Sharestates Invs., LLC v 280 Linden LLC
2022 NY Slip Op 32780(U)
August 11, 2022
Supreme Court, Kings County
Docket Number: Index No. 519252/19
Judge: Lawrence Knipel

At an IAS Term, Commercial Part 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 19th day of August, 2022.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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SHARESTATES INVESTMENTS, LLC, SERIES BC2018-001836,

Plaintiff,

-against-

280 LINDEN LLC,
RUBEN AZRAK,
DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT,
NYC ENVIRONMENTAL CONTROL BOARD,
SAMSUNG C&T AMERICA INC.,
ARBIE CONSTRUCTION,
REIS CONSTRUCTION LLC,

"JOHN DOE 1-10," said names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in, or lien upon, the premises described in the complaint,

Defendants.

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DECISION AND ORDER

Index No. 519252/19

Mot. Seq. No. 3

The following e-filed papers read herein:	NYSCEF Doc No.:
Notice of Motion, Affirmation/Affidavit, and Exhibits Annexed	65-79
Affirmation in Opposition	81
Reply Affirmation	82

In this action to foreclose a mortgage on certain commercial real property located at 280 Linden Boulevard in Brooklyn, New York (Block 4868, Lot 27), plaintiff Sharestates Investments, LLC, Series BC2018-001836 ("plaintiff"), moves in Seq. No. 3 for an order: (1) granting it summary judgment, pursuant to CPLR 3212, as against each of the

answering defendants 280 Linden LLC and Ruben Azrak ("280 Linden" and "Azrak," respectively, and, collectively, the "answering defendants"), as well as striking their joint answer, dated December 17, 2019; (2) granting it a default judgment, pursuant to CPLR 3215, as against each of the non-answering defendants Department of Housing Preservation & Development, NYC Environmental Control Board, Samsung C&T America Inc., Arbie Construction, and Reis Construction LLC (collectively, the "non-answering defendants"); (3) appointing a referee to compute the amount due to plaintiff under a Consolidation, Extension, and Modification Agreement, dated March 27, 2018, which encompasses the Consolidated Note in the principal amount of $3,350,000 of the same date (the "consolidated note"), and the Consolidated Mortgage, Assignment of Leases and Rents, and Security Agreement, also of the same date (the consolidated mortgage"); and (4) amending the caption to delete the "John Doe 1-10" defendants as unnecessary parties.

Background

In March 2018, defendant 280 Linden executed and delivered to plaintiff the aforementioned consolidated note and mortgage. Concurrently, defendant Azrak executed and delivered to plaintiff his guarantee of the underlying debt (the "guarantee"). By February 1, 2019, 280 Linden was in payment default under the consolidated note and mortgage, whereas Azrak was in payment default under this guarantee. By a forbearance agreement executed and delivered in May 2019, defendants were granted an extension until July 15, 2019 to pay off the underlying debt to plaintiff. After the answering defendants failed to timely perform under the forbearance agreement, plaintiff, on August 30, 2019,

commenced this action as against 280 Linden on the consolidated note and mortgage, as well as against Azrak on the guarantee. Thereafter, the answering defendants joined issue. Following the expiration of the pandemic-related moratorium, plaintiff served the instant motion on February 14, 2022. The answering defendants objected by way of their joint counsel's affirmation in opposition. Plaintiff's motion was fully submitted on March 23, 2022, with the Court reserving decision.

Discussion

"In moving for summary judgment in an action to foreclose a mortgage, a plaintiff generally establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" (*Central Mtge. Co. v Resheff*, 200 AD3d 640, 643 [2d Dept 2021]). Here, plaintiff has established its prima facie entitlement to judgment as a matter of law by submitting copies of the consolidated mortgage, consolidated note, forbearance agreement, and evidence of the payment default (*see Deutsche Bank Natl. Tr. Co. v Finger*, 195 AD3d 789, 791 [2d Dept 2021]).

