

72nd Ninth LLC v 753 Ninth Ave. Realty LLC

2017 NY Slip Op 30814(U)

April 20, 2017

Supreme Court, New York County

Docket Number: 850009/2016

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

72nd NINTH LLC,

Plaintiff,

Index No. 850009/2016

Decision and Order

-against-

753 NINTH AVE REALTY LLC, et al.,

Defendants.

ELLEN M. COIN, J.:

In this mortgage foreclosure action, plaintiff moves for summary judgment (1) on all causes of action; (2) striking the answer and counterclaim of defendants 753 Ninth Avenue Realty LLC, 212 East 72nd Street LLC, Evanthia Koustis, Marina Koustis, and Sofia Koustis (the Koustis Defendants), and for a default judgment against defendant Admiral Energy Corp. The Koustis Defendants cross-move to amend their answer to the complaint to assert a fifteenth affirmative defense that the underlying contracts contain a penalty, are unconscionable, oppressive and unreasonable under New York law. For the reasons stated below, the motion is granted and the cross-motion is denied.

Facts

Plaintiff 72nd Ninth LLC (plaintiff) is the assignee of a consolidated note (the 753 note) executed by 753 Ninth Ave Realty LLC (753 Realty) on February 27, 2014 in favor of Doral Bank in the amount of \$4,600,000. Plaintiff was also assigned a

consolidated mortgage on commercial property owned by defendant 753 Realty, located at 753 Ninth Avenue, New York, New York, securing the 753 note.

Plaintiff is the assignee of a note (the 212 note) executed by 212 East 72nd Street LLC (212 East) on February 27, 2014 in the sum of \$3,500,000 in favor of Doral Bank. Plaintiff was also assigned a mortgage on a one-family dwelling located at 212 East 72nd Street, New York, New York (the House), owned by defendant 212 East, securing the 212 note.

The 212 note was to mature only one year after execution; the 753 note would mature five years after execution.

Defendant Evanthia Koustis is the sole member and owner of 753 Realty and 212 East. She had lived in the House for some 22 years, but transferred the property to 212 East on February 1, 2013 "as a perquisite [sic] to obtaining [a] Loan as mandated by" a prior lender (E. Koustis aff ¶¶ 8, 11 at 3-4). The House had not been rented or used for any business purpose (id. ¶ 9 at 4).

The Koustis defendants allege that in November 2013, they asked Suzuki Capital LLC and Sam Suzuki to act as their mortgage broker to obtain a loan against the two properties in order to pay off the balance due under a previous loan from RCG Debt IV REIT, L.P., which held a mortgage on the properties (id. ¶ 6 at 3). They allege that Doral Bank appointed Sam Suzuki to represent it in connection with the loans to the Koustis

defendants. Further, they allege that in a rider to its commitment letter, Doral Bank indicated that it was requiring that the two properties be managed by Royal Host Realty LLC (Royal Host). The Koustis defendants allege that none of them saw the Royal Host management agreement until the closing on the Doral mortgage transactions. They concede that they were represented by counsel at the closing on the refinancing transactions with Doral Bank, but claim that the attorney "had been procured by Suzuki" (S. Koustis Aff. ¶ 54 at 12). Finally, they claim that Royal Host's management fee made it impossible for the commercial property (753 Ninth Avenue) to pay the fee and carry the debt service for the Doral loans (id. ¶ 64 at 14).

The Pleadings

Plaintiff's complaint seeks foreclosure of the two properties (First and Second Causes of Action), a deficiency judgment against Evanthia, Marina and Sofia Koustis based upon their guarantees of the underlying loans (Third Cause of Action), and foreclosure of plaintiff's security interest in the personal property contained in the two mortgaged properties (Fourth Cause of Action).

The Koustis defendants' original answer contained the following affirmative defenses: (1) lack of standing, (2) failure to state a cause of action; (3) failure to state a cause of action based upon documentary evidence; (4) lack of good faith;

(5) that one of the properties is a primarily residential residence and that plaintiff has failed to comply with the rules applicable to residential mortgage foreclosure actions; (6) that defendants have not caused plaintiff to suffer any damages; (7) unclean hands, unjust enrichment and/or equitable estoppel; (8) laches, waiver, set-off; (9) lack of subject matter jurisdiction; (10) statute of frauds; (11) failure to join a necessary party; (12) that defendants were not the proximate cause of plaintiff's damages; (13) payment; (14) usury. In addition, they asserted a counterclaim that plaintiff failed to adhere to the requirements of the Truth in Lending Act.

