

<b>Provident Bank v Shah</b>
2018 NY Slip Op 32719(U)
October 22, 2018
Supreme Court, New York County
Docket Number: 850162/2017
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I. A. S. PART 47**

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THE PROVIDENT BANK,

Plaintiffs,

INDEX NO.: 850162/2017

SEQ. NO.: 001

-against-

**DECISION  
AND ORDER**

KEDAR R. SHAH; HRIETU SHAH; RAMESH B. SHAH; HRIETU SHAH AND RAMESH B. SHAH, TRUSTEES OF THE KS IRREVOCABLE TRUST; NEW YORK STATE DEPT OF TAXATION AND FINANCE; BOARD OF MANAGERS OF THE ONE UNION SQUARE EAST CONDOMINIUM; ITRIA VENTURES, LLC, and "JOHN DOE 1 to JOHN DOE 25", said names being fictitious, the persons or parties intended being the person, parties, corporations or entities, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

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X

**PAUL A. GOETZ, J.:**

This is an action to foreclose a mortgage on real property known as 1 Irving Place, Unit # P14B, New York, New York 10003 (subject property).

Plaintiff, The Provident Bank, moves pursuant to CPLR 3212 for an order (1) granting it summary judgment against the individual defendants, Kedar R. Shah, Hrietu Shah, and Ramesh B. Shah (Shah defendants), as well as Hrietu Shah and Ramesh B. Shah as Trustees of the KS Irrevocable Trust, on the grounds that there are no triable

issues of fact in this proceeding; (2) granting a default judgment in its favor pursuant to RPALP §1321 against non-answering defendants, New York State Department of Taxation and Finance, Board of Managers of One Union Square East Condominium and Itria Ventures, LLC; (3) deleting from the caption the reference to "John Doe 1 to John Doe 25"; and (4) referring this action to a referee to ascertain and compute the amount due to plaintiff for principal and interest under the mortgage and for additional sums due plaintiff. Plaintiff also requests that the court order the referee to examine and report whether the mortgaged premises should be sold in one parcel or in multiple parcels.

The Shah defendants oppose plaintiff's motion for summary judgment and cross-move for an order dismissing the amended complaint pursuant to RPAPL §1301, or in the alternative, referring this matter to the Foreclosure Settlement Conference Part.

#### I. Background

On November 27, 2012, plaintiff entered into a commercial loan (Loan) with Bennigan's Saddlebrook, LLC d/b/a Bennigan's Grill and Tavern (Bennigans) in the principal sum of \$985,000. The loan was memorialized by a note (Note) which was executed on November 27, 2012 by defendants Kedar Shah and Suketu Shah in their capacity as "Managers" of Bennigans (Jones affidavit, exhibit 1 at 6). The Loan was secured by certain mortgages and guaranties. Specifically, the Shah defendants, in their individual capacities, executed a mortgage (Mortgage) for their residence, the subject property (*id.*, exhibit 4 at 5). The subject property is one unit in the Park Tower of the

premises known as One Union Square East Condominium. As further consideration for the loan, defendant Ramesh Shah executed an Unconditional Limited Guaranty. As collateral security for his obligation under this guaranty, Ramesh Shah pledged his interest in the subject property (*id.*, exhibit 2 at 6). Likewise, defendants Kedar Shah and Hrietu Shah each executed Unconditional Guarantees pledging their respective interests in the subject property as security for the repayment of the loan (*id.*).

On February 1, 2016, Bennigans failed to make the required monthly payment and failed to do so each and every month thereafter (*id.*, at 5 ¶20). Plaintiff applied escrow funds to satisfy the monthly installment payments from February 2016 thru July 2016 (*id.*, at 5 ¶ 21).

On August 8, 2016, plaintiff issued a default notice to Bennigans and the Shah defendants, accelerated the outstanding balance and demanded immediate payment in full (*id.*). Plaintiff alleges that, after the Shah defendants were notified of the default, defendant Kedar Shah fraudulently transferred his interest in the subject property to the KS Irrevocable Trust (*id.*).

On January 17, 2017, plaintiff filed a commercial foreclosure action in New Jersey seeking to foreclose a second mortgage given by non-parties Suketu Shah, Jayana Shah and Chandrakant Shah (New Jersey mortgagors) against their residential property located at 29 Bloomfield Avenue, Township of Woodbridge, New Jersey (New Jersey property). Plaintiff did not obtain a money judgment or a deficiency judgment on the mortgage debt

in the New Jersey action, but did obtain a final judgment of foreclosure which allowed plaintiff to complete a sheriff's sale of the New Jersey property. Plaintiff scheduled a sheriff's sale of the New Jersey property, but adjourned the sale and ultimately reached an agreement with the New Jersey mortgagors, whereby it was agreed plaintiff would accept a payment in the sum of \$216,000 from Suketu Shah as partial satisfaction of the outstanding indebtedness of the New Jersey mortgagors (*id.*, at 6 ¶26). Plaintiff commenced the instant New York action on July 25, 2017. After commencing the instant action in New York, plaintiff agreed to voluntarily dismiss the New Jersey action and discharge the New Jersey mortgage. Plaintiff credited the \$216,000 to the Shah defendants' indebtedness.

## II. The instant action

Following the default on the loan and the Shah defendants' failure to honor their personal guaranties, the plaintiff commenced the instant action to foreclose the mortgaged subject property located at 1 Irving Place, Unit P14B, New York, New York 10003. Bennigans declared bankruptcy and is protected by the automatic stay provisions of the Bankruptcy Code. Accordingly, plaintiff did not name Bennigans as a party to this foreclosure proceeding.

Plaintiff seeks to enforce the mortgage and the Shah defendants' guaranties securing the loan to Bennigans (*id.*, Footnote 1 at 3). The Shah defendants answered the

amended complaint<sup>1</sup>, oppose the instant motion for summary judgment and cross-move to dismiss the amended complaint on the grounds that plaintiff elected its remedy to pursue another foreclosure action in New Jersey which was filed against the Shah defendants' former business partners, and was based upon the same debt sued upon in the instant case. The Shah defendants argue that plaintiff's instant New York action is prohibited by RPAPL § 1301. The Shah defendants also allege that the mortgage and guaranties fail to identify the debt obligation and mortgaged premises; and finally, they claim they are entitled to a mandatory settlement conference pursuant to CPLR 3408.

### III. Discussion

#### A. Motion for Summary Judgment

In order to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]). To establish a prima facie entitlement to judgment as a matter of law, a lender must prove the following elements: (1) an underlying credit agreement, (2) a personal guarantee of the obligations of the credit agreement signed by the defendant, and (3) failure to make payment in accordance with the terms of the credit agreement and

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<sup>1</sup> Plaintiff's filed a Verified Foreclosure Complaint on July 25, 2017. On August 21, 2017, plaintiff filed an Amended Foreclosure Complaint, as of right, to add defendant, Itria Ventures, LLC as a party.

guaranty (*Provident Bank v Tropp*, 43 Misc 3d 1204(A) [Sup Ct Kings County, 2014]); see *Northfork Bank Co. v Graphic Forms Assoc.*, 36 AD3d 676 [2d Dept 2007]; *JP Morgan Chase Bank v Gamut–Mitchell, Inc.*, 27 AD3d 622 [2d Dept 2006]). In a foreclosure action, a mortgagee's prima facie entitlement to judgment as a matter of law is demonstrated by proof of the mortgage and evidence of default (*Citi Financial Co. (DE) v McKinney*, 27 AD3d 224 [1<sup>st</sup> Dept 2006]; see also *Chemical Bank v Broadway 55-56th St. Assoc.*, 220 AD2d 308 [1<sup>st</sup> Dept 1995]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812 [2<sup>nd</sup> Dept 1993]).

“On a motion for summary judgment to enforce a written guaranty, all that the creditor needs to prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty” (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998] ). Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986] ). The parties' competing contentions are viewed in the light most favorable to the party opposing the motion (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990] ). Entitlement to a judgment of foreclosure is established, as a matter of law, where the plaintiff produces the mortgage, the unpaid note, and evidence of the default (*Independence Bank v Valentine*,

113 AD3d 62 [2d Dept 2013]).

In the instant case, plaintiff, having a security interest in and to the subject property, established its prima facie entitlement to judgment as a matter of law by submitting the Mortgage, underlying Note, and guaranties, which were executed by Bennigans and the Shah defendants. Plaintiff has also established that the Shah defendants are in default under the loan documents by failing to make payments upon demand (see *Baron Assoc., LLC v Garcia Group Enters., Inc.* 96 AD3d 793 [2d Dept 2012]). Plaintiff also demanded immediate payment of same from the Shah defendants, who failed to make payment of the accelerated loan.

In opposition, the Shah defendants do not dispute the validity of the mortgage, nor do they dispute the default under the terms of the loan. Rather, the Shah defendants argue that issues of fact exist pertaining to discrepancies in plaintiff's loan documents. The Shah defendants also cross move to dismiss for plaintiff's failure to comply with the provisions set forth in RPAPL §1301 and CPLR 3408.

First, the Shah defendants argue that the mortgage fails to identify the obligation it purports to secure.

A mortgage "must clearly refer to the obligation which the realty is to secure." (*North-East Hospitality v Batavia Innkeepers*, 262 AD2d 1049, 1050 [4th Dept 1999] internal quotation marks and citations omitted). A mortgage and guaranty executed on the same day and as part of the same transaction will be read together (*Yoi-Lee Realty*

*Corp. v 177th St. Realty Assoc.*, 208 AD2d 185 [1<sup>st</sup> Dept 1995]).

In this case, the Mortgage clearly states that it is given to secure the payment of the promissory note dated November 27, 2017. The Mortgage identifies the premises being mortgaged, sold, granted, assigned and conveyed as 1 Irving Place, Unit P 14B, New York, New York 10003. The Shah defendants concede that the mortgage which plaintiff seeks to foreclose is executed by Kedar Shah, Hrietu Shah and Ramesh Shah individually, and that the Mortgage identifies the obligation to be secured as the November 27, 2012 promissory note signed by Bennigans. However, the Shah defendants claim that the Mortgage failed to identify the individuals obligation, to wit, the guaranties. The Shah defendants argue that they are not obligated under the Note and thus, non-payment does not constitute a default under the Mortgage. Finally, defendants Kedar Shah and Hrietu Shah argue that the guarantees do not identify the collateral used to secure the same; therefore they allege that the Mortgage is insufficient to permit plaintiff to foreclose upon unidentified collateral.

Here, the Mortgage clearly refers to the debt owed in the sum of \$859,500 and the Note. Construing the Mortgage together with the guaranties, there is no ambiguity as to whether the Mortgage was intended to secure the Note. Moreover, a review of the Unconditional Limited Guarantees reveals the collateral pledged is "Residential real estate located at 1 Irving Place, Unit #P14B, Section 3, Vol. 7, Block 870, Lot 1033, County and State of New York" (*id.*, Exhibit 2 at 2). Additionally, the Unconditional Guarantees

refer to any property taken for security of the Note or the guaranty of the Note. In this case, it is undisputed that the collateral given to secure the loan was the mortgaged premises.

Accordingly, the Shah defendants have not satisfied their burden of establishing with admissible evidence that triable issues of fact exist based upon discrepancies in the loan documents.

**B. Cross Motion to Dismiss**

Next, the Shah defendants move to dismiss the amended complaint pursuant to RPAPL § 1301 and CPLR 3408.

RPAPL § 1301 provides in relevant part as follows:

"1. Where final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff of the county where he resides, if he resides within the state, or if he resides without the state, to the sheriff of the county where the judgment-roll is filed; and has been returned wholly or partly unsatisfied.

2. The complaint shall state whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part has been collected.

3. While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought."

"The purpose of the statute is to avoid multiple lawsuits to recover the same mortgage debt" (*Aurora Loan Servs., LLC v Lopa*, 88 AD3d 929, 930 [2d Dept 2011]).

Pursuant to RPAPL §1301, "[t]he holder of a note and mortgage may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but must only elect one of these alternate remedies" (*Aurora Loan Servs., LLC v Lopa*, 88 AD3d 929, 930 [2d Dept 2011]). Stated another way, an action for foreclosure cannot be maintained where the plaintiff has previously pursued a separate action on the note and recovered a money judgment against the defendant which has not been satisfied (*VNB N.Y Corp. v Paskesz*, 131 AD3d 1235, 1236 [2d Dept 2015] [internal citations omitted]).

The Shah defendants argue that RPAPL §1301(1) precludes plaintiff from bringing the instant foreclosure action because plaintiff received a final judgment in a New Jersey foreclosure action on the same debt. In addition, the Shah defendants claim plaintiff violated RPAPL §1301(2) by failing to state, in the instant complaint or amended complaint, whether any other action, i.e. the New Jersey action, had been brought to recover any part of the mortgage debt. It is undisputed that plaintiff did not mention the New Jersey foreclosure action which was commenced prior to the filing of the instant action. The Shah defendants further seek dismissal of plaintiff's complaint as barred by RPAPL §1301(3) which provides that while a foreclosure action "is pending ... no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought."

In opposition, plaintiff argues that RPAPL §1301 does not prohibit simultaneous foreclosure actions against properties located in different states, and is inapplicable

because this section does not apply where the property securing the loan is located outside of New York. Plaintiff also claims that it did not seek or receive a judgment on the mortgage debt in the New Jersey foreclosure action.

Plaintiff's commencement of the instant foreclosure action is not in violation of RPAPL §1301(1). That section only applies where a final judgment has been rendered in the first action on the debt, which is not the case here (*VNB N.Y. Corp. v Paskesz*, 131 AD3d 1235 at 1236). Further, it is undisputed that the plaintiff did not comply with RPAPL §1301(2). However, in light of the fact that there has been no demonstration of prejudice to the rights of any party, and as reflected in the wherefore clause, the Shah defendants original debt has been reduced, i.e. the \$216,000 payment plaintiff received by the New Jersey mortgagors, this defect may be ignored (*Marton Assoc. v Vitale*, 172 AD2d 501 [2d Dept 1991]). Accordingly, plaintiff's failure to state that an earlier action on the debt had been brought in New Jersey action does not warrant dismissal of the amended complaint and that portion of the cross motion seeking to dismiss the amended complaint pursuant to a violation of RPAPL §1301 (2) is denied (*id.*).

“RPAPL §1301(3) ... ‘prohibits a party from commencing an action at law to recover any part of the mortgage debt while the foreclosure proceeding is pending or has not reached final judgment, without leave of the court in which the foreclosure action was brought’ ” (*VNB N.Y. Corp. v Paskesz*, 131 AD3d at 1236, quoting *First Nationwide Bank v Brookhaven Realty Assocs.*, 223 AD2d 618, 622 [2d Dept 1996]; see RPAPL 1301[3]).

However, “[a]lthough RPAPL §1301(3) prohibits a mortgage lender seeking repayment of a loan from simultaneously prosecuting an action at law to recover upon a promissory note and an action in equity to foreclose the mortgage, the prohibition does not apply where ... the property securing the loan is located outside of New York State” (*Wells Fargo Bank Minn. v Cohn*, 4 AD3d 189, 189 [1st Dept 2004]; see also *Federal Deposit Ins. Corp. v De Cresenzo*, 207 AD2d 823, 824 [2d Dept 1994]; *Fielding v Drew*, 94 AD2d 687, 687 [1st Dept 1983]).

In the present action, the mortgaged property that was the subject of plaintiff's New Jersey foreclosure action was located in New Jersey, thus precluding the application of RPAPL §1301(3) (see *Valley Natl. Bank v Spitzer*, 31 Misc 3d 1232[A], 2011 NY Slip Op 50926[U], \*4, [Sup Ct, Kings County 2011]).

The facts of each of the cases relied upon by the Shah defendants are distinguishable from those of the instant case. The instant action has been brought in New York against the guarantors, who, as the mortgagors, were not named as defendants in the foreclosure action in New Jersey.

As the Court of Appeals stated in (*Provident Sav. Bank & Trust Co. v Steinmetz*, 270 NY 129, 131 [1936]), "no action can be maintained to foreclose a mortgage except upon property in this State, the debt thus sued upon must be one secured by mortgage upon property in this State." Accordingly, the Shah defendants' cross motion to dismiss on the grounds that plaintiff violated RPAPL § 1301(3) is denied.

Next, the Shah defendants argue that this matter should be referred to the settlement part because this foreclosure action seeks to foreclose on their residence.

CPLR 3408 requires a mandatory settlement conference in every “residential foreclosure action” involving a home loan as defined in RPAPL § 1304. As so defined, home loans are those which are made to a natural person and in which the debt incurred is primarily for personal, family, or household purposes (see RPAPL §1304[5][a][ii], [iii]). The borrower, as defined under the instant loan and Note is Bennigans and the Shah defendants, in their official capacity as managers of Bennigans. The Shah defendants are recognized in the Guaranties. Accordingly, the borrower of the sum evidenced by the Note was Bennigans, not the individual Shah defendants. The borrower, Bennigans, was not a natural person (see RPAPL §1304[5][a][ii]). Further, the debt incurred was the \$900,000 loan given to Bennigans. Since the purpose of the loan was to open a Bennigan’s franchise, it was not primarily incurred for personal, family, or household purposes (see RPAPL §1304[5][a][ii]). “While it is unfortunate that here, a primary residence may be lost in foreclosure, not everyone under every circumstance is entitled to reap the protections afforded to victims of the mortgage crisis by the New York Legislature pursuant to CPLR 3408.” (*Independence Bank v Valentine*, 113 AD3d 62, 66 [2d Dept 2013]). Under these facts, the Shah defendants do not fall within the protections afforded to homeowners under CPLR 3408. Here, the plaintiff made a loan to Bennigans, a corporation, not the Shah defendants as natural persons. The Shah defendants simply acted as guarantors of Bennigan’s loan. The Shah defendants used their own primary residence

in New York to secure their obligations as guarantors of the Mortgage. Therefore, the Shah defendants acted only as guarantors of this loan, not as borrowers, in using their own home as collateral security.

Accordingly, since a mortgagor is only entitled to a mandatory settlement conference under CPLR 3408 for a home loan that falls under the definition outlined in RPAPL § 1304(5) (see *Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9,18 [2d Dept 2013]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 104–105 [2d Dept 2011]), and the loan here does not fall within the ambit of that statute, no settlement conference is required. Accordingly, that branch of the Shah defendants' cross motion seeking a mandatory conference pursuant to CPLR 3408 is denied.

Plaintiff's motion for a default judgment against the non-answering defendants is granted, there being no opposition.

#### IV. Conclusion

Accordingly, based upon the foregoing, it is hereby

**ORDERED** that the portion of plaintiff's motion for summary judgment is granted; and it is further

**ORDERED** that the portion of plaintiff's motion for an order of reference against the defendants, Kedar R. Shah, Hrietu Shah, Ramesh B. Shah, and Hrietu Shah and Ramesh B. Shah, Trustees of the KS Irrevocable Trust, for all of the relief requested in the amended verified complaint be and is hereby **GRANTED** as set forth below; and it is

further

**ORDERED** that the portion of plaintiff's motion for an order of reference against the defendants, New York State Department of Taxation and Finance; Board of Managers of the One Union Square East Condominium, and Itria Ventures, LLC, for all of the relief requested in the amended verified complaint be and is hereby **GRANTED**; and it is

further

**ORDERED** that the Clerk of the Court is hereby authorized and directed to enter judgment in favor of plaintiff and against the defendants, Kedar R. Shah, Hrietu Shah, Ramesh B. Shah, Hrietu Shah and Ramesh B. Shah, Trustees of the KS Irrevocable Trust, New York State Department of Taxation and Finance; Board of Managers of the One Union Square East Condominium, and Itria Ventures, LLC, for all of the relief requested in the amended verified complaint; and it is further

**ORDERED** that the portion of plaintiff's motion requesting appointment of a Referee to compute the amount due plaintiff be and hereby is **GRANTED**; and it is further

**ORDERED** that the parties shall confer with one another and within 20 days of entry of this order submit to the court a list of three proposed referees from the Part 36 fiduciary list to compute the amount due to plaintiff.

DATED: October 22, 2018

ENTER:

  
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Hon. Paul A. Goetz, JSC