The Community Preserv. Corp. v Midwood Gardens, LLC
2014 NY Slip Op 30911(U)
April 3, 2014
Supreme Court, Kings County
Docket Number: 500178/13
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm-6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of April, 2014.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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THE COMMUNITY PRESERVATION CORPORATION,

Plaintiff,

- against -

Index No. 500178/13

MIDWOOD GARDENS, LLC, ET AL.,

Defendants.

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The following papers numbered 1 to 6 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4-5
Reply Affidavits (Affirmations)	6

Upon the foregoing papers, plaintiff Community Preservation Corporation moves for an order 1) pursuant to CPLR 3212, granting summary judgment in its favor and against defendants Midwood Gardens, LLC (Midwood) and Donald Fishoff and striking these defendants' answer, affirmative defenses and counterclaims, 2) pursuant to CPLR 3215, granting a default judgment against defendants Premium Technical Services Corporation, Environmental Control Board of the City of New York, New York City Department of Finance and New York State Department of Taxation and Finance, 3) pursuant to Real

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Property Actions and Proceedings Law (RPAPL) § 1321, appointing a referee to compute and 4) amending the caption to delete the "John Doe" defendants.

Plaintiff commenced this action on January 10, 2013 to foreclose a consolidated mortgage encumbering the property at 1537, 1541 and 1543 East 19th Street in Brooklyn. On October 17, 2007, plaintiff issued a loan to Midwood in the principal amount of $14,300,000, the proceeds of which were to be used toward the acquisition of the subject property and the construction of a condominium project thereon. The loan is evidenced by a note previously executed by Midwood on September 20, 2006 in the principal sum of $2,565,000; and a gap note, dated October 17, 2007, in the principal sum of $11,735,000. These notes were consolidated, amended and restated pursuant to a Consolidated, Amended and Restated Building Loan Note (Consolidated Note), dated October 17, 2007. The Consolidate Note is secured by mortgages held by plaintiff consisting of a mortgage dated September 20, 2006, in the principal sum of $2,565,000, which was recorded on October 10, 2006 and a gap mortgage, dated October 17, 2007, in the principal sum of $11,735,000, which was recorded on November 5, 2007. The mortgages were consolidated, extended and modified so that together they form a single first priority mortgage lien on the premises in the amount of $14,300,000, pursuant to the Building Loan Mortgage Modification, Consolidation, Extension, Assignment of Leases and Rents and Security Agreement (Consolidated Mortgage) dated October 17, 2007, and recorded on November 5, 2007. The Consolidated Note provided, inter alia, that funds would be advanced pursuant to the terms of the Building

Loan Agreement entered into by plaintiff and Midwood and that the outstanding principal amount, along with all interest accrued thereon, shall become due and payable on November 1, 2009 (the "Maturity Date"). As further security for the loan, defendant Donald Fishoff, the managing member of Midwood, signed a personal guaranty for the repayment of loan.

The loan was thereafter modified and extended pursuant to a Modification and Extension Agreement between plaintiff and Midwood dated May 28, 2010, and recorded on July 9, 2010. The Modification and Extension Agreement, inter alia, (i) reduced the loan amount to $11,500,000; (ii) extended the completion date of the project from June 2, 2009 to December 1, 2011; and (iii) extended the Maturity Date of the loan from November 1, 2009 to June 1, 2012. Concomitantly therewith, plaintiff and Midwood executed the First Amendment to the Building Loan Agreement (the "First Amendment"). Defendants confirmed in the Modification and Extension Agreement that they signed on May 28, 2010 that:

> "The Mortgagor hereby represents, warrants and covenants that
>
> * * *
>
> (iii) the Principal Indebtedness constitutes a valid and binding obligation of the Mortgagor, enforceable against the Mortgagor in accordance with the respective terms hereof and of the Note, the Mortgage and the Loan Documents, and is not subject to any offset, claim, counterclaim or defense of any kind or nature whatsoever"

Likewise, the First Amendment to Building Loan Agreement dated May 28, 2010 states:

[* 4]

> "Borrower hereby represents and warrants that the Building Loan Agreement constitutes the valid and binding obligation of the borrower, enforceable against the Borrower in accordance with the its terms, and is not subject to any offset, claim, counterclaim or defense of any kind or nature whatsoever."

According to the complaint, Midwood defaulted under the loan documents by, inter alia, failing to pay to plaintiff the principal, together with all accrued and unpaid interest thereon, that matured and became due and payable in full on the Maturity Date of June 1, 2012. In their answer, defendants raise thirteen affirmative defenses: 1) plaintiff's claims are barred by setoff; 2) plaintiff prevented defendants from performing their obligations; 3) breach of the covenant of good faith and fair dealing; 4) failure to satisfy a condition precedent; 5) performance was suspended due to "temporary commercial impracticability;" 6) plaintiff's claims are barred in whole or in part by documentary evidence; 7) substantial performance; 8) plaintiff prevented and delayed defendants from performing their obligations; 9) unclean hands; 10) waiver; 11) equitable estoppel; 12) waiver and ratification and 13) failure of plaintiff to mitigate damages. Defendants also interpose counterclaims for a declaratory judgment that defendants are not in breach of their obligations, a judgment cancelling and expunging the note and mortgage, a judgment enjoining plaintiff from enforcing the loan documents or foreclosing on the property, a declaratory judgment that the loan documents are unenforceable and damages.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default"

(*Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079, 1080 [2010] [internal quotation marks omitted]; *see US Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez*, 49 AD3d 711 [2008]). In its moving papers, plaintiff includes copies of the executed mortgage and loan documents and the affidavit of Daniel Wheeler, who identifies himself therein as a vice president of plaintiff. Mr. Wheeler avers that Midwood defaulted under the loan documents by failing to pay plaintiff the principal and all outstanding accrued and unpaid interest upon the maturity date of June 1, 2012. Mr. Wheeler states additionally that Fishoff failed to comply with the terms of his personal guaranty by failing to pay the amounts due thereunder.

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law by submitting the mortgage, the unpaid note, and the affidavit of Mr. Wheeler attesting to the default (*see People's United Bank v Hallock Landing Assocs., LLC*, 114 AD3d 835 [2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 655 [2013]). Further, there is no dispute that Midwood did not pay the outstanding principal and interest due on the Maturity Date. The burden thus shifts to defendants to establish by admissible evidence the existence of a triable issue of fact as to its affirmative defenses and counterclaims (*see Washington Mut. Bank v Valencia*, 92 AD3d 774 [2012]; *Chemical Bank v Bowers*, 228 AD2d 407 [1996]).

In his affirmation in opposition, Fishoff argues, in sum and substance, that plaintiff engaged in bad faith and breached the covenant of fair dealing by delaying or halting funds,

demanding changes to the project (specifically, that the planned condominium be converted to rentals due to the changing real estate market) and requiring new paperwork. Fishoff submits with his affidavit an e-mail from Mr. Wheeler, sent on August 7, 2009, indicating that CPC would "not make any advances until a new extension is in place on the revised deal" and that CPC would require "approved plans for the new layouts" for the proposed project. However, to the extent Midwood attempts to interpose affirmative defenses and counterclaims relating to acts and/or omissions of plaintiff occurring prior to May 28, 2010, such defenses, counterclaims, and set-offs were validly waived by the loan extension and modification documents (*see Petra CRE CDO 2007–1, Ltd. v 160 Jamaica Owners, LLC*, 73 AD3d 883 [2010]; *Quest Commercial, LLC v Rovner*, 35 AD3d 576 [2006]; *PGA Mktg. v Windsor Plumbing Supply*, 124 AD2d 576, 577 [1986]). Other e-mails submitted by Fishoff which address the allegedly onerous requirements imposed by plaintiff regarding the construction project are dated after the maturity date of May 28, 2010, when plaintiff was no longer obligated to advance funds. Plaintiff's continued involvement in the project following the Maturity Date is consistent with its remedies under Section 12 of the Building Loan Agreement and does not constitute a waiver of its right to foreclose. The only other submitted e-mail, dated May 18, 2012, was sent by plaintiff's workout specialist and states merely that he wished to be notified of inspections so that he may appear as well. There is nothing in this e-mail which demonstrates that plaintiff acted in bad faith, unreasonably withheld funds or imposed burdensome requirements on Midwood. The court finds that the remaining exhibits submitted by Fishoff, a 2012 report and a *New York Times* article addressing plaintiff's financial difficulties, are insufficient to raise an issue of fact.

