

**350 E. 10th St. LLC v 9th & 10th St. L.L.C.**

2022 NY Slip Op 30386(U)

January 18, 2022

Supreme Court, New York County

Docket Number: Index No. 850273/2018

Judge: Melissa A. Crane

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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. MELISSA CRANE PART 60M

Justice

350 EAST 10TH STREET LLC, Plaintiff,

INDEX NO. 850273/2018
MOTION DATE 06/30/2021
MOTION SEQ. NO. 001

- v -

9TH & 10TH STREET L.L.C., GREGG SINGER, ONYX ASSET MANAGEMENT, LLC, MYLES WITTENSTEIN, CHICKAREE CHICK, LLC, MICHAEL BLOOMBERG, CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF BUILDINGS, NEW YORK CITY BOARD OF STANDARDS AND APPEAL, LANDMARKS PRESERVATION COMMISSION, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, MYLES WITTENSTEIN AS TRUSTEE OF THE MYLES WITTENSTEIN REVOCABLE TRUST, JOHN DOE #1 THROUGH JOHN DOE #12,

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 148, 149, 150, 151, 152, 154, 155, 168, 178

were read on this motion to/for JUDGMENT - SUMMARY

Under motion sequence 001, plaintiff 350 East 10th Street LLC moves: (i) for summary judgment on all causes of actions in the Amended Verified Complaint, (ii) to strike the Verified Answer with Counterclaims of defendants 9th & 10th Street LLC ("Borrower") and Gregg Singer ("Guarantor"), (iii) to dismiss the answering defendants counterclaims, (iv) to enter default against non-answering defendants, (v) to discontinue the action as to the John Doe defendants, and (vi) to appoint a Referee to compute sums due to plaintiff. For the following reasoning, plaintiff's motion is granted.

Defendants 9th & 10th Street LLC and Gregg L. Singer (the relevant defendants) cross-move for a stay to secure funds for plaintiff's mortgage and for certain events to occur in a related Federal Action. That motion is denied. This motion has been pending since 2019 and virtually nothing has occurred in this case since that time. The moment to secure additional

funding or wait for the Federal Court has passed. Plaintiff has been patiently waiting a long time.

As only plaintiff has provided a statement of material facts, the following is undisputed. Plaintiff brought this action to foreclose on a certain Agreement of Spreader, Consolidation and Modification of Mortgage (the "Mortgage") dated April 21, 2016. Defendant 9th & 10th Street LLC (the "Borrower") executed the Mortgage in favor of plaintiff to secure the principal sum of \$44 million encumbering the property known as 605-616 East 9th Street, New York, New York 10009 (Block: 392, Lot: 10) (the "Property") (Fact Statement ¶ 1 [NYSCEF Doc. No. 114]; Carmel Aff. ¶ 4 [NYSCEF Doc. No. 102]). Plaintiff recorded the Mortgage in the Office of the City Register of the City of New York, New York County on June 16, 2016 (Fact Statement ¶ 1; Carmel Aff. ¶ 4). Plaintiff gave the Mortgage as security for the repayment of a Consolidated, Amended and Restated Note (the "Note") in the amount of \$44 million, executed by Borrower in plaintiff's favor (Fact Statement ¶ 3; Carmel Aff. ¶ 5). To further secure the indebtedness of the Note, on or about April 21, 2016, defendant Gregg Singer ("Guarantor") executed a Conditional Guarantee (the "Guarantee") of all obligations under the Note and Mortgage to plaintiff in the amount of \$44 million (Fact Statement ¶ 4; Carmel Aff. ¶ 6). Plaintiff, the original lender, is the owner and holder of the Note, Mortgage, Guarantee, Reserve Agreement and all other loan documents executed in connection with the note (Fact Statement ¶ 5; Carmel Aff. ¶ 8). Section 21 of the Mortgage, entitled "Events of Default," states:

The Debt shall become immediately due and payable at the option of the Mortgagee upon any one or more of the following events (each being an "Event of Default", and, collectively, "Events of Default"): (a) if any portion of the Debt is not paid when the same is due and payable . . .

(Fact Statement ¶ 6; Carmel Aff. ¶ 10; Mortgage § 21 [NYSCEF Doc. No. 20]).

It is undisputed that the Borrower has failed to comply with the terms and provisions of the Note and Mortgage by, among other things, (i) failing to pay the monthly payment which became due on January 1, 2018, and all months thereafter; and (ii) failing to pay the principal sum of up to \$44 million on or before May 1, 2018 (the "Maturity Date"), constituting events of default (Fact Statement ¶ 7; Carmel Aff. ¶¶ 11-12). Pursuant to Section 22 of the Mortgage, entitled "Remedies of Mortgagee":

During the continuance of any Event of Default . . .

(b) Mortgagee may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Mortgagor and in and to the Mortgaged Property by Mortgagee itself or otherwise, including, without limitation, the following actions: . . .

(i) declare the entire Debt to be immediately due and payable.

(Fact Statement ¶ 8; Mortgage § 22). The Loan has now been accelerated by its terms, thus all amounts immediately became due and payable (Fact Statement ¶ 9; Carmel Aff. ¶ 28). Plaintiff is the owner and holder of the Loan Documents (Fact Statement ¶ 10; Carmel Aff. ¶ 8). The Loan was made to a commercial entity, was not incurred for personal, family, or household purposes, and the Borrower does not reside at the Property. As a result, the Borrower is not entitled to a 90-day notice and is not entitled to the settlement conference required under CPLR 3408 (Fact Statement ¶ 11; Carmel Aff. ¶ 13). Nor, by the above terms, were the relevant defendants entitled to notice or demand.

Both at oral argument and on the papers, the relevant defendants have failed to raise any material issues of fact to rebut plaintiff's showing. Indeed, relevant defendants' opposition brief, which is 25 pages long, yet lacks a table of contents, is a rambling litany of defenses. It includes: (1) that plaintiff's affidavit in support is insufficient because the affiant has the title "Director," (2) that defendant did not receive notice of default (even though the mortgage expressly disavowed notice), (3) statute of limitations, (4) abuse of process, (5) champerty, etc. Defendants even had the temerity to interpose a covid hardship defense, when both the mortgage default and the motion for summary judgment predate the pandemic.

Thus, it is undisputed that the Borrower has defaulted under the Note and the Mortgage is now immediately due and payable. Plaintiff 350 East 10th Street LLC has made a *prima facie* showing of entitlement to judgment as a matter of law.

Accordingly, it is

**ORDERED** that the court grants plaintiff 350 East 10th Street LLC's motion for summary judgment; and it is further

**ORDERED** that defendants 9th & 10th Street LLC and Gregg L. Singer are barred and foreclosed of and from all estate, right, title, interest, claim, lien and equity of redemption of, in and to the said Property and each and every part and parcel thereof; that the said Property may be decreed to be sold in one parcel, according to law, subject to the terms set forth in Paragraph 27 in the Complaint; and it is further

**ORDERED** that that the monies arising from the sale thereof may be brought into Court and that the Plaintiff may be paid the amount due under the Note and Mortgage as set forth in the Complaint, with interest and late charges to the time of such payment and prepayment penalty and the expenses of such sale, plus reasonable attorney's fees, together with the costs and disbursements of this action, and it is further

**ORDERED** that an inquest will take place on May 17, 2022 at 9:30 a.m. to compute sums due to plaintiff; and it is further

**ORDERED** that Mark McKew, with an address at 1725 York Ave., Suite 29A, New York, NY 10128, (212) 876-6783, [mmckew@mckewlaw.com](mailto:mmckew@mckewlaw.com), is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the premises can be sold in parcels; and it is further

**ORDERED** that the Referee shall hold no hearing and take no testimony or evidence other than by written submission; the Court is the ultimate arbiter and the Referee's report is merely an advisory finding; and it is further

**ORDERED** that by accepting this appointment the Referee certifies that they are 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 their 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 themselves or paying funds to themselves 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 and to defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the Referee (promptly means within two business days); and it is further

**ORDERED** that if defendants have objections, they must submit them to the Referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

**ORDERED** the failure by defendants to submit objections to the Referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; 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 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 all other requests for relief are denied as moot.

1/18/2022  
DATE

  
MELISSA CRANE, 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