Dunhill Asset Servs. III LLC v 175 Dixon Ave. Realty, Inc.
2012 NY Slip Op 30478(U)
February 24, 2012
Sup Ct, Suffolk County
Docket Number: 33023/11
Judge: Thomas F. Whelan
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SHORT FORM ORDER

COPY

INDEX No. 33023/11

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2/3/12
ADJ. DATES 2/17/12
Mot. Seq. #00 2- MG
Mot Seq. #00 3 - XMD
Submit Order
CDISP Y___ N x

DUNHILL ASSET SERVICES III LLC,

Plaintiff,

-against-

175 DIXON AVENUE REALTY, INC., SOUVENIR COLLECTION, INC., BALBIR K. KANDHRA a/k/a BALBIR KAUR KANDHRA, LONG ISLAND DEVELOPMENT CORPORATION, US SMALL BUSINESS ADMINISTRATION, ET ALS,

Defendants.

SILLS, CUMMIS & GROSS, PC
Attys. For Plaintiff
30 Rockefeller Plaza
New York, NY 10112

KRISS & FEUERSTEIN, LLP
Attys. For 175 Dixon, Souvenir & Kandhra
360 Lexington Ave.
New York, NY 10017

VINCENT MESSINA, ESQ.
Receiver
267 Carleton Ave.
Central Islip, NY 11743

Upon the following papers numbered 1 to 12 read on this motion (#002) by the plaintiff for accelerated judgments and appointment of a referee to compute and cross motion (#003) by certain defendants to terminate receiver ship and discharge receiver ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; 8 ; Notice of Cross Motion and supporting papers 4-7 ; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers ____; Other 9 (memorandum); 10-11 (memorandum); 12 (memorandum) ; (~~and after hearing counsel in support and opposed to the motion~~), it is

ORDERED that this motion (#002) by the plaintiff for an order: (1) awarding it summary judgment against the answering defendants including the dismissal of their affirmative defenses and counterclaims; (2) substituting one or more occupants found at the premises for unknowns named in the caption and/or otherwise deleting as party defendants certain named defendants; (3) fixing the defaults in answering of the remaining defendants; and (4) appointing a referee to compute amounts due under the subject note and mortgage is considered under CPLR 3212, 1024, 3215 and RPAPL § 1321 and is granted; and it is further

ORDERED that the cross motion (#003) by defendants, 175 Dixon Avenue Realty, Inc., Souvenir Collection Inc. and Balbir K. Kandhra, for an order denying the plaintiff's motion, terminating the receivership granted on a prior motion by the plaintiff and discharging the receiver appointed therein by the court, is considered under CPLR Article 64 and RPAPL Article 13 and is denied.

This action arises out of an $834,000.00 small business loan made by Citibank to defendant 175 Dixon Avenue Realty, Inc.[hereinafter Dixon] on March 20, 2008 as evidenced by the terms of a promissory note. The loan was secured by a mortgage given by Dixon on March 20, 2008 on commercial property situated in Amityville, New York. The loan was further secured by, among other things, the unconditional written guarantees of payment and performance of the obligations of Dixon by defendants, Souvenir Collection, Inc.[hereinafter "Souvenir"] and Kandhra under the subject loan documents. By allonge to the mortgage note dated April 26, 2011, Citibank transferred all of its interests in the note to the plaintiff. By assignment dated April 25, 2011, effective as of April 26, 2011, Citibank assigned the mortgage together with all bonds, notes or obligations described in the mortgage and the monies due and to grow thereon with interest to the plaintiff.

