

**Business Loan Ctr., LLC v 422 Smithtown Blvd.
Realty Corp.**

2012 NY Slip Op 32738(U)

November 1, 2012

Supreme Court, Suffolk County

Docket Number: 07-38883

Judge: Peter H. Mayer

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-11-12
ADJ. DATE 7-17-12
Mot. Seq. # 003 - MotD

-----X
BUSINESS LOAN CENTER, LLC,

Plaintiff,

- against -

422 SMITHTOWN BLVD. REALTY CORP.,
422 SMITHTOWN CATERING
CORPORATION d/b/a BAVARIAN INN,
VINCENT TRAMONTANA, BANK OF
AMERICA, N.A. f/k/a FLEET NATIONAL
BANK, NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE, and 'JOHN
DOE #1" THROUGH "JOHN DOE #20", the
twenty names being fictitious and unknown to the
Plaintiff, the person or parties intended being the
tenants, occupants, persons or corporations, if
any, having or claiming an interest in or lien on
the premises.

Defendants.
-----X

PRASSANA MAHADEVA, ESQ.
Attorney for Plaintiff
445 Hamilton Avenue, Suite 1102
White Plains, New York 10601

LAW OFFICES OF JOHN B. ZOLLO, P.C.
Attorney for Defendants 422 Smithtown Blvd, 422
Smithtown Catering and Vincent Tramontana
38 Southern Blvd., Suite 3
Nesconset, New York 11767

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated June 13, 2012 and supporting papers 1 - 55 (including Memorandum of Law dated November 23, 2010); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the , dated , and supporting papers; (4) Reply Affirmation by the , dated , and supporting papers; (5) Other (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by the plaintiff pursuant to CPLR 3212 for summary judgment on its complaint, to strike the answer of the defendants 422 Smithtown Blvd. Realty Corp., 422 Smithtown

Catering Corporation d/b/a Bavarian Inn, and Vincent Tramontana, for leave to enter a default judgment as against the defendants Bank of America, N.A. f/k/a Fleet National Bank and New York State Department of Taxation and Finance pursuant to CPLR 3215, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321; and for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted to the extent indicated herein; and it is further

ORDERED that Kenneth Seidell, Esq. with an office at 50 Route 111, Smithtown, New York 11787 is hereby appointed Referee to ascertain and compute the amount due upon the note and mortgage documents which this action was brought to foreclose, and to examine and report whether the mortgaged premises can be sold in parcels; and it is further

ORDERED that pursuant to CPLR 8003 (a) the Referee be paid the statutory fee for the computation of the amount due plaintiff; and it is further

ORDERED that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to, section 36.2 (c) (“Disqualifications from appointment”) and section 36.2 (d) (“Limitations on appointments based upon compensation”); and it is further

ORDERED that the pleadings and papers served and filed in this action be amended by striking defendants “John Doe #1 through John Doe #20”; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
-----X
BUSINESS LOAN CENTER, LLC, :
:
Plaintiff, :
:
- against - :
:
422 SMITHTOWN BLVD. REALTY CORP., 422 SMITHTOWN :
CATERING CORPORATION d/b/a BAVARIAN INN, VINCENT :
TRAMONTANA, BANK OF AMERICA, N.A. f/k/a FLEET :
NATIONAL BANK, and NEW YORK STATE DEPARTMENT :
OF TAXATION AND FINANCE, :
Defendants. :
-----X

The defendants 422 Smithtown Blvd. Realty Corp. (Realty Corp.) and 422 Smithtown Catering Corporation d/b/a Bavarian Inn (Catering Corp.) obtained a U.S. Small Business Administration loan

from Business Loan Center, Inc. in the sum of \$667,500.00 as evidenced by a note dated March 22, 1999 and executed by their president, the defendant Vincent Tramontana (Tramontana). Said note was secured by a mortgage on property known as 422 Smithtown Boulevard, Lake Ronkonkoma, New York (Lake Ronkonkoma property) executed by the defendant Realty Corp. by its president Tramontana on said date. In addition, Tramontana personally executed an unconditional guarantee of said loan and a mortgage on premises known as 60 Arrowhead Lane, East Setauket, New York (East Setauket property) to secure said guarantee. The defendant Realty Corp. by its president Tramontana also executed a collateral assignment of rents and leases of the Lake Ronkonkoma property and a security agreement granting a security interest in said property to Business Loan Center, Inc.

Thereafter, the defendants Realty Corp. and Catering Corp. obtained another U.S. Small Business Administration loan from Business Loan Center, Inc. in the sum of \$332,500.00 as indicated by a note dated November 28, 2000 executed by their president Tramontana. The defendant Realty Corp. by its president Tramontana executed a mortgage dated November 28, 2000 on the Lake Ronkonkoma property to secure said second loan. Tramontana personally executed an unconditional guarantee of said second loan. The defendant Realty Corp. by its president Tramontana also executed a collateral assignment of rents and leases of the Lake Ronkonkoma property and the defendant Catering Corp. executed a security agreement granting a security interest in said property to Business Loan Center, Inc.

