

**604 W. 178th Corp. v Sunnyside Washington Hgts.
Funding LLC**

2019 NY Slip Op 32093(U)

July 8, 2019

Supreme Court, New York County

Docket Number: 655853/2018

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE P. BLUTH

PART

IAS MOTION 32

Justice

-----X

INDEX NO. 655853/2018

604 WEST 178TH CORP., VRACHNOS ASSOCIATES,

MOTION DATE N/A, N/A, N/A

Plaintiffs,

MOTION SEQ. NO. 001 002 003

- v -

SUNNYSIDE WASHINGTON HEIGHTS FUNDING LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

SUNNYSIDE WASHINGTON HEIGHTS FUNDING LLC

Third-Party
Index No. 595074/2019

Plaintiff,

-against-

RAMESH SARVA, NEW YORK STATE DEPARTMENT OF
TAXATION & FINANCE, NEW YORK CITY DEPARTMENT OF
FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT, AND JOHN DOE 1
THROUGH JOHN DOE 12, THE LAST TWELVE NAMES
BEING FICTITIOUS AND UNKNOWN TO THIRD-PARTY
PLAINTIFF, THE PERSONS OR PARTIES INTENDED BEING
THE TENANTS, OCCUPANTS, PERSONS OR
CORPORATIONS, IF ANY, HAVING OR CLAIMING AN
INTEREST UPON THE PREMISES DESCRIBED IN THE
THIRD-PARTY COMPLAINT

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 46, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 74, 75, 76, 77

were read on this motion to/for

DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 107, 110, 111

were read on this motion to/for

DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 003) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, were read on this motion to/for APPOINT - FIDUCIARY

Motion Sequence Numbers 001, 002 and 003 are consolidated for disposition. The motion (MS001) by plaintiffs to dismiss defendant Sunnyside Washington Heights Funding LLC's ("Sunnyside") counterclaims, cancel the notice of pendency, grant third-party defendant Sarva's motion to dismiss the third-party complaint is granted.

The motion (MS002) to dismiss the third party complaint by third-party defendant Sarva is granted and the ex-parte motion (MS003) by defendant Sunnyside to appoint a receiver is denied as moot.

Background

In this commercial foreclosure action, plaintiffs seek a declaratory judgment that they are not in default of two notes and mortgages. Plaintiff 604 West 178th Street Corp. owns a property in Manhattan and plaintiff Vrachnos Associates owns a property in Woodside, Queens. Plaintiffs claim that it took out loans on these properties from non-party Peapack-Gladstone Bank ("Peapack"). Plaintiffs complain that defendant Sunnyside took over the loans from Peapack in order to "manufacture" a default and foreclose on the properties so it could recover higher default interest rates on these notes (both are 24%). Soon after Sunnyside took over from Peapack, Sunnyside sent letters claiming that plaintiffs were in default on the loans because there were more than the maximum allowable number of violations on the property (*see* NYSCEF Doc. Nos. 36, 37).

Plaintiffs argue that they have made every mortgage payment and that Sunnyside was required to provide plaintiffs with notice of a default under the terms of the mortgages. Plaintiffs

also claim that Sunnyside waived its right to claim that the violations on the properties constitute a default because Peapack failed to complain about the violations for the four years this entity held the mortgages.

In opposition, Sunnyside asserts it did not have to give plaintiff any notice of the default under the terms of the mortgage. Sunnyside claims that the provision concerning outstanding violations gave plaintiffs six months to remove violations. Sunnyside asserts it properly accelerated the mortgages based on the numerous violations on these properties. Sunnyside argues that the defaults under the violations provision of the mortgages constitute “independent defaults” as if they were listed as separate defaults under the mortgages. Sunnyside asserts counterclaims against plaintiffs based on their alleged default under the mortgages and a third-party complaint against Sarva as guarantor of these loans.

Discussion

“[O]n a CPLR 3211 motion to dismiss we accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 508, 91 NYS3d 13 [1st Dept 2018] [internal quotations and citation omitted]).

In this case, there is no dispute that there were more than the permitted violations on each property (40 for 178th Street, 50 for Woodside) and that this violated a term of the mortgages. As an initial matter, the Court rejects plaintiffs’ claim that Sunnyside waived its right to declare a default because Peapack did not complain about this issue. Plaintiffs signed mortgages that obligated them to keep the violations on the properties below a particular threshold; the fact that a prior lender did not enforce this provision does not eliminate it from the contract.

And the Court is not persuaded by plaintiffs' argument to the extent they claim that because they made the mortgage payments, the Court should ignore whether they complied with the violations provision. Keeping violations off a building is a material provision of a mortgage; a lender whose interest is secured by premises is justifiably concerned about the value of that property if the borrower stops making payments. The value of that property can be negatively affected by having dozens of violations, especially if those violations are serious.

The central question in this motion is to evaluate the intent of the relevant provisions in these mortgages to determine whether Sunnyside was required to give plaintiffs notice of their alleged default.

The violations provision holds that:

“Violations. The Mortgagor covenants and undertakes (i) to reduce all outstanding notices of violations with any municipal department having jurisdiction over said premises to a maximum of 40 violations and (ii) if violations ever exceed 40 violations, to reduce said violations of record to a maximum of 40 violations within six (6) months from the date said violations were levied against said premises and (iii) to continue to make diligent efforts to have such violations removed of record thereafter. Failure to comply with the above shall constitute a default under said mortgage as if such default were specifically contained in Paragraph 21 hereof and the Mortgagor agrees to indemnify and hold Mortgagee harmless from and against any loss, liability, damage or expense suffered or incurred by Mortgagee arising out of or by reason of Mortgagor's failure to comply with the above” (NYSCEF Doc. No. 55, ¶ 47 [the 178th Street mortgage]; NYSCEF Doc. No. 61 ¶ 45 [Woodside mortgage provides for 50 violations]).

Paragraph 21 provides, in part, that:

“21. Defaults. The whole of the indebtedness secured by said mortgage shall immediately become due and payable at the option of the Mortgagee, and thereupon the Mortgagee shall have the right, among others, to foreclose said mortgage or may sell the said premises in accordance with applicable law (including, without limitation, pursuant to Article 14 of the New York Real Property Actions and Proceedings Law), upon the happening of any one or more of the following: . . . (c) Failure of the Mortgagor to comply with or perform any other warranty or covenant of said mortgage or in the obligation secured thereby within the grace period, if any, herein specified” (*id.* ¶ 21; Woodside mortgage, ¶ 21).

This paragraph also states that:

“Anything to the contrary herein notwithstanding, before exercising its rights under Paragraph 21(c) through (r) hereof, the Mortgagee shall give to Mortgagor notice in writing with respect to any non-monetary defaults (other than those defaults covered by the other provisions of Paragraph 21) and Mortgagor shall have thirty (30) days from the date of such notice to cure the default, except that, with respect to such defaults which are curable but which are incapable of being cured in said thirty (30) day period, the Mortgagor shall commence to cure such default within thirty (30) days, shall proceed promptly and diligently to cure the same and shall complete such cure within sixty (60) days after such notice date. Notwithstanding the foregoing, the provisions of this paragraph will not be applicable to any default which pursuant to the terms hereof or any other Loan Document has a specifically stated notice requirement and/or grace period. Failure to obtain and maintain the casualty and liability insurance required under said mortgage shall be deemed a monetary default for the purposes of this paragraph” (*id.*).

Notice Requirement and/or Grace Period

The question here is whether plaintiffs were entitled to notice before they were declared in default. A default under paragraph 21(c) (which is applicable here) clearly requires that the borrower is entitled to a 30-day period to cure the default unless the default is pursuant to a provision that has a “specifically stated notice requirement and/or grace period.”¹ That necessitates an analysis of whether Paragraph 47 has a “specifically stated notice requirement and/or grace period.

The only time period mentioned in the violations paragraph is six months—plaintiffs had six months to reduce violations to the maximum amount (40 or 50)—and that is not a *notice* requirement. The claim that the *notice* comes from the relevant city or state agency is unavailing—that is only notice about a single violation, not notice that it has more than 40 or 50 and the six-month time period began. In the context of this mortgage, it makes no sense that a

¹ Sunnyside’s claim that a default of the violations provision is not a default under paragraph 21(c), but rather a separate independent default has no support in the mortgage. 21(c) applies to other warranties or obligations in the mortgage—that is exactly what the violations provision is. Sunnyside’s claim that the violations provision occupies some unidentified portion of paragraph 21 outside of (c) is a strained reading designed to avoid the notice requirement.

violation issued by a third-party could constitute a “specifically stated notice requirement” commencing a six-month period to remove the violations.

The Court also finds that this six-month period is not a grace period. A grace period is “Additional time scheduled or allocated to complete a task, such as complying with a regulation, meeting an obligation, or obtaining an agreement” (Black’s Law Dictionary, Online Dictionary 2d ed]). The six-month period cannot be read to be *additional* time to reduce the number of violations; it is, in fact, the only amount of time provided to plaintiffs to reduce the number of violations.

The Court finds that Sunnyside was required to give plaintiffs a 30-day cure period before declaring plaintiffs in default because the violations provision does not have a notice requirement or grace period. The fact that plaintiffs had six months to reduce the number of violations does not mean that Sunnyside had no obligation to send a notice of default. That interpretation requires the Court to hold that the 40th (or 50th for Woodside) violation was somehow a notice to plaintiffs that its six-month period had started. That is not a rational interpretation of the mortgages.

Three Separate Events of Default

Sunnyside also claims that the three obligations under paragraph 47 (or 45) should be viewed as three separate events of default. Under this view, paragraph 47 imposes three obligations on the borrower: (1) the violations on the property must be below 40 (or 50), (2) if violations exceed 40 (or 50), then the borrower has six months to reduce the number to 40 (or 50) and (3) to continue to make diligent efforts to have such violations removed. The first obligation appears to require the borrower to reduce violations already on the premises (i.e. when the borrower executed the mortgage) to a max of 40 or 50. This portion has no cure period. The

second requirement—to reduce the violations to the maximum allowed within six months — seems to apply to violations that were issued *after* they executed the mortgage. Although this has a time period, as stated above, it is not a “specifically stated notice requirement and/or grace period.” And the final obligation requires plaintiffs to make diligent efforts to cure the violations; this has no time period.

Even if the Court were to view these as separate obligations, it does not compel the conclusion that Sunnyside did not have to give a notice requirement. The default letters sent to plaintiffs fail to specify which of these three obligations was violated; Sunnyside only cited to the violations provision generally in these letters (paragraph 47 for the Manhattan property and 45 for the Woodside premises) instead of pointing to which specific obligation it was relying on. Sunnyside did not state that it was accelerating the amount due because plaintiffs failed to reduce violations within six months. Even if the Court were to assume that the default was based on the failure to remove violations during the six-month time period, the Court notes that the default letters do not state when this six-month period began or ended.

From these default notices, the Court has no idea whether the subject violations were on the property prior to the execution of these mortgages or whether they were issued *after* the mortgage was signed. This default notice is not sufficient to accelerate the all sums due because it is unclear which portion of the violations provision is being cited.² Instead, it appears that Sunnyside sent letters declaring the loans in default based only on the fact that there were more than the allowable number of violations. That is not sufficient to declare the loans in default.

² If the Court were to read paragraph 47 as a single obligation with three parts, then it would still reach the same conclusion. Under this view, there is a max of 40 or 50 violations. If the number of violations exceeds the maximum, then the borrower has six months to reduce it to the limit and the borrower must continue to make diligent efforts to reduce such violations. This clearly implicates the notice requirement of paragraph 21 because there is no clear time period for what constitutes diligent efforts to cure violations or when the six-month time period begins. Sunnyside also made no mention of plaintiff’s lack of diligent efforts in these default notices.

Summary

There is nothing in the violations provision or paragraph 21 that suggests that the six-month time period could begin without notice from the lender. Even if the Court were to find that the default was based on plaintiffs' failure to reduce the number of violations within 6 months (something that is not clear in the default letters), that time period is not a specifically stated notice period or grace period. It might be considered a "cure" period, a term that is used elsewhere in the mortgage, but that does not save Sunnyside's counterclaims or third-party complaint.

Granting the motions by plaintiff and Sarva (the guarantor) to dismiss the counterclaims and third-party complaint is consistent with the intent of the mortgages. It makes sense to permit plaintiffs thirty days to address the violations. As stated above, the violations issued by a city or state agency arise in isolation—they are not accompanied by a reminder that it might violate the terms of a mortgage. It was incumbent upon Sunnyside to tell plaintiffs that it had the relevant cure period (30 days) to remedy the violations.

To be clear, the Court takes no position on plaintiffs' claim that Sunnyside and its members engaged in predatory lending or inappropriate behavior. Plaintiffs had contracts that required them to keep the number of violations below a certain threshold and plaintiffs do not deny that they failed to do so. The Court's dismissal of Sunnyside's counterclaims and third-party complaint (which relate to Sunnyside's effort to foreclose on the mortgages) is based only on Sunnyside's failure to give plaintiffs proper notice under the terms of the mortgage.

The motion to appoint a receiver is denied as moot given that the Court is dismissing Sunnyside's claims.

Accordingly, it is hereby

ORDERED that the motion (MS001) by plaintiffs to dismiss the counterclaims and third-party complaint by defendant Sunnyside Washington Heights Funding LLC is granted and the counterclaims and the third-party complaint are severed and dismissed and the Clerk is directed to cancel the Notice of Pendency filed against the premises located at 602-606 West 178th Street, New York, NY, Block 2144, Lot 40 (NYSCEF Doc. No. 21); and it is further

ORDERED that the motion (MS002) by third-party defendant Ramesh Sarva to dismiss the third-party complaint is granted; and it is further

ORDERED that the ex parte motion (MS003) by defendant Sunnyside Washington Heights Funding LLC for the appointment of a receiver is denied.

Next Conference: October 15, 2019 at 2:15 p.m.

7/8/19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: