

27 W. 72nd St. Note Buyer LLC v JTRE W72nd St. LLC

2020 NY Slip Op 32283(U)

June 23, 2020

Supreme Court, New York County

Docket Number: 850183/2017

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: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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27WEST 72ND STREET NOTE BUYER LLC,

Plaintiff,

INDEX NO. 850183/2017

MOTION DATE _____

MOTION SEQ. NO. 005

- v -

JTRE W72ND STREET LLC, JACK TERZI, BOARD OF MANAGERS OF THE OLCOTT CONDOMINIUM, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, JOHN DOE NO. I TO JOHN DOE NO. XXX, INCLUSIVE, THE LAST THIRTY NAMES BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF, THE PERSONS OR PARTIES INTENDED BEING THE TENANTS, OCCUPANTS, PERSONS OR CORPORATIONS,

Defendant.

DECISION + ORDER ON MOTION

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JTRE W72ND STREET LLC

Plaintiff,

Third-Party
Index No. 595187/2018

-against-

MICHAEL SHAH

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 155

were read on this motion to/for MODIFY ORDER/JUDGMENT.

The motion by plaintiff and third-party defendant Shah to modify the Court’s order dated May 20, 2019 and to reargue is granted to the extent that the counterclaims are dismissed. The cross-motion by defendants for an order compelling a payoff letter from plaintiff, leave to amend their counterclaims and to consolidate this action is denied.

Background

This commercial foreclosure action primarily focused on whether plaintiff properly accelerated the mortgage based on defendants' alleged failure to maintain a cash collateral account. The Court previously found that plaintiff had not provided defendants with the 30 days' notice required under the terms of the mortgage and dismissed the case (NYSCEF Doc. No. 120).

Plaintiff contends, correctly, that this Court was silent on plaintiff's previous request for dismissal of defendants' counterclaims and on their third-party counterclaim against Shah. Therefore, the Court grants the motion to reargue to the extent that the Court will now consider the counterclaims on their merits, something it did not do in the decision dismissing the complaint.

Counterclaims

Defendants brought counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing and a third-party claim against Shah for tortious interference with a contract.

Plaintiff contends that a breach of contract counterclaim cannot stand where the borrower is unable to show its own compliance under the loan documents and that a note and a mortgage are not bilateral agreements which require material performance on the part of the mortgagee. In opposition, defendants contend that this Court's order was clear because the Court entered judgment.

As the Court stated above, it overlooked the branch of plaintiff's motion that sought to dismiss these counterclaims and it entered judgment disposing of the case without offering a specific ruling on those issues.

With respect to the breach of contract counterclaim, that should have been dismissed because the contract is still in effect. The Court found that plaintiff had improperly accelerated the mortgage, which means that the terms of the mortgage remain. Moreover, as plaintiff points out, a mortgage is a unilateral contract (*see Flemington Natl. Bank & Trust Co. v Domler Leasing Corp.*, 65 AD2d 29, 36-37, 410 NYS2d 75 [1st Dept 1978]). This refers to a contract where one side has fully performed and the remaining obligations are on the other party only (*id.* at 37). Here, plaintiff (via its predecessor) performed by lending the money to defendants who, in return, must repay that sum along with interest and comply with the other obligations set forth in the note and mortgage. The fact that plaintiff did not give defendants proper notice before declaring all amounts due is not a breach of contract; it is an error that results in the nullification of that acceleration. This claim is dismissed.

For similar reasons, the Court dismisses the breach of the covenant of good faith and fair dealing counterclaim. The fact is that defendants received the loan money and the improper acceleration did not impede or destroy defendants' receipt of any funds.

The tortious interference claim is also without merit and is dismissed. This tort requires that there be a breach of contract, which as stated above, there has not been (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424, 646 NYS2d 76 [1996] [discussing elements of a tortious interference with contract claim]). The Court merely found that a predicate notice to foreclosure on this loan was improper. That does not state a cause of action for tortious interference with a contract.

Defendants' Cross-Motion

Defendants cross-move to compel a payoff statement, for leave to amend the answer and to consolidate this case with another pending action. This cross-motion is denied. Defendants'

demands about a payoff letter are moot because the Court granted defendants' cross-motion for summary judgment dismissing the complaint. And that demand asks the Court to order plaintiff to produce "a proper" payoff statement and accept a payoff amount with a certain interest rate. The Court declines to order plaintiff to create a document with the conditions asserted by defendants where there is no pending foreclosure cause of action. Defendants cite no basis upon which the Court could force plaintiff to send a payoff letter after the Court has already found that plaintiff's foreclosure case must be dismissed. While the Court recognizes that defendants are unhappy with plaintiff's actions after the Court dismissed the complaint, its request is not relevant to the claims at issue in this case. And, as plaintiff points out, defendants are essentially asking that the Court order the ultimate relief defendants seek in their proposed fourth counterclaim: a payoff letter in the amount claimed by defendants. That is improper.

The basis for defendants' request for leave to amend—the purported additional bad faith acts that arose after the Court's May 21, 2019 order—is not relevant to this case and that branch of the cross-motion is denied. The counterclaims, as discussed above, are meritless and the allegedly wrongful actions taken after the Court found that plaintiff's acceleration was improper have no place in this case. The additional counterclaims alleged by defendants in its proposed amended answer (for declaratory relief and malicious prosecution) fail to state a cause of action. Defendants fail to identify a provision in the note or mortgage or caselaw that support a claim for injunctive relief forcing a lender to provide a payoff letter with the "proper amount" and declare that amount "as full satisfaction" in accordance with the loan where plaintiff no longer seeks to foreclose.

The fact that plaintiff did not comply with a provision of the mortgage before acceleration does not state a malicious prosecution cause of action. And, of course, defendant did not deny that it failed to keep the required amount in the cash collateral account.

Finally, there is no basis to consolidate: this case is now completely resolved and there is nothing left to consolidate.

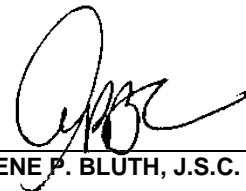
Accordingly, it is hereby

ORDERED that the motion by plaintiff to modify, clarify and or reargue is granted to the extent that the Court grants the motion and dismisses defendants' counterclaims and third-party claim, and the Court adheres to its previous decision in all other respects; and it is further

ORDERED that the cross-motion by defendants to compel a payoff letter, for leave to amend and to consolidate this matter with another pending action is denied.

06/23/2020

DATE



ARLENE P. BLUTH, 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