The defendants Realty Corp., Catering Corp., and Tramontana (the Bavarian Inn defendants) subsequently defaulted on their loan payments. Thereafter, the plaintiff, Business Loan Center, LLC, commenced this action on December 13, 2007 to foreclose the mortgages dated March 22, 1999 and November 28, 2000 on the Lake Ronkonkoma property and the mortgage dated March 22, 1999 on the East Setauket property and to enforce Tramontana's personal guarantees. Only the Bavarian Inn defendants answered.

The answer of the Bavarian Inn defendants contains general denials as well as affirmative defenses that the plaintiff lacks standing to commence this action based on the failure to record and present the assignment, the defendant Tramontana has made mortgage payments to the original mortgagee, the action was not commenced within the applicable statutory time frame, and the plaintiff failed to provide the defendants with notice of default and an opportunity to cure. In addition, the answer contains the affirmative defenses that the defendants are willing to enter into a forbearance agreement, the complaint fails to state a cause of action, the law requires that a foreclosure conference be scheduled, and the defendant Tramontana is prepared to "bring mortgage current." The answer also contains the affirmative defenses that the plaintiff has failed to name indispensable parties who are the former owners who have a judgment against the defendant relating to the property, and that the defendant was unable to operate its business through no actions of its own because the facility was closed by the Town as a result of high lake water.

The plaintiff now moves¹ for summary judgment on the complaint, the striking of the answer of the Bavarian Inn defendants, leave to enter a default judgment as against the defendants Bank of

¹ Plaintiff's prior motion for the same relief was denied, without prejudice, by order of this Court dated June 14, 2011 for failure to provide sufficient information concerning its standing to maintain this action.

America, N.A. f/k/a Fleet National Bank and New York State Department of Taxation and Finance, an order of reference, and leave to amend the caption to strike defendants “John Doe #1 through John Doe #20.” In support of the motion, the plaintiff submits, among other things, the affidavit dated November 15, 2010 of the plaintiff’s vice president Mark Lehrer, the affirmations dated June 7, 2012 and November 23, 2010 of the plaintiff’s attorney, Prassana Mahadeva, the aforementioned loan documents, the default letter dated July 7, 2007, the notice of pendency, the affidavits of service of the summons, complaint and notice of pendency, certified copies of the certificates of formation of Business Loan Center, LLC and of conversion of Business Loan Center, Inc. to Business Loan Center, LLC, and the affidavit of service of the motion upon the Bavarian Inn defendants and their attorney. No opposition to this motion has been submitted.

The plaintiff’s attorney explains by affirmation that on January 31, 2003, prior to the commencement of this action and subsequent to the origination of the loans, Business Loan Center, Inc. underwent a business entity name change to Business Loan Center, LLC, that the name change did not affect plaintiff’s standing inasmuch as both entities shared the same physical address where the loan documents were always located, and that plaintiff is currently the holder of the loan documents. The plaintiff submits a copy of the certification of conversion of Business Loan Center, Inc. to Business Loan Center, LLC certified as true and accurate by the Secretary of State of Delaware. Mark Lehrer, a vice president of the plaintiff, indicates in his affidavit that the Bavarian Inn defendants defaulted on their May 2007 loan payment due under the first note, that plaintiff demanded payment by letter dated July 11, 2007, and that as of November 11, 2010 each of the defendants were in default in the aggregate amount of \$1,328,241.30.

To establish a prima facie showing of entitlement to judgment as a matter of law in a foreclosure action, a plaintiff must submit evidence of the mortgage and note, and the defendant’s default thereunder (*see Levitin v Boardwalk Capital, LLC*, 78 AD3d 1019, 912 NYS2d 101 [2d Dept 2010]). A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note prior to commencement of the action with the filing of the complaint (*see GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Where the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief (*see GRP Loan, LLC v Taylor, supra*; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]).

Here, the plaintiff established its prima facie entitlement to judgment as a matter of law by producing the mortgages, the unpaid notes, the personal guarantees, and evidence of default (*see U.S. Bank Natl. Assn v Denaro*, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; *Capital One, N.A. v Knollwood Properties II, LLC*, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]; *Baron Assocs., LLC v Garcia Group Enterprises, Inc.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]; *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011], *lv to appeal dismissed* 19 NY3d 940, 950 NYS2d 94 [2012]). The plaintiff also demonstrated that it was the owner and holder of the subject loan documents prior to the commencement of this action by submitting the certified copies of the certificates of formation of Business Loan Center, LLC and of conversion of Business Loan Center, Inc.

to Business Loan Center, LLC on January 31, 2003 (*see GRP Loan, LLC v Taylor, supra*).

