SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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SILVER STREET (2010), LLC,

Plaintiff,

-against-

30 THOMPSON LLC and JOHN DOE #1 through JOHN DOE #10, the last ten names being fictitious and unknown to Plaintiff, the persons and parties intended being the tenants, occupants, persons or entities, if any, having or claiming an interest in or upon the premises described in the Complaint,

Defendants.

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Index No. 652377/2016
Motion Seq: 001

DECISION

HON. ARLENE P. BLUTH

Plaintiff's motion to appoint a referee to compute and for summary judgment against defendant is granted and defendant's cross-motion to dismiss plaintiff's complaint is denied.

Background

This foreclosure action arises out of a purchase money mortgage and assignment of leases and rents and security agreement dated May 20, 2015 on commercial property located at 30 Thompson Street, New York, NY. Plaintiff claims that under the terms of the note and the mortgage, defendant was required to pay interest monthly in arrears on the unpaid principal balance at the rate of 10% per annum with the first payment due on July 1, 2015. Plaintiff claims that defendant's failure to make a timely payment constitutes a default under both the note and the mortgage.

Plaintiff claims that defendant failed to make a payment due on April 1, 2016, in the

amount of $79,166.66. Plaintiff contends that it sent defendant a written notice of default on April 6, 2016 specifying the specific payment that had not been made, that this failure constituted a default under the note and the mortgage, and stating that the default must be cured within ten days from the date of the written notice. Plaintiff asserts that defendant failed to cure and that on April 18, 2016, plaintiff sent defendant a notice of acceleration indicating the loan balance was accelerated and demanding full payment of the amount due under the note along with accrued interest.

Plaintiff further argues that defendant failed to pay real estate taxes on the property due on July 1, 2015 and January 1, 2016, which constitutes a further default of the mortgage. Plaintiff insists that defendant's 21 affirmative defenses have no merit.

In opposition to plaintiff's motion and in support of its cross-motion, defendant claims that plaintiff has not provided sufficient evidence of a default, and therefore plaintiff has not met its prima facie burden. Defendant claims that the affidavit of Peter Gaslow, manager of plaintiff, is not sufficient.

Defendant also insists that plaintiff's complaint must be dismissed pursuant to CPLR 3211(a)(1), (3), and (7). Defendant argues that plaintiff's failure to comply with the notice provisions contained in the underlying note and mortgage merits dismissal of plaintiff's complaint. Defendant claims that plaintiff failed to send the notice of default or the notice of acceleration to Mr. Lawrence DiGiovanna (an attorney).

Defendant also claims that the notice of default (dated April 6, 2016) is defective because the notice provisions of the mortgage and the note required plaintiff to give defendant ten days to cure the default. Defendant argues that because it received the notice of default the following

day (April 7, 2016) and the notice of default stated that the ten-day period to cure ran from April 6, 2016, defendant only had 9 days to cure the purported default. Defendant maintains that this shortened time period to cure violates provisions of the mortgage and the note and therefore renders the notice of default ineffective.

Defendant also argues that the notice of default was rescinded when Marielena Fraga (plaintiff's employee) sent an email on April 11, 2016 to Rheem Bell & Mermelstein LLP (with a cc to Peter Gaslow and his legal counsel) stating that the interest payment had not been received for April. Defendant insists that because this email did not reference the notice of default or impose a deadline for payment, plaintiff rescinded the notice of default.

In reply to its motion and in opposition to defendant's cross-motion, plaintiff claims that defendant has not disputed that it failed to make the interest payment on April 1, 2016 and does not allege that it cured, or even attempted to cure, the default. Plaintiff claims that the affidavit of plaintiff's manager is sufficient to support its prima facie burden for summary judgment. Plaintiff further claims that plaintiff was not required to provide defendant with any notice of default or acceleration under the mortgage's terms. Plaintiff insists that notice was not a condition precedent for accelerating the entire amount due. Plaintiff contends that the notice of default and acceleration was superfluous and the provision (6.2) of the mortgage permitting acceleration without notice controls over any contrary provision.

Plaintiff also claims that the default and acceleration notices were proper. Plaintiff insists that the need to send a copy to Mr. DiGiovanna, an attorney, was eliminated when defendant changed the notice provision to include the law firm Rheem, Bell & Mermelstein LLP. This new notice request did not indicate that notice needed to be delivered to Mr. DiGiovanna. Plaintiff

also argues that the failure to strictly comply with the notice provision can be overlooked here because defendant actually received the notice and failed to show any prejudice as a result of the failure to strictly comply with the notice provision.

Plaintiff also disputes that the notice of default was defective or that the notice of default was rescinded due to the email sent by plaintiff's employee that failed to cite the notice of default.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must 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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac*

d'Amiante Du Quebec, Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"A plaintiff in a mortgage foreclosure action establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of the defendant's default" (*LNV Corp. v Francois*, 134 AD3d 1071, 1071-72, 22 NYS3d 543 [2d Dept 2015]).

Here, plaintiff has met its prima facie burden. An affidavit from plaintiff's employee attesting to defendant's default is sufficient to shift the burden to defendant to raise a triable issue of fact (*HSBC Bank USA, Nat. Ass'n v Spitzer*, 131 AD3d 1206, 1207, 18 NYS3d 67 [2d Dept 2015]; *Emigrant Mtge. Co., Inc v. Beckerman*, 105 AD3d 895-96, 964 NYS2d 548 [2d Dept 2013]). As an initial matter, defendant did not submit any evidence to raise a triable issue of fact regarding whether it had, in fact, defaulted. Defendant did not submit proof that it had made the April 1, 2016 payment or that it had paid real estate taxes. The Court will next consider defendant's claims regarding the notice of default.

Rescinding the Default?

Defendant's argument that the email from plaintiff's employee inquiring about the April 2016 payment rescinded the notice of default fails. This email, dated April 11, 2016, stated "We still have not received the interest payment for April. Please advise when we should see this come into the account as it [sic] past due" (affirmation of defendant's counsel, exh H). There is nothing in this email that states or even suggests that plaintiff intended to rescind the notice of default.

Defendant failed to cite caselaw supporting its position or submit further evidence

demonstrating that plaintiff took any affirmative steps to rescind its notice of default. Had defendant responded to this email and entered into negotiations with plaintiff about curing the default, there may have been an issue of fact regarding rescission (*see Waterways Ltd. v Barclays Bank PLC*, 202 AD2d 64, 71, 615 NYS2d 886 [1st Dept 1994]). But this hypothetical situation did not occur and defendant did not submit any evidence that it ever responded to this email. Instead, plaintiff sent defendant a notice of acceleration on April 18, 2016.

Notice to Mr. DiGiovanna

Plaintiff does not dispute that it never sent the notice of default to Mr. DiGiovanna. The purported "change notice" (aff of Gaslow, exh C) sent by defendant is silent regarding its impact on the existing notice provisions in the mortgage. This letter requests that "all notices in relation to the . . . Note and Mortgage be sent to" Rheem Bell & Mermelstein LLP "going forward" (*id.*). As an initial matter, the use of the phrase "going forward" demonstrates that defendant sought to change the notice provisions in the mortgage.

Even if the mortgage's notice provision was still in effect, the failure to send the notice of default to Mr. DiGiovanna does not merit dismissal of plaintiff's complaint. Defendant did not claim that it failed to receive the notice of default or that it was prejudiced by plaintiff's purported failure to send a copy to Mr. DiGiovanna (*see Suarez v Ingalls*, 282 AD2d 599, 600, 723 NYS2d 380 [2d Dept 2001]). The notice of default is addressed to Rheem Bell & Mermelstein LLP as directed in defendant's request (aff of Gaslow, exh D). Plaintiff substantially complied with the notice requirements by sending the notice of default to defendant's counsel and gave defendant an opportunity to cure the default *(see Indymac Bank,*

F.S.B. v Kamen, 68 AD3d 931, 890 NYS2d 649 [2d Dept 2009]).

10-Day Notice

Although plaintiff's claim that it was not required to send the notice of default is correct, once plaintiff decided to send the notice, it had to comply with the applicable provisions of the note and the mortgage discussed below. Plaintiff's claim that its right to declare a default and accelerate without notice should control over other provisions, including the notice provisions, fails because "[t]he rules of construction of contracts require us to adopt an interpretation which gives meaning to every provision of a contract" (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46, 150 NYS2d 171 [1956]). If this Court does not review plaintiff's compliance with the notice requirements, then those provisions would have no effect.

It is undisputed that defendant received the notice of default letter (dated April 6, 2016) on April 7, 2016. This letter states that defendant had "10 days from the date of this notice" to cure the default (aff of Gaslow, exh D). The note states that plaintiff could make all sums "without further notice, immediately become due and payable at the option of Payee upon the happening of a default under this Note and continuance of such default for ten (10) days after written notice" (Gaslow aff, exh B ¶ 5). The mortgage states that delivery of notices under both the mortgage and the note become effective upon delivery for items sent by federal express (*see* aff of Gaslow, exh A ¶ 7.1).

Based on these two provisions, the Court finds that defendant had ten days after it received the notice of default to cure its default. Although plaintiff's letter, as defendant claims, improperly set out the time for defendant to cure the default, defendant failed to demonstrate how

this error merits dismissal of plaintiff's action. A foreclosure "action is equitable in nature and triggers the equitable powers of the court. It is an action addressed to a court of equity, which should determine the rights of the parties according to equity and good conscience" (14A Carmody-Wait 2d § 92:31). "[S]trict compliance with contractual notice provisions need not be enforced where the adversary party does not claim the absence of actual notice or prejudice by the deviation" (*Fortune Limousine Serv., Inc. v Nextel Communications*, 35 AD3d 350, 353, 826 NYS2d 392 [2d Dept 2006]).

Here, the Court must consider whether plaintiff's notice of default, which did not strictly comply with the notice provisions of the mortgage and the note, should render the notice of default ineffective. The Court finds that this error, which could be read to lessen the cure period by 1 day, was not egregious enough to render the notice of default ineffective or to dismiss the entire action. Defendant did not claim or provide any evidence that it could have cured the default had it obtained an extra day. Defendant did not claim that plaintiff rejected its attempt to cure the default because it was made untimely. Defendant did not claim that it was prejudiced by the shortened time period. In fact, defendant offered no proof that it made any attempts to cure the default.

Also critical is the fact that plaintiff did not seek to enforce the shortened time period to cure, and instead sent the notice of acceleration on April 18, 2016, which is more than 10 days after defendant's receipt of the notice of default. Because the notice of acceleration was effective when it was received, and it was sent via the same means as the notice of default, the Court will assume *arguendo* that defendant received this acceleration on April 19, 2016. Although plaintiff's notice of default purported to shorten defendant's time period to cure the default,

plaintiff waited 12 days before declaring that defendant's time to cure had expired. Defendant, a sophisticated party who entered into a commercial transaction worth $9.5 million, did not offer any evidence that it contacted plaintiff to address the shortened cure period at any time before its current cross-motion to dismiss. Under these circumstances, the Court finds that dismissing plaintiff's complaint is not warranted.

Accordingly, plaintiff's motion for summary judgment is granted in all respects and defendant's cross-motion to dismiss is denied.

The parties are hereby directed to settle an order on notice in accordance with this decision and to appoint a referee to compute as sought in the motion.

The parties are directed to appear for a status conference on March 7, 2017 at 2:30 p.m.

This is the Decision and Order of the Court.

ARLENE P. BLUTH J.S.C.

Dated: December 8, 2016
New York, New York

ARLENE P. BLUTH, JSC