

<b>TD Bank, N.A. v Morcal Corp.</b>
2012 NY Slip Op 31319(U)
May 3, 2012
Sup Ct, Nassau County
Docket Number: 21825/10
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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TD BANK, N.A.,

Plaintiff,

-against-

MORCAL CORP., ATLANTIC FEATHER AND FOAM, INC., IAN RUBINSTEIN, 420 DOUGHTY BLVD., CORP., DOUGHTY PARK, INC., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, FDIC AS RECEIVER FOR LIBERTY POINTE BANK, AEC ELECTRICAL SERVICES CORP., MARJAM SUPPLY CO., INC., and "JOHN DOE NOS. 1-10" being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporation, if any, having or claiming to have an interest in or lien upon the described premises,

Defendants.

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MORCAL CORP., ATLANTIC FEATHER AND FOAM, INC. and IAN RUBINSTEIN,

Counterclaim Plaintiffs,

-against-

TD BANK, N...A., TOM SZCZEPANIAK, BRIAN J. TERRY and KEN V. JONES,

Counterclaim Defendants.

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TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 21825/10

MOTION DATE: March 22, 2012  
Motion Sequence # 003

The following papers read on this motion:

Notice of Motion.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X
Memorandum of Law.....	X

Motion by plaintiff TD Bank for summary judgment against defendants Morcal Corp., Ian Rubinstein, Atlantic Feather and Foam, Inc., and New York State Department of Finance is **granted** to the extent of liability on the note and mortgage. Motion by plaintiff for summary judgment dismissing the Morcal defendants' counterclaims is **granted**. Motion by plaintiff for a default judgment against defendant AEC Electrical Services Corp is **granted**. Motion by plaintiff to dismiss as against defendants Robert Consulting Group, Ltd., Rock-It-Cargo USA, LLC, Pacific Transit Services, Inc., U.T.C. Overseas, Inc., SpeedMark Transportation, Inc., 420 Doughty Boulevard Corp., and Doughty Park, Inc., without prejudice to rights plaintiff may have against those defendants pursuant to leases covering the premises is **granted**. Motion by plaintiff for the appointment of a referee to compute the amount due on the mortgage is **granted** to the extent that plaintiff may submit an order in compliance with Part 36 of the Rules of the Chief Judge. Motion by plaintiff to amend the caption to delete the names of "John Doe" parties is **granted** to the extent indicated below.

This is an action to foreclose a mortgage. Plaintiff TD Bank holds a mortgage on a parcel of real property located in Inwood. The mortgage secures a note dated September 29, 2008 in the amount of \$6,080,000 issued by defendant Morcal Corp. Pursuant to the terms of the note, Morcal was required to pay monthly principal and interest at a variable rate of LIBOR plus a margin. The note required the maker to enter an "interest rate hedging agreement," or "SWAP," with the Bank, with a notional amount equal to the amount outstanding on the mortgage. The "net economic effect" of the hedging agreement was to fix the cost to the maker of the interest rate under the note. The note was due September 1, 2013 and had an acceleration provision if the maker defaulted in a monthly principal and interest payment. The note was guaranteed by defendant Ian Rubinstein and also by defendant Atlantic Feather and Foam, Inc. Atlantic Feather is controlled by Rubinstein and is also a tenant in the premises.

On September 10, 2009, the parties entered into a modification agreement, whereby the the interest rate was adjusted, so that the margin was 2 % up until September 10, 2009 and 2.01 % thereafter. Marcal defaulted on the note by failing to pay the monthly principal

and interest due February 1, 2010.

This action for foreclosure was commenced on November 23, 2010. Defendants New York State Department of Finance, Marjam Supply Co., and LibertyPointe Bank appeared and waived notice of all proceedings, except discontinuance of the action, the referee's report of the sale, and proceedings to obtain surplus monies.

Defendants Morcal, Atlantic Feather, and Rubinstein assert three counterclaims which purport to assert a claim for fraud. Defendants assert that the principal and interest payments were automatically debited each month from Morcal's account with TD Bank. Defendants argue that because the amount due pursuant to the SWAP agreement was difficult to calculate, Morcal was somehow fraudulently induced to enter into the loan.

Plaintiff is moving for summary judgment against defendants Morcal, Rubinstein, Atlantic Feather, and New York State Department of Finance. Plaintiff is also moving for summary judgment dismissing the Morcal defendants' counterclaims. Plaintiff also requests a default judgment against defendant AEC Electrical Services Corp. Additionally, plaintiff moves to dismiss against defendants Robert Consulting Group, Ltd., Rock-It-Cargo USA, LLC, Pacific Transit Services, Inc., U.T.C. Overseas, Inc., SpeedMark Transportation, Inc., 420 Doughty Boulevard Corp., and Doughty Park, Inc., without prejudice to rights plaintiff may have against those defendants pursuant to leases which have been assigned to plaintiff as mortgagee. Finally, plaintiff moves for the appointment of a referee to compute the amount due on the mortgage and to amend the caption to delete the names of "John Doe" parties, who may have an interest in the premises as tenants.

On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Plaintiff has established prima facie entitlement to judgment by offering the mortgage and Morcal's default. The burden shifts to defendants to show a triable issue of fact as to

why a judgment of foreclosure should not be entered.

In an interest rate SWAP agreement, the parties agree to swap cash flows over a stated period of time on a hypothetical principal amount known as the "notional amount." One party makes periodic interest payments to the other party at a fixed rate, and the counterparty makes periodic payments to the other party at a variable rate on the same notional amount (*BKB Properties v Suntrust Bank*, 2011 US App LEXIS 14350 [6<sup>th</sup> Cir 2011]). SWAP's are often used by sophisticated investors as a form of hedge transaction.

Rubinstein asserts that he did not know the amount due each month pursuant to the SWAP. However, the purpose of the SWAP was to convert the variable interest rate into a fixed rate obligation of the borrower. If Rubinstein's affidavit were sufficient to avoid summary judgment, summary foreclosure would never be available in a mortgage-related SWAP transaction.

Accordingly, plaintiff's motion for summary judgment against defendants Morcal, Rubinstein, Atlantic Feather, and New York State Department of Finance is **granted** to the extent of liability on the note and mortgage. Plaintiff's motion for summary judgment dismissing the Morcal defendants' counterclaims is **granted**.

Plaintiff's motion for a default judgment against defendant AEC Electrical Services Corp. is **granted**. Plaintiff's motion for the appointment of a referee to compute the amount due on the mortgage is **granted** to the extent that plaintiff may submit an order in compliance with Part 36 of the Rules of the Chief Judge.

Motion by plaintiff to dismiss as against defendants Robert Consulting Group, Ltd., Rock-It-Cargo USA, LLC, Pacific Transit Services, Inc., U.T.C. Overseas, Inc., SpeedMark Transportation, Inc., 420 Doughty Boulevard Corp., and Doughty Park, Inc., without prejudice to rights plaintiff may have against those defendants pursuant to leases covering the premises is **granted**. Plaintiff's motion to amend the caption to delete the names of "John Doe" parties is **granted** to the extent that all subsequent papers in this action shall bear the names of the proper persons and entities who remain parties to the action.

So ordered.

**ENTERED**

Dated MAY 03 2012      MAY 07 2012      Stephen A. Bucaro

NASSAU COUNTY  
COUNTY CLERK'S OFFICE      J.S.C.