

Nautilus Capital LLC v 5th St. Parking LLC
2018 NY Slip Op 31112(U)
May 31, 2018
Supreme Court, New York County
Docket Number: 850015/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

INDEX NO. 850015/2017

NAUTILUS CAPITAL LLC,

Plaintiff,

MOTION SEQ. NO. 002

- v -

5TH STREET PARKING LLC AND MYLENE LIGGETT,

Defendants.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for VACATE ORDER/JUDGMENT

Upon the foregoing documents, it is ordered that the motion is denied.

Plaintiff Nautilus Capital LLC ("Nautilus") commenced this action against defendants 5th Street Parking LLC ("5th Street") and Mylene Liggett ("Liggett") (collectively "defendants") to foreclose on a commercial mortgage against property known as 1994-2002 and 1998 Madison Avenue, New York, New York. Doc. 1.1 Defendants now move, pursuant to CPLR 5015, to vacate a decision and order of this Court, dated April 12, 2018, which, inter alia, granted Nautilus summary judgment and appointed a referee to compute damages. After oral argument, and after consideration of the parties' papers and the relevant statutes and case law, the motion is denied.

1 All references are to the documents filed with NYSCEF in this matter.

FACTUAL AND PROCEDURAL BACKGROUND:

Nautilus commenced the captioned action against 5th Street and Liggett by filing a summons and complaint on January 12, 2017. Doc. 1.² Defendants joined issue by service of their answer, which they filed with this Court on February 26, 2017. Doc. 6.

In the complaint, Nautilus alleged that, on or about April 30, 2015, 5th Street executed a promissory note in the amount of \$2 million, evidencing a loan by Nautilus to 5th Street, and 5th Street executed a mortgage and security agreement securing repayment of the loan. *Id.*, at pars. 7-8. On or about the same date, Liggett, sole member of 5th Street, executed a guaranty of all of the indebtedness owed by 5th Street. *Id.*, at par. 12; Doc. 28, at par. 3. The note required 5th Street to pay 10% interest during the first year of the loan and, if the note was renewed, 11% during the second year of the note term. Ex. B to Doc. 1, at pars. 3(a) and 3(b). In the event defendants defaulted on the note, the interest rate was to increase to 24%. Ex. B to Doc. 1, Note, at par. 11(f); Ex. B to Doc. 1, Mortgage, at Sec. 3.6.

On or about August 5, 2016, 5th Street defaulted by failing to make a payment due on August 1, 2016. Doc. 1, at par. 13. Despite Nautilus' demand for accelerated payment of the note, defendants failed to pay the amount owed. *Id.*, at pars. 14-15. Nautilus claimed that, as of December 22, 2016, defendants owed it \$2 million plus accrued and unpaid interest at the default rate of 24% per annum from August 1, 2016, plus attorneys' fees and other expenses arising from the default. *Id.*, at par. 19.

Nautilus subsequently moved, *inter alia*, for summary judgment on the complaint, to dismiss defendants' affirmative defenses, and for the appointment of a referee to compute damages. Docs. 8-12. The motion was initially returnable on June 26, 2017. Doc. 8. That day,

² Nautilus has withdrawn claims against certain unidentified defendants initially named as defendants.

defendants submitted a “Request for Adjournment” until July 31, 2017 due to their attorney’s “time constraints and travel” which, they maintained, “rendered it impossible to timely oppose [Nautilus’] motion.” Doc. 16. On July 24, 2017, the parties stipulated to a final adjournment of the motion until August 4, 2017. Doc. 17. Pursuant to the stipulation, defendants were to serve their opposition papers no later than July 28, 2017. *Id.* By interim order dated October 31, 2018, this Court ordered 5th Street to retain counsel within 30 days “or a default will be entered against it.” Doc. 19.³ Despite the prior final stipulated adjournment, this Court adjourned the motion until December 12, 2017 and directed that opposing papers, if any, were to be served by December 1, 2017. *Id.* Defendants failed to serve opposition to the motion and, by order dated April 12, 2018, this Court granted plaintiff summary judgment on the complaint, dismissed defendants’ affirmative defenses, amended the caption to remove unidentified individuals and entities initially named as defendants, and appointed a referee to compute damages. Doc. 20.

On May 11, 2018, defendants moved, by order to show cause, to “set aside the April 12 [o]rder” pursuant to CPLR 5015(a) and to restore this case to the calendar. Doc. 35. Defendants obtained a temporary restraining order preventing Nautilus from taking any steps in furtherance of the April 12, 2018 order pending the May 30, 2018 hearing of their application. *Id.*

In support of the application, defendants’ attorney argued that the order should be vacated in the interest of justice and as a matter of public policy given “that there is an issue of fact as to whether the loan upon which [Nautilus] seeks relief violates the New York Criminal Usury Statute . . . [and] should therefore be declared void and unenforceable.” Doc. 28, at par. 28. Defendants’

³ Defendants did not retain their current counsel until May 8, 2018. Doc. 28. It is unclear from NYSCEF when their initial attorneys, Levy & Nau, P.C., ceased representing 5th Street but it was clearly sometime between July 24, 2017, when that firm agreed to a final adjournment of plaintiff’s summary judgment motion, and October 31, 2017, when this Court directed 5th Street to obtain new counsel. Docs. 17 and 19. Liggett directed Levy & Nau to cease representing her on April 2, 2018. Doc. 25. Charles Higgs, Esq. filed a notice of appearance as counsel for defendants on May 11, 2018. Doc. 34.

attorney further asserts that the order should be vacated on the ground that plaintiffs failed to demonstrate their entitlement to summary judgment.

In an affidavit in support of the motion, Liggett states, inter alia, that:

[Nautilus] has provided me with a payoff letter, which alleges that the [a]mount due on the loan as of April 30, 2018 is \$2,927,113.40, consisting of:

Principal	\$2,000,000
Interest	\$850,666.67
Administrative Fee	\$1,500
Real Estate Tax	\$44,405.59
Legal Fees	\$30,541.14

Doc. 31, at par. 17.

Liggett maintains that the interest charged on the loan was in excess of 25% and therefore violated New York’s criminal usury law. This, she asserts, establishes a meritorious defense to plaintiff’s claim. She further argues that, because she and 5th Street “were without counsel as of April 2, 2018, the action and any pending motions should have been stayed to provide [her] with the opportunity to retain counsel.” Id., at par. 19.

In opposition to the motion, Nautilus argues that the interest rate of 10% for the first year of the loan term and 11% for the second year of the loan term increased to an interest rate of 24% upon default in accordance with the note and the mortgage, and thus did not violate New York’s criminal usury statute. Nautilus further asserts that the other fees, such as origination, prepayment and satisfaction fees, as well as attorneys’ fees (Ex. B to Doc. 1, at par. 7), did not render the loan usurious.

LEGAL CONCLUSIONS:

CPLR 5015 provides, in pertinent part, as follows:

Relief from judgment or order

(a) On Motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry.⁴

“A defendant seeking to vacate a default under [CPLR 5015(a)] must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action” (*Eugene Di Lorenzo, Inc. v A. C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]).” *Shmuklyer v Feintuch Communications, Inc.*, 158 AD3d 469, 470 (1st Dept 2018).

Defendants have failed to set forth a reasonable excuse for failing to oppose the motion for summary judgment. Although Liggett argues that since she and 5th Street “were without counsel as of April 2, 2018, the action and any pending motions should have been stayed to provide [her] with the opportunity to retain counsel” (Doc. 31, at par. 19), this contention is disingenuous. As noted above, Nautilus’ motion for summary judgment was initially adjourned at defendants’ request due to their attorney’s “time constraints and travel” which, they maintained, “rendered it impossible to timely oppose [the said] motion.” Doc. 16. On July 24, 2017, at which time defendants were still represented by counsel, the parties stipulated to a final adjournment of the motion until August 4, 2017. Doc. 17. Pursuant to the stipulation, defendants were to serve their opposition papers no later than July 28, 2017. *Id.*

⁴ Defendants do not specify that they are moving under CPLR 5015(a)(1) but, since they argue that there was a reasonable excuse for their default, it is evident that they rely on this subdivision.