The burden then shifted to the defendants to demonstrate “the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff” (*Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]; *see Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158, 1159, 945 NYS2d 330 [2d Dept 2012]). It was incumbent upon the Bavarian Inn defendants “to produce evidentiary proof in admissible form sufficient to require a trial of [their] defenses” (*U.S. Bank Trust N.A. Trustee v Butti*, 16 AD3d 408, 408, 792 NYS2d 505 [2d Dept 2005]), which they failed to do (*see Washington Mut. Bank, F.A. v O’Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]).

Notably, no affidavit has been submitted by the individual defendant Tramontana denying that he executed the loan documents or that he failed to make the required loan payments due in May 2007 and thereafter or supporting his affirmative defenses (*see Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]). In any event, general denials are insufficient to raise any triable issues of fact (*see Duban v Platt*, 23 AD2d 660, 257 NYS2d 109 [2d Dept 1965], *appeal dismissed* 16 NY2d 612, 261 NYS2d 63 [1965], *affd* 17 NY2d 526, 267 NYS2d 907 [1966]). With respect to the alleged affirmative defenses, there was no need for an assignment of the loan documents to establish standing inasmuch as the plaintiff’s form was merely converted from a corporation to a limited liability company in January 2003 (*see generally Summit Bank v Taylor*, US Dist Ct, SD NY, 96 Civ 7229, Jones, J., 1997). The action was timely commenced within the six-year statute of limitations period (*see CPLR 213 [4]*). The plaintiff provided a copy of the default letter dated July 11, 2007 from the plaintiff’s attorney indicating that the lender had been in discussions with the Bavarian Inn defendants and had not received any “exit plan” from them. The Bavarian Inn defendants failed to demonstrate that they did not receive said letter. The affirmative defense of failure to state a cause of action is boilerplate in nature and lacks merit (*see LaSalle Bank Natl. Assn. v Kosarovich*, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006]). Although a subordinate judgment creditor is a necessary party in a mortgage foreclosure action (*see Real Property Actions and Proceedings Law § 1311 [3]*), the Bavarian Inn defendants failed to provide any proof that the former owners of the property or properties were subordinate judgment creditors and thus indispensable parties.

As for the affirmative defense that the default was not due to any fault on the part of the Bavarian Inn defendants, “[g]enerally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome” (*Kel Kim Corp. v Central Markets, Inc.*, 70 NY2d 900, 902, 524 NYS2d 384 [1987]). “While [impossibility of performance] defenses have been recognized in the common law, they have been applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances” (*id.*). “Impossibility excuses a party’s performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible.” (*id.*). “[T]he impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract” (*id.*). Under the common law, contractual force majeure clauses, which are clauses excusing nonperformance due to circumstances beyond the control of the parties, provide a similarly narrow defense (*see id.*). Here, the mortgage documents do not contain any force

Business Loan Center v 422 Smithtown Blvd. Realty Corp.
Index No. 07-38883
Page No. 6

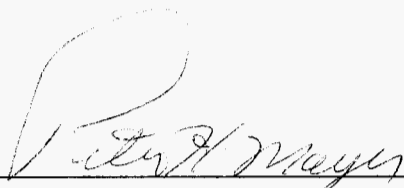
majeure clauses and the Bavarian Inn defendants fail to specify when the Town closed the defendants' facility near Lake Ronkonkoma or submit any documentation to that effect. Thus, the Bavarian Inn defendants failed to raise a triable issue of fact (*see U.S. Bank Natl. Assn v Denaro, supra*).

Furthermore, the plaintiff has demonstrated its entitlement to leave to enter a default judgment against the defendant Bank of America, N.A. f/k/a Fleet National Bank (*see Swedbank, AB v Hale Ave. Borrower, LLC, supra*)². Said defendant was required to demonstrate a reasonable excuse for its default in appearing or answering the complaint and the existence of a potentially meritorious defense, which it failed to do (*see id.*).

Based on the foregoing, the motion for summary judgment on the complaint, to strike the answer of the Bavarian Inn defendants, for leave to enter a default judgment as against the defendant Bank of America, N.A. f/k/a Fleet National Bank, and for an order of reference is granted (*see id.*; *HSBC Bank USA, N.A. v Roldan, supra*).

Dated: _____

11/1/12



PETER H. MAYER, J.S.C.

² Plaintiff also requested a default judgment against the defendant New York State Department of Taxation and Finance. However, the motion papers contain a notice of appearance dated January 23, 2008 from the New York State Commissioner of Taxation and Finance. Therefore, said request has been denied.