SHORT FORM ORDER

INDEX No. 16221-11

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8/15/11
ADJ. DATES 8/19/11
Mot. Seq. # 001 - MotD
CDISP Y____ N X

OLD DOCK ASSOCIATES,

Plaintiff,

-against-

BDG YAPHANK, LLC, YAPHANK ENTERPRISE, LLC and NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Defendants.

SINREICH, KOSAKOFF & MESSINA
Attys. For Plaintiff
267 Carleton Ave.
Central Islip, NY 11722

BERKMAN, HENOCH, PETERSON
Attys. For Defendant, BDG Yaphank
100 Garden City Plaza
Garden City, NY 11530

Upon the following papers numbered 1 to 5 read on this motion to dismiss the complaint; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 4-5; Replying Affidavits and supporting papers ____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by defendant, BDG Yaphank, LLC, for an order dismissing the complaint served in this mortgage foreclosure action is considered under CPLR §3211(a)(1) and (a)(7 and is granted only to the extent that the plaintiff's demand for recovery of a deficiency judgment against the moving defendant is dismissed.

On October 19, 2007, the moving defendant, BDG Yaphank, LLC (hereinafter BDG), gave a purchase money mortgage to the plaintiff in the amount of $9,274,779.00 in connection with BDG's purchase of commercial real property situated in Bellport, New York. By the complaint served in this action, the plaintiff seeks the remedy of foreclosure and sale and a judgment against BDG for the deficiency, if any, in the net amount of the proceeds of the public sale of the premises and the amount due under the terms of the mortgage. Underlying these claims are allegations that the plaintiff defaulted in paying two interest-only payments in the amount of $130,362.17 due on October 1, 2010 and January 1, 2011. The plaintiff further alleges that BDG also defaulted under the terms of the mortgage by failing to pay real estate taxes due on December 1, 2010 and by reason of its transfer of the mortgaged premises without payment of all amounts due by reason of such transfer.

In lieu of answering, defendant BDG interposed this motion wherein it seeks dismissal of the plaintiff's complaint pursuant to CPLR §3211(a)(1) and (a)(7). The motion rests principally on BDG's contention that the plaintiff failed to satisfy a contractual condition precedent prior to commencing this action by failing to serve a notice of default with notice to cure, affording BDG the requisite cure periods

required by the terms of the mortgage. BDG further contends that the plaintiff's demands for a deficiency judgment against it is interdicted by the non-recourse provisions of the mortgage which limit the plaintiff's remedy to the mortgaged premises. For the reasons stated below, the motion is granted only with respect to the plaintiff's claims for a deficiency judgment against BDG.

The moving defendant claims that dismissal of the plaintiff's demands for recovery of a deficiency judgment is warranted because ¶ 24 of Rider to Mortgage specifically limits the remedies of the plaintiff to the mortgaged premises. With these contentions the court agrees. The moving papers sufficiently demonstrated that the plaintiff has no cause of action for recovery of a deficiency judgment against the moving defendant because the nonrecourse provisions mortgage specifically limits the remedies of the plaintiff to the mortgaged premises (*see* ¶ 24 of Rider to Mortgage). Dismissal of the plaintiff's complaint pursuant to CPLR 3211(a)(1) and (a)(7) is thus granted with respect to the plaintiff's claims for recovery of a deficiency judgment.

The moving defendant's claims for dismissal of the plaintiff's claims for foreclosure and sale rest upon different grounds, namely, that the plaintiff's failure to give proper notice of the defaults and cure periods constituted a failure to satisfy contractual conditions precedent which preclude the plaintiff's prosecution of its claims for foreclosure and sale of the subject mortgage. The record reflects that two separate letters, both dated February 9, 2011, were prepared by the plaintiff with respect to defaults. In the first, the plaintiff notified the moving defendant of its default in payment of the two interest-only payment due on the first of October 2010 and the first of January 2011 and that the plaintiff had fifteen days to cure its default. The second letter dated February 9, 2011 advised the moving defendant of its default in the payment of taxes due on December 1, 2010 and that it had 30 days to cure such default. Only the first letter advising the moving defendant of the default in payment is alleged in the plaintiff's complaint to have issued to the moving defendant (*see* Complaint ¶ 18), although the two letters dated February 9, 2011 described above, are attached to the complaint. In its opposing papers, the plaintiff alleges that the default in payment letter referred to in the complaint was dated February 9, 2011 but was mailed on March 2, 2011.

Receipt of either letter is not denied by the moving defendant. Instead, it claims that the plaintiff's complaint recites issuance of only one letter giving notice of the payment or monetary defaults and erroneously states that said letter is dated March 2, 2011. These circumstances coupled with the fact that this letter afforded only 15 days notice to cure, rather than 30 days notice to cure, is sufficient proof that the plaintiff failed to satisfy contractual conditions precedent imposed upon the non-payment defaults alleged in the complaint, namely, the failure to pay real estate taxes and under the due-on-transfer provisions of the mortgage. The failure to establish satisfaction of the issuance of due notice of non-payment defaults with 30 days to cure allegedly entitles to the moving defendant to dismissal of the plaintiff's complaint pursuant to CPLR § 3211(a)(1) and (a)(7). In its reply papers, the moving defendant claims that "notice of default is an absolute prerequisite to the declaration that the mortgage balance is due and such notice applies to any default" (*see* Affirmation in Reply by Bruce J,. Bergman, dated August 25, 2011). To support this claim, the moving defendant relies upon Paragraph 1 of the Rider to the mortgage which is expressly incorporated by reference into the mortgage. Said paragraph provides as follows:

> 1. If there shall be a monetary default under this Mortgage, Mortgagee shall give Mortgagor written notice thereof and fifteen (15) days to cure same and if there shall be a non-monetary default under this Mortgage, Mortgagee shall give Mortgagor written notice thereof and thirty (30) days to cure same. If after expiration of such thirty (30) days said non-monetary default has not been cured, Mortgagee may, but shall not be obligated to, cure such default and the reasonable amounts advanced by Mortgagee, and the other costs and

> expenses of mortgagee in curing such default, with interest at the rate of sixteen (16%) percent per annum from the time of the advances or payments, shall be added to the indebtedness secured by this Mortgage and may be collected hereunder at any time after the time of such advances or payments. *If Mortgagee shall not elect to cure such default, the provisions of paragraph 4 and 14 of the printed portion of this mortgage shall prevail* [emphasis added].

Paragraph 14 of the mortgage provides as follows:

> 14. That the whole of said principal sum and the Interest shall become due at the option of the mortgagee: (a) after failure to exhibit to the mortgagee, within ten business days after written demand, receipts showing payment of all taxes, water rates, sewer rents and assessments; or (b) after the actual or threatened alteration, demolition or removal of any building on the premises without the written consent of the mortgagee; or (c) after the assignment of the rents of the premises or any part thereof without the written consent of the mortgagee; or (d) if the buildings on said premises are not maintained in reasonable good repair; or (e) after failure to comply with any requirement or order or notice of violation of law or ordinance issued by any governmental department claiming jurisdiction over the premises within three months from the issuance thereof; or (f) if on application of the mortgagee two or more fire insurance companies lawfully doing business in the State of New York refuse to issue policies insuring the buildings on the premises; or (g) in the event of the removal, demolition or destruction in whole or in part of any of the fixtures, chattels or articles of personal property covered hereby, unless the same are promptly replaced by similar fixtures, chattels and articles of personal property at least equal in quality and condition to those replaced, free from chattel mortgages or other encumbrances thereon and free from any reservation of title thereto; or (h) after thirty days' notice to the mortgage, in the event of the passage of any law deducting from the value of the land for the purposes of taxation any lien thereon, or changing in any way the taxation of mortgages or debts secured thereby for state or local purposes; or (i) if the mortgagor fails to keep, observe and perform any of the other covenants, conditions or agreements contained in this mortgage after receipt of written notice and a reasonable opportunity to cure the same.

Paragraph 4 of the mortgage provides as follows:

> 4. That the whole of said principal sum and interest shall become due at the option of the mortgagee: after default in the payment of any installment of principal or of interest for fifteen days or after default in the payment of any tax, water rate, sewer rent or assessment for thirty days after notice and demand; or after default after notice and demand either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursement the mortgagee for premiums paid on such insurance, as hereinbefore provided; or after default upon request in furnishing a statement of the amount due on the mortgage and whether any offsets or defenses exist

> against the mortgage debt, as hereinafter provided. An assessment which has been made payable in installments at the application of the mortgagor or lessee of the premises shall nevertheless, for the purpose of this paragraph, be deemed due and payable in its entirety on the day the first installment becomes due or payable or a lien.

Upon its review of the record, the court finds that the defendant's submissions failed to establish that the complaint fails to state a cause of cause of action for foreclosure of the subject of the subject mortgage. In this regard, the court notes that subparagraph (a) of rule 3015 of the CPLR provides as follows: "[T]he performance or occurrence of a condition precedent in a contract need not pleaded. A denial of performance or occurrence shall be made specifically and with particularity. In case of such denial, the party relying upon the performance or occurrence shall be required to prove on the trial only such performance or occurrence as shall have been so specified". Compliance with the contractual conditions precedent are thus not an element of a plaintiff's claim for foreclosure and sale of mortgaged premises. Instead, a cognizable claim for such relief is stated upon allegations as to the existence of the note and mortgage and a default on the part of the mortgagor in payment or otherwise under the terms of the subject mortgage (*see* ***Levitin v Boardwalk Capital, LLC,*** 78 AD3d 1019, 912 NYS2d 101[2d Dept 2010]; ***Tower Funding, Ltd. v David Berry Realty, Inc***., 302 AD2d 513, 755 NYS2d 413 [2d Dept 2003]).

It is well settled law that when a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist Coll. v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], quoting ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). In considering a motion to dismiss for legal insufficiency under CPLR 3211(a)(7), the court must afford the complaint a liberal construction after accepting the facts alleged therein to be true and determine only whether those facts fit within any cognizable legal theory (*see* ***Peery v United Capital Corp***., 84 AD3d 1201, 924 NYS2d 470 [2d Dept 2011]; ***Reiver v Burkhart, Wexler & Hirschberg, LLP***, 73 AD3d 1149, 901 NYS2d 690 [2d Dept 2010]; ***Goldin v Engineers Country Club***, 54 AD3d 658, 864 NYS2d 43 [2d Dept 2008]). If the court can determine that the plaintiff may be entitled to relief on any view of the facts alleged, its inquiry is complete and the complaint must be declared legally sufficient (*see* ***Symbol Tech. v Deloitte & Touche, LLP***, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]). In making such determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of a that particular claim by applicable statutes or rules (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc***., 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009]).

A review of the complaint served in this action reveals that the factual allegations asserted therein state legally cognizable claims for the foreclosure and sale of the subject premises, as they assert the existence and the moving defendant's execution of the note and mortgage and several defaults under the terms thereof. The failure to plead the performance or occurrence of contractual conditions precedent, such as those relating to notices of default and cure periods upon which the moving defendant relies as a predicate dismissal of the plaintiff's claims for foreclosure and sale , does not render the plaintiff's complaint legally insufficient. To the extent that the instant motion may be considered as one to dismiss pursuant to CPLR 3211(a)(7) for failure to state a legally sufficient claim for such relief it is denied.

To the extent that the instant motion may be considered as one to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) because the record contains sufficient documentary proof that the plaintiff has no cause of action due to one or more failures in the satisfaction of contractual conditions precedent to the maintenance of this suit by the plaintiff, it is denied. It is well established that a motion pursuant to CPLR

3211(a)(1) for dismissal of a claim based on documentary evidence is appropriately granted only where the documentary evidence submitted utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see* ***Goshen v Mutual Life Ins. Co. of New York***, 98 NY2d 314, 746 NYS2d 858 [2002]; ***Mason v First Cent. Nat. Life Ins. Co. of New York***, 86 AD3d 854, 927 NYS2d 694 [2d Dept 2011]; ***Comito v. Foot of Main, LLC***, 82 AD3d 1033, 918 NYS2d 890, 890 [2d Dept 2010; ***Reiver v. Burkhart Wexler & Hirschberg, LLP***, 73 A.D.3d 1149, 901 N.Y.S.2d 690[2d Dept 2010]).

Here, the moving defendant contends that pursuant to Paragraph 1 of the Rider to the mortgage, the plaintiff was required to serve notice of a monetary default with an attendant 15 notice to cure and to serve a notice of default regarding any non-monetary default with a 30 day notice to cure. A careful reading of the provisions of Paragraph 1 of the Rider to the mortgage reveal, however, that they are applicable only in the event that the plaintiff, mortgagee, elects to cure a default. Where, as here, the mortgagee elects not to cure the default, "the provisions of paragraph 4 and 14 of the printed portion of this mortgage shall prevail" (*see* ¶ 1 of the Rider to Mortgage). The moving defendant's reliance on Paragraph 1 of the Rider is misplaced as its notice and cure provisions have not been shown to control under the circumstances of this case. Moreover, the moving defendant failed to address its express waiver of its "right to assert or interpose against the mortgagee or the Note or this mortgage (or the payment, collection or other enforcement of either of such instrument)" any or all defenses thereto (*see* ¶ 13 of the Rider to Mortgage). Under these circumstance, the court finds that the documentary proof submitted by the moving defendant failed to utterly refute the plaintiff's factual allegations, thereby conclusively establishing as a matter of law the asserted defense of the failure to satisfy contractual conditions precedent. Dismissal of the plaintiff's claims for foreclosure and sale of the mortgaged premises is thus denied.

In view of the foregoing, the instant motion (#001) by defendant, BDG Yaphank, LLC, for dismissal of the plaintiff's complaint pursuant to CPLR 3211(a)(1) and/or (a)(7) is granted only to the extent that the plaintiff's demand for recovery of a deficiency judgment against the moving defendant is dismissed. Within 45days after service of all responsive pleadings, the plaintiff shall request the scheduling of a preliminary conference as contemplated by 22 NYCRR § 202.12.

DATED: September 16, 2011

THOMAS F. WHELAN, J.S.C.