Despite the stipulated final adjournment, however, this Court, by interim order dated October 31, 2018, adjourned the motion once again, this time until December 12, 2017, and directed that defendants file opposition papers no later than December 1, 2017. Doc. 19. This Court also ordered 5th Street to retain counsel within 30 days “or a default will be entered against it.” Id. Nevertheless, defendants failed to serve opposition to the motion and, by order dated April 12, 2018, this Court granted plaintiff’s motion. Doc. 20. Given the clear mandate of this Court’s October 31, 2017 order, and since Liggett did not discharge her attorneys, Levy & Nau P.C., until April 2, 2018, the assertion by defendants’ attorney that “[d]efendants appear to have been unaware of the pending deadline [by] which they were required to file [opposing papers]” (Doc. 28, at par. 24) is speculative and begs credulity.

Further, the record is devoid of any indication that 5th Street retained counsel within 30 days of this Court’s interim order dated October 31, 2017. Indeed, current counsel for defendants was not retained until May 11, 2018, after Nautilus’ motion for summary judgment was decided on April 12, 2018. Docs. 20, 34.

Since defendants’ proffered excuse for their default was not reasonable, this Court need not address whether they established a potentially meritorious defense. *See Hertz Vehicles LLC v Westchester Radiology & Imaging, PC*, 2018 Slip Op 03609 (1st Dept, May 17, 2018). In any event, however, defendants failed to make such a showing. Although they contend that the interest they were charged violated New York’s criminal usury law, they fail to explain how this alleged violation of the law occurred. Although Liggett maintains that Nautilus “provided her with a payoff letter” stating that the amount due on the loan as of April 30, 2018 was \$2,927,113.40, consisting of principal (\$2,000,000); Interest (\$850,666.67); Administrative Fee (\$1,500); Real Estate Tax (\$44,405.59); and Legal Fees (\$30,541.14) (Doc. 31, at par. 17), defendants fail to

annex a copy of the “payoff letter” to their motion. Further, since defendants fail to provide any information regarding how this alleged amount of interest was calculated, this Court cannot determine whether it was excessive. Thus, defendants have failed to fulfill their “heavy burden of proving [criminal usury] by clear and convincing evidence (citations omitted).” *Roopchand v Mohammed*, 154 AD3d 986, 988 (2d Dept 2017).⁵

The motion is also denied to the extent defendants seek to vacate this Court’s April 12, 2018 order on the merits. Specifically, as noted above, defendants assert that Nautilus’ motion for summary judgment should have been denied on the ground that it did not establish its entitlement to that relief. This Court notes that this branch of defendants’ motion essentially seeks reargument of the April 12, 2018 order. However, since the motion is not “identified specifically” as a motion to reargue, as required by CPLR 2221(d)(1), it must be denied on this basis alone. Moreover, motions for reargument must be based on facts or law which were “allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” CPLR 2221(d)(2). Since defendants did not oppose Nautilus’ motion for summary judgment, they necessarily could not have raised the issue of criminal usury, the sole basis on which they seek to vacate this Court’s April 12, 2018 order (Doc. 28, at par. 28), in connection with their prior motion.

Therefore, in accordance with the foregoing, it is hereby:

⁵ This Court further notes that, although defendants claim that Nautilus exceeded the legal interest rate by charging for, inter alia, attorneys’ fees and origination fees, such fees are not considered interest. *See Marion Blumenthal Trust v Arbor Commercial Mtge. LLC*, 40 Misc3d 1215(A) (Sup Ct New York County 2013), citing 3 NYCRR 4.1; 3 NYCRR 4.2. Defendants further assert that a prepayment fee contributed towards rendering the loan usurious. However, there is no basis for this contention given the concession by defendants’ counsel at oral argument that his clients did not prepay the loan.

ORDERED that the motion by defendants 5th Street Parking LLC and Mylene Liggett is denied in all respects; and it is further

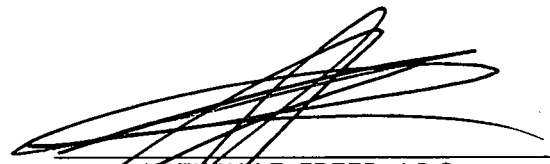
ORDERED that all stays are vacated; and it is further

ORDERED that plaintiff Nautilus Capital LLC is to serve a copy of this order with notice of entry on defendants, as well as on the County Clerk's Office (Room 141B), within 20 days hereof; and it is further

ORDERED that this constitutes the decision and order of the court.

5/31/2018

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE