SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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JACK GARFIELD,

Plaintiff,

- against -

119 HILLSIDE CORP., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; CITY OF NEW YORK DEPARTMENT OF FINANCE; BARAK TSABARI A/K/A BRIAN TSABARI, JONATHON RENDON, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; "John Doe #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

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Index No.: 20032/2012

Motion Date: 06/14/13

Motion Nos.: 48

Motion Seq.: 2

The following papers numbered 1 to 16 were read on this motion by plaintiff for an order pursuant to CPLR 3212, striking the joint answer interposed by defendants 119 Hillside Corp. and Barak Tsabari a/k/a Brian Tsabari and granting summary judgment in favor of the plaintiff appointing a referee to compute the amount due and for an order amending the caption:

	Papers Numbered
Notice of Motion-Affirmations-Exhibits	1 - 7
Affirmation in Opposition	8 - 12
Reply Affirmation	13 - 16

In this mortgage foreclosure action, plaintiff moves for an order striking the joint answer interposed by defendants 119 Hillside Corp and Barak Tsabari a/k/a/ Brian Tsabari; granting summary judgment against said defendants on the ground that the answer contains no valid defense and that no triable issues of fact exist; and appointing a referee to compute the sums due and owing to plaintiff.

This foreclosure action pertains to a corporately owned property located at 119-01 Hillside Avenue, Richmond Hill, New York. Based upon the record before this court, on June 5, 2008, defendant 119 Hillside Corp., borrowed the sum of $364,54.00 from plaintiff Jack Garfield. The note executed and delivered to the plaintiff acknowledged the loan, the rate of interest, and the monthly installments. The note was secured by a mortgage on said property executed by and delivered to the plaintiff by the corporation. Defendant, Brian Tsabari, executed a personal guaranty promising full payment of the note. The plaintiff asserts that defendant defaulted on the payment of the note and mortgage when he failed to make his monthly mortgage payments beginning in June, 2009.

The plaintiff subsequently accelerated the defendant's mortgage and brought an action to foreclose by filing a lis pendens and summons and complaint on September 26, 2012. Counsel asserts that all of the defendants have been duly served with a copy of the summons and verified complaint. Defendant served a verified answer on December 17, 2012 containing a general denial and asserting five affirmative defenses including failure to state a cause of action, failure to comply with the notice requirements of RPAPL § 1303,waiver of its right to foreclose, estoppel and unclean hands.

In support of the motion for summary judgment, the plaintiff submits, the affirmation of counsel, Joshua Levy, Esq., the affidavit of Jack C. Garfield, a copy of the note and mortgage, copies of the affidavits of service on all the defendants; a copy of the pleadings; and a copy of defendant Tsabari’s personal guaranty.

In his affirmation, plaintiff’s counsel asserts that as this is a property owned by a corporation, none of the rules and regulations applicable to owner-occupied residential mortgage foreclosures, such as notice and foreclosure conferences apply herein. Counsel also asserts that the defendant’s answer contains only a general denial and boiler plate affirmative defenses but does not affirmatively assert that the delinquent

payments required by the note and mortgage have been made. In addition, counsel asserts that the complaint contains a sufficiently pled cause of action for foreclosure naming the parties, providing evidence of the note and mortgage and the defendants' default thereon. Counsel also contends that the defendant has failed to submit specific allegations to support the remaining conclusory affirmative defenses. Counsel states that based upon the evidence submitted, the plaintiff has made a prima facie showing that it is entitled to a judgment of foreclosure and sale.

In his affidavit in support of the motion dated April 16, 2013, Jack Garfield states that defendants have defaulted under the terms of the subject note and mortgage by failing to pay the installments commencing June 4, 2009 and that there is now due and owing to the plaintiff for principal, the sum of $364,584 plus interest according to the note and mortgage from September 5, 2008.

In opposition to the motion, defendant Brian Tsabari submits an affidavit dated May 22, 2013, in which he states that Hillside Corporation was formed to purchase vacant property to improve with houses and to then sell. He states that the plaintiff lent money to the defendant to finance the purchase price of the property or to finance the construction costs. He states that the usual procedure is that when the property is sold the lender receives payment on its investment. He states that in 2000 the corporation purchased 119-01 Hillside Avenue which contained both vacant land and a building. He states that in 2008 plaintiff provided funding for construction on the property at 119-04 Hillside Avenue but was given a mortgage on 119-01 Hillside Avenue and a collateral mortgage on 119-04 Hillside Avenue. He states that the property located at 119-04 has been sold and the mortgages satisfied although the property at 119-01 has not been sold.

Defendant's counsel, Warren S. Hecht, Esq., states, based upon the defendant's affidavit, there is a question of fact as to whether the plaintiff orally agreed that he would not foreclose on the mortgage but would wait until the property was sold in order to receive a return on his loan. Counsel also asserts that the plaintiff received a satisfaction of a mortgage concerning the premises located at 119-04 Hillside Avenue which is a collateral mortgage relating to the same loan that is now being foreclosed.

In reply, the plaintiff submits an affidavit stating that the defendant has acknowledged execution of a note and mortgage

regarding the subject premises and does not deny that the loan has not been paid in accordance with the terms of the note and mortgage.

It is well settled that a Plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to summary judgment through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005); Layden v Boccio, 253 AD2d 540 [2d Dept.1998); State Mortgage Agency v Lang, 250 AD2d 595(2d Dept. 1998]). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial.

Here, the plaintiff's submissions are sufficient to establish its entitlement to summary judgment against defendant mortgagor 119 Hillside Corp and the guarantor, Barak Tsabari a/k/a Brian Tsabari. The moving papers demonstrated, prima facie, that none of the asserted defenses set forth in the answer of defendant are meritorious and that plaintiff is entitled to summary judgment on its claims against said defendants (see EMC Mortg. Corp. v Riverdale Assocs., 291 AD2d 370 [2d Dept. 2002]; State of New York v Lang, 250 AD2d 595 [2d Dept. 1998]). As stated above, the complaint herein sufficiently sets forth a valid cause of action for foreclosure. The affidavit of service of the process server constitutes prima facie evidence that defendants were validly served pursuant to CPLR 308 (see Bank of N.Y. v Segui, 68 AD3d 908 [2d Dept. 2009; Cavalry Portfolio Servs., LLC v Reisman, 55 AD3d 524 [2d Dept. 2008]; Jefferson v Netusil, 44 AD3d 621 [2d Dept. 2007]). Plaintiff submitted a copy of the mortgage, note and affidavit establishing defendants' default in payment. Therefore, the moving papers demonstrated, prima facie, that none of the asserted defenses set forth in the answer of defendant are meritorious and that plaintiff is entitled to summary judgment on its claims against defendants (see State of New York v Lang, 250 AD2d 595).

The burden then shifted to defendant to establish the existence of a triable issue of fact by producing evidentiary proof in admissible form sufficient to demonstrate the existence of a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiffs (see State Bank of Albany v Fioravanti, 51 NY2d 638 [1980]; Solomon v Burden, 104 AD3d 839 [2d Dept. 2013]). This court finds that the conclusory allegations of the affirmative

defenses set forth in defendant's answer are insufficient to defeat the motion for summary judgment (see Wells Fargo Bank Minn., Natl. Assn. v. Perez, 41 AD3d 590 [2d Dept. 2007]). The defendant's contention that there was an oral agreement at the time of the making of the mortgage in which the plaintiff purportedly agreed not to foreclose until the sale of the property is barred by the parol evidence rule and is insufficient to raise a question of fact as to the defendant's failure to abide by the unequivocal terms of the note and mortgage. "Evidence of what may have been agreed orally between the parties prior to the execution of an integrated written instrument cannot be received to vary the terms of the writing" (Bontempts v Aude Constr. Corp., 98 AD3d 1071 [2d Dept. 2012]). Here, the oral agreement was not incorporated into the terms of the mortgage and moreover, the mortgage contains a clause stating that it may not be changed or terminated orally (see Solomon v Burden, supra; Bontempts v Aude Constr. Corp., supra; Eastern Sav. Bank, FSB v Sassouni, 68 AD3d 917 [2d Dept. 2009]; M & T Mortg. Corp. v. Ethridge, 300 AD2d 286 [2d Dept. 2002]; Wasserman v Harriman, 234 AD2d 596 [2d Dept. 1996]). In addition, the release and satisfaction of a collateral mortgage does not constitute a satisfaction of the subject mortgage.

Therefore, the plaintiff's motion for summary judgment is granted and the affirmative defenses contained in the defendant's answer are stricken. The submissions further reflect that Plaintiff is entitled to amend the caption to substitute necessary parties, Mel Anderson, Carlton Douglas and Paul Parker as party-defendants in lieu of "John Doe #1" through "John Doe #3." The names of "John Doe #4 through "John Doe #12 may be deleted from the caption as they are not necessary parties. Plaintiff's further application for the appointment of a referee to compute the amounts due under the subject mortgage is also granted.

Settle order on notice.

Dated: August 26, 2013
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.