SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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RUSSELL ABRAMS, SANDRA ABRAMS, SEPI REALTY LLC, and WEST 70TH OWNERS CORP.,

Plaintiffs,

- v -

ASM SPV, L.P., SAPPHIREEDGE HOLDINGS LIMITED, and MITCHELL MARKS,

Defendants.

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INDEX NO. 153931/2024

MOTION DATE 04/30/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 33, 34, 35, 36, 37, 38, 39, 40, and 51

were read on this motion for INTERIM RELIEF.

LOUIS L. NOCK, J.S.C.

This is an action to void, or deem satisfied, pursuant to Article 15 of the Real Property Actions and Proceedings Law, a mortgage given by plaintiff West 70th Owners Corp. (the "Prior Owner") in favor of defendant ASM SPV, L.P. ("ASM"), upon the property located at 45 West 70th Street, New York, New York (the "Property"), to secure a promissory note given to said defendant by plaintiffs Russell and Sandra Abrams, also known as Sandra Piedrabuena. The Abramses are the shareholders of the Prior Owner and members of plaintiff Sepi Realty LLC ("Seller").[1] Defendant Mitchell Marks is the principal of ASM. Plaintiffs seek a preliminary mandatory injunction requiring the following acts:

1. Defendant SapphireEdge Holdings Limited ("Buyer") to close a contract of sale for the Property with Seller, scheduled definitely for June 18, 2024;

2. The proceeds of the sale to be released, except for $3,140,000 to be held in escrow pending determination of this action; and

[1] Seller took possession of the property by deed dated April 19, 2022 (NYSCEF Doc. No. 3).

3. ASM to issue a satisfaction of mortgage, or, in the alternative, that the court issue an order directing the County Clerk to "expunge, nullify, and/or otherwise dispose of" the mortgage.

Upon the foregoing documents, the motion is denied, as set forth in the following memorandum decision.

Background

On March 5, 2018, ASM and Russell Abrams, as well as nonparties Aracar Group SPV 1 LLC ("Aracar") and Aracar Group Holdings, Corp. ("Manager"), entered into an agreement pursuant to which ASM purchased 2000 shares of Aracar, a company founded by the Abramses (complaint, NYSCEF Doc. No. 1, ¶ 11), for $1,000 per share, a total of $2,000,000 (Letter Agreement, NYSCEF Doc. No. 4). As relevant herein, ASM had the right, on written notice to Aracar, to redeem 80% of its investment in Aracar within 30 days prior to the two-year anniversary of the share purchase, such redemption period to end on the two-year anniversary (*id.*, ¶ 7 [a]). Upon redemption, Aracar was to pay ASM the amount ASM sought to redeem within 30 days and reduce ASM's interest in Aracar accordingly (*id.*, ¶ 7 [b]). If, at the time ASM exercised its redemption rights, ASM had received less than $2,000,000 in cumulative disbursements from Aracar, or if Aracar did not pay ASM within 30 days of redemption, Russell Abrams was to pay ASM $2,000,000, less the amount of any distributions to ASM (*id.*, ¶ 7 [c]). Russell Abrams' obligation was to be evidenced by a promissory note or guarantee, secured by a mortgage on the property (*id.*).

The promissory note was given by both of the Abramses to ASM on March 6, 2018, to mature in three years (Note, NYSCEF Doc. No. 6). The note accrued interest as follows:

> In the event this note is repaid within two (2) years from the date hereof, no interest shall be due hereunder. Thereafter, the principal sum due hereunder shall bear interest at the rate of nine percent (9%) per annum payable on the Maturity

> date hereunder, when all of the Principal Amount and all interest accrued thereon shall be due and payable.
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> * * *
>
> In the event that payment shall not be made when due, whether at maturity, by acceleration or otherwise, [the Abramses] agree[] that (a) the interest rate on the unpaid balance of the principal sum of this Note shall be the lesser of (i) the highest interest rate permitted by law, or (ii) 24%, and (b) all costs of collection and, to the extent permitted by law, reasonable attorneys' fees and disbursements, may be collected as part thereof.

(*Id.* at 1.)

ASM stated in a letter to the Abramses that it would not record the mortgage with the City Registrar unless there was a default under the note or the mortgage, and the Abramses agreed not to "sell, transfer, pledge, hypothecate or mortgage all or any part of the Premises without [ASM's] prior written consent" (March 6, 2018, letter, NYSCEF Doc. No. 5). In conjunction with the deal, the Abramses also executed a confession of judgment for $2,000,000.00, to be held in escrow pursuant to an escrow agreement (*id.*; Sandra Abrams aff., NYSCEF Doc. No. 12, ¶¶ 19-20).