In opposition to plaintiff's prima facie showing, the answering defendants have failed to raise a triable issue of fact. The answering defendants' trio of principal objections are unavailing. Contrary to their initial contention, plaintiff is authorized under both New York and Delaware law to commence and prosecute this action because, pursuant to 6 Del. Code § 18-215 (2006), it is not a separate entity from its servicing agent and parent company, Sharestates Investments, LLC, as more fully set forth in the margin.[1]

[1] Here, each Series LLC is owned by and forms a part of Sharestates Investments, LLC, pursuant to Title 6, § 18-215 of the Delaware Code. Title 6, § 18-215 states, in relevant part, that "[a] limited (footnote continued)

The answering defendants' next contention, that plaintiff – by concurrently suing Azrak on the guarantee – is in violation of RPAPL § 1301 (3), misconstrues the purpose of the statute. The intent of "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*" (*Dollar Dry Dock Bank v Piping Rock Builders, Inc.*, 181 AD2d 709, 710 [2d Dept 1992] [emphasis added]). Stated otherwise, "RPAPL § 1301 (3) prohibits a mortgage lender seeking repayment of a loan from simultaneously prosecuting an *action at law* to recover upon a promissory note and an *action in equity* to foreclose the mortgage" (*Wells Fargo Bank Minnesota, N.A. v Cohn*, 4 AD3d 189, 189 [1st Dept 2004] [emphasis added]). This principle of election of remedies applies with equal force to a separate action to recover under a loan guarantee (*see TBS Enters., Inc. v Grobe*, 114 AD2d 445, 446 [2d Dept 1985], *lv denied* 67 NY2d 602 [1986]). Although Azrak is entitled to be "shield[ed] . . . from the expense and annoyance of two independent actions *at the same time with reference to the same debt*," the statutory bar does not apply here because, at this time, plaintiff is pursuing in a *single* action all of its claims as against 280 Linden under the note/mortgage and as against Azrak under the guarantee (*see Central Tr. Co. v Dann*, 85 NY2d 767, 772 [1995] [emphasis in the original; citation omitted]).[2]

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liability company agreement may establish or provide for the establishment of 1 or more designated series of members, managers, limited liability company interests or assets." Further, Title 6, § 18-215 (b) (1) states that "[u]nless otherwise provided in a limited liability company agreement, a protected series shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued."

[2] As the Second Judicial Department explained in *TBS Enters. v Grobe* (at page 446), "RPAPL 1301 [§] (3) prohibits a second action to recover any part of a mortgage debt without (footnote continued)

Equally unavailing is the answering defendants' final contention that plaintiff's motion for summary judgment is premature. "A party contending that a motion for summary judgment is premature is required to demonstrate that additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant" (*Reynolds v Avon Grove Props.*, 129 AD3d 932, 933 [2d Dept 2015]). Here, plaintiff's motion is not premature, inasmuch as the answering defendants have failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence and that facts essential to justify their opposition to the motion are exclusively within plaintiff's knowledge and control (*see Lopez v WAS Distrib., Inc.*, 34 AD3d 759, 760 [2d Dept 2006]).

The answering defendants' ancillary contentions (as well as their remaining affirmative defenses) have been considered and found to be without merit.

Conclusion

Accordingly, it is

ORDERED that plaintiff's motion in Seq. No. 3 is *granted in its entirety*, plaintiff is granted summary judgment as against the answering defendants, and their joint answer, dated and e-filed December 17, 2021 (NYSCEF Doc No. 19), is stricken; and it is further

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leave of court[,] and RPAPL [§] 1371 deems the proceeds of a foreclosure sale to be in full satisfaction of the mortgage debt *in the absence of a motion for a deficiency judgment*" (emphasis added). Consistent with the foregoing, plaintiff has represented (at page 12 n 6 of its counsel's reply affirmation) that "[a]fter a foreclosure sale . . . , should any deficiency result [in that sale], the Plaintiff may or may not seek leave to pursue the deficiency against [Azrak]."

ORDERED that a long-form order appointing a referee and granting a default judgment against the non-answering defendants (as well as for ancillary relief) is being issued contemporaneously herewith.

This constitutes the decision and order of the Court.

ENTER,

J. S. C.