

Golden Resources, LLC v Seddio

2022 NY Slip Op 31846(U)

June 10, 2022

Supreme Court, Kings County

Docket Number: Index No. 514634/20

Judge: Lawrence Knipel

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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 360 Adams Street, Brooklyn, New York, on the 10th day of June, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
GOLDEN RESOURCES, LLC,

Plaintiff,

-against-

Index No. 514634/20

JOYCE BECKER SEDDIO, FRANK SEDDIO A/K/A
FRANK R. SEDDIO, MARIE F. CONDE, JOHN
DOE NO. 1 THROUGH JOHN DOE NO. 15,

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	18-19
Opposing Affidavits (Affirmations) _____	26
Affidavits/ Affirmations in Reply _____	36
Other Papers: _____	

Upon the foregoing papers, defendants Joyce Becker Seddio and Frank Seddio a/k/a/ Frank R. Seddio move for an order, pursuant to CPLR 3211 (a) (1), (3), (10) and Real Property Actions and Proceedings Law [RPAPL] §§ 1301 and 1311, dismissing the complaint of plaintiff Golden Resources, LLC.

Plaintiff commenced this action to foreclose certain mortgages encumbering the properties at 2333 East 69th Street and 9306 Flatlands Avenue in Brooklyn. The

mortgages were executed by defendants to secure a \$1,120,000 loan to certain companies in Kentucky (borrowers). The promissory note evincing the loan was executed on July 18, 2013. As additional security for repayment of the loan, Frank Seddio entered into a personal guaranty dated July 18, 2013.¹ Upon the default of the borrowers, plaintiff commenced a Kentucky action against the borrowers and Frank Seddio, as guarantor, to recover a judgment for the outstanding indebtedness. By order dated March 19, 2018, the Fayette County Circuit Court rejected Frank Seddio's alleged defenses, granted plaintiff's motion for partial summary judgment against Frank Seddio and granted plaintiff a money judgment against Frank Seddio in the amount of (a) \$2,063,303.67 as of February 1, 2018, plus additional late fees and interest (at the default rate under the note of 13.0% per annum) from February 2, 2018 until paid in full, and (b) \$226,653.40 for attorney's fees and expenses incurred by plaintiff as of December 3, 2017, plus any additional legal fees and expenses incurred by plaintiff until such judgment was paid in full.

In response to the instant action to foreclose the subject mortgages, defendants brought the instant motion to dismiss on grounds that the action is precluded under the election of remedies provision of RPAPL 1301.

Pursuant to RPAPL 1301, "[t]he holder of a note and mortgage may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but must only elect one of these alternate remedies" (*Gizzi v Hall*, 309 AD2d 1140, 1141 [3d Dept 2003]; see *Aurora Loan Servs., LLC v Lopa*, 88 AD3d 929, 930 [2d Dept 2011]). "The

¹The guaranty was also signed by Djenane Bartholomew and Dexter Bartholomew, whose obligations thereunder were subsequently discharged in Bankruptcy, according to defendants.

purpose of the statute is to avoid multiple lawsuits to recover the same mortgage debt” (*Aurora Loan Servs., LLC*, 88 AD3d at 930). RPAPL 1301 (1) provides that “[w]here final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued . . . and has been returned wholly or partly unsatisfied” (*see Sabbatini v Galati*, 14 AD3d 547, 548 [2d Dept 2005]). “Stated another way, an action for foreclosure cannot be maintained where the plaintiff has previously pursued a separate action on the note and recovered a money judgment against the defendant which has not been satisfied” (*VNB N.Y. Corp. v Paskesz*, 131 AD3d 1235, 1236 [2d Dept 2015]; *see Simms v Soraci*, 252 AD2d 519 [2d Dept 1998]; *see also Marine Midland Bank v Lake Huntington Dev. Group*, 185 AD2d 395 [3d Dept 1992]). The election of remedies rule applies to actions on the guaranty of a note (*see TBS Enters. v Grobe*, 114 AD2d 445 [2d Dept 1985]; *Manufacturers Hanover Trust Co. v 400 Garden City Assoc.*, 150 Misc 2d 247, 249 [Sup Ct, Nassau County 1991]). “The legislative intention underlying RPAPL [1301] ‘is to avoid multiple suits to recover the same mortgage debt and confine the proceedings to collect the mortgage debt to one court and one action’” (*Anron Air Sys. v Columbia Sussex Corp.*, 202 AD2d 460, 462 [2d Dept 1994], quoting *Dollar Dry Dock Bank v Piping Rock Bldrs.*, 181 AD2d 709, 710 [2d Dept 1992]). The statute’s purpose is “to avoid inappropriate duplicative and vexatious litigation by the same party” (*Central Trust Co. v Dann*, 85 NY2d 767, 772 [1995]; *Aurora Loan Servs., LLC*, 88 AD3d at 930).