On January 28, 2020, ASM sent Russell Abrams a letter stating that ASM was "exercising its Redemption Rights pursuant to paragraph 7(a) of the Letter Agreement to redeem our Interests in [Aracar]" (January 28, 2020, letter, NYSCEF Doc. No. 8). Russell Abrams argues that the letter was not a proper exercise of ASM's redemption rights because ASM did not specify the percentage of its interest in Aracar ASM wanted to redeem. Plaintiffs also assert that ASM has been writing off its interest in Aracar on its taxes, which should be considered satisfaction of the investment (ASM K-1 statements, NYSCEF Doc. No. 7). The record does not indicate that Aracar redeemed ASM's interest as requested.

Defendant Marks asserts that, contrary to the agreement, the Abramses then gave a new mortgage on the property to a third party without ASM's consent, sometime prior to October 2020 (notice of default, NYSCEF Doc. No. 37). On October 12, 2020, ASM informed the Abramses that they were in default of the ASM mortgage by allowing the new mortgage to be recorded against the property, and stated that if the Abramses did not satisfy the new mortgage within 10 days, ASM would record its mortgage and assess all amounts required to do so against the Abramses as part of the amount due under the note (*id.*).

On March 22, 2024, Buyer and Seller entered into a contract for the sale of the Property (Russell Abrams aff., NYSCEF Doc. No. 13, ¶ 46). Plaintiffs requested a payoff statement from ASM, which ASM provided (payoff statement, NYSCEF Doc. No. 9). Plaintiffs dispute the amount due for interest, in that they argue that the note does not bear any interest during the first two years of its term, and that unpaid amounts following maturity bear interest at 16% per annum rather than 24%.

Standard of Review

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual" (CPLR 6301). Preliminary injunctions "should be issued cautiously and in accordance with appropriate procedural safeguards" (*Uniformed Firefighters Assn. of Greater N.Y. v City of N.Y.*, 79 NY2d 236, 241 [1992]). "The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Unlike ordinary preliminary injunctions, mandatory injunctions, i.e., those in which the court directs a party to perform some act to preserve the status quo rather than refrain from doing so, are disfavored (*Second on Second Cafe, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 265 [1st Dept 2009] ["courts are generally reluctant to grant mandatory preliminary injunctions"] [internal quotation marks and citation omitted]). "A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite" (*Spectrum Stamford, LLC v 400 Atl. Tit., LLC*, 162 AD3d 615, 617 [1st Dept 2018]). The movant must satisfy a "heavy burden of proving a clear right to mandatory injunctive relief" (*Rosa Hair Stylists, Inc. v Jaber Food Corp.*, 218 AD2d 793, 794 [2d Dept 1995]). Where the requested relief would effectively grant the movant the ultimate relief sought, or where the record establishes "sharp issues of fact, injunctive relief should not be granted" (*Lehey v Goldburt*, 90 AD3d 410, 411 [1st Dept 2011] [internal quotation marks and citations omitted]). "The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts (*Nobu Next Door, LLC*, 4 NY3d at 840).

Discussion

As an initial matter, plaintiffs provide no authority for the court to force Buyer to continue with the closing or do anything with the proceeds that is not in accordance with the contract of sale, if Seller does not wish to. Moreover, the complaint seeks to either void, or deem satisfied, the mortgage on the Property issued to ASM (complaint, NYSCEF Doc. No. 1, ¶¶ 43-57). The third item of the relief sought on the motion, namely, that ASM be required to issue a satisfaction of the mortgage or that the court direct the County Clerk to "expunge, nullify, and/or otherwise dispose of" the mortgage (order to show cause, NYSCEF Doc. No. 27), effectively

seeks the ultimate relief sought by the complaint. That alone is sufficient reason to deny the motion (*Spectrum Stamford, LLC*, 162 AD3d at 617; *Lehey*, 90 AD3d at 411). Plaintiff has also, however, failed to demonstrate a likelihood of success on the merits.

There are two essential issues underlying the parties' dispute. First, whether ASM properly exercised its right to redeem its interest in Aracar such that plaintiffs are obligated to make the payment secured by the note and mortgage; and second, whether ASM has properly assessed the interest owed on the mortgage. To resolve these questions, the court must look to the language of the contractual documents. As the Court of Appeals has summarized, the basic principles of contract interpretation are as follows:

> It is fundamental that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms, and that courts should read a contract as a harmonious and integrated whole. Courts may not, through their interpretation of a contract, add or excise terms or distort the meaning of any particular words or phrases, thereby creating a new contract under the guise of interpreting the parties' own agreements. In that regard, a contract must be construed in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect.

(*Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, N.A. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017] [internal quotation marks and citations omitted].)

