

1715 Brooklyn LLC v Perl
2022 NY Slip Op 33254(U)
September 26, 2022
Supreme Court, Kings County
Docket Number: Index No. 513983/2021
Judge: Francois A. Rivera
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 I.A.S. Part 52 of the
Supreme Court of the State
of New York, held in and
for the County of Kings, at
the Courthouse thereof,
360 Adams Street,
Brooklyn, New York
11201, on the 26th day of
September 2022

HONORABLE FRANCOIS A. RIVERA

-----X
1715 BROOKLYN LLC, JG FUNDING CORP.
and GBIAHA INC.

Plaintiffs,

-against-

YOEL PERL

Defendants.
-----X

DECISION & ORDER

Index No.: 513983/2021

In accordance with CPLR 2219, the following papers were considered on the notice of motion filed on November 16, 2021, under motion sequence number three, by plaintiffs 1715 Brooklyn, LLC, JG Funding Corp. and GBIAHA Inc. seeking an order: (1) pursuant to CPLR 3212 awarding summary judgment in their favor on the complaint asserted against the defendant Yoel Perl; (2) striking defendant Yoel Perl's answer; and (3) dismissing the defendant Yoel Perl's affirmative defenses and counterclaims pursuant to CPLR 3211 and CPLR 3212.

- Notice of Motion
- Affirmation in Support
- Exhibits A to Q
- Affidavit in Support
- Statement of Material
- Affirmation in Support
- Affirmation in Opposition
- Exhibits 1 to 7
- Affidavit in Opposition
- Affirmation in Reply

On March 31, 2022, the Court granted the defendant leave to file a counter statement of material facts in accordance with 22 NYCRR 202.8-g if filed on or before April 8, 2022. The Court also granted the plaintiffs time to reply to the counter statement if filed on or before April 15, 2022. If the parties complied the motion would be deemed fully submitted as of April 15, 2022, without the need for an additional appearance. Both sides complied with the Court's direction of March 31, 2022.

LAW AND APPLICATION

The plaintiffs 1715 Brooklyn, LLC, JG Funding Corp. and GBIAHA Inc. (hereinafter collectively as plaintiffs) submitted a statement of material fact pursuant to Uniform Court Rule 202.8-g. Therein the following facts were alleged.

On or about June 14, 2019, Yoel Perl (hereafter Perl or defendant), as owner and sole member of 1715 Brooklyn LLC (hereinafter 1715 Brooklyn), obtained a loan on behalf of 1715 Brooklyn from JG Funding Corp. (hereinafter JG Funding) in the amount of \$1,265,000. In furtherance of said loan, Perl, on behalf of 1715 Brooklyn, executed and delivered to JG Funding a Consolidated and Restated Mortgage Note dated June 14, 2019, in the amount of \$1,265,000 (hereinafter the Note). As security for the Note, Perl, as owner and sole member of Brooklyn LLC, executed and delivered a Mortgage to JG Funding on behalf of 1715 Brooklyn (hereinafter the Mortgage). The Mortgage encumbers real property owned by 1715 Brooklyn located at 1715 Nostrand Avenue, Brooklyn, NY. (hereinafter the Property).

Perl executed a Pledge and Security Agreement in favor of JG Funding. Pursuant to the Pledge and Security Agreement, Perl as Pledgor, pledged his entire 100% interest in 1715 Brooklyn to JG Funding, the Lender, as security for 1715 Brooklyn's performance of its obligations on the loan. Perl also executed on behalf of 1715 Brooklyn a Control Agreement which was annexed as Exhibit A to the Pledge and Security Agreement. Perl also executed a Proxy Agreement which was annexed as Exhibit B to the Pledge and Security Agreement. The plaintiffs highlighted the following portions of the Pledge and Security Agreement as follows.

Section 7(a) of the Pledge and Security Agreement states:

If an Event of Default shall occur, Lender shall have the right to receive any and all cash dividends or distributions thereafter paid in respect of the Pledged Interests and make application thereof to the Loan Obligations, in such order as Lender, in its sole discretion, may elect. If an Event of Default shall occur, then all such Pledged Interests at Lender's option shall be registered in the name of Lender or its nominee or its designee, and Lender or its nominee or its designee may thereafter exercise (i) all voting, and all organizational rights, as applicable pertaining to the Pledged Interests, and (ii) any and all rights of conversion, exchange, and subscription and any other rights, privileges or options pertaining to such shares of the Pledged Interests as if it were the absolute owner thereof ..."

Section 8(b) of the Pledge and Security Agreement states:

"Pledgor hereby irrevocably authorizes and empowers Lender and assigns and transfers unto Lender, and constitutes and appoints Lender and any of its assigns their true and lawful attorney-in-fact, and as their agent, irrevocably, with full power of substitution for Pledgor and in their name, in order to more fully vest in Lender the rights and remedies provided for herein following the occurrence of an Event of Default, and Pledgor further authorizes and empowers Lender and any of its assigns, as Pledgor's attorney-in-fact, and as its agent, irrevocably, with full power of substitution for Pledgor and in its name, to proceed from time to time following the occurrence of an Event of

Default in Pledgor's name in any statutory or non-statutory proceeding affecting Pledgor or the Collateral..."

Section 8(d) of the Pledge and Security Agreement states:

Following the occurrence of an Event of Default, Lender may without notice to, or assent by, Pledgor, require that: (i) any and all distributions, dividends, interest and other payments payable to Pledgor with respect to all or any part of the Collateral be paid to Lender, and (ii) Lender shall have the right to cause Lender or its nominee, designee, agent or assignee to become substitute for Pledgor, or its designee, as officers and/or directors in Borrower.

On June 14, 2020, the Note matured with entire principal amount of \$1,265,000 plus outstanding interest due and owing at maturity. On July 1, 2020, Perl on behalf of Brooklyn LLC entered into a Loan Extension Agreement ("Loan Extension Agreement") wherein the Maturity Date of the Note was extended to September 14, 2020 (Extended Maturity Date). The principal amount of \$1,265,000 was not paid on September 14, 2020. The principal of \$1,265,000 has not been paid. Pursuant to the terms of the Note and the Mortgage, in the event of a default by 1715 Brooklyn, a default interest rate of 24% would be applied.

On March 10, 2021, JG Funding notified Perl by letter that Perl's 100% interest in Brooklyn LLC was transferred to GBIAHA Inc. and further instructed Perl to immediately forward any and all payments of leases and rents directly to JG funding. Perl did not forward the rents collected from the Property to JG Funding. A forbearance agreement was sent to Perl via his attorney. However, Perl did not sign the forbearance agreement.

The plaintiffs rely on the following passages to support their claims. Paragraph 35 of the Mortgage states that “[t]he terms and provisions of this mortgage shall not be changed, modified, or discharged in whole or in part except by an instrument in writing signed by the party against whom enforcement of such change, modification or discharge is sought or by its agent thereunto duly authorized in writing.” Paragraph 16(d) of the Pledge and Security Agreements refers to waivers, amendments, successors, assigns and the governing law. Paragraph 16(d) states that “[n]one of the terms or provisions of this Agreement may be waived, amended, or otherwise modified except by a written instrument executed by the party against which enforcement of such waiver, amendment, or modification is sought.” Additionally, Paragraph 7 of the Loan Extension Agreement states that the “[a]greement may not be modified or terminated other than by a writing signed by the party against whom enforcement of the modification or termination is sought.”

In the instant motion, every statement in the statement of material facts was supported by documentary evidence. In Perl’s counter statement of material facts, the defendant did not dispute the plaintiffs’ statement of material facts. However, the defendant contended that the maturity date of the note was further extended by the parties. Therefore, the plaintiffs had demanded, and Perl tendered to the plaintiffs from the time period of September 2020 through February 2021 multiple payments totaling \$54,812.14. This statement of disputed facts was supported by defendant’s affidavit and evidence purporting to show certain wire transfers.

The defendant, therefore, contends that he did not default on his debt to the plaintiffs. He also contends that the motion is premature as no discovery has been conducted.

In the case at bar, the plaintiff's motion is based primarily on documentary evidence which is undisputed by the defendant. The parties, however, factually dispute whether there was a further extension of the maturity date on the subject note. This disputed fact would depend on the conduct of the parties, the surrounding circumstances, and their reasonable expectations of the parties based on that conduct.

The defendant correctly contends that there has been no discovery in the instant action. The fact in dispute may be better elucidated after deposition of the parties. CPLR 3212(f) permits a court to deny a motion for summary judgment where it appears that the facts essential to oppose the motion "exist but cannot then be stated" (CPLR 3212[f]; see *Jones v American Commerce Ins. Co.*, 92 AD3d 844, 845 [2nd Dept 2010]). "This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (*James v Aircraft Serv. Intl. Group*, 84 AD3d 1026, 1027 [2nd Dept 2011], quoting *Baron v. Incorporated Vil. of Freeport*, 143 AD2d 792, 793 [2nd Dept 1988]). Here, the plaintiffs' motion for summary judgment on it claims asserted against the defendant and to dismiss the defendant's counterclaims was made prior to the parties conducting and discovery including depositions.

It is therefore denied, without prejudice as premature and may be renewed after the parties' depositions are conducted.

CONCLUSION

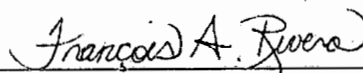
The branch of the motion by the plaintiffs 1715 Brooklyn, LLC, JG Funding Corp. and GBIAHA Inc. for an order pursuant to CPLR 3212 awarding summary judgment in their favor on the complaint asserted against the defendant Yoel Perl is denied as premature.

The branch of the motion by the plaintiffs 1715 Brooklyn, LLC, JG Funding Corp. and GBIAHA Inc. for an order pursuant to CPLR §3212 striking defendant Yoel Perl's answer is denied as premature.

The branch of the motion by the plaintiffs 1715 Brooklyn, LLC, JG Funding Corp. and GBIAHA Inc. for an order dismissing the defendant Yoel Perl's affirmative defenses and counterclaims pursuant to CPLR 3211 and CPLR 3212 is denied as premature.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

FRANCOIS A. RIVERA