CIT Small Bus. Lending Corp. v Crossways Holding, LLC

2014 NY Slip Op 32449(U)

August 29, 2014

Sup Ct, Suffolk County

Docket Number: 061018/2013

Judge: Thomas F. Whelan

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[* 1]

MEMO DECISION/ORDER

INDEX No. 061018/2013

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

ORIGINAL

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4/22/14
SUBMIT DATE: 822/14
Mot. Seq. # 001 - MG
ORDER SIGNED
CDISP: NO

CIT SMALL BUSINESS LENDING CORPORATION,
Plaintiff

-against-

CROSSWAYS HOLDING, LLC, SHERESE SWEENEY LEONARD, DDS, PC, SHERESE T. LEONARD, and JOHN DOE 1 through JOHN DOE 10, the names of these last ten defendants, being fictitious, intended as persons: having some occupancy, lien or other interest in the mortgaged premises;
Defendants.

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Upon the following papers numbered 1 to 8 read on this motion by the plaintiff for summary judgment, the deletion of parties and the appointment of a referee to compute ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ______; Answering papers 5-6 ; Reply papers 7-8 ; Other ______; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for accelerated judgments against the defendants, the appointment of a referee to compute and other incidental relief is considered under CPLR 3212, 3215 and RPAPL 1321 and is granted

The plaintiff commenced this action to foreclose two mortgages given by the defendant, Crossways Holdings, LLC [hereinafter Crossways], on October 19, 2007 to secure two separate notes of the same date executed by Crossways and defendant, Sherese Sweeney Leonard, DDS, PC, in connection with a small business loan transaction funded by the plaintiff. The first note, in the amount of $440,000.00, was further secured by an Security Agreement on personalty executed by Crossways

and by an unconditional guaranty of the obligations of the obligors/mortgagor by defendant, Sherese T. Leonard. The second note in the amount of $424,000.00 was also further secured by a separate unconditional guaranty executed by defendant, Sherese T. Leonard.

The plaintiff claims that a default in payment under the terms of the first note and mortgage occurred on December 15, 2012 and that default in payment under the terms of the second note and mortgage on February 1, 2013. Following the issuance of default notices to the defendants, the plaintiff commenced this action seeking to foreclose the liens of both mortgages and for the recovery of deficiency judgments against the obligor and guarantor defendants. In addition, the plaintiff seeks foreclosure of the lien encumbering the personal property that is the subject of the security agreement securing the first note and mortgage. The mortgagor/obligor defendants and guarantor defendant, Sherese Sweeney Leonard, appeared herein by service of a joint answer containing eight affirmative defenses and three counterclaims seeking damages and attorneys fees.

The plaintiff now moves for an order: (1) awarding it summary judgment against the answering defendants together with dismissal of its affirmative defenses and counterclaims asserted in the answer of the defendants; and (2) deleting as party defendants certain named defendants; and (3) appointing a referee to compute amounts due under the subject mortgage. The motion is considered under CPLR 3215, 3212 1024 and RPAPL §1321 and is granted.

It well established that a prima facie case for foreclosure and sale is established by the plaintiff's production of the mortgage, the unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; ***KeyBank Natl. Ass'n v Chapman Steamer Collective, LLC***,117 AD3d 991, 986 NYS2d 598 [2d Dept 2014]; ***Independence Bank v Valentine***, 113 AD3d 62, 64, 976 NYS2d 504 [2d Dept 2014]; ***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]; ***Baron Assoc., LLC v Garcia Group Enters., Inc***., 96 AD3d 793, 793, 946 NYS2d 611 [2d Dept 2012]). To establish prima facie entitlement to judgment as a matter of law on the issue of liability with respect to a guaranty, a plaintiff must submit proof of the underlying note, a guaranty and the failure of the defendant to make payment in accordance with the terms of those instruments (*see* ***Griffon V, LLC v 11 East 36th, LLC***, 90 AD3d 705, 934 NYS2d 472 [2d Dept 2011]; ***Baron Assoc., LLC v Garcia Group Enter., Inc***., 96 AD3d 793, *supra*).

These standards are enlarged where, as here, an answer served includes the defense of standing (*see* ***Emigrant Mortg. Co., Inc. v Persad***, 117 AD3d 676, 985 NYS2d 608 [2d Dept 2014]). To be entitled to an award of summary judgment against an answering defendant who duly asserts a standing defense in its answer, the plaintiff must establish, prima facie, its standing to prosecute its claims (*see* ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Rivas***, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012]; ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d [2d Dept 2012]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see* ***US Bank of NY v Silverberg***, 86 AD3d 274, 279,

926 NYS2d 532 [2d Dept 2011]; ***Wells Fargo Bank, N.A. v Marchione***, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]; ***US Bank, N.A. v Collymore***, 68 AD3d 752, *supra*).

Here, the moving papers established, prima facie, the plaintiff's entitlement to summary judgment on its First, Second and Third causes of action against the mortgagor, obligor and guarantor defendants sounding in foreclosure and sale of the real and personal property encumbered, as such papers included copies of the mortgage, the unpaid notes, the guaranties and the other loan documents executed on together with due evidence of a default in payment by those obligated to make such payment (*see* CPLR 3212; RPAPL §1321; ***KeyBank Natl. Ass'n v Chapman Steamer Collective, LLC***, 117 AD3d 991, *supra*; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, *supra*; ***Solomon v Burden***, 104 AD3d 839, *supra*). The moving papers further demonstrated, that the plaintiff has standing to prosecute its clams for foreclosure and sale as it was the original lender who advanced the funds to the defendant mortgagor under the terms of the loan documents and that it maintained possession of the notes and the other documents continually to he the note prima facie, that the affirmative defenses and counterclaims asserted in the answer of the defendants 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]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832,880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, NA v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). Notably, self-serving and conclusory allegations do not raise issues of fact and do not require plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see* ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movants' papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see* ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also* ***Madeline D'Anthony Enter., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591[2d Dept 2010]).

In their opposing papers, the mortgagor/obligor defendants do not challenge the validity of the loan documents, their execution thereof or their defaults in payment under the terms thereof. Their challenges to the plaintiff's motion rest upon the procedural ground that the motion is premature due to the absence of discovery and the assertion of claims premised upon purported omissions, negligent or reckless acts and/or other conduct on the part of the plaintiff as the issuer of the small business loan under the terms of the transactional documents at issue in this action. This latter defense is premised upon the allegations that the loan was oppressive and unconscionable at the time it was made due to its unaffordability and the plaintiff's conduct in making such a loan under such circumstances should preclude it from enforcing its contractual remedies. Both of these grounds are rejected as umeritoious for the reasons stated below.

It is well established that while the remedy of foreclosure is equitable in nature and may be denied in cases of estoppel, bad faith, fraud or oppressive or unconscionable conduct *(see* ***Nassau Trust Co. v Montrose Concrete Prods. Corp.***, 56 NY2d 175, 183, 451 NYS2d 663, 667 [1982]; ***Ferlazzo v Riley***, 278 NY 289, 16 NE2d 286 [1938]), a foreclosure action is in the nature of a proceeding in rem to appropriate the land and, as such, is unlike most other equity actions which operate in personam (*see* ***Jo Ann Homes v Dworetz***, 25 NY2d 112, 302 NYS2d 799 [1969]). This distinction is not without a difference as it compels a vastly more limited application of equitable principles to foreclosure actions than to other actions equitable in nature. A court's resort to equity to deny the remedy of foreclosure is thus limited to cases wherein there is clear and convincing evidence of fraud, exploitive overreaching or unconscionable conduct on the part of the obligee to exploit an inadvertent, inconsequential, technical, non-prejudicial default by the mortgagor (*see* ***Cohn v Middle Rd. Riverhead Dev. Corp.***, 162 AD2d 578, 556 NYS2d 764 [2d Dept 1990]; ***Key Intern. Mfg. Inc. v Stillman***, 103 AD2d 475, *supra*; ***Karas v Wasserman***, 91 AD2d 812, 458 NYS2d 280 [3d Dept 1982]; *see also* ***Federal Home Loan Mtge. Corp. v Bronx New Dawn***, 1995 WL 412399, [SDNY 1995]; *cf.*, ***Graf v Hope Bldg. Corp.***, 254 NY 1, *supra*).

