

Horn v Nestor

2019 NY Slip Op 32346(U)

July 31, 2019

Supreme Court, New York County

Docket Number: 810002/2013

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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>810002/2013</u>
STEVEN HORN	MOTION DATE	_____
Plaintiff,	MOTION SEQ. NO.	<u>011 012</u>

- v -

MARIANNE NESTOR, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, AND JOHN DOE AND/OR JOHN DOE #1-10, INCLUDING, THE LAST TEN NAMES BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF, THE PERSON OR PARTIES INTENDED BEING THE TENANTS, OCCUPANTS, PERSONS OR CORPORATIONS, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LINE UPON THE PREMISES IN THE COMPLAINT,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 0011) 430-498 were read on this motion and cross-motion for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 012) 508, 509, 510, 511, 512 were read on this motion to/for WITHDRAW AS COUNSEL

Motion Sequence Numbers 011 and 012 are consolidated for disposition.

The motion (MS011) for summary judgment by plaintiff is granted and the cross-motion by defendant Marianne Nestor for summary judgment is denied. The motion (MS012) by plaintiff's attorney to withdraw as counsel is granted without opposition.

Background

This foreclosure action relates to property located at 135 East 19th Street in Manhattan. Plaintiff claims that he became involved with Nestor when he learned that she was looking for a loan for her business operations. Plaintiff insists he (along with a business partner) lent Nestor

\$700,000 in November 2008 and an additional \$400,000 in January 2009 for her businesses.

Plaintiff claims that these first two loans were secured by mortgage liens on the subject premises.

Plaintiff acknowledges that Nestor repaid these two loans and then asked for another loan in November 2011 for \$900,000. Plaintiff agreed and the note required Nestor to pay \$9,468.75 each month. As collateral for the debt, Nestor executed a mortgage secured by the property.

Plaintiff claims that the loan was for business purposes only and contends that Nestor's primary residence was not at the subject premises. Plaintiff claims that Nestor failed to make the August 1, 2012 payment when the check Nestor sent was returned for insufficient funds.

In opposition and in support of her cross-motion, Nestor claims that she bought the subject property with her husband in 1977 and it has been used by her residence since that time. Nestor insists that the loan was used for *both* business and personal purposes.

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]).

Plaintiff claims that Nestor waived her right to assert affirmative defenses and counterclaims in this action by signing the note. Section 3 of the Note provides that “The Maker of this Note hereby waives the right to interpose any defense (other than payment in money), set-off or counterclaim to any action brought by the holder of this Note to enforce such holder’s rights hereunder” (NYSCEF Doc. No. 416, ¶ 3). Plaintiff claims that this provision requires the Court to dismiss all of Nestor’s affirmative defenses and counterclaims except for the Seventh Affirmative Defense (payment).

Plaintiff also points out that Nestor signed an “Estoppel Certificate” in December 2011 which provided that plaintiff had a valid first lien on the premises and that Nestor “certifies that the premises are used for commercial purposes only. The Undersigned further declares that the proceeds of the mortgage are being used for the improvement and maintenance of said premises or other commercial business interests and that none of the proceeds shall be used to address the personal matters of the undersigned. It is the intention of the undersigned to manage the premises as an income generating asset and that the premises shall not be used as their principal residence” (NYSCEF Doc. No. 464). There is a notarized signature from Nestor at the bottom of the document and she does not deny she signed it.

In opposition and in support of her cross-motion, Nestor emphasizes that the property has been her residence since she bought it in the late '70s. Nestor points out that Section 6 of the mortgage requires her to occupy the property unless the Lender agrees in writing that she does not have to comply with this obligation. Nestor's central claim is that plaintiff did not properly accelerate the loan. She contends that she was not provided with a reasonable time period to correct her default. Nestor relies on paragraphs 15, 20 and 22 of the mortgage.

Nestor admits that she failed to make the August 1, 2012 payment and that plaintiff sent a letter dated August 13, 2012 declaring the total amount of the loan due (Nestor does not recall receiving this letter). Two days later, plaintiff's counsel sent another letter advising her that she could reinstate the loan if she paid \$16,080.50 by August 20, 2012. Nestor did not make that payment. Instead, Nestor insists she wired plaintiff \$28,376.25 on October 28, 2012 and argues this was payment for August, September and October (including payment at the regular interest rate). Nestor also claims that the Estoppel Certificate is not dispositive and merely one document among others that this Court should consider.

As an initial matter, the Court finds that Nestor waived her right to assert affirmative defenses and counterclaims other than payment. Nestor does not deny signing the mortgage or the Estoppel Certificate, both of which lead to one conclusion: that this was a commercial loan secured by the premises where Nestor's only defense was payment. The mortgage provision cited by Nestor (Section 6) does not change the Court's conclusion because it expressly permitted plaintiff to enter into an agreement whereby Nestor did not have to live in the premises. Plaintiff and Nestor did exactly that with the Estoppel Certificate. The fact that Nestor may have used the premises as her residence while in Manhattan (apparently, Nestor

often stayed at a house in Oyster Bay) is of no moment. Nestor signed an agreement stating the loan was for business purposes and the residence was not to be used for her primary residence.

The central question on this motion is whether plaintiff properly accelerated the loan. That requires the Court to consider the relevant paragraphs of the Note and Mortgage as well as the two letters sent by plaintiff in August 2012.

Paragraph 15 of the Mortgage provides that:

“Notices Required under this Security Instrument. All notices given by me or Lender in connection with this Security Instrument will be in writing. Any notice to me in connection with this Security Instrument is considered given to me when mailed by first class mail or when actually delivered to my notice address if sent by other means. Notice to any one Borrower will be notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address is the address of the Property unless I give notice to Lender of a different address. I will promptly notify Lender of my change of address. If Lender specifies a procedure for reporting my change of address, then I will only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender will be given by delivering it or by mailing it by first class mail to Lender's address stated on the first page of this Security Instrument unless Lender has given me notice of another address. Any notice in connection with this Security Instrument is given to Lender when it is actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument” (NYSCEF Doc. No. 462, ¶ 15).

Paragraph 20 provides that:

“Note Holder's Right to Sell the Note or an Interest in the Note; Borrower's Right to Notice of Change of Loan Servicer; Lender's and Borrower's Right to Notice of Grievance. The Note, or an interest in the Note, together with this Security Instrument, may be sold one or more times. I might not receive any prior notice of these sales. The entity that collects the Periodic Payments and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law is called the "Loan Servicer." There may be a change of the Loan Servicer as a result of the sale of the Note. There also may be one or more changes of the Loan Servicer unrelated to a sale of the Note. Applicable Law requires that I be given written notice of any change of the Loan Servicer. The notice will state the name and address of the new Loan Servicer, and also tell me the address to which I should make my payments. The notice also will contain any other information required by RESPA or Applicable Law. If the Note is sold and

hereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to me will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser. Neither I nor Lender may commence, join or be joined to any court action (as either an individual party or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other has not fulfilled any of its obligations under this Security Instrument, unless the other is notified (in the manner required under Section 15 of this Security Instrument) of the unfulfilled obligation and given a reasonable time period to take corrective action. If Applicable Law provides a time period which will elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. All rights under this paragraph are subject to Applicable Law” (*id.* ¶ 20).

Paragraph 22 states:

“Lender's Rights If Borrower Fails to Keep Promises and Agreements. Except as provided in Section 18 of this Security Instrument, if all of the conditions stated in subsections (a), (b) and (c) of this Section 22 are met, Lender may require that I pay immediately the entire amount then remaining unpaid under the Note and under this Security Instrument. Lender may do this without making any further demand for payment. This requirement is called "Immediate Payment in Full." If Lender requires Immediate Payment in Full, Lender may bring a lawsuit to take away all of my remaining rights in the Property and have the Property sold. At this sale Lender or another Person may acquire the Property. This is known as "Foreclosure and Sale." In any lawsuit for Foreclosure and Sale, Lender will have the right to collect all costs and disbursements and additional allowances allowed by Applicable Law and will have the right to add all reasonable attorneys' fees to the amount I owe Lender, which fees shall become part of the Sums Secured. Lender may require Immediate Payment in Full under this Section 22 only if all of the following conditions are met: (a) I fail to keep any promise or agreement made in this Security Instrument or the Note, including, but not limited to, the promises to pay the Sums Secured when due, or if another default occurs under this Security Instrument; (b) I do not correct the default” (*id.* ¶ 22).

The Court observes that although subsection “c” is mentioned at the beginning of Paragraph 22, there is no subsection c contained in the mortgages submitted with this motion.

The Court observes that plaintiff’s position that the *mortgage* did not require notice is tenuous at best. The mortgage clearly provides that plaintiff can only declare all amounts due if a promise is not kept (subsection a) and the borrower does not correct the default (subsection b). Subsection b implicates some sort of cure or notice period. If plaintiff could accelerate the loan

without any notice, then there would be no purpose to paragraph 22(b); in other words, Nestor could not cure the default if the loan was accelerated immediately after she missed a payment.¹

However, the Court's inquiry does not end there. Paragraph 7 permits the acceleration of the loan at the option of plaintiff "(a) upon nonpayment of any installment of interest due hereunder within ten (10) days of its due date" (NYSCEF Doc. No. 461, ¶ 7). And paragraph 4 provides that Nestor "waives notice of presentment for payment, demand for payment, notice of nonpayment and dishonor, protest and notice of protest" (*id.* ¶ 4). Clearly, the Note permits plaintiff to declare the entire loan due after a missed payment without any notice to Nestor.

"[W]here there is an inconsistency between a note and a mortgage, the terms of the note control, or prevail over those in the mortgage" (Bruce J. Bergman, *Bergman on New York Mortgage Foreclosures*, § 1.01[2][a]). Therefore, the Court finds that the terms of the note prevail. The Note did not require notice of a default to be sent to Nestor and permitted only a ten day-cure period; and there is no contention that Nestor made any payments until October, long after her bounced payment on August 1, 2012.

Moreover, the notices sent by plaintiff on August 13 and August 15 do not compel the Court to deny plaintiff's motion or to grant Nestor's cross-motion. Paragraph 19 of the Mortgage details a procedure by which Nestor could have paid a certain amount to stop plaintiff's enforcement of the mortgage (*see* NYSCEF Doc. No. 462, ¶ 19). This appears to be the purpose of the August 15 letter, which lays out a certain amount Nestor could pay by August 20 to reinstate the loan. This letter did not revoke the acceleration or require plaintiff to take other actions to declare Nestor in default; the August 13 letter accelerating the loan was enough. The

¹ The Court notes that in many "standard" mortgages, paragraph 22(c) contains a notice period; as stated above, this subsection was not included in the documents submitted on this motion. At oral argument, counsel for plaintiff asserted it was deleted.

Court observes that the Second Department considered a substantially similar paragraph 19 and noted that “the reinstatement provision in paragraph 19 of the mortgage did not prevent it from validly accelerating the mortgage debt” (*Bank of N.Y. Mellon v Dieudonne*, 171 AD3d 34, 39, 96 NYS3d 354 [2d Dept 2019]).

Moreover, even if plaintiff improperly calculated the interest rate in the August 15 letter, that does not bar the Court from granting plaintiff summary judgment.² Nestor does not claim she paid the “right” (in her version) amount by August 20 or even by the end of August. Nestor did not make a payment until October and Nestor failed to submit anything showing that this payment would reinstate the loan. Plaintiff need not have done anything else before bringing the instant action.

Summary

The record before this Court suggests that defendant Nestor is a sophisticated businesswoman who secured a series of loans with Horn for business purposes. The fact that she defaulted on a loan secured by her property does not transform this case into a residential mortgage foreclosure case given that she signed the Note and the Estoppel Certificate. These two documents show she agreed to *not* assert affirmative defenses or counterclaims except for payment and that the loan was for business purposes. Clearly, that part was an important part of the agreement for plaintiff.

The Court cannot ignore these agreements because Nestor prefers to assert affirmative defenses now. And that she may have used the loan proceeds for personal purposes does not change the language of the Note or the Estoppel Certificate. In Nestor’s memo in opposition, she claims that the Estoppel Certificate is a document “which Ms. Nestor acknowledges signing but

² Plaintiff appears to have included interest at the default rate from August 1 rather than include a 10-day grace period mentioned in paragraph 7 of the Note.

does not recall reading” (NYSCEF Doc. No. 480 at 14). That is not a good enough reason to ignore the documents Nestor signed.

Finally, the note was properly accelerated on August 13 and the August 15 letter let Nestor know what she had to pay and when in order to de-accelerate the loan and reinstate it. She did not make that payment. Instead, three months later, Nestor paid what she wanted when she wanted; that was too little and too late to reinstate the loan. The Court must conclude that plaintiff is entitled to summary judgment.

Motion to Withdraw as Counsel

The Court also grants counsel for plaintiff’s motion (MS012) to withdraw as counsel. There shall be a stay until September 17, 2019. After that stay expires, plaintiff must forward the necessary documents to the referee appointed below within 30 days.

Accordingly, it is hereby

ORDERED that the motion by plaintiff (MS011) for summary judgment is granted and the cross-motion by defendant Marianne Nestor for summary judgment is denied; and it is further

ORDERED that the answer, affirmative defenses and counterclaims asserted by defendant Nestor are severed and dismissed; and it is further

ORDERED that plaintiff is awarded a default judgment against all non-appearing defendants; and it is further

ORDERED that **Elaine Shay, Esq. with an address of 800 Third Avenue, 28th floor, New York, New York 10022** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the tax parcel 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 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 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 himself or paying funds to himself 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 *after the stay referenced in connection with counsel for plaintiff's motion to withdraw as counsel expires* 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 defendants John Doe #1-#10 are stricken from the caption and the caption shall read as follows:

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

-----X
STEVEN HORN

Plaintiff,

v.

MARIANNE NESTOR, NEW YORK CITY
PARKIGN VIOLATIONS BUREAU, NEW
YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY
TRANSIT ADJUDICATION BUREAU,

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 removed pursuant hereto; 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/supctmanh)).

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 it is further

ORDERED that the motion (MS012) by plaintiff to withdraw as counsel is granted without opposition upon e-filing proof of compliance with the following conditions:

Within ten (10) days of this Order, the movant shall:

(1) serve by certified and regular mail, to plaintiff's current address, a copy of this Order together with a notice directing plaintiff to appoint a substitute attorney within forty five (45) days or to proceed self-represented, and

(2) e-file proof of service of each of the foregoing within fourteen (14) days of service.

(3) serve the clerks as set forth in this order (to change the caption, etc.)

Upon filing proof of service of the above, movant shall be relieved as counsel for plaintiff.

All proceedings are hereby stayed and the stay shall expire on September 17, 2019. Plaintiff must send documents to the referee within 30 days after the stay expires.

Next Conference: January 7, 2020 @ 2:15 p.m. If a motion for judgment of foreclosure and sale has been filed, then no conference is necessary and plaintiff may seek an adjournment. Please consult this part's rules for information on how to obtain an adjournment. If a motion has not been made, then a conference is required to explore the reasons for the delay.

7/31/19

DATE

HON. ARLENE P. BLUTH

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE