

George L. Penny, Inc. v Mattituck Dev. Corp.

2014 NY Slip Op 32199(U)

August 8, 2014

Sup Ct, Suffolk County

Docket Number: 002586-2012

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY



Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 04-29-2014
Motion Submit Date: 05-20-2014
Motion Sequence No.: 002 MOTD

_____X
GEORGE L. PENNY, INC.,

Plaintiff,

-against-

MATTITUCK DEVELOPMENT CORP., END OF THE ROAD LLC., MAUREEN M. MOONEY, DANIEL C. MOONEY, KIERNAN MOONEY, DEIRDRE MOONEY, BRENDAN MOONEY, HUDSON CITY SAVINGS BANK, PATCHOGUE PLATE GLASS CO., INC., SUFFOLK DESIGNER LIGHTING, INC., and NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Defendants.

_____X

In this action to foreclose on consolidated mortgages and notes and to enforce guaranties thereof, the plaintiff moves for, among other things, summary judgment and the appointment of a referee to compute the amount due and owing (Mot. Seq. 002). Defendants oppose the motion. Additionally, although they did not serve a notice of cross-motion in accordance with CPLR 2215, defendants Mattituck Development Corp. ("MDC"), End of the Road LLC ("ETR"), Maureen M.

Mooney, Kieran Mooney, Deirdre Mooney and Brendan Mooney request that summary judgment dismissing the complaint as asserted against them be granted.

Initially, that branch of plaintiff's motion seeking to substitute Maureen M. Mooney, as administrator of the Estate of Daniel C. Mooney in place of defendant Daniel C. Mooney, now deceased and amended the caption accordingly is granted as unopposed, the stay is vacated and the case is restored to the calendar.

It is well settled that a mortgagee establishes its prima facie entitlement to summary judgment in a foreclosure action where it produces both the mortgage and unpaid note, together with evidence of mortgagor's default (*see Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158, 1159 [2d Dept 2012]). A prima facie claim for a deficiency judgment based upon a written guaranty of payment is established by the production of the underlying agreements and evidence of a default on the part of the guarantor defendants (*see Archer Capital Fund, LP v GEL, LLC*, 95 AD3d 800 [2d Dept 2012]). Where the mortgagee makes such a showing, the burden shifts to the defendants "to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense 'such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff'" (*Solomon v Burden*, 104 AD3d 839 [2d Dept 2013], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467 [2d Dept 1997]). Speculative and conclusory allegations are insufficient to defeat summary judgment (*see, Boone v. Bender*, 74 AD3d 1111, 1113 [2nd Dept. 2010]). "A defendant in a mortgage foreclosure action who seeks to avoid summary judgment against it where there have been unquestionable defaults, must meet a threshold of believability if it claims that there was an oral promise to forgo or delay foreclosure. The bare assertion that certain representatives of the mortgagee made such a promise is not enough to create

an issue of fact” (*New York State Urban Dev. Corp. v. Marcus Garvey Brownstone Houses, Inc.*, 98 AD2d 767, 770 [2d Dept 1983]).

Here, plaintiff established its prima facie entitlement to judgment as a matter of law. With respect to the foreclosure claim, the Plaintiff submitted the mortgages, unpaid notes, and Consolidation and Extension Agreement, together with evidence of ETR’s default as set forth in the affidavit of George L. Penny, President of George L. Penny, Inc. With respect to the claim for a deficiency judgment based upon the Mooney defendants’ guarantees, plaintiff produced the underlying agreements and evidence of ETR’s default (*see Archer Capital Fund, LP v GEL, LLC*, 95 AD3d 800 [2d Dept 2012]).

In opposition, the defendants fail to raise a triable issue of fact as to any bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff. Contrary to the defendants’ contention, the letter from plaintiff’s counsel dated June 30, 2013 (“June Letter”), did not supercede the loan documents in any respect. There is no language in the June Letter expressing any intent of the parties that the terms therein were meant to supercede the terms of the loan documents. Nor is there any indication that the effect of the June Letter was to eliminate the guarantees by the individual Mooney defendants. Rather, the June Letter addresses pay off of the loan as part of a bankruptcy proceeding by ETR/MDC. Although such a bankruptcy proceeding was commenced, it is undisputed that it was dismissed before a plan of reorganization was approved by the Bankruptcy Court. Therefore, the terms of the June Letter were rendered moot and the pay off never occurred.

The issue of whether Hudson City Savings Bank has a right to redeem the property at issue or whether it has waived such right is not properly raised on the instant motion and, therefore, will

not be addressed at this time.

Plaintiff is also granted summary judgment dismissing the counterclaim asserted against it by defendant Patchogue Plate Glass Co. ("P.G."), Inc., a subordinate lien holder. Although P.G. may have an enforceable interest in any surplus monies following a foreclosure sale, it does not have a valid unjust enrichment claim against plaintiff for the value of its mechanics lien.

That branch of plaintiff's motion requesting the appointment of a referee is also granted.

Finally, that branch of plaintiff's motion seeking to amend the caption to delete the names of Defendants John Doe No.1 through John Doe No. 100 is also granted.

Based upon the foregoing, defendants' request for summary judgment dismissing the complaint as asserted against them is denied.

This constitutes the **DECISION** of the Court.

Submit Order.

**Dated: August 8, 2014
Riverhead, New York**



EMILY PINES
J. S. C.

FINAL
 NON FINAL

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