2390 Creston Holdings LLC v Bivins
2015 NY Slip Op 32453(U)
December 23, 2015
Supreme Court, New York County
Docket Number: 850261/14
Judge: Kelly O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

2390 CRESTON HOLDINGS LLC and GALSTER FUNDING LLC,

Plaintiffs,

Index No. 850261/14

-against-

OLIVER BIVINS, II, INDIVIDUALLY; OLIVER BIVINS, II, AS ADMINISTRATOR OF THE ESTATE OF LORNA M. BIVINS; EDWARD MERMELSTEIN; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; THE UNITED STATES OF AMERICA; THE UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE; STATE OF NEW YORK; "JOHN DOE 1-10" and "JANE DOE 1-10" said names being fictitious parties intended being possible tenants, occupants, persons or corporations, if any, having an interest in or lien upon the premises, described in the complaint,

Defendants.

HON. KELLY O'NEILL LEVY; J.

In this action arising out of a mortgage loan in the principal sum of $2,400,000.00, secured by an apartment building located at 39 East 67th Street, New York, New York (the Premises), defendant Oliver Bivins, II, individually and as administrator of the estate of Lorna M. Bivins (the Estate),[1] moves, pursuant to 3212, for summary judgment dismissing the action. Plaintiffs 2390 Creston Holdings LLC and Galster Funding LLC cross-move, pursuant to CPLR 3212, for summary judgment in

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[1] No other defendants have appeared on this motion.

their favor and to strike the amended answer, affirmative defenses and counterclaims asserted by defendants, and to amend the caption.

Nonparty North Fork Bank entered into a consolidated note and mortgage with Lorna M. Bivins (the Decedent) on November 8, 2005, with respect to a loan secured by the Premises. The consolidated note and mortgage was recorded on November 28, 2005. The monthly installment payment of principal, interest and tax escrow was approximately $25,000. North Fork Bank was succeeded in interest by Capital One, N.A. (Capital One).

The Decedent died on February 25, 2011, and her son, defendant Oliver Bivens, II (Bivens) was appointed as administrator of the Estate in March 2011.

By letter dated September 21, 2012, Capital One claimed that the monthly installment payments on the note and mortgage due July 1, 2012, August 1, 2012 and September 1, 2012 were unpaid (Acceleration Letter). Capital One stated that it declared the outstanding principal amount of the loan and all interest to be due and payable, and that the unpaid principal balance of the note would accrue interest at the default rate provided in the note, which was 24%. Exhibit 3. The letter included a reservation of rights, including that any delay in enforcing its rights would not constitute a waiver of those rights.

A few days after receiving the letter, the Estate paid

$75,000 to Capital One in order to reinstate the loan. Capital One sent the Estate a statement, dated October 22, 2012, which shows that $75,000 was credited to the Estate's account, shows interest accrual for October of 24%, and an adjustment for that same period reducing the total amount accrued ($43,233.88) by $28,844.67, which brings the interest charged for that period to 6%. The statement further shows that there is no amount past due, and explicitly states that the interest on the loan is 6%, which was the previous rate of interest on the loan. Exhibit 7. Similarly, the year-end loan statements for 2012 and 2013 show that the year-end interest rate for the loan was 6%. Exhibits 4 and 5.

The consolidated note and mortgage provides that the agreement "cannot be changed orally but only in writing by the person to be charged." Exhibit A, ¶ 32. It does not provide that the writing must be signed or executed, nor does it require any particular format.

The Estate continued to pay the monthly payments, as shown on the invoices, for the next 20 months. The statements continued to reflect a 6% interest rate, up to and including the May 20, 2014 invoice, which showed a monthly payment due on June 2, 2014 of $25,900.28. Exhibit 8. On May 23, 2014, Capital One assigned the mortgage and note to plaintiff 2390 Creston Holdings LLC (Creston). On the same date, Creston granted Galster Funding

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LLC (Galster) a security interest in the consolidated note and mortgage by executing a collateral assignment of mortgage in favor of Galster. Exhibit C. Galster reassigned its interest back to Creston on October 27, 2014. Exhibit D.

On or about May 29, 2014, the Estate paid the $25,900.28 installment due on June 2, 2014. Exhibit 13. Plaintiffs, by their attorney, on that same date sent the Estate a demand letter for "immediate payment of the entire unpaid principal balance plus interest, late charges, escrow deficit and advances or expenses paid on your behalf (if any) and all other charges pursuant to the Consolidated Note and Mortgage." Exhibit 9. The attorney attached a copy of the Acceleration Letter dated September 21, 2012. Plaintiffs also returned the check that the Estate had sent, enclosing it in a letter claiming that it was rejecting the payment. Exhibit 14. Plaintiffs demanded over $1.1 million in interest at the default rate. They later commenced this action.

In October 2014, while this action was pending, plaintiffs and defendants executed a stipulation permitting the closing of the sale of the Premises to a third party, subject to certain conditions, including defendants' deposit of $2.5 million in escrow pending settlement of this dispute. Defendants paid the amount of undisputed principal and interest at the note rate of 6%, plus fees and disbursements, including a prepayment penalty

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and attorneys' fees. Those amounts were paid at the closing on October 28, 2014. Exhibits 19 and 20.

Defendants now seek summary judgment dismissing the complaint in its entirety.

Plaintiffs cross-move for default interest on the note and mortgage from September 21, 2012 through November 26, 2014, in the sum of $865,671.44; per diem interest in the sum of $577.11 from November 27, 2014 through and including the date upon which they receive the $865,671.44; an order directing plaintiffs' attorney (Harry Zubli, Esq.) and defendants' attorney (Vernon Ginsburg LLP) to disburse to plaintiff so much of the $2.5 million escrow funds held by them as necessary in order to pay and satisfy the judgment; and for leave to amend the caption so as to remove plaintiff Galster.

DISCUSSION

Defendants maintain that they are entitled to summary judgment on their first affirmative defense and counterclaim because plaintiffs' predecessor in interest reinstated the consolidated note and mortgage, and defendants are not in default under the reinstated loan.

Plaintiffs argue that the loan was never reinstated, and that they are entitled to default interest on the loan from the time that the loan was accelerated.

Plaintiffs rely on case law that concludes that computer-

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generated statements cannot be relied upon to demonstrate that the loan was reinstated (*Flushing Unique Homes, LLC v Brooklyn Fed. Sav. Bank*, 100 AD3d 956, 958 [2d Dept 2012] [monthly statements generated after maturity date did not constitute a waiver of preconditions to extending the term of a loan]), and also maintain that unless Capital One expressly retracted the Acceleration Letter with another signed letter, the loan was not reinstated. They further maintain that, because defendants did not proffer the full amount of arrears, the loan could not be reinstated. Plaintiffs are mistaken.

First, defendants are not relying on statements that were merely continuations of the statements that they had received prior to receiving the Acceleration Letter. Rather, the October statement shows that Capital One accepted the $75,000 payment that defendants offered, and thereafter revised their records to show that it retracted the demand for 24% default interest, and reverted to the 6% interest under the original loan. The statement shows that Capital One had charged the Estate default interest, but then credited it with the difference, and the statement shows that there was no other payment due. While plaintiffs contend that the reinstatement was required to be by a signed document, they do not support that averment with any terms in the note. Rather, the agreement provides only that any modification must be in writing by the person to be charged.

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Here, the October statement is a writing by Capital One, plaintiffs' predecessor in interest, which is the entity to be charged. Having expressly adjusted the interest amount and the interest percentage, Capital One, in writing, demonstrated that it was reinstating the original loan. *Cf. EMC Mtge. Corp. v Patella*, 279 AD2d 604, 606 (2d Dept 2001).

The fact that defendants did not proffer the full amount of arrears, as calculated by plaintiffs, does not alter this conclusion. While it is true that defendants may not have had a right to a reinstatement of the loan with the payment of $75,000, Capital One certainly had the option of reinstating the loan. The fact that it did so is demonstrated in the October 2012 statement. In the cases upon which plaintiffs rely, in contrast, the lenders informed the borrowers that acceptance of partial payment did not alter their obligation to pay the accelerated amount in full, and the lender did not affirmatively act to revoke the acceleration, but merely accepted partial payments. *See e.g. UMLIC VP, LLC v Mellace*, 19 AD3d 684, 684 (2d Dept 2005); *Lavin v Elmakiss*, 302 AD2d 638, 639 (3d Dept 2003).

The October 2012 statement, together with the year-end statements for 2012 and 2013 are ample proof that Capital One reinstated the interest rate of 6%. Plaintiffs have not brought forth any evidence to counter the only reasonable conclusion to be arrived at based upon the documentary evidence. The

Acceleration Letter, reserving Capital One's rights, does not negate Capital One's later affirmative action in reinstating the loan. This is not a case where it is mere inaction or delay in asserting one's rights that is implicated. Rather, Capital One expressly reversed the default interest rate and the default interest charges. The only logical conclusion is that it reinstated the loan, and plaintiffs have not offered any other reasonable explanation for Capital One's affirmative action.

Consequently, defendants are entitled to summary judgment dismissing the complaint, and the court need not reach the questions of whether plaintiffs waived their rights to enforce the acceleration of the loan, or are estopped from so doing.

CONCLUSION

Accordingly, it is hereby

ORDERED that the summary judgment motion of defendant Oliver Bivins, II, individually and as administrator of the Estate of Lorna M. Bivins is granted and the complaint is severed and dismissed as against said defendants with costs and disbursements as taxed by the Clerk, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiffs' cross motion is denied in its entirety.

Dated: December 23, 2015

ENTER: Kelly O'Neill Levy

J.S.C.

HON. KELLY O'NEILL LEVY