By the complaint served and filed herein, the plaintiff alleges that defendant Dixon defaulted under the terms of the note and mortgage in two distinct ways. First, Dixon failed to pay real estate taxes advanced by Citibank and other tax delinquencies owing to the County of Suffolk, the Town of Babylon and the Village of Amityville as outlined in the default letter of May 19, 2010 sent by Citibank's counsel to Dixon and defendant Kandhra. Dixon is alleged to be in further default of its obligations to pay monthly installments due under the terms of the note and mortgage as outlined in the May 19, 2010 letter default letter. Citibank thereafter notified Dixon of its defaults in January of 2011 and demanded payment of all outstanding amounts. By letter of February 1, 2011, Citibank notified Dixon and Kandhra that the defaults had not been cured and that the loan had been accelerated. By correspondence dated September 28, 2011, the plaintiff notified defendants Dixon and Kandhra of the prior notices of default and loan acceleration and advised of further defaults in the payment of installments due in July, August and September of 2011. By virtue of the continuing tax delinquencies, which, at the time of the complaint totaled some $108,00.00, and Dixon's other default in payment of amounts due under the accelerated loan, the plaintiff demands a judgment of foreclosure directing the public sale of the mortgaged premises. The plaintiff also demands a deficiency judgment against Dixon, by virtue of its defaults under the terms of the note and mortgage, and against defendants Souvenir and Kandhra by virtue of their defaults under the terms of their written guarantees (*see* Complaint ¶¶ 37-58).

Issue was joined only by the service of an answer on behalf of defendants Dixon, Souvenir and Kandhra. Therein, these answering defendants assert twenty-three affirmative defenses and six counterclaims, in which they demand recision of the loan documents and money damages purportedly attributable to tortious conduct on the part of the plaintiff. In October, 2011, the plaintiff moved ex-parte for the appointment of receiver, which application was granted on November 4, 2011.

By the instant motion, the plaintiff seeks summary judgment against the answering defendants, including the dismissal of their affirmative defenses and counterclaims. The plaintiff also seeks an order substituting Amity Express Deli, Inc., an occupant found at the premises and sued herein as John Doe #1, for said defendant and deleting as party defendants the remaining unknown defendants. The plaintiff further demands an order fixing the defaults in answering of the remaining defendants, including newly identified Amity Express Deli, Inc., and an order appointing a referee to compute amounts due under the subject note and mortgage.

The answering defendants oppose and demand an order discharging the receiver previously appointed and directing the termination of the receivership. The answering defendants advance few, if any, of the twenty-three affirmative defenses set forth in their joint answer as defendant Dixon, admits

in the affidavit of its officer, Kundhra Manmohan, "certain late payments are not in dispute" (*see* ¶ 7 of Manmohan affidavit attached to cross moving papers). The defendants nevertheless argue that the acceptance of late payments by the plaintiff and its predecessor-in-interest both before and after the purported acceleration of the loan constituted a waiver of said defaults and resulted in an improper acceleration of the loan. In addition, Dixon's officer Manmohan claims to have been induced into making late payments of principal and interest by reason of certain oral representations regarding default cures and forbearance on the part of plaintiff and/or its predecessor-in-interest. Such conduct is allegedly inimical to current notions of fairness, justice and equity owing to borrowers caught in today's adverse economic times and allegedly constitutes unclean hands. These circumstances purportedly warrant the imposition of an estoppel against the plaintiff precluding it from obtaining the relief demanded on its motion-in-chief. In addition, the answering defendants claim that the receivership previously granted should be terminated as it imposes an extreme hardship on the beneficial owners of Dixon since they operate the Amity Express Deli, a tenant at the subject premises. Rents paid by the owners of Dixon on behalf of the deli are now collected by the receiver along with all other rents. The defendants allege that these circumstances deprive the beneficial owners of Dixon of cash necessary to keep its loan obligations, current.

The defendants further allege that the substitution of Amity Express Deli, Inc. should be denied because its existence as a going concern and occupant of the premises was open and obvious and should have been known to the plaintiff. Upon such denial, the defendants contend that the court should deny the plaintiff's motion due to its failure to properly join Amity Express Deli, Inc. who, as a tenant of the mortgaged premises, is a necessary party.

It is well established that in an action to foreclose a mortgage, a prima facie case is made by the plaintiff's production of the note and mortgage and proof on the part of the defendant/mortgagor and any guarantors of a default in payment or other material terms set forth in the mortgage (*see* ***Garrison Special Opportunities Fund, L.P. v Arthur,*** 82 AD3d 1042, 918 NYS2d 894 [2d Dept 2011]; ***Swedbank, AB v Hale Ave. Borrower, LLC***., 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; ***Rossrock Fund II, L.P. v Osborne***, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]). Here, the plaintiff established its entitlement to summary judgment on its complaint by its production of the note and mortgage, the written guarantees and due evidence of the defaults in payments due and owing thereunder.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses and counterclaims asserted in their answer (*see* ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The opposing papers submitted by the answering defendants were insufficient in this regard.

Once a mortgagor defaults on loan payments, a mortgagee is not required to accept less than the full repayment as demanded (*see* ***EMC Mtge. Corp. v Stewart***, 2 AD3d 772, 769 NYS2d 408 [2d Dept 2003]; ***First Federal Sav. Bank v Midura***, 264 AD2d 407, 694 NYS2d 121 [2d Dept 1999]). Here, the plaintiff correctly points out that, notwithstanding the asserted defenses of a waiver of defaults on the part of the plaintiff, various defaults in the payment of overdue taxes remain, uncured, to date. The defendants' claims that all of the missed payments have been brought current by late payments made by Dixon and accepted by the plaintiff and/or its predecessor-in-interest relate solely to the monthly installments of principal and interest. The existence of the outstanding tax liability defaults, which are

not denied by the answering defendants, render the defendants' waiver of default defense unmeritorious under the authorities cited above.

To the extent that the defendants' waiver defense is premised upon a purported waiver on the part of the plaintiff and/or its predecessor-in-interest of the right to foreclose, it is likewise rejected as unmeritorious. The September 28, 2011 correspondence by plaintiff's counsel ratifying the prior notices of default and Notice of Acceleration issued by Citibank and advising of additional defaults by Dixon together with the plaintiff's reservation of all non-waiver provisions and other of its rights and entitlements renders the answering defendants' claims of waiver and/or estoppel wholly unavailing (*see* ***Rossrock Fund II, L.P. v Osborne***, 82 AD3d 737, supra).

Also unavailing are the defendants' claims of an absence of an enforceable loan acceleration. The law is clear that "when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene" (***Home Sav. of Am., FSB v Isaacson***, 240 AD2d 633, 659 NYS2d 94 [2d Dept 1997]; ***New York Guardian Mortgagee Corp. v Olexa***, 176 AD2d 399, 401, 574 NYS2d 107). Once a default has been declared and a loan's maturity has been accelerated, a mortgagee is not required to accept a tender of less than full repayment as demanded (*see* ***Albertina Realty Co. v Rosbro Realty Corp***., 258 NY 472, 180 NE 176 [1932]; ***Home Sav. of Am., FSB v Isaacson***, 240 AD2d 633, *supra*). Moreover, the mere acceptance of a partial payment of the accelerated debt is not an affirmative act revoking the acceleration, where as here, provisions of the loan documents expressly disavow any waivers by acts or non-acts of the plaintiff and correspondence between it and the borrower expressly states that the borrower remains liable for the balance of the accelerated debt even after the partial payment are accepted (*see* ***UMLIC VP, LLC v Mellace***, 19 AD3d 684, 799 NYS2d 61 [2d Dept 2005]; ***P.T. Bank Cent. of Asia v Ho Ho Ho Realty***, 273 AD2d 212, 709 NYS2d 116 [2d Dept 2000]).

The defendants' claims that oral assurances of the plaintiff and/or its predecessor-in-interest that the tender of late payments of missed installments would be a sufficient cure of Dixon's defaults so as to preclude the commencement of this foreclosure action are also rejected as unmeritorious. The subject mortgage indenture provides that its terms could not be changed except by a writing signed by the party against whom a change is sought to be enforced. The defendants' assertion of such oral assurances, even if established by competent proof, amount to nothing more than claims of an alleged oral modification of the terms of the mortgage and/or an oral forbearance agreement, the enforcement of which is precluded by the terms of the loan documents and the statute of frauds (*see* General Obligations Law § 15–301[1]; ***North Bright Capital, LLC v 705 Flatbush Realty***, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]).

Finally, the court rejects the defendants' claim that the plaintiff's request for the substitution of Amity Express Deli, Inc., in the place of John Doe #1, should be denied and as a result, the plaintiff's motion denied due to a failure to join a necessary party. Amity Express Deli, Inc., defaulted in answering the summons and complaint and said default remains in effect. All that is needed to employ the substitution contemplated by CPLR 1024 is a showing that the plaintiff made timely efforts to identify the correct party before the statute of limitations expired (*see* ***Temple v New York Community Hosp***., 89 AD3d 926, 933 NYS2d 321 [2d Dept 2011]; ***Comice v Justin's Rest.***, 78 AD3d 641, 909 NYS2d 670 [2d Dept. 2010]). The plaintiff's use of CPLR 1024 comports with the above as the statute of limitations has not been implicated. The answering defendants have no authority to raise jurisdictional defenses on behalf of Amity Express Deli, Inc. as the defense of a lack of in personam jurisdiction is personal to that defendant (*see* ***Gray-Joseph v Shuhai Liu***, 90 AD3d 988, 934 NYS2d 868 [2d Dept 2011]; ***Olesniewicz v Khan***, 8 AD3d 354, 777 NYS2d 705 [2d Dept 2004). In any event, the failure to join a necessary, but

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not indispensable, party to a foreclosure action merely leaves that party's rights unaffected by the judgment (*see* ***Private Capital Group, LLC v Hosseinipour***, 86 AD3d 554, 927 NYS2d 665 [2d Dept 2011]; ***1426 46 St., LLC v Klein***, 60 AD3d 740, 876 NYS2d 425 [2d Dept 2009]). .

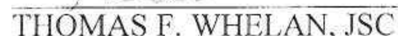
The court thus finds that the plaintiff is entitled to summary judgment on its complaint and dismissing the affirmative defenses and counterclaims set forth in the joint answer of defendants Dixon, Souvenir and Kandhra. Likewise granted are those portions of the instant motion wherein the plaintiff seeks an order substituting Amity Express Deli, Inc, in the place of John Doe #1 and dropping as party defendants the remaining unknown defendants listed in the caption together with an amendment of the caption to reflect same (*see* CPLR 1024).

The plaintiff's moving papers further established the default in answering on the part of the newly substituted defendant, Amity Express Deli, Inc. and the remaining named defendants, none of whom served answers to the plaintiff's complaint. Accordingly, the defaults of all such defendants are hereby fixed and determined. Since the plaintiff has been awarded summary judgment against the sole answering defendant and has established a default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see* RPAPL § 1321; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994];***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Perla v Real Prop. Holdings, LLC***, 23 Misc3d 697, 874 NYS2d 873 [Sup Ct. Kings County 2009]; ***HSBC Mtge. Serv., Inc. v Alphonso***, 16 MIsc3d (A), 2007 WL 2429711 [Kings County Sup. Ct. 2007]). Those portions of the instant motion wherein plaintiff demands such relief are thus granted, subject only to the submission of an order providing, in blank, for the appointment of such referee as hereinafter directed.

The defendants' cross motion(#003) is denied. The defendants' demands for a "denial" of the plaintiff's motion-in-chief are substantively insufficient for the reasons set forth above. The defendants' demands for an order discharging the receiver previously appointed and terminating the receivership are denied. Where, as here, the mortgage indenture includes provisions by which the mortgagor expressly consents to the appointment of a receiver "as a matter of right and without regard to the necessity to disprove adequacy of the security for the Obligations and the solvency of [the] Mortgagor or other persons liable for payment of the Obligations", the plaintiff is entitled to the appointment of a temporary receiver. The circumstances relied upon by the defendants as grounds for the vacatur of the receiver's appointment are not sufficient to warrant the granting of such relief (*see* ***GECMC 2007-C1 Ditmars Lodging, LLC v Mohola, LLC.***, 84 AD3d 1311, 924 NYS2d 531 [2d Dept 2011]).

The plaintiff is directed to forthwith submit, upon a copy of this order, an order providing in blank for the appointment of a referee to compute by this court and the matters necessarily attendant with respect to such appointment.

DATED: 2/24/12



THOMAS F. WHELAN, JSC