

31 E. 28th St. Note Buyer LLC v Terzi

2020 NY Slip Op 31432(U)

April 20, 2020

Supreme Court, New York County

Docket Number: 654085/2019

Judge: Andrew Borrok

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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: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

31 EAST 28TH STREET NOTE BUYER LLC,

Plaintiff,

- v -

JACK TERZI, HAGAI LANIADO

Defendant.

-----X

INDEX NO. 654085/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents, 31 East 28th Street Note Buyer LLC's (the **Plaintiff**) motion for summary judgment in lieu of complaint is granted and Jack Terzi and Hagai Laniado (collectively, the **Defendants**) cross-motion pursuant to CPLR § 3211 (a)(4), RPAPL § 3103(3), and CPLR § 2201 is denied.

The Relevant Facts and Circumstances

Reference is made to (i) a Mortgage Note (NYSCEF Doc. No. 3, the **Original Note**), dated August 6, 2014, by JTRE Park 28 LLC (**JTRE**) as borrower in favor of Signature Bank as lender, pursuant to which Signature Bank provided JTRE with a loan of \$2,800,000 for 31-33 East 28th Street, New York, New York (the **Property**) as such Original Note was assigned pursuant to an Allonge (*id.*, the **Allonge**; the Allonge together with the Original Note, hereinafter, the **Note**), dated July 19, 2017, pursuant to which Signature Bank assigned its interest in the Note to the Plaintiff, and (ii) a Limited Guaranty (NYSCEF Doc. No. 4, the

Guaranty), dated August 6, 2014, by and between Signature Bank as lender and the Defendants, as guarantors. Pursuant to the terms of the Note, the Maturity Date was August 10, 2017 (NYSCEF Doc. No. 3, at 1, § 2) and the default interest rate was set at the 24% or the maximum rate allowed to be charged by law, whichever is lower (*id.* at 4, § 8). Pursuant to the Guaranty, the Defendants guaranteed the payment and performance of the “Guaranteed Obligations” (NYSCEF Doc. No. 4 at 2, § 1.1). And, Section 1.2 of the Guaranty defined the “Guaranteed Obligations” as including:

(ii) until the Lender has verified that the DSCR Conditions (as hereinafter defined) have been attained the repayment in full of the Loan; and

...

For purposes hereof **DSCR Conditions** shall mean that the Lender has been provided with a copy of a signed lease for the Unit (as defined in the Note) with the tenant occupancy open for business and paying rent and the Lender has confirmed that the debt service coverage ratio for the Unit is not less than 1.3 to 1.0 (on the assumption that the Loan is amortizing over a term of thirty (30) years) ...

(*id.* at 2).

Following an alleged default based on the borrower’s purported failure to replenish the amount on deposit in the cash collateral account in accordance with a certain amended and restated cash collateral agreement, the Plaintiff accelerated the loan and sent the borrower a written demand claiming that the amount due was the principal amount of \$2,711,323.03, interest at the contract rate from and after May 1, 2017, and interest at the default rate from and after May 13, 2017.

And, on August 22, 2017, the Plaintiff commenced an action to foreclose the mortgages encumbering the Property captioned *31 East 28th Street Note Buyer LLC v. JTRE Park 28 LLC, Jack Terzi, Hagai Laniado, et al.* (Index No. 850193/2017, the **Foreclosure Action**).

Subsequently, the Plaintiff moved for summary judgment and the borrower cross-moved to

dismiss the Foreclosure Action. By a decision and order (NYSCEF Doc. No. 21, the **Foreclosure Decision**), dated May 20, 2019, the court (Bluth, J.) denied the Plaintiff's motion for summary judgment and granted the borrower's cross-motion for summary judgment dismissing the complaint holding that the Plaintiff failed to provide the requisite 30-day cure period because the obligation to replenish the Cash Collateral Account does not constitute "any other sum or money required to be expended" and because there was no allegation of a monetary default under the loan documents. The Plaintiffs have filed a Notice of Appeal (NYSCEF Doc. No. 18), as well as a motion for clarification of the Foreclosure Decision, or in the alternative, for leave to reargue.

Subsequently by letter, dated June 24, 2019 (NYSCEF Doc. No. 5), from the Plaintiff to JTRE, Mr. Terzi, and Mr. Laniado, the Plaintiff made a written demand for all amounts due and owing under the Note and Guaranty. And, on July 17, 2019, the Plaintiff commenced this action for summary judgment in lieu of complaint to recover sums outstanding under the Guaranty and the Defendants cross-moved to dismiss.

Discussion

A. Plaintiff's Motion for Summary Judgment

Pursuant to CPLR § 3213, a party may move for summary judgment in lieu of complaint "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment." In order to prevail in such a motion, "a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note's terms (*Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]). Once the plaintiff

establishes its *prima facie* showing, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue of fact (*id.*).

The Plaintiff argues that the Defendants are liable because they breached the Guaranty by failing to attain the DCSR Conditions and by failing to pay any sums due under the Guaranty (NYSCEF Doc. No. 2, ¶¶ 15-24). In the opposition papers, the Defendants argue that summary judgment should be denied because there remains an issue of fact concerning amounts owed under the Note, namely whether the Plaintiff is entitled to charge JTRE the default interest rate from the date that the Plaintiff allegedly declared an improper default on the subject mortgage. The arguments fails as the court (Bluth, J.) determined that the default declared on the basis asserted in the Foreclosure Action was void.

It is undisputed that (i) the maturity date of the Note has passed without repayment by JTRE, (ii) the Defendants have not complied with the DCSR Conditions, and (iii) the Defendants have not made payment pursuant to the Guaranty. As a result, the Plaintiff has established its *prima facie* case for summary judgment. In addition, the Defendants fail to submit any evidence establishing the existence of a triable issue of fact concerning damages.

To the extent that the Defendants argue that date of default is related to the breach of separate agreements that are the subject of the Foreclosure Action, the Defendants are incorrect. The Note provides that payment is due upon the maturity date of the Note (NYSCEF Doc. No. 3, at 1, § 2) and that the default interest rate applies upon maturity of the Note (*id.* at 4, § 8). As a result, damages due from Defendants in this action – i.e., the amount outstanding under the Note – is

determined pursuant to the terms of the Note. Put another way, the Foreclosure Action is disposed and whether the 30-day cure period applies to the borrower's purported failure to replenish the Cash Collateral Account is simply not relevant inasmuch as the Note has matured and the subject of this action is undeniably a monetary default as the loan remains unpaid. The parties do not dispute that the principal due and owing on the Note is \$2,711,323. There is no obligation for the Plaintiff to exhaust its collection options under the Note before proceeding on the Guaranty (NYSCEF Doc. No. 4, § 1.6). Inasmuch as the defendants argue that there is a factual dispute over the applicable interest rate, which requires denial of the CPLR § 3213 motion, there is no dispute as the terms of the Note govern. The Plaintiff is entitled to the principal amount owed as of the original maturity date, plus the maximum interest permitted by law from the date of the default (which, here, is 16% from August 10, 2017).

Accordingly, the Plaintiff's motion for summary judgment in lieu of complaint is granted.

B. The Defendants' Cross-Motion

1. Dismissal pursuant to CPLR § 3211(a)(4)

Under CPLR § 3211 (a)(4), a court has broad discretion to grant dismissal where there is another action pending between the same parties for the same cause of action. Dismissal is permitted where the actions concern the same parties, arise out of the same subject matter or alleged wrongs, and it is inconsequential that different legal theories or claims are set forth in the two actions (*Shah v RBC Capital Mkts. LLC*, 115 AD3d 444, 444-445 [1st Dept 2014]). Although dismissal in these circumstances is permitted, it is not mandated (CPLR § 3211[a][4]).

The Defendants argue that this action should be dismissed because the Foreclosure Action remains pending, involves substantially the same parties, and arising from the same subject matter. The argument is unavailing. As an initial matter, the Foreclosure Action was dismissed. And, the Plaintiffs sued the borrower in that action looking to foreclose based on the alleged default of the borrower to replenish the amount required in the Cash Collateral Account. This action is brought against the Defendants as guarantors of the Note pursuant to a payment Guaranty (i.e., and not collection) to collect the amount due on the Note based on the fact that the Note has matured and remains unpaid. It is beyond cavil that an action maintained against a Guarantor may be maintained separately from an action against an obligor [*see e.g., Fehr Bros, Inc. v Scheinman*, 121 AD2d 13 [1st Dept 1986]]. Put another way, the Foreclosure Action and the instant action do not involve substantially the same parties or the same subject matter. In the Foreclosure Action, JTRE has asserted a counterclaim against the Plaintiff from this action. However, JTRE is not a defendant to this action, rather it is the individual guarantors of the Note that are the Defendants. Further, JTRE's counterclaims in the Foreclosure Action are based on a breach of different mortgage contracts concerning the Plaintiff's allegedly improper declaration of a default. In contrast, this action centers solely on those obligations contained in the Guaranty and the Note. Thus, the two actions involve separate legal obligations that flow from separate agreements. In addition, the two actions can be distinguished by the relief sought in each: the Foreclosure Action seeks damages for the Plaintiff's purported breaches of different agreements, while this seeks recovery of outstanding obligations under the Guaranty. Accordingly, there is insufficient identity between the parties and causes of actions in the Foreclosure Action and the present action such that the branch of the Defendants' cross-motion to dismiss pursuant to CPLR § 3211 (a)(4) is denied.

2. Dismissal pursuant to RPAPL § 1301

Real Property Actions and Proceedings Law § 1301(3) provides that:

[w]hile 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 Defendants argue that the Plaintiff is precluded from enforcing the Guaranty because of the first filed Foreclosure Action that sought to recover the mortgage debt. The argument fails. The court's decision in the Foreclosure Action was not based on the failure to pay the Note on the maturity date. Indeed, Plaintiff's sole avenue to recover its mortgage debt is presently in this action. In other words, dismissal of the Plaintiff's claims in the Foreclosure Action necessarily means that the Plaintiff may initiate a separate action on the Guaranty (*see McSorley v Spear*, 13 AD3d 495, 496 [2d Dept 2004] [explaining that a foreclosure action where the defendant obtained a judgment in its favor dismissing the complaint could not preclude the plaintiff from commencing a separate action on the note under RPAPL § 1303(3) because the foreclosure action was no longer pending]).

To the extent that the Defendants argue that the Foreclosure Action remains pending because the Plaintiff filed an appeal, the Plaintiff's appeal does not concern recovery of the mortgage debt, but rather JTRE's counterclaims and third-party complaint. As the appeal does not seek to confirm or overturn any portion of the Foreclosure Decision dismissing the Plaintiff's claims to the mortgage debt, the Plaintiff's notice of appeal in the Foreclosure Action does not preclude the Plaintiff from bringing this action. Accordingly, that branch of the Defendants' cross-motion to dismiss pursuant to RPAPL § 1303(3) is denied.

Based on the foregoing, that branch of the Defendants' motion to stay the action pursuant to CPLR § 2201 is also denied.

Accordingly, it is

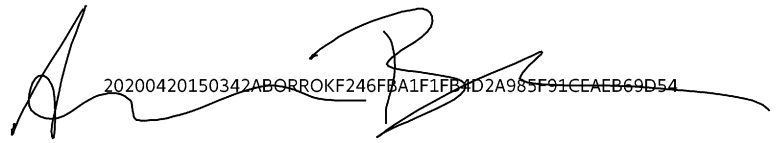
ORDERED that the Plaintiff's motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that the Defendants' cross-motion pursuant to CPLR § 3211 (a)(4), RPAPL § 3103(3), and CPLR § 2201 is denied; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff for the amount of \$2,711,323 from the date of August 10, 2017, the original maturity date, with interest at 16 percent per annum, the maximum rate allowed by law in NY, from the date of default to the date of entry of judgment, and at the statutory rate thereafter, for a total amount of _____, as calculated by the Clerk of Court.

4/20/2020

DATE


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ANDREW BORROK, 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