

Bronx Broadway Funding, Inc. v Rainford Dev. LLC
2019 NY Slip Op 31636(U)
May 31, 2019
Supreme Court, New York County
Docket Number: 805013/2018
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: <u>HON. ARLENE P. BLUTH</u>	PART	IAS MOTION 32
	<i>Justice</i>	
-----X	INDEX NO.	<u>805013/2018</u>
BRONX BROADWAY FUNDING, INC.,	MOTION DATE	<u>N/A</u>
Plaintiff,	MOTION SEQ. NO.	<u>002</u>
- v -		

RAINFORD DEVELOPMENT LLC, MILTON RAINFORD, 5099 BROADWAY, LLC, GEORGE PSATHAS, BRUNI ELECTRIC INC., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, JOHN DOE 1 THROUGH 20,

Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 65, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 83

were read on this motion to/for

JUDGMENT - SUMMARY

The motion by plaintiff for summary judgment against defendants Rainford Development LLC and Milton Rainford and to appoint a referee to compute is granted.

Background

This commercial foreclosure relates to a property located at 5099 Broadway in Manhattan. Plaintiff claims it is seeking to foreclose on a mortgage worth \$900,000. Plaintiff's predecessor-in-interest, Ponce De Leon Bank, was the original mortgagee. Defendant Rainford Development LLC is the borrower and defendant Milton Rainford personally guaranteed the loan.

In the instant action, there is no dispute that the borrower made the monthly payments on the loan. The default here arises out of defendants Rainford Development LLC and Mr.

Rainford's (collectively, "Borrower") purported failure to pay taxes. The default notice from Ponce De Leon dated September 19, 2017 states that the Borrower failed to "pay Taxes and Other Charges due under Section 5 of the Mortgage [and] you are now in default of your obligations" (NYSCEF Doc. No. 72). The letter also warns that the failure to pay taxes and other charges "may result" in the loan being accelerated without further notice (*id.*). Plaintiff claims that when it accelerated the loan on January 12, 2018, there was \$17,824.14 owed in real estate taxes and \$6,182.38 in water charges. Plaintiff contends that this amount far exceeded the \$7,211.83 balance in the escrow account used to pay the taxes.

The Borrower claims that when Ponce De Leon held the loan, he would pay \$9,061 per month toward the principal, interest and an escrow for taxes (NYSCEF Doc. No. 65 ¶ 2 [Rainford aff]). The Borrower argues that the escrow payment collected by the Ponce De Leon was \$2,576.86 per month and that Ponce De Leon would pay the taxes (*id.*). The Borrower insists that only when the loans were transferred to plaintiff in September 2017 was he told that he was in default and had his loans accelerated (*id.* ¶ 3). The Borrower concludes that any failure to pay the taxes was the responsibility of Ponce De Leon.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light

most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The central issue on this motion is whether the Borrower has raised an issue of fact with respect to whether Ponce De Leon should have paid the taxes from the escrow account. To reach that conclusion, the Court must first consult the terms of the mortgage. Paragraph 5 requires the Borrower to pay the taxes and water charges (NYSCEF Doc. No. 2 at 9).¹ Paragraph 6 states that an escrow account can be used to pay these taxes (defined as "Taxes and Other Charges") in the event of a default (*id.* at 10). Although paragraph 6 also mentions that the escrow account will be used to pay "Taxes and Insurance Premiums," that refers to specific payments made under paragraphs 3 and 4 of the mortgage (*id.*). The default here is under paragraph 5.

This yields only one conclusion—that while the Borrower is correct that the escrow account could be used to pay taxes, that was only where there was a default. There is no mention in paragraph 5 that the escrow account would be used to regularly pay real estate taxes and water

¹ The Court observes that portions of the mortgage are completely illegible both in the document uploaded to NYSCEF and the hard copy submitted to the Court.

charges. And, as plaintiff points out (and the Borrower does not adequately dispute), there was simply not enough money in the escrow account to cover the taxes and water charges due when the loan was accelerated in January 2018. Whether Ponce De Leon or plaintiff should have told the Borrower about the lack of funds in the escrow account misreads the terms of the mortgage—paragraph six provides that Ponce De Leon was supposed to tell the Borrower if the escrow fund did not have enough funds to pay the Taxes and Insurance premiums under paragraphs 3 and 4 (*id.*) It had nothing to do with the Borrower's responsibility to pay the taxes under paragraph 5.

The Court also observes that the September 19, 2017 default letter from Ponce De Leon (not from plaintiff) stating that the Borrower was in default for not paying his taxes (NYSCEF Doc. No. 72) is dated four months before the loan was accelerated; the letter only warns that the loan might be accelerated. Plaintiff claims that the loan was accelerated in the complaint (*see* NYSCEF Doc. No. 2, ¶ 17 [declaring "There is now due and owing to Plaintiff the unpaid principal balance, together with interest thereon at the rate provided in the Note . . ."]). While the Court recognizes the Borrower's frustration about plaintiff's purported refusal to negotiate a settlement, the fact is, that on these papers, there is no reason why the Borrower didn't pay the outstanding taxes and water charges before the loan was accelerated. The Borrower's claim that the loan was accelerated in September 2017 is not supported with any documentation.

The Court also severs and dismisses the affirmative defenses. While plaintiff argues why each affirmative defense is meritless and should be dismissed, the Borrower does not substantively address any of these arguments.

Summary

The Borrower's view is that this case is about a "gotcha" default; that he dutifully paid his monthly charges and plaintiff sought out an immaterial default to foreclose on the property immediately after taking over the loan from Ponce De Leon. Regardless of plaintiff's motivation, the Borrower does not dispute that taxes and water charges are outstanding nor does he sufficiently explain why he didn't pay (or attempt to pay) those charges after receiving the default notice. It may be that plaintiff had no intention of settling, but that does not excuse the failure to pay taxes. That is certainly not an immaterial default—it puts the property at risk of a tax lien foreclosure.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted and the answer and affirmative defenses of defendants Rainford Development LLC and Milton Rainford are severed and dismissed; and it is further

ORDERED that plaintiff is entitled to a default judgment against the non-answering defendants; and it is further

ORDERED that Elaine Shay 800 Third Avenue, Suite 2800, New York, NY 10022, is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff for principal, interest and other disbursements advanced as provided for in the note and mortgage upon which this action is brought, and to examine whether the mortgaged property can be sold in parcels; and it is further

ORDERED that the Referee may take testimony pursuant to RPAPL § 1321; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in

compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) (“Disqualifications from appointment”), and §36.2 (d) (“Limitations on appointments based upon compensation”), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of her/his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee’s report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff’s failure to move this litigation forward; and it further

ORDERED that the caption be amended to remove John Doe from the caption, and the

caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
BRONX BROADWAY FUNDING, INC.,

Plaintiff,

v.

RAINFORD DEVELOPMENT LLC, MILTON
RAINFORD, 5099 BROADWAY, LLC, GEORGE
PSATHAS, BRUNI ELECTRIC INC., NEW
YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, NEW YORK CITY
DEPARTMENT OF FINANCE, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD,

Defendant(s).
-----X

and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added and removed; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/suptctmanh)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein and the Receiver.

Next Conference: November 12, 2019 at 2:15 p.m. If plaintiff has moved for a judgment of foreclosure and sale before the conference, then plaintiff can seek an adjournment. Please

consult the part's rules for information about how to obtain an adjournment. An appearance is required if a motion for a JFS has not been made; counsel appearing for plaintiff must come prepared to explain the delay or interest may be tolled.

5/31/19

DATE



ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

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