker, real estate broker or mortgage broker.

Once plaintiff has made a prima facie showing, it is incumbent upon defendant “to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff” (see Cochran Inv. Co., Inc. v Jackson, 38 AD3d 704 [2d Dept 2007] quoting Mahopac Natl. Bank v Baisley, 244 AD2d 466 [2d Dept 1997]). In opposition to the motion, defendants assert that plaintiff has violated RPAPL §1301 (3) by maintaining two separate causes of action to recover on the mortgage debt; that plaintiff has not satisfied the statutory conditions as required under RPAPL §1304; that plaintiff violated Banking Law (BL) §§6-1 and 6-m; and that the restated note dated December 15, 2008 in the amount of \$175,000.00 requires a usurious rate of interest.

Defendants' assertion that plaintiff has violated Banking Law §§6-1 and 6-m for failure to provide a 90 day pre-foreclosure notice as required under RPAPL §1304 is without merit. Appellate case authorities have determined that service of the statutory notices required by RPAPL § 1303 and § 1304 are conditions precedent to a mortgage foreclosure action (see Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95 [2d Dept 2011]; First Natl. Bank of Chicago v Silver, 73 AD3d 162 [2d Dept 2010]). RPAPL §1304 requires that, with regard to a “high-cost home loan,” a “subprime home loan” or a “non-traditional home loan,” at least 90 days before a lender or mortgage loan servicer commences legal action against the borrower, including a mortgage foreclosure action, the lender or mortgage loan servicer must give the borrower a specific, statutorily prescribed notice. In essence, the notice warns the borrower that he or she may lose his or her home because of the loan default, and provides information regarding assistance for homeowners who are facing financial difficulty. The specific language and type-size requirements of the notice are set forth in RPAPL §1304(1). The foreclosing party has the burden of showing compliance with the notice requirements.

Here, the affidavit of plaintiff Aronoff makes it clear that he is not a private banker, real estate broker or mortgage broker. Contrary to defendants' allegations, the statutory requirement of sending notice to borrowers pursuant to RPAPL §1304 only applies to "lenders", which are defined as "mortgage bankers" under the New York Banking Law §590(1)(f). As no evidence has been proffered to the contrary by defendants, their contention is fatally flawed.

Defendants' assertion that plaintiff has violated RPAPL §1301 (3) by maintaining two separate causes of action to recover on the mortgage debt is likewise without merit. The holder of a note and mortgage may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but must only elect one of these alternate remedies (see Aurora Loan Services, LLC v Lopa, 88 AD3d 929 [2d Dept 2011]). RPAPL §1301 "is the embodiment of the equitable principle that once a remedy at law has been resorted to, it must be exercised to exhaustion before a remedy in equity, such as foreclosure, may be sought" (Valley Sav. Bank v Rose, 228 AD2d 666 [2d Dept 1996]). The purpose of the statute is to avoid multiple lawsuits to recover the same mortgage debt. Here, the second action complained of consisted of a legal malpractice action filed in connection with the alleged dual representation of plaintiff and defendant by an attorney on the subject loan. Plaintiff's counsel asserts on personal knowledge, that while a summons and complaint was filed on November 1, 2012, same was never served upon the defendants herein and that the time to effectuate such service has expired. Accordingly, there is no second action pending.

Lastly, defendants assert that the interest rate on plaintiff's note is usurious. Under the civil usury statute, the maximum interest rate on a loan is 16% per annum (see General Obligations Law §5-501[1]; Banking Law §14-a [1]). To successfully raise the defense of usury, a debtor must allege and prove by clear and convincing evidence that a loan or forbearance of money, requiring interest in violation of a usury statute, was charged by the holder or payee with the intent to take interest in excess of the legal rate (see Giventer v Arnow, 37 NY2d 305 [1975]). If usury can be gleaned from the face of an instrument, intent will be implied and usury will be found as a matter of law (see Fareri v Rain's Intl., 187 AD2d 481 [2d Dept 1992]). To determine whether a transaction is usurious, courts look not to its form but to its substance or real character (see O'Donovan v Galinski, 62 AD3d 769 [2d Dept 2009]). If an instrument provides that the creditor will receive additional payment in the event of a contingency beyond the borrower's control, the contingent payment constitutes interest within the meaning of the usury statutes (see Diehl v Becker, 227 NY 318 [1919]; Browne v Vredenburg, 43 NY 195 [1870]). Lastly, a corporation may not interpose a defense of civil usury (see General Obligations Law §5-521 [1]) and an individual guarantor of a corporate obligation is also precluded from asserting such a defense (see Schneider v Phelps, 41 NY2d 238 [1977]; Arbuzova v Skalet 92 AD3d 816 [2d Dept 2012]).

Here, as set forth above, defendants' assertion of usury is precluded by virtue of the corporate status of Alexim Holding, LLC and the status of the individual guarantors for the corporate obligation. Furthermore, it can be discerned from the four corners of the restated note that the interest rate of "24%", which is immediately followed by the limiting language "or the maximum permitted by law until the entire loan is paid in full", does not constitute excessive interest within the meaning of the usury statutes. Likewise, section 5 of the subject restated note states that "[i]f a law which applies to this loan and which sets maximum loan charges is finally interpreted so that the interest of other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (i) any such loan charge shall be

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reduced by the amount necessary to reduce the charge to the permitted limit..." Based upon the foregoing limiting language contained in the restated note, the applicable interest rate cannot exceed the legal statutory limits. As such, defendants' assertion that the note is usurious is both precluded and without merit.

Notably, defendants did not deny having received the loan proceeds and having defaulted on their loan payments in their opposition papers.

Accordingly, the motion for summary judgment is granted and the defendants' combined answer is stricken. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (see Vermont Fed. Bank v Chase, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; Bank of East Asia, Ltd. v Smith, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The foregoing constitutes the order and decision of the court.

Dated: January 7, 2014



HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION

At IAS Part 34 of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the Courthouse thereof located at 1 Court Street, Riverhead, New York 11901, on the 7th day of January 2014.

P R E S E N T. HON. JOSEPH C. PASTORESSA

Hon. _____
JOSEPH C. PASTORESSA, J.S.C.

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MICHAEL S. ARONOFF,

Plaintiff,

Index No. 13-0649

-against-

**ORDER APPOINTING
REFEREE IN
MORTGAGE
FORECLOSURE**

JOHN ANIA, ALEXA ANIA a/k/a ALEXA LARGOZA, ALEXIM HOLDINGS, LLC, BRIARCLIFF LANDSCAPE, INC. and "JOHN DOE" Nos. "1" through "5", inclusive, the names of the last 5 defendants being fictitious, the true names of said defendants being unknown to the plaintiff it being intended to designate fee owners, tenants, or occupants of the mortgaged premises and/or persons or parties having or claiming an interest in or a lien upon the mortgaged premises, if the aforesaid individual defendants be dead, their heirs at law, next of kin, distributees, executors, administrators, trustees, committees, devisees, legatees, and the assignees, lienors, creditors and successors in interest of them, and generally all persons having or claiming under, by, through, or against the said defendants named as a class, of any right, title or interest in or lien upon the premises described in the complaint herein,

Defendants.

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Plaintiff having moved this Court for an Order for summary judgment, pursuant to CPLR 3212, and for an Order, pursuant to RPAPL § 1321, appointing and directing a referee to compute the amount due to the plaintiff, and to examine and report whether the mortgaged premises can be sold in parcels, and upon the summons and verified complaint herein, with due

proof that all defendants have been duly served with said process, and the Answer of defendants John Ania, Alexa Ania A/K/A Alexa Largoza and Alexim Holdings, LLC, the remaining defendants having failed to appear.

And upon the Affirmation of Kathryn Dalli, Esq. dated April 5, 2013, of Twomey, Latham, Shea, Kelley, Dubin & Quartararo, LLP, attorneys for plaintiff, and the Affidavit of plaintiff Michael S. Aronoff, duly sworn to on April 5, 2013, the Affirmation in Opposition of William F. Bates, Esq., dated April 25, 2013, the Affidavit of Defendant John Ania, sworn to on April 25, 2013, and the Reply Affirmation of Kathryn Dalli, Esq., dated May 8, 2013, showing that the plaintiffs are entitled to the relief requested herein

NOW, on motion of Twomey, Latham, Shea, Kelley, Dubin & Quartararo, LLP, attorneys for plaintiff, it is

ORDERED, that the motion is granted, and it is further

ORDERED, that Ehn Howard Lynch, Esq., of 4250 Veterans Memorial Hwy.
Suite 302 Holbrook, NY 11741 ^{(631) 467-3233}, New York, is hereby appointed Referee to, with convenient speed, ascertain and compute the amount due upon the note and mortgage being foreclosed in this action, except attorneys' fees, and to examine and report whether the mortgaged premises can be sold in parcels, and it is further

ORDERED, that the summons and complaint and notice of pendency in this action and all proceedings had herein be and the same hereby are deemed amended by severing and striking from the caption herein the names John Doe Nos. "1" through "5", and that the action be discontinued as to them, all of the foregoing without prejudice to any of the proceedings heretofore had herein or to be had herein with the caption hereinafter to read as follows:

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MICHAEL S. ARONOFF,

Plaintiff,

-against-

JOHN ANIA, ALEXA ANIA a/k/a ALEXA
LARGOZA, ALEXIM HOLDINGS, LLC,
and BRIARCLIFF LANDSCAPE, INC.,

Defendants.
-----X

and the matter shall be maintained under the same index number, and it is further

ORDERED, that, if required, the Referee take testimony pursuant to RPALP § 3121, and
it is further

ORDERED, that, pursuant to CPLR § 8003(a), a fee of \$ 250.00, shall be
paid to the Referee for the computation stage and upon the filing of his/her report, and it is
further

ORDERED, that by accepting this appointment the Referee certifies that he/she is in
compliance with Part 36 of the Rules of the Chief Judge, 22 NYCRR Part 36, including, but not
limited to, § 36.2(c) ("Disqualification from Appointment") and § 36.2(d) ("Limitations on
appointments based upon compensation").

ENTER:



HON. JOSEPH C. PASTORELLA, JSC

Referee's fee to compute is fixed at \$250.00
pursuant to 22 NYCRR 36.4(d).