Turning first to ASM's exercise of its redemption rights, the letter agreement provides that ASM may redeem its interest in Aracar during a thirty-day period prior to the two-year anniversary of its initial investment upon written notice to Aracar (Letter Agreement, NYSCEF Doc. No. 4, ¶ 7 [a]). There are no requirements or specifications as to the content of the notice. Plaintiffs' argument that ASM did not properly exercise its rights to redeem its interest in Aracar because it failed to specify what percentage it wished to redeem, finds no support in the contractual language, and the court may not add such a requirement under the guise of interpretation (*Nomura Home Equity Loan, Inc., supra*). Moreover, a plain reading of ASM's

notice that it was exercising its redemption rights is that it sought to redeem its entire interest in Aracar (January 28, 2020, letter, NYSCEF Doc. No. 8 ["ASM SPV, L.P. is exercising its Redemption Rights pursuant to paragraph 7(a) of the Letter Agreement to redeem our Interests in Aracar Group SPV I LLC]"). For purposes of deciding the motion, the court finds this notice to be sufficient under the terms of the contractual documents, and the Abramses were, thus, required to discharge the obligation secured by the note and mortgage (Letter Agreement, NYSCEF Doc. No. 4, ¶ 7 [c]). Plaintiffs, therefore, cannot demonstrate a likelihood of success on the merits that the mortgage should be voided or deemed satisfied based on ASM's failure to timely exercise its right to redeem.

Having found that ASM properly exercised its right to redeem, the court must consider the proper payoff amount of the mortgage. In this, neither party is entirely correct about the calculation of interest. The payoff statement indicates first that ASM is assessing compound interest upon the note. "Compound interest . . . is recoverable where there is an express agreement between the parties" (*Gutman v Savas*, 17 AD3d 278, 279 [1st Dept 2005]). No such express agreement is present here. The court understands that ASM has provided a subsequent payoff statement that now calculates the interest as simple interest (letter to court dated June 11, 2024, NYSCEF Doc. No. 51).

Moreover, ASM also improperly assesses interest for the first two years of the term of the note. The note provides that "[i]n the event this Note is repaid within two (2) years from the date hereof, no interest shall be due hereunder. Thereafter, the principal sum due hereunder shall bear interest at the rate of nine percent (9%) per annum payable on the Maturity Date hereunder" (Note, NYSCEF Doc. No. 6 at 1). ASM interprets this language as assessing interest for the full term of the note if the Abramses failed to repay it within two years. However, the court

interprets the use of the word "thereafter" at the beginning of the second sentence of this provision to mean that interest would not start to accrue until the third year of the term of the note. The contract language is not susceptible of a construction that interest should accrue, in effect, retroactively, if the Abramses failed to repay the note early.

ASM is correct, however, with respect to the interest rate applicable to unpaid amounts following the maturity date. The note provides that "[i]n the event that payment shall not be made when due . . . [the Abrams agree] that (a) the interest rate on the unpaid balance of the principal sum of this Note shall be the lesser of (i) the highest interest rate permitted by law, or (ii) 24% (Note, NYSCEF Doc. No. 6, ¶ 2 [b]). Plaintiffs argue that the highest interest rate permitted by law is set by General Obligations Law § 5-501. The statute provides, in relevant part, that "[t]he rate of interest, as computed pursuant to this title, upon the loan or forbearance of any money, goods, or things in action, except as provided in subdivisions five and six of this section or as otherwise provided by law, shall be six per centum per annum unless a different rate is prescribed in section fourteen-a of the banking law" (General Obligations Law § 5-501 [1]). The Banking Law sets the maximum interest rate at 16% (Banking Law § 14-a). However, the parties executed the promissory note as part of ASM's investment in Aracar, not as a loan or forbearance (*Christopher v Gurrieri*, 238 AD2d 299, 299 [2d Dept 1997] ["The promissory note sued upon was executed by the defendants in connection with their purchase of the plaintiff's business. Therefore, the transaction was neither a loan nor a forbearance"]). In any case, as the post-maturity interest rate follows the Abrams' default in payment of the note when due, the interest rate caps set forth above do not apply (*Kraus v Mendelsohn*, 97 AD3d 641, 641 [2d Dept 2012] ["The defense of usury does not apply where the terms of the mortgage and note impose a rate of interest in excess of the statutory maximum only after default or maturity"] [internal

quotation marks and citations omitted]). The highest rate permitted by law is therefore 25%, as set forth in Penal Law § 190.40. As 24% is lower, it is the applicable post-default interest rate.

Based on the foregoing, neither side has proffered the correct payoff amount on the mortgage and note. However, it is plaintiff's burden to demonstrate a likelihood of success on the merits (*Nobu Next Door, LLC*, 4 NY3d at 840), and because plaintiff is incorrect regarding the terms of the contractual documents, plaintiff has failed to do so.

Plaintiff's incorrect calculation is further grounds for the court to decline ordering the sale of the Property to proceed or that plaintiff's proposed but incorrect payoff amount be maintained in escrow.

Finally, the court also notes a lack of authority for plaintiffs' position that ASM reporting an operating loss for Aracar on its K-1 statements should serve as sufficient reimbursement of the Abrams' obligations under the note and mortgage.

Accordingly, it is hereby

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

6/14/2024
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
	[ ]	**GRANTED**	[X]	**DENIED**	[ ]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**			[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**			[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**