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Fishoff also claims that Midwood was never notified of any default "as required under section 24 of the May 28, 2010 amendment." However, while this particular section (as well as the revised section under the Modification and Extension Agreement) concerns the form of notices and the addresses to which they be sent, there is no provision in the loan documents requiring any notice of default to be sent to defendants in the event that the loan has matured. Article III, Section 3.1 of Consolidated Mortgage defines the events that shall constitute an "Event of Default," including if:

> "default shall be made in [the] payment of the principal of the Note, when and as the same shall became due and payable, whether at maturity or by acceleration" (Section 3.1 [a][ii]).

Section 3.1 provides that

> "If one or more of the . . . Events of Default shall happen,
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> * * *
>
> then and in every such case:
>
> I. During the continuance of any such Event of Default the Mortgagee, *without giving notice to the Mortgagor*, may declare the entire principal of the Note then outstanding (if not then due and payable), and all accrued and unpaid interest thereon together with all other Indebtedness, to be due and payable immediately (emphasis added).*

Further, Section 8 of the Consolidated Note provides that defendants "hereby jointly and severally waive presentation for payment, demand for payment, notice of nonpayment, protest, notice of protest, diligence in collecting and notice of dishonor...."

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*Defendants argue that this paragraph "I" refers only to the immediately preceding Event of Default in subsection "y" (mortgagor accepting or using any Federal Low Income Tax Credits without the prior written consent of the mortgagee). However, a plain reading of section 3.1 as a whole, including the phrase "then and in *every* such case" (emphasis added) indicates that paragraph "I" applies to all listed Events of Default (subsections "a" through 'y").

Because the Consolidated Note had matured without any further extensions granted, and was due and payable on May 28, 2010, plaintiff was not required to declare a default or to make evident its election to accelerate the amount due prior to commencing this foreclosure action (*see Gerrity Co. Inc. v Riscica*, 214 AD2d 866 [1995]; *Syracuse Trust Co. v First Trust & Deposit Co.*, 239 App Div 586 [1933]; *Eastern Sav. Bank, FSB v Aguirre*, 30 Misc 3d 1230[A], 2011 NY Slip Op 50285[U] [Sup Ct, Queens County 2011]).

Accordingly, plaintiff's motion for an order granting summary judgment on its complaint and dismissing the affirmative defenses and counterclaims of defendants, appointing a referee to compute and amending the caption is granted.

Plaintiff submit affidavits of service demonstrating service of process on Premium Technical Services Corporation, Environmental Control Board of the City of New York, New York City Department of Finance and New York State Department of Taxation and Finance. According to the affirmation of regularity of plaintiff's counsel, Premium Technical Services Corporation has appeared in this action but has not answered the complaint, while the Environmental Control Board of the City of New York, New York City Department of Finance and New York State Department of Taxation and Finance have not appeared in the action. As a result, that part of plaintiff's motion for a default judgment against these defendants is granted (*see* CPLR 3215).

Settle order on notice.

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J. S. C.

HON. LAWRENCE KNIPEL
SUPREME COURT JUSTICE