Motion for a Default Judgment

Defendant Admiral Energy Corp. appeared in this action by counsel but failed to serve an answer to the complaint. Its time to do so has long since passed, and it does not oppose plaintiff's motion for a default judgment against it. Accordingly, the court grants this aspect of the motion.

Motion for Summary Judgment and Cross-Motion to Amend

Plaintiff has established its standing in this foreclosure action, as it has provided prima facie evidence that it was the assignee of the subject mortgages, and the holder and assignee of the underlying notes at the time this action was commenced (*Wilmington Trust Co. v Walker*, 2017 WL 1217980, *1 (1ST Dept 2017; *OneWest Bank FSB v Carey*, 104 AD3d 444 [1st Dept 2013]).

The Koustis defendants fail to demonstrate any issue of fact as to plaintiff's standing. Thus, the First Affirmative Defense of lack of standing is dismissed.

It is uncontested that in February 2013, in connection with a mortgage issued by RCG Debt IV REIT, L.P. (RCG), defendant Evanthia Koustis transferred her interest in the House to 212 East, a limited liability company. The transfer was made in order to obtain the loan from RCG, before Doral Bank or Suzuki ever became involved with the Koustis defendants' efforts to refinance the RCG loan.

CPLR 3408, which mandates foreclosure settlement conferences, is limited to residential foreclosure actions involving "home loans" as that term is defined by RPAPL § 1304(5)(b). "As so defined, home loans are those which are made to a natural person and in which the debt incurred is primarily for personal, family, or household purposes" (*Independence Bank v Valentine*, 113 AD3d 62, 66 [1ST Dept 2013]).

Here 212 East executed the note in the sum of \$3,500,000 (Shatz Aff, ex. 17). Although the collateral Mortgage, Assignment of Rents and Security Agreement with Doral Bank defined the "borrower" as 753 Ninth Ave Realty LLC, the mortgagor was defined as 212 East 72nd Street LLC (Shatz Aff., ex.4). 753 Realty and 212 East were defined collectively as the "Borrower" under the Cross-Default Agreement (Shatz Aff., ex. 6). The

Cross-Default Agreement states that 212 East applied to Doral Bank for a \$3,500,000 loan to be secured by a first mortgage lien on the House. Notwithstanding the inconsistency in the documents, it is clear that the borrower was not a natural person (*Independence Bank v Valentine*, 113 AD3d at 66), and the subject loan does not fall within the ambit of RPAPL § 1304(5)(b) (*id.* at 67). The Fifth Affirmative Defense of failure to comply with the rules applicable to residential mortgage foreclosures is therefore dismissed.

Turning to the Koustis defendants' claim that the default interest rate on the loan was usurious, a limited liability company or an individual guarantor of such an entity's debt may not assert the defense of civil usury (General Obligations Law § 5-521[1]; Limited Liability Company Law § 1104[a]; *Schneider v Phelps*, 41 NY2d 238, 242 [1977]; *Bankers Trust Co. v Braten*, 184 AD2d 239 [1st Dept 1992]; *Fred Schutzman Co. v Park Slope Advanced Med., PLLC*, 128 AD3d 1007, 1008 [2nd Dept 2015]).

In light of the fact that Evanthia Koustis transferred the House to her wholly-owned limited liability company in order to obtain financing from RCG, a prior lender, she cannot argue that her own prior transfer in the RCG transaction was used in the Doral Bank re-financing to disguise what was in fact a usurious personal loan.

In addition, as the bar of usury does not apply to loans in

excess of \$2,500,000, the Koustis defendants cannot assert such defense in regard to the 212 East loan, which was in the amount of \$3,500,000 (Shatz Aff., ex. 17) (General Obligations Law § 5-501(6)(b)). The interest rate on the loan was 6.25% per annum, well below the 16% maximum interest rate established by General Obligations Law § 5-501 and Banking Law § 14-a(1). It was only after default that the interest rate increased to 24% per annum. As plaintiff urges, the defense of usury "does not apply where...the terms of the mortgage and note impose a rate of interest in excess of the statutory maximum only after default or maturity" (*Kraus v Mