

NH Smith Lender, LLC v 232 Smith St. LLC
2021 NY Slip Op 32216(U)
October 12, 2021
Supreme Court, Kings County
Docket Number: Index No. 516709/20
Judge: Lawrence Knipel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of October, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice,

-----X

NH SMITH LENDER, LLC,

Plaintiff,

- against -

Index No. 516709/20

232 SMITH STREET LLC; LOUIS V. GRECO, JR.; SECOND DEVELOPMENT SERVICES, INC.; SDS LEONARD, LLC; MIDTOWN-REN ENTERPRISE INC.; VANGUARD CONSTRUCTION SOLUTIONS LLC; TRIBORO CONTRACTORS SUPPLY CORPORATION; HIRANI ENGINEERING & LAND SURVEYING P.C.; IDEAL STEEL SUPPLY CORPORATION; ALL SEASONS LANDSCAPING TS INC., AHERN RENTAL, INC., and JOHN DOE #1 through JOHN DOE #10 (said John Doe defendants being fictitious, it being intended to name all other parties who may have some interest in or lien upon the premises sought to be foreclosed),

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

186-193

Opposition Affidavits (Affirmations) Annexed _____

194

Reply Affidavits (Affirmations) Annexed _____

195

Upon the foregoing papers in this action to foreclose a mortgage on the real property at 232/240 Smith Street a/k/a 59/61 Douglass Street in Brooklyn (Property), defendants 232 Smith Street LLC (232 Smith or Borrower), Louis V. Greco, Jr. (Greco or Guarantor), SDS Leonard LLC (SDS Leonard or Guarantor) and Second Development Services, Inc. (SDS or Guarantor) (collectively, defendants) move (in motion sequence [mot. seq.] seven) for an order, pursuant to CPLR 2221 (d), granting them leave to reargue this court's August 19, 2021 order and, upon reargument, denying the summary judgment motion of plaintiff NH Smith Lender, LLC (NH Smith).

Background

On September 8, 2020, NH Smith commenced this foreclosure action by filing a summons, a complaint and a notice of pendency against the Property. NH Smith seeks to foreclose on: (1) an Acquisition Loan Consolidated Mortgage on the Property, which secures a December 29, 2017 Acquisition Loan Consolidated Note in the amount of \$7,170,574.00 executed by the borrower; (2) a Building Loan Mortgage on the Property, which secures a December 29, 2017 Building Loan Note in the amount of \$2,946,021.00 executed by the borrower; and (3) a Project Loan Mortgage on the Property, which secured a December 29, 2017 Project Loan Note in the amount of \$1,958,405.00 executed by the borrower (the Mortgages).

The complaint alleges that “[p]ursuant to the terms of the Notes and Mortgages, all amounts due and owing under the Notes were due and payable in full on [the] December 29, 2018 [maturity date]” and “[b]orrower failed to pay all amounts due under the Notes

on or before the Maturity Date” (complaint at ¶¶ 22 and 36). The complaint alleges that defendants Greco, SDS and SDS Leonard executed guarantees as further security for the loans (*id.* at ¶¶ 33-35). The complaint further alleges that there is now due and owing from borrower and/or the guarantors under the Notes, Mortgages and Guarantees the total amount of \$16,820,930.37 as of June 30, 2020 (*id.* at ¶ 45). The complaint asserts three causes of action for: (1) foreclosure asserted against all of the defendants; (2) breach of contract against the Guarantors; and (3) a deficiency judgment against the Borrower.

On June 9, 2021, after successfully cross-moving to vacate their appearance default, defendants answered the complaint, denied the material allegations therein and asserted affirmative defenses, including “payment” and that the “maturity date” set forth in the complaint is wrong. Defendants’ answer asserted counterclaims against NH Smith for: (1) breach of contract “by not timely funding the answering Defendants thereby hindering the development of the property . . .”; (2) breach of contract because it “improperly paid directly to . . . suppliers and Contractors . . . in excess of Five Hundred Thousand dollars . . .”; (3) “Plaintiff acted in bad faith during negotiations to settle any alleged default . . .”; (4) “Plaintiff misrepresented certain things, pertinent to the agreement and sought to be enforced herein by Plaintiff, to Defendants such as [their] willingness to settle disputes and mitigate spurious claims alleged by them”; (5) “Plaintiff interfered with the Answering Defendants’ development process relevant to the development of [the Property]”; (6) “Plaintiff acted in bad faith and did not deal fairly with these answering defendants”; and (7) “[b]y its misrepresentation and negligence, Plaintiff breached its alleged contract with

the answering defendants and caused economic duress and injury” (answer at ¶¶ 8, 11, 14, 17, 20, 23 and 26). Defendants’ answer also asserts cross claims against Vanguard Construction Solutions LLC and Midtown-Ren Enterprise, Inc. for negligence.

On June 29, 2021, NH Smith replied to defendants’ counterclaims and denied the material allegations therein.

On July 20, 2021, NH Smith moved (in mot. seq. five) for an order granting it summary judgment against defendants, striking defendants’ answer and counterclaims, issuing an order of reference and a default judgment against the non-answering defendants.

On August 16, 2021, defendants, in opposition, submitted an affidavit from Greco in which he claims that this action “is not ripe for summary judgment as there are several issues of material fact that exist in this action . . .” Specifically, Greco attested that “[d]efendants cured any claimed default by continuing to work with Plaintiff to remediate any default [which] is evident from Plaintiff’s round of financing towards the construction on October 9, 2018.” Greco asserted that “[d]espite a notice of default sent on October 1, 2018, the parties discussions and wires sent [over] several days evidences a waiver of any default of the lender.” Greco also asserted that “[b]ecause Plaintiff took control of funding the sub-contractors it completely took our ability to manage our sub-contractors.” Greco also claimed that there are “many offsets” against the lender and summary judgment cannot be granted until it is determined “what is owed” because “[s]ince Plaintiff’s last funding [o]n October 9, 2018, there should have been \$1,937,355.00 in escrow remaining representing the balance of the Building Loan Reserve . . .” and “\$199,661.05 in escrow

remaining representing the balance of the Project Loan Reserve . . .” Greco argues that those funds were improperly released to plaintiff by the escrow agent due to their alleged default on the October 1, 2018 maturity date. Defendants also claimed that the “impossibility doctrine applies as any non-performance by Defendants should be excused based upon the various issues that took place with the [construction] site that caused Defendants[’] inability to perform . . .”

NH Smith, in reply, directed the court to paragraph H.21.b of the Building Loan Mortgage and Project Loan Mortgage executed by Borrower in favor of NH Smith, which specifically provides that:

“[i]n any action commenced by Mortgagee by reason of Mortgagor’s default under the terms of this Mortgage or the Note, or Other Loan Documents, or bond secured hereby, whether such action be an action to foreclose or an action under the bond or Note, *Mortgagor hereby waives any defense other than payment, and waives any right to set-off by way of damages, recoupment or counterclaim in damages*, whether arising out of this Mortgage or the bond or Note or otherwise, which Mortgagor may otherwise be entitled to. Mortgagor shall have an independent action for such claim and such independent action shall not at any time be joined or consolidated with any action commenced by Mortgagee under this Mortgage, or Other Loan Documents, or the bond or Note secured hereby” (emphasis added).

The August 19, 2021 Decision and Order

This court issued an August 19, 2021 decision and order in which it granted NH Smith’s summary judgment motion. This court held, after oral argument, that:

“it is uncontested that Defendants waived all defenses & counterclaims except actual payment and further that Defendants failed to repay the loan after its maturity.

“Defendants’ contentions to the contrary notwithstanding, stop work orders, lawsuits by neighbors and other difficulties encountered during construction do not constitute a Force Majeure. Neither does COVID, which did not commence till well over a year after the loan matured. Defendants have failed to otherwise raise a triable issue of fact or issue of law. Accordingly, motion for SJ & related relief is granted. . . .”

Defendants’ Instant Motion to Reargue

On September 1, 2021, defendants moved for an order granting them leave to reargue the August 19, 2021 decision and order and, upon reargument, denying NH Smith’s summary judgment motion. Defense counsel argues that the court “overlooked or misunderstood” certain facts and law. Specifically, defense counsel argues that “Plaintiff did not serve a notice of default upon Defendants and failed to properly accelerate the loan pursuant to [a] purported event of default” and that the only notice of default in the record “did not accelerate the loan based upon loan maturity.” Defendants also challenge the sufficiency of the affidavit testimony regarding defendants’ payment default upon the maturity of the loan. Finally, defendants claim that their counterclaims were not waived, despite the express waiver in the mortgages.

NH Smith, in opposition, submits an attorney affirmation asserting that “Defendants re-assert the same hodge-podge of incorrect and misplaced arguments” previously raised in opposition to NH Smith’s summary judgment motion, and suggest that sanctions should be imposed against defendants for their frivolous motion practice. NH Smith notes that

defendants' grounds for reargument were "recycled" from their opposition to the underlying summary judgment motion and were already considered and rejected by the court. NH Smith asserts that the Kloos affidavit submitted in support of its summary judgment motion sufficiently described defendants' failure to pay the loan upon maturity, and "Defendants did not and cannot offer any record evidence to the contrary." NH Smith notes that the mortgages (at section E.1) all provide that, upon an event of default, mortgagee may "take whatever action Mortgagee deems necessary to protect the security of this Mortgage [and] may do so without notice or demand upon Mortgagor . . ." Finally, NH Smith asserts that the court already rejected defendants' efforts to interpose affirmative defenses and counterclaims, pursuant to the express waiver in the mortgages.

Discussion

"A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d] [2]). A motion for leave to reargue is not intended to provide an unsuccessful party with successive opportunities to reargue issues previously decided (*Ahmed v. Pannone*, 116 AD3d 802 [2014]).

Here, defendants failed to demonstrate that this court overlooked or misapprehended any facts or law when it issued the August 19, 2021 decision and order granting summary judgment in favor of NH Smith. Based on the plain language in the subject mortgages, defendants specifically agreed to waive all defenses and counterclaims except for payment,

and there is no dispute that defendants failed to pay all outstanding amounts due and owing under the mortgages upon the maturity of the loans. Defendants' reargument motion is nothing more than an improper reiteration of the very same arguments that defendants previously asserted in opposition to NH Smith's summary judgment motion. Accordingly, it is hereby

ORDERED that defendants' motion (mot. seq. seven) for leave to reargue this court's August 19, 2021 decision and order is granted but, upon reargument, the court adheres to the August 19, 2021 decision and order.

This constitutes the decision and order of the court.

E N T E R



J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE