MEMO DECISION/SHORT FORM ORDER

ORIGINAL

INDEX No. 32913-12

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

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/16/14
ADJ. DATES 5/30 14
Mot. Seq. # 003 - MG
CDISP: NO

DARBY GROUP COMPANIES, INC.,

Plaintiff,

-against-

WULFORST ACQUISITION, LLC, NEIL REGO, GEORGE HEINLEIN, PEOPLE'S UNITED BANK: as successor by merger to the Bank of Smithtown, OWEN CONSTRUCTION CORP., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and "JOHN DOE No. 1" TO "JOHN DOE No. XXX", inclusive the last names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises which is the subject of this action,

Defendants.

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Upon the following papers numbered 1 to 10 read on this motion by the plaintiff for summary judgment on its complaint; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ; Answering papers 5-7; Reply papers 8-9; 10; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#003) by the plaintiff for accelerated judgments on its complaint in this mortgage foreclosure action and the appointment of a referee to compute is considered under CPLR 3212, 3215 and RPAPL § 1321 and is granted.

The plaintiff commenced this action to foreclose an October 24, 2011 commercial mortgage given to the plaintiff by defendant, Wulforst Acquisition, LLC [hereinafter "Acquisition"]. The mortgage secured a consolidated, amended and restated the mortgage note of October 24, 2011 in the amount of $2,800,000.00 which the plaintiff advanced to defendant Acquisition. It encumbered vacant land that was intended to be developed with a residential subdivision contiguous to a golf course. Prior to October 24, 2011, both properties were in foreclosure due to the non-payment of multiple mortgages encumbering each parcel.

Prior to the October 24, 2011 closing of the plaintiff's loan, Wulforst Farms owned the subject premises and the second adjacent golf course was owned by a subsidiary thereof known as Rugby Group. In September of 2011, principals of Wulforst Farms, the Rugby Group and the plaintiff developed a plan to refinance the debt on both parcels by the purchase of both parcels to newly formed limited liability companies and by the purchase of the existing mortgages by defendants Rego and Heinlein, the subordination of the largest mortgage to the plaintiff's mortgage and the assignment of the remaining unsubordinated notes and mortgages to the plaintiff. On September 9, 2011, these parties entered into a Loan Purchase Agreement which contemplated the purchase of both parcels and of all mortgage debts on both properties. Title to the subject premises out of Wulforst Farms, LLC to defendant Acquisition would eventuate while title to the adjacent golf course property would be transferred by Rugby to a newly formed entity known as Fox Hill Acquisitions, LLC.

The agreement also contemplated that the plaintiff would, if required, replace certain Letters of Credit generated and issued by Peoples United Bank's [hereinafter PUB] predecessor-in-interest in favor of municipal agencies in the aggregate amount of $681,560.00 that were required by the Town of Riverhead. Two of these Letters of Credit issued as security for certain aspects of the development of the subject premises as planned in August of 2009 and on May 19, 2010 while a separate one issued in June of 2009 for the construction of a new club house on the separate golf course parcel. Although these letters of credit were denominated as "Irrevocable", they expired by their terms one year after the expiration date listed on the front. They were, however, subject to an automatic renewal for an additional one year period except where the Town advised 45 days prior to such date that the Letters of Credit would not be renewed.

Also executed on September 9, 2011 was a Loan Purchase and Sale Agreement [hereinafter "LPSA"] between defendants Rego and Heinlein and PUB by which PUB agreed to sell to Rego and Heinlein the prior mortgage loans it held that encumbered the subject premises and those on the adjacent parcel. Prior thereto, PUB's predecessor-in-interest, issued three Letters of Credit in favor of the Town of Riverhead, its Planning Board and Water District in connection with the development of the subject premises each of which, by their terms, expired in 2010.

The closing of the LPSA occurred on October 24, 2011. Thereat, PUB demanded defendants Rego and Heinlein to deposit of the sum of $681,560.00, the aggregate face amount of the Letters of Credit, into an account with the PUB under the terms of Cash Collateral Agreement governing such account so to insure PUB against payment liability under the terms of the previously issued Letters of Credit that had not been returned to it. Pursuant the terms of that Agreement, defendants Rego and Heinlein were required to deposit the sum of $681,560.00 in an account with PUB over which PUB was granted a first priority lien and a security interest as collateral for the security for the Letters of Credit obligations. PUB required proof of cancellation upon the written consent of the beneficiaries and the return of the Letters of Credit to PUB which the defendants agreed to provide within 90 days

of the execution of the Cash Collateral Agreement. The Cash Collateral Agreement thus imposed these obligations upon the defendants Rego and Heinlein. Failure to comply constituted a default which the Bank could remedy by withdrawal of the amounts on deposit in the reimbursement account established with PUB under the terms of the Cash Collateral Agreement. However, immediately following its execution, Rego and Heinlein assigned the Cash Collateral Agreement to the plaintiff who assumed the obligations of Rego and Heinlein thereunder. The account was allegedly funded by the plaintiff and the funds so deposited were ultimately released by PUB in September of 2012, after the plaintiff posted replacement Letters of Credit with Town officials.

The defendant mortgagor commenced this action by the filing of a summons with notice in October of 2012. It was followed by the filing and service of an amended summons and complaint in January of 2012. Therein, the plaintiff charges the mortgagor defendant with a continuing default in its payment obligations under the terms of the note and mortgage beginning on July 1, 2012. The remaining defendants are joined as party defendants by reason of their possession of some subordinate interest or lien in the premises, each of which, is subject to extinguishment upon the sale of the premises if granted by the court.

Only defendants Acquisition, Rego and Heinlein appeared by way of answer. Therein, they assert two affirmative defenses. The first sounds in fraudulent inducement and rests upon allegations that the mortgage is void because the closing at which Acquisition purchased the subject premises was fraudulently induced by misrepresentations regarding the full force and effect of the Letters of Credit made by the plaintiff at the time they were negotiating the September 9, 2011 Loan Purchase Agreement. The defendants claim that they would not have purchased the property absent these false representations by the plaintiff. The second defense is premised upon the existence of a prior commenced action by the answering defendants against the plaintiff and others in which the purported misrepresentations as to the existence and viability of the expired Letters of Credit which underlie the fraud defense asserted here, are raised as an affirmative claim for the recovery of money damages and declaratory relief. That action has been stayed by order of the Honorable Peter F. Mayer, J.S.C., as the plaintiff successfully moved to compel arbitration of the claims asserted therein by the defendants.

The defendants' claim of fraudulent inducement rests upon allegations that a principal of the plaintiff, Michael Askin, fraudulently represented that the Letters of Credit previously issued by PUB's predecessor-in-interest were in full force or would be replaced by the plaintiff if required by the Town as a condition of the development of the property. More particularly, defendant Heinlein alleges that in September of 2011, the plaintiff was a borrower under a defaulted $500,000.00 building loan given by PUB's predecessor-in-interest that was secured by a mortgage on the subject property then owned by Wulforst Farms. Michael Askin is alleged to have been in control of both Wulforst and the plaintiff and he allegedly approached defendant Rego with a plan to refinance the debts on the subject premises and the adjacent golf course property in which Rego had some exposure by the purchase thereof by two newly formed limited liability companies. Defendant Rego enlisted defendant Heinlein who met with Askin after which they agreed to purchase the $3,300,000.00 total mortgage debt, including the building loan in exchange for Darby's purchase money mortgage loan of $2,800,000.00. Defendant Heinlein allegedly told Askin that due to Acquisition's limited cash reserves, the Letters of Credit previously issued had to remain in place. It is further alleged that Askin represented that such Letters were in place and would be replaced if required. Based upon those representations, the defendants allege that they moved forward with the purchase of the debt obligations of Wulforst Farms and Darby from PUB and executed the Cash Collateral Agreement

pursuant to which they deposited $681,560.00 in the secured account with PUB to ensure the continued force and effect of the Letters of Credit thereby enabling Acquisition to immediately move forward with the development of the subject premises. Following the October 24, 2011 closing of the various transactions, defendant Heinlein purportedly learned from Town of Riverhead officials that development was precluded since the Letters of Credit were expired for some time and had not been replaced.

By the instant motion, the plaintiff seeks summary judgment on its complaint against the answering defendants, and in effect, default judgments against the remaining known defendants who failed to appear by answer and an order deleting as party defendants the unknown defendants listed in the caption, together with the appointment of a referee to compute as contemplated by RPAPL §1321. The answering defendants oppose the plaintiff's motion upon the grounds that they have raised questions of fact as to the plaintiff's entitlement to the remedy of foreclosure and sale due to the defendants' possession of their fraudulent inducement defense or, at the very least, that discovery should be had with respect thereto. For the reasons stated below, the motion is granted.

Entitlement to a judgment of foreclosure may be established, as a matter of law, where the plaintiff 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 (*see* ***Bank of Smithtown v 219 Sagg Main, LLC***, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***Solomon v Burden***, 104 AD3d 839, 961 NYS2d 535 [2d Dept 2013]; ***US Bank Natl. Ass'n v Denaro,*** 98 AD3d 964, 950 NYS2d 581 [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, 945 NYS2d 330 [2d Dept 2012]; ***HSBC Bank v Shwartz,*** 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; ***US Bank N.A. v Eaddy***, 79 AD3d 1022, 1022, 914 NYS2d 901 [2010]; ***Zanfini v Chandler***, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]). Here, the moving papers established the plaintiff's entitlement to summary judgment on its complaint to the extent it asserts claims against the answering defendants as it included copies of the mortgage, the unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; *see* ***Bank of Smithtown v 219 Sagg Main, LLC***, 107 AD3d 654, *supra*; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, *supra*; ***Solomon v Burden***, 104 AD3d 839, *supra*). The moving papers further established, prima facie, that the affirmative defenses asserted in the answer are without merit.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses asserted in their answer or otherwise 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]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]). Upon its review of the opposing papers, the court finds that no such questions of fact were raised.

Instruments such as deeds and mortgages that have been entered into by a party thereto whose execution thereof was fraudulently induced do not render such instruments void but only voidable (*see* ***Marden v Dorothy***, 160 NY 39, 54 NE 726 [1899]; ***Dalessio v Kressler***, 6 AD3d 57, 773 NYS2d 434 [2d Dept 2004]; ***Yin Wu v Wu***, 288 AD2d 104, 733 NYS2d 45 [1st Dept 2001]). While it has been held that a mortgage may not be set aside solely because the underlying transaction was tainted by a

fraudulent representation (*see* ***Joann Homes at Bellmore v Dworetz***, 25 NY2d 112, 302 NYS2d 799 [1969]; ***Dyke v Peck***, 279 AD2d 841, 719 NYS2d 391 [3d Dept 2001]), a fraudulently induced mortgage may give rise to a claim for its recision and/or money damages and may even be asserted as a defense but only in cases wherein recision is not sought (*see* ***Neighborhood Hous. Serv. of New York City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]; ***First Union Mtge. Corp. v Fern***, 298 AD2d 490, 749 NYS2d 42 [2d Dept 2002]; ***Norton Co. v C-TC 9th Ave. Partnership***, 198 AD2d 696, 603 NYS2d 364 [3d Dept 1993]; ***Bankers Trust N.Y. Corp. v Renting Off.***, 91 AD2d 1140, 1141, 458 NYS2d 720 [3d Dept 1983]). In addition, mortgagors often assert claims of fraud defensively in an effort to convince the court to invoke its equity powers and deny the plaintiff the remedy of foreclosure under case authorities which authorize the court to do so in cases where "estoppel, bad faith, fraud, or oppressive or unconscionable conduct" is established (***Nassau Trust Co. v Montrose Concrete Prods. Corp.***, 56 NY2d 175, 183, 451 NYS2d 663 [1982]; ***GMAC, LLC v Ray***,110 AD3d 1030, 973 NYS2d 922 [2d Dept 2013]; ***Liberty Pointe Bank v 75 E. 125th St., LLC***, 95 AD3d 706, 946 NYS2d 26 [1st Dept 2012]; ***Snyder v Potter***, 134 AD2d 664, 521 NYS2d 175 [3d Dept 1987).

To make out a claim for or defense premised on fraud in the inducement, the defendant must establish a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation and damages" (***Fromowitz v W. Park Assoc., Inc***., 106 AD3d 950, 965 NYS2d 597 [2d Dept 2013]; *quoting* ***Introna v Huntington Learning Ctrs., Inc***., 78 AD3d 896, 898, 911 NYS2d 442 [2d Dept 2010]; *see* ***Eurycleia Partners, LP v Seward & Kissel, LLP***, 12 NY3d 553, 559, 883 NYS2d 147 [2009]; ***County of Suffolk v Long Is. Power Auth.***, 100 AD3d 944, 954 NYS2d 619 [2d Dept 2012]). Where the facts allegedly misrepresented are not matters peculiarly within the knowledge of the presenter of such facts and the claimant has the means to discover the true nature of the transaction by the exercise of ordinary intelligence and fails to make use of those means, the defendant cannot claim justifiable reliance on misrepresentations of his adversary (*see* ***Danann Realty Corp. v Harris***, 5 NY2d 317, 320–321, 184 NYS2d 599 [1959]; ***DiBuono v Abbey, LLC***, 95 AD3d 1062, 944 NYS2d 280 [2d Dept 2012]; ***Urstadt Biddle Prop., Inc. v Excelsior***, 65 AD3d 1135, 885 NYS2d 510 [2d Dept 2009]).

Here, the answering defendants have no viable claim of reliance, let alone justifiable reliance, upon the purported misrepresentations of the plaintiff's principal Askin. The expiration date of the Letters of Credit were stated on the face thereof and subject to a single one year renewal period according to the terms of each Letter of Credit. Each of these Letters of Credit expired at the time of the defendants' negotiation of the purchase agreements and of course, the closing of the plaintiff's mortgage loans in October of 2011. The expiration dates were thus easily discoverable upon a simple reading of the Letters of the Credit and there is evidence in the record that copies thereof were in the possession of the defendants' transactional counsel as early as August of 2011. In any event, because the expiration dates of the Letters of Credit were not matters peculiarly within the knowledge of the plaintiff and the defendants had the means to ascertain the truth regarding the continued existence or viability of the Letters of Credit by simply reviewing the expiration dates set forth thereon, the defendants may not be heard to complain that they were wrongfully induced into entering into the mortgage by virtue of purported representations of Michael Askin. The court is thus left with mere allegations that one or more of the underlying transactions was tainted by a fraudulent representation which is insufficient to set aside a mortgage or to otherwise deny the mortgagee its contractual remedies in light of the mortgagor's default (*see* ***Jo Ann Homes at Bellmore, Inc. v Dworetz***, 25 NY2d 112, *supra*).

In addition, the record reflects the absence of any asserted claim for recision in this action or in the prior action commenced by the answering defendants in which they seek money damages due to these same purported misrepresentations and declaratory relief directing the plaintiff to post new Letters of Credit. Under the case authorities cited above, the absence of a claim for recision of the mortgage based upon the plaintiff's alleged acts of fraudulent inducement warrants a finding that the this defense is insufficient to defeat the plaintiff's motion for summary judgment (*see* ***Neighborhood Hous. Serv. of New York City, Inc. v Meltzer***, 67 AD3d 872, *supra*; ***First Union Mtge. Corp. v Fern***, 298 AD2d 490, *supra*; ***Norton Co. v C-TC 9th Ave. Partnership***, 198 AD2d 696, *supra*; ***Bankers Trust NY Corp. v Renting Off.***, 91 AD2d 1140, 1141, *supra*; *cf.* ***GMAC, LLC v Ray***, 110 AD3d 1030, *supra*).

Nor can the defendants' asserted defense of fraud be construed as sounding in an equitable estoppel defense. As indicated above, a mortgagee may be estopped by his conduct from foreclosing its mortgage lien to prevent a fraud or injustice to the person against whom enforcement is sought (*see* ***Nassau Trust Co. v Montrose Concrete Prods. Corp.***, 56 NY2d 175, 183, *supra*). However, "to defend against a summary judgment motion in a foreclosure action it is incumbent upon the real property owner who relies upon an estoppel defense to produce evidentiary proof in admissible form sufficient to require a trial of that defense as mere conclusions, expressions of hope, unsubstantiated allegations or assertions are insufficient" (***State Bank of Albany v Fioravanti***, 51 NY2 638, 435 NYS2d 947 [1980]). "The elements of estoppel are, with respect to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position" (***First Union Natl. Bank v Tecklenburg***, 2 AD3d 575, 577 769 NYS2d 573, 575 [2d Dept 2003] *quoting* ***Airco Alloys Div. v Niagara Mohawk Power Corp.***, 76 AD2d 68, 81–82, 430 NYS2d 179 [4th Dept 1980]; *see also* ***River Seafoods, Inc. v JPMorgan Chase Bank***, 19 AD3d 120, 796 NYS2d 71 [1st Dept 2005]).

Here, all allegations as to the purportedly false and misleading Letters of Credit representations and the purported affect on the defendants' ability to commence development of the subject premises are advanced only in the affidavit of defendant Heinlein. Such self serving and unsubstantiated allegations that alone are advanced as proof thereof are insufficient to raise any genuine question of fact regarding a lack of knowledge of the true facts, reliance nor any prejudicial change in the position of the defendants (*see* ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994]; *see also* ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]).

Rejected as unmeritorious are the nuanced allegations advanced in the affidavit of defendant Heinlein that the motion should be denied as premature since discovery proceedings have not been conducted. The rule at CPLR 3212(f), which governs such a claim, provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (***Martinez v Kreychmar***, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see* ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871[2d Dept 2012]).

In addition, the movant must show that his or her "ignorance was unavoidable and that reasonable attempts were made to discover the facts which would give rise to a triable issue of fact" (***Zheng v Evans***, 63 AD3d 791, 881 NYS2d 461 [2d Dept 2009]), as the "'mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered' by further discovery is an insufficient basis for denying the motion" (***Woodard v Thomas***, 77 AD3d 738 at 740, 913 NYS2d 103 [2d Dept 2010], *quoting*, ***Lopez v WS Distrib., Inc.***, 34 AD3d 759, 760, 825 NYS2d 516; *see* ***Friedlander Org., LLC v Ayorinde***, 94 AD3d 693, 943 NYS2d 538 [2d Dept 2012]). Defendants failed to demonstrate how further discovery may reveal or lead to relevant evidence, that facts essential to opposing the plaintiff's motion were within the exclusive knowledge and control of the plaintiff or ignorance was unavoidable and that reasonable attempts were made to discover the facts which would give rise to a triable issue of fact (*see* CPLR 3212[f]; ***Keybank Natl. Ass'n v Chapman Steamer Collective, LLC***, ___ AD3d ___, 2014 WL 2198414 [2d Dept 2014]; ***Zheng v Evans***, 63 AD3d 791, *supra*).

The court thus finds that the plaintiff is entitled to an award of summary judgment dismissing the answering defendants' two affirmative defenses and an award in favor of the plaintiff on its complaint against said defendants. Those portions of the instant motion wherein the plaintiff seeks such relief are granted pursuant to CPLR 3212.

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 default in answering on the part of the remaining defendants, none 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 against the answering defendants 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]; ***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]).

Proposed order providing for the appointment of a referee to compute, as modified by the court, has been marked signed.

DATED: 6/18/14

THOMAS F. WHELAN, J.S.C.