

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

HANA BANK, NEW YORK)	
AGENCY,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. N10L-11-127 CLS
)	
YOUNG F. CHO and HEIDI H.)	
CHO,)	
)	
Defendants.)	
)	

Date Submitted: March 4, 2011
Date Decided: April 6, 2011

On Defendants' Motion to Stay. **DENIED.**

ORDER

Stamatios Stamoulis, Esq., Richard C. Weinblatt, Esq., Two Fox Point Centre, 6 Denny Road, Suite 307, Wilmington, DE 19809. Attorneys for Plaintiff.

Richard H. Cross, Jr., Esq., David G. Holmes, Esq., 913 North Market Street, Suite 1001, P.O. Box 1380, Wilmington, DE 19899. Attorneys for Defendants.

Scott, J.

Introduction

Before this Court is the Defendants' motion to stay the Delaware proceedings. The Court has reviewed the parties' submissions. For the reasons that follow, the Defendants' Motion to Stay is **DENIED**.

Facts

On September 22, 2008, Young F. Cho and Heidi H. Cho ("Defendants") entered into a mortgage agreement with Hana Bank, New York Agency ("Plaintiff") in the principal amount of \$1.2 million secured by residential property located at 1213 Barley Mill Road, Greenville, Delaware (the "Mortgage"). The Mortgage was executed in New York and is the basis of the Writ of Scire Facias in the Delaware foreclosure proceeding filed by Plaintiff.

The promissory note and Mortgage contract contain a New York choice of law provision even though foreclosure proceedings on the Mortgage would have to be filed in Delaware.

On November 3, 2009, Defendants stopped making payments under the Mortgage and it went into default. On September 13, 2010, Plaintiff informed the Defendants that they were in default and Plaintiff would commence legal action if the Defendants did not cure the default.

On September 27, 2010, Defendant Young Cho filed a complaint against Plaintiff in the Supreme Court of New York (the "New York action"). The *in*

personam action concerned the Mortgage contract and promissory note with claims of breach of contract, unjust enrichment, breach of the duty of good faith and fair dealing, and fraud in the inducement. The promissory note stated the loan bear interest rate was the LIBOR rate plus 3.2%, and further provided that in the event of a default as described in the Mortgage contract, the interest rate would be increased by the maximum rate allowed by law or 3%, whichever is lower (“default rate”). According to the Defendants, Plaintiff raised the interest rate to the default rate prior to the first month’s payment on the Mortgage and it remains in place.

On November 12, 2010, the Plaintiff brought this *in rem* foreclosure action (the “Delaware action”). On January 18, 2011, the Defendants filed their answer raising the affirmative defense of payment and raised the claims of breach of contract, fraud in the inducement, and estoppel.¹ The Defendants then filed this motion to stay the Delaware action.

On March 1, 2011, the motion to stay was argued before the Court. Prior to the hearing the New York action was dismissed.

Discussion

Despite the fact that the Defendants filed their action first in New York, their motion to stay is denied because the Plaintiff will suffer an overwhelming hardship

¹ D.I. 6.

as Delaware is the only jurisdiction that can provide complete relief by foreclosing the property. Generally, “(a) litigation should be confined to the forum in which it is first commenced and (b) . . . a defendant should not be permitted to defeat the plaintiff’s choice of forum in a pending suit, by commencing litigation involving the same cause of action, in another jurisdiction of its own choosing.”² Whether to grant the stay is within the discretion of the trial court.³ But, in order to grant the stay, the Plaintiff in this case must show an overwhelming hardship in litigating the case in New York, the Defendant’s choice of forum.⁴ In determining whether the Plaintiff has suffered an overwhelming hardship, the following factors are considered:

(1) The relative ease of access to proof; (2) the availability of compulsory process for witnesses; (3) the possibility of the view of the premises, if appropriate, and (4) all other practical problems that would make the trial of the case easy, expeditious and inexpensive. We add a further factor-whether or not the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction.⁵

“Delaware courts should exercise discretion in favor of a stay where a prior action, involving the same parties and issues, is pending elsewhere in a court capable of

² *ANR Pipeline Co. v. Shell Oil Co.*, 525 A.2d 991, 992 (Del. 1987) (citing *McWane Cast Iron Pipe Corp. v. McDowell-Wellman E. Co.*, 263 A.2d 281, 283 (Del. 1970)).

³ *Aveta, Inc. v. Colon*, 942 A.2d 603, 608 (Del. Ch. 2008) (citations omitted).

⁴ *Id.* at 609.

⁵ *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964), *rev’d on other grounds, PepsiCo, Inc. v. Pepsi-Cola Bottling Co. of Asbury Park*, 261 A.2d 520 (Del. 1969).

doing prompt and *complete* justice.”⁶ This prevents forum shopping and promotes judicial economy by confining litigation to one jurisdiction.⁷

The Defendants argue the stay must be granted because the New York action is the first pled action. That argument fails for two reasons: (1) the New York action has been dismissed and (2) the critical issue is whether overwhelming hardship exists, not which case was filed first. As of the hearing date, March 1, 2011, the New York action had been dismissed. Should the Defendants successfully appeal that decision and if the stay is granted in favor of the New York action, the Plaintiff will be forced to litigate in two jurisdictions: in New York on the *in personam* action and in Delaware on the *in rem* foreclosure action. This would present an overwhelming hardship on the Plaintiff.

The Delaware Supreme Court made it clear, when it reversed the Court of Chancery’s decision in *Candlewood*, that the only critical issue is whether overwhelming hardship exists.⁸ In this situation the Plaintiff will suffer an overwhelming hardship since New York is unable to provide complete justice by foreclosing the Delaware property.⁹ Even though the Defendants were the first to file in New York challenging the validity of the mortgage, the Plaintiff had to file

⁶ *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1145 (Del. 2010) (citing *McWane Cast Iron Pipe Corp.*, 263 A.2d at 283.) (emphasis added).

⁷ *United Phosphorus, Ltd. v. Micro-Flo*, 808 A.2d 761, 764 (Del. 2002).

⁸ *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 999 (Del. 2004).

⁹ In their motion, the Defendants concede Plaintiff would be required to file the foreclosure action in Delaware since the property is located in Delaware.

the foreclosure action in Delaware since the property at issue is located in this state. This presents an overwhelming hardship on Plaintiff as it will be forced to litigate in two jurisdictions.

In support of their motion in opposition, the Plaintiffs assert *Acierno*¹⁰ is the controlling case because the Delaware action would dispose of the case inexpensively and expeditiously. When it denied the motion to stay in *Acierno*, the Court of Chancery did not give any weight to when the actions were filed.¹¹ Instead, the Court of Chancery found it was the more proper forum to decide the narrow, state law issue presented.¹² The decision was affirmed because the Court of Chancery gave the appropriate weight to the factors that would inexpensively and expeditiously dispose of the case.¹³

This case is similar to *Acierno* because requiring the parties to litigate in this Court rather than in New York would make disposition of the case inexpensive and expeditious. In their answer to the Delaware action, the Defendants raise the affirmative defense of payment and bring the claims of breach of contract, fraud in the inducement and estoppel.¹⁴ In the New York action, the Defendants raise the

¹⁰ *Acierno v. New Castle County*, 679 A.2d 455 (Del. 1996).

¹¹ *Id.* at 458.

¹² *Id.*

¹³ *Id.*

¹⁴ In a mortgage foreclosure action, the defenses of payment, satisfaction, and avoidance of the mortgage are available. *American National Insurance Co. v. G-Wilmington Associates, L.P.*, 2002 WL 31383924 (Del. Super.) (citation omitted). “Pleas of avoidance include acts of God,

claims of breach of contract, fraud in the inducement, unjust enrichment, and breach of the duty of good faith and fair dealing. The Defendants have raised substantially the same issues related to the formation of the mortgage in the Delaware action as the New York action. Since the Delaware action is the only one that can provide complete justice, it is the only action that can dispose of the case inexpensively and expeditiously.

Conclusion

Based on the forgoing, Defendants' motion to stay the Delaware proceeding is **DENIED**.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

assignment, conditional liability, duress, exception, forfeiture, fraud, illegality, justification, non-performance of condition precedents, ratification, unjust enrichment and waiver.” *Id.*