It is equally well established that a lender has no fiduciary or other heightened duties owing to a borrower in transactions arising from a credit transaction (*see* ***Rakylar v Washington Mut. Bank***, 51 AD3d 995, 858 NYS2d 759 [2d Dept 2008]; ***Standard Fed. Bank v Healy***, 7 AD3d 610, 777 NYS2d 499 [2d Dept 2004]). "The fact that the plaintiff sought and received a loan [that] he [allegedly] could not afford does not mean that he can now proceed against the party that made his [purported] mistake possible" (***Patterson v Somerset Investors Corp.***, 96 AD3d 817, 946 NYS2d 217 [2d Dept 2012]; *see also* ***Aydin v Opteum Financial Services, LLC***, 2014 WL 2612516 [E.D.N.Y 2014]). Moreover, evidence that the plaintiff's decision to lend money to a mortgagor was unwise for any reason is insufficient by itself to raise a triable issue of fact as to whether the plaintiff engaged in fraudulent or unconscionable conduct so as to defeat a motion for summary judgment in a foreclosure action (see ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). This is especially so where, as here, the defendant obligors accepted the benefits of the contract for a significant length time but after defaulting, urges a defense based upon the plaintiff's purportedly wrongful conduct (*see* ***Feinstein v Levy***, 121 AD2d 499, 503 NYS2d 821 [1st Dept 1986]; ***Ricca v Ricca*** 57 AD3d 868, 869, 870 NYS2d 419 [2d Dept 2008]). Finally, it is clear "that New York law does not recognize a cause of action against banks for commercial bad faith unless the institution has itself acted dishonestly by becoming a participant in a fraudulent scheme" (***LPP Mortgage, Ltd. v Card Corp.***, 17 AD3d 103, 793 NYS2d 346 [1st Dept 2005]). The defendants' asserted defenses are thus without merit.

To the extent that the defendants' opposition rest upon claims that the remedy of foreclosure and sale is simply too harsh and should thus be denied by the court under the circumstances of this case, such claims they also lacking in merit. The Second Department's recent reiteration of the long standing rule that "the stability of contract obligations must not be undermined by judicial sympathy" casts serious doubt upon the efficacy of any "harshness" defense (***Emigrant Mtge. Co., Inc. v Fisher***, 90 AD3d 823, 935 NYS2d 313 [2d Dept. 2011], *quoting* ***First Natl. Stores v Yellowstone Shopping Ctr.***, 21 NY2d 630, 638, 290 NYS2d 721 [1968], *quoting* ***Graf v Hope Bldg. Corp.***, 254 NY 1, 4–5, *supra*; *see also* ***Independence Bank v Valentine***, 113 AD3d 62, *supra*). Any resort to equity under

the circumstances of this case would violate the clear proscription against the undermining of the stability of contracts.

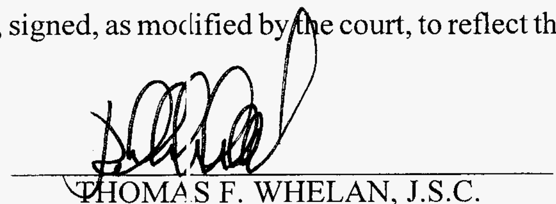
The mortgagor/guarantor defendants' procedural challenge rests upon claims that the motion should be denied as premature so as to afford the defendants the opportunity to engage in discovery as contemplated by CPLR 3212(f). The rule at CPLR 3212(f) provides that "should it appear from affidavits submitted 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]). 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 Organization, LLC v Ayorinde***, 94 AD3d 693, 943 NYS2d 538 [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 (2d Dept 2006]; *see* ***Friedlander Organization, LLC v Ayorinde***, 94 AD3d 693, 943 NYS2d 538 [2d Dept 2012]).

Here the defendants' demands for discovery relate to the defenses and counterclaims asserted in their answer which have herein been found to be lacking in substantive merit. Under these circumstances, the defendants cannot show that the discovery sought "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" (see ***Martinez v Kreychmar***, 84 AD3d 1037, *supra*).

In view of the foregoing, the instant motion (#001) is granted. The plaintiff is awarded summary judgment dismissing the affirmative defenses and counterclaims asserted in the answer of the obligor/mortgagor/guarantor defendants. The plaintiff is further awarded summary judgment on its complaint and to the appointment of a referee to compute amounts due under the subject notes and mortgages.

Proposed order appointing a referee to compute, signed, as modified by the court, to reflect the terms this memo decision and order.

Dated: August 29 2014



THOMAS F. WHELAN, J.S.C.