It is undisputed that no execution has been issued with respect to the Kentucky judgment. Therefore, the instant foreclosure action is barred by RPAPL 1301 (1). Contrary to the contention of plaintiff, a defense based on RPAPL 1301 was not waived by defendants under the terms of the mortgages and guaranty. In support of this argument, plaintiff cites to the following language contained in the mortgages:

“2.4 Cumulative Remedies. All remedies contained in this Security Instrument are cumulative and Mortgagee shall also have all other remedies provided at law and in equity or in the Guarantee. Such remedies may be pursued separately, successively or concurrently at the sole subjective direction of Mortgagee and may be exercised in any order and as often as occasion therefor may arise. No act of Mortgagee shall be construed as an election to proceed under any particular provisions of this Security Instrument to the exclusion of any other provision of this Security Instrument or as an election of remedies to the exclusion of any other remedy which may then or thereafter be available to Mortgagee. No delay or failure by Mortgagee to exercise any right or remedy under this Security Instrument shall be construed to be a waiver of that right or remedy or of any default hereunder. Mortgagee may exercise any one or more of its rights and remedies at its option without regard to the adequacy of its security.

* * *

“2.6 Additional Remedies in Case of Default.

(a) Mortgagee shall be entitled to recover judgment as aforesaid either before, after or during the pendency of any proceedings for the enforcement of the provisions of this Mortgage, and the right of Mortgagee to recover such judgment shall not be affected by any entry or sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the provisions of this Mortgage, or the foreclosure of the lien of, or absolute conveyance pursuant to, this Mortgage....provided, however, that in no case shall Mortgagee receive a greater amount than the aggregate amount due under the Guarantee from the proceeds of the sale

of the Property and the distribution from the estate of Mortgagor.

(b) Any recovery of any judgment by Mortgagee and any levy of any execution under any judgment upon the Property shall not affect in any manner or to any extent the lien of this Mortgage upon the Property or any part thereof, or any liens, conveyances, powers, rights and remedies of Mortgagee hereunder, but such liens, conveyances, powers, rights and remedies shall continue unimpaired as before."

Plaintiff also invokes the following language in the guaranty:

"2. Nature of Guaranty; Waivers . . . This is an absolute, unconditional, irrevocable and continuing guaranty and will remain in full force and effect until all of the Indebtedness has been indefeasibly paid in full, and the Lender has terminated this Guaranty . . . The Guarantors' obligations hereunder shall not be affected, modified or impaired by any counterclaim, set-off, recoupment, deduction or defense based on any claim the Guarantors may have (directly or indirectly) against the Borrowers or the Lender, except payment or performance of the Indebtedness.

* * *

"11. Preservation of Rights. No delay or omission on the Lender's part to exercise any right or power arising hereunder will impair any such right or power or be considered a waiver of any such right or power, nor will the Lender's action or inaction impair any such right or power. The Lender's rights hereunder are cumulative and not exclusive of any other rights or remedies which the Lender may have under other agreements, at law or in equity. The Lender may proceed in any order against the Borrowers, the Guarantors of, or the collateral securing, the Indebtedness."

While the foregoing provisions impart contractual rights to plaintiff regarding the manner in which it may seek repayment of the loan indebtedness (whether by action on the note, action on the guaranty, or foreclosure), and the order in which the proceedings

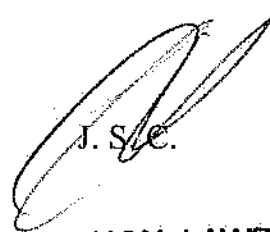
may be brought, there is no express language in the mortgages whereby defendants waived the statutory protection afforded by RPAPL 1301 to prevent duplicative judgments against a borrower, mortgagor or guarantor. The sole provision in the aforesaid instruments which expressly pertains to the election of remedies states that “[n]o act of Mortgagee shall be construed . . . as an election of remedies to the exclusion of any other remedy *which may then or thereafter be available to Mortgagee*” (emphasis added). As no execution was issued under the Kentucky judgment, which remains unsatisfied, a foreclosure action on the mortgage securing the same debt is a remedy which is not currently *available* to plaintiff under RPAPL 1301 (1).

Further, the Supreme Court, Kings County has previously stated that where mortgage loan documents appeared to permit both an action on a guaranty and a foreclosure action to proceed simultaneously, the plaintiff “may not, by contractual agreement or under the guise of contract construction, avoid the strictures of [RPAPL 1301 (3)] since to allow the simultaneous prosecution of [the guaranty] action and the foreclosure action would result in having two courts address the same claims and issues” and that “[s]uch duplication of claims and multiple litigation simultaneously addressing the same issues would contravene the legislative purpose and the policy reflected in [RPAPL 1301 (3)]” (*Orchard Hotel, LLC v Zhavian*, 34 Misc 3d 1219[A], 2012 NY Slip Op 50180[U], *16 [Sup Ct, Kings County 2012]). Similarly, interpreting the contractual language in the loan documents here to allow a foreclosure action on an unsatisfied judgment on the same mortgage debt would be antithetical to the purpose and policy reflected in RPAPL 1301 (1).

Accordingly, defendants' motion to dismiss the complaint pursuant to RPAPL 1301 (1) is granted. The complaint is hereby dismissed. This court has considered plaintiff's other arguments in opposition to defendants' motion and finds them unavailing.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,

A handwritten signature in black ink, appearing to be "J. S. C.", is written over a circular stamp or seal.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**