

Kats v Agosto

2020 NY Slip Op 31704(U)

May 5, 2020

Supreme Court, New York County

Docket Number: 810027/10

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

-----X
RUDOLF KATS,

Plaintiff,

v

BLANCA AGOSTO ET AL.,

Defendants.
-----X

RUDOLF KATS,

Plaintiff,

v

BLANCA AGOSTO, GREEN ERA CONSTRUCTION
CORP., 20 MAIDEN LANE ASSOCIATES LLC,
ET AL.,

Defendants.
-----X

RUDOLF KATS,

Plaintiff,

v

BLANCA AGOSTO, GREEN ERA CONSTRUCTION
CORP., 20 MAIDEN LANE ASSOCIATES LLC,
ET AL.,

Defendants.
-----X

DECISION AND ORDER

Index No. 810027/10
Action No. 1
SEQ 009

Index No. 850027/12
Action No. 2
SEQ 002, 003

Index No. 850360/14
Action No. 3
SEQ 003

NANCY M. BANNON, J.:

I. INTRODUCTION

In these three related breach of contract and foreclosure actions arising from a series of four loans by the plaintiff Richard Kats to the defendant Blanca Agosto made between April 2007 and October 2008, which were secured by a mortgage on a parcel of real property owned by Agosto at 127 East 106th Street in Manhattan (the property), the plaintiff seeks (1) summary judgment on the issue of liability as against defendant Agosto, (2) dismissal of Agosto's affirmative defenses and counterclaims, (3) the appointment of a referee to compute the amount due to the plaintiff under the subject mortgages and notes, and (4) to amend the captions to delete the "John Doe" defendants, and to discontinue the action against those defendants.

Additionally, in the actions filed under Index No. 850027/2012 (Action No. 2) and 850360/2014 (Action No. 3), the plaintiff also seeks leave to enter a default judgment as against the defendants Green Era Construction Corp. (Green Era) and 20 Maiden Lane Associates LLC (Maiden Lane). Finally, in action No .2, the plaintiff seeks to appoint a temporary receiver of rents and profits for the building.

II. BACKGROUND

The proceeds of the loans were allegedly used to complete a renovation project at the property. Agosto failed to repay the loans as agreed to by the parties. The action filed under Index No. 810027/2010 (Action No. 1) seeks to foreclose on the fourth mortgage. Summary judgment was awarded to the plaintiff in that action by decision and order dated October 14, 2015. However, the parties agreed to vacate that order by stipulation dated October 14, 2015, as part of global settlement discussions. The action filed under Index No. 850027/2012 (Action No. 2) seeks to foreclose on the second mortgage. The action filed under Index No. 850360/2014 (Action No. 3) seeks to foreclose on the first and third mortgages. The court notes that there has been a protracted history of settlement discussions between the parties and that the court has expended a considerable amount of time and resources attempting to settle these matters. Defendant Agosto opposed the motions. The motions are granted to the extent discussed herein.

III. DISCUSSION

A. The motions for summary judgment and other relief

The plaintiff has met its burden of proof on the branches of his motions seeking summary judgment against Agosto by

establishing a prima facie showing of entitlement to judgment as a matter of law on the issue of liability on his causes of action to foreclose on four mortgages, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985).

The proof submitted is voluminous, and includes, *inter alia*, the pleadings, a supporting affirmation of the plaintiff's attorney, an affidavit of the plaintiff, an affidavit of the attorney who represented Agosto in connection with some of the loans, an affidavit of Agosto's mortgage broker, the subject mortgages and notes, and financing statements and other documentation relating to such mortgages and notes. The proof shows that Agosto borrowed the sums of \$125,000.00, \$200,000.00, \$120,000.00, and \$75,000.00 from the plaintiff, an independent lender, to complete a renovation project at the subject premises, and that Agosto failed to repay the plaintiff in accordance with the terms of the note instruments. It also establishes that the notes were secured by mortgages on the real property at 127 East 106th Street, New York, New York, and that the plaintiff is in possession of the notes and mortgages. Having produced sufficient evidence of the mortgages, the unpaid notes, and Agosto's default, the plaintiff demonstrates his entitlement to summary judgment on its cause of action seeking

foreclosure. See VNB N.Y. Corp. v Pisces Props., Inc., 138 AD3d 583 (1st Dept. 2016).

In opposition to the plaintiff's motions for summary judgment, Agosto fails to raise any triable issue of fact. Moreover, Agosto's purported cross-motions to dismiss the complaint as against her were improperly brought after the submission of her opposition and beyond the deadline for opposition set by the court, and as such, may not be considered. As to Agosto's answer, the court notes that Agosto contractually waived her right to interpose any defenses other than payment, including civil usury, as well as her right to assert any counterclaims, and that such a waiver is generally enforceable. See JPMCC 2007-CIBC 19 Bronx Apts, LLC v Fordham Fulton LLC, 84 AD3d 613 (1st Dept. 2011); Feldman v Torres, 34 Misc. 3d 47 (App. T. 2nd Dept. 2011) (citing cases). Moreover, even if Agosto had not agreed to such a waiver, for the reasons summarized in the plaintiff's moving papers, her claims of civil usury and other defenses are without merit.

The branch of the plaintiff's motions seeking leave to enter a default judgment against Green Era, who has not answered or otherwise appeared in this action, is untimely. CPLR 3215(c) requires that any motion for a default judgment be made within one year and that any untimely motion be denied and the

complaint As dismissed as abandoned, upon motion or the court's own motion, absent "sufficient cause" shown. See Seide v Calderon, 126 AD3d 417 (1st Dept. 2015); Diaz v Perez, 113 AD3d 421 (1st Dept. 2014); Utak v Commerce Bank, Inc., 88 AD3d 522 (1st Dept. 2011). The affidavits of service submitted with the motions indicate that service of the summons and complaint was made upon Green Era in the action filed under Index No. 850027/2012, Action No. 2, on April 2, 2012, and in the action filed under Index No. 850360/2014 on December 4, 2014, Action No. 3. The motion for leave to enter a default judgment in the action filed under Index No. 850027/2012 was not made until September 30, 2017. The motion for leave to enter a default judgment in the action filed under Index No. 850360/2014, was not made until October 2, 2017. The plaintiff proffers no reason for that delay nor any authority condoning such a delay. Since the plaintiff has failed to demonstrate "sufficient cause" (CPLR 3215(c)), its motion for leave to enter a default judgment against Green Era is denied and the complaint is dismissed as against that defendant.

The plaintiff also seeks leave to enter a default judgment against the defendant Maiden Lane. Maiden Lane was named as a party because, according to the records of the New York County Clerk, Maiden Lane is the holder of a money judgment against

Agosto in the amount of \$15,895.00, which was filed on July 18, 2011. The plaintiff seeks to extinguish Maiden Lane's lien, if such a lien exists, against the mortgaged premises, by operation of the final judgment of foreclosure and sale sought in the complaint. Maiden Lane withdrew its answer with affirmative defenses and cross-claim in Action No. 2, by stipulation dated August 15, 2012. In Action No. 3, Maiden Lane filed a notice of appearance waiving service of responsive pleadings without prejudice to asserting a claim to any surplus revenue arising from the public sale of the mortgaged premises. The plaintiff's submissions establish that he is entitled to a default judgment as against Maiden Lane.

The branches of the plaintiff's motions seeking leave to amend the caption to remove "John Doe #1" through "John Doe #50" and to discontinue this action as against those defendants are granted.

B. The motion to appoint a receiver

In mortgage foreclosure actions, where the mortgage instrument explicitly provides for the appointment of a receiver in the event of default, an application for the appointment of a receiver is governed by RPL 254(10). RPL 254(10) provides, in relevant part, that where the parties have agreed to a provision entitling the holder of the mortgage to the appointment of a

receiver, the provision shall be read to mean that the mortgagee "shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default of defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness." This provision allows for the appointment of a receiver without a showing by the plaintiff of impending jeopardy to the mortgaged premises. See CSFB 2004-C3 Bronx Apts LLC v Sinckler, Inc., 96 AD3d 680 (1st Dept. 2012); Bank of America, N.A. v Schoharie Senior Housing Development Fund Corporation, 166 AD3d 1114 (3rd Dept. 2018); Clinton Capital Corp. v One Tiffany Place Developers, Inc., 112 AD2d 911 (2nd Dept. 1985); Kestenberg v Platinum Properties Corp., 112 AD2d 268 (2nd Dept. 1985).

Even when the mortgage instrument contains such a provision for a receivership, however, no automatic entitlement to a receiver exists. The court retains within its equitable power the discretion to deny a motion for appointment. See ADHY Advisors LLC v 530 West 152nd Street LLC, 82 AD3d 619 (1st Dept.

2011); Groh v Halloran, 86 AD2d 30 (1st Dept. 1982); Clinton Capital Corp. V One Tiffany Place Developers, Inc., supra.

The mortgage agreement here provides that the mortgagee may apply for the appointment of a receiver, as a matter of right and without regard to the adequacy of the security for the indebtedness, in an action to foreclose the mortgage. Thus, the plaintiff is entitled to the appointment of a receiver of the rents and profits of the premises covered by the mortgage. See CSFB 2004-C3 Bronx Apts LLC v Sinckler, Inc., supra; Naar v I.J. Litwak & Co., Inc., 260 AD2d 613 (2nd Dept. 1999). Based on the record before the court, no basis exists for denying the plaintiff's motion.

IV. CONCLUSION

Accordingly, it is,

ORDERED that the plaintiff's motions for summary judgment as against defendant Blanca Agosto, dismissal of the affirmative defenses and counterclaims of Blanca Agosto, to appoint a referee to compute the amount due to the plaintiff under the subject mortgages and notes, and to amend the captions to delete the "John Doe" defendants and discontinue the action against those defendants are granted; and it is further,

ORDERED that the plaintiff's motion for summary judgment is granted to the extent that the plaintiff is granted leave to

enter a judgment of foreclosure against defendant Blanca Agosto with the full amount of damages assessed against them to be determined by David Dender, Esq., 65 Glenwood Rd Plainview, NY 11803, 1-516-433-7999, David@Denderlaw.Com as referee, who shall issue a report and recommendation to the court on the amounts due under the note and mortgages, and to enter default judgment against defendant Maiden Lane, foreclosing them from asserting any interest in the mortgagor's share in the subject real property located at 127 East 106th Street in Manhattan; and it is further,

ORDERED that the plaintiff's motion is granted, without opposition to the extent that the caption in these three actions are hereby amended as follows:

RUDOLF KATS,

Plaintiff,

v

BLANCA AGOSTO, GREEN ERA CONSTRUCTION CORP.
and 20 MAIDEN LANE ASSOCIATES LLC,

Defendants.

and it is further,

ORDERED that the plaintiff's motion for default judgment against defendant Green Era is denied as untimely, and plaintiff's motion for default judgment against defendant Maiden Lane is hereby granted, and that any lien that Maiden Lane may have had on the property in question is extinguished; and it is further,

ORDERED that the plaintiff's motion for the appointment of a temporary receiver is granted, and that David Dender, Esq., 65 Glenwood Rd Plainview, NY 11803, 1-516-433-7999, David@Denderlaw.Com, be and hereby is appointed to act as the receiver of the real property located at 127 East 106th Street, New York, New York, with the usual powers and duties of a receiver during the pendency of this proceeding for the benefit of the plaintiff of all the rents and profits now due and unpaid or may become due and issuing out of the subject property; and it is further,

ORDERED that the receiver is authorized to forthwith take charge and enter into possession of the subject property; and it is further,

ORDERED that the receiver is authorized to retain the services of a managing agent or real estate management corporation in connection with the day-to-day management of the subject property, such managing agent or real estate management

corporation to be entitled to reasonable fees in the management of the corporation and the property; and it is further,

ORDERED that, before entering upon his duties, the receiver shall be sworn to faithfully and fairly discharge the trust committed to him and shall execute to the People of the State of New York and with the Clerk of this court an oath and undertaking with sufficient sureties, in the sum of \$1,500,000, which may be in the form of an insurance policy or insurance bond, the costs of which shall be borne by Defendant Agosto, conditioned upon the faithful discharge of his duties as such receiver; and it is further,

ORDERED that the receiver be and hereby is directed to demand, collect, and receive from the occupants, tenants, and/or licensees in possession of the subject property, or other persons liable therefor, all the rents, maintenance fees, assessments, and license fees now due and unpaid or hereafter to become fixed and due; and it is further,

ORDERED that the receiver may institute and prosecute suits for the collection of rent, maintenance fees, assessments, and license fees, and other charges now due or hereafter to become due or fixed, and summary proceedings for the removal of any tenants, tenant-shareholders, or licensees or other persons therefrom; and it is further,

ORDERED that pursuant to the provisions of General Obligations Law § 7-105, anybody holding any deposits or advances of rental as security under any lease or license agreement affecting space in the subject property shall turn over such deposits or advances to the receiver within five days after the receiver shall have qualified, and the receiver shall thereupon hold such security subject to such disposition thereof as shall be provided by order of this court to be made and entered in this proceeding; and it is further,

ORDERED that if any of the tenants, their contractors, agents, and/or employees are in possession of expired or unexpired leases, agreements, correspondence, notices, and registration statements relating to the subject property, they shall immediately deliver them to the receiver; and it is further,

ORDERED that the receiver shall not incur any expenses on his own behalf, including fees and commissions due to him or his attorney, in excess of \$2,500.00, and is prohibited from incurring obligations in excess of the monies in his hands without further order of the court or the consent of the defendants' attorney, except, however, that the receiver is permitted to incur expenses above and beyond such monies collected for the purposes of procuring the necessary insurance,

as described above, and in securing bond and surety, as described above, provided that, if the receiver expends money for the cost of obtaining that insurance, bond, and surety, that money shall be reimbursed to him by the plaintiff; and it is further,

ORDERED that the receiver shall promptly deposit all monies received by him at the time he receives said money, in his own name as receiver, in a commercial bank of his choosing, provided that the commercial bank shall be authorized to do business in New York and the relevant account shall be opened at a branch located in Manhattan (the depository) and that no withdrawals shall be made therefrom except as directed by this court or on a draft or check signed by the receiver and countersigned by the surety on his undertaking; and it is further,

ORDERED that the depository shall send monthly statements of deposits into and withdrawals from the account of the depositor receiver to the receiver and the attorney for the petitioner; and it is further,

ORDERED that the receiver is authorized to pay the taxes, assessments, water charges, sewer rents and charges, and charges for electricity, as well as the operational expenses of the subject property, and the cost of all insurance required by the terms of the cooperative corporation's by-laws or operating

agreement, provided that, if the receiver expends money for any of those expenses, that money shall be reimbursed to him by the petitioner, and the receiver may, after notice to the defendants, (a) rent or lease units in the subject property for terms not exceeding two years, (b) approve the sale of shares and issue a proprietary lease referable to an ownership interest in those units, (c) make secure the subject property and safeguard it from the elements and from acts of theft or vandalism, (d) comply with all requirements of any department or other authority having jurisdiction, (e) take such further action that a prudent owner or manager would with respect to the subject property to preserve its value; and it is further,

ORDERED that the tenants, tenant-shareholders, licensees, or other persons in possession of the units in the subject property attorn to the receiver and turn over to him all rents, license fees, and other charges of such property now due and unpaid or that may hereafter become due to the plaintiff corporation; and that, during the pendency of this proceeding, the plaintiff corporation and any person purporting to act on its authority, and their agents, other than those designated or retained by the receiver, be, and hereby are, enjoined and restrained from (a) collecting the rents, license fees, and other charges of the subject property, (b) contracting to lease,

rent, license, partition, or sell the subject property or any portion thereof, (c) approving or disapproving sales of shares in the plaintiff corporation referable to apartment units in the subject property or issuing proprietary leases in connection therewith, (d) interfering with the receiver or in any way with the subject property or its possession, (e) transferring or removing or in any way disturbing any of the occupants thereof; and it is further,

ORDERED that all tenants, tenant-shareholders occupants, employees, and licensees of the property and other persons liable for the rents be and hereby are enjoined and restrained from paying any rent or license fees or other charges for such property to any person or corporation other than the receiver or his designees; and it is further,

ORDERED that all parties to this action turn over to the receiver all rents collected from and after the date of this order; and it is further,

ORDERED that all persons now or hereafter in possession of the subject property, or any part thereof, and not holding such possession under valid and existing leases or tenancies, do forthwith surrender such possession to the receiver, subject to emergency laws, if any; and it is further,

ORDERED that the receiver, after paying the expenses of the management and care of the subject property as provided above retain the balance of the monies that may come into his hands until the termination of the receivership; and that then, after deducting therefrom his proper fees and disbursements in amounts approved by this court, retain said monies in his hands until the further order of this court and provide a final accounting to the attorney for the parties of all funds received and/or disbursed by the receiver; and it is further,

ORDERED that the receiver shall continue as receiver until further order of this court; and it is further,

ORDERED that, upon proper motion of the receiver to settle his final account, the fees of the receiver shall be paid in accordance with CPLR 8004; and it is further,

ORDERED that the receiver, or any party hereto may, at any time, on proper notice to all parties who may have appeared in the proceeding and who have not waived such notice, apply to this court for further and other instructions or powers necessary to enable the receiver properly to fulfill his duties; and it is further,

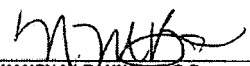
ORDERED that the appointee named herein shall comply with section 35a of the Judiciary Law and CPLR 6401-6404, RPAPL 1325,

and Rule 36 of the Chief Judge, and file all reports, statements, oaths, or other documents as required by law or directive of the court or Chief Judge; and it is further,

ORDERED that the receiver shall not make any secondary appointments without the prior written approval of the court, and that the receiver shall apply in a separate application for the appointment of a managing agent, landlord-tenant counsel, if applicable, or other management services professional pursuant to Rule 36.1 of the Uniform Court Rules.

This constitutes the Decision and Order of the Court.

Dated: May 5, 2020


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

ENTER: _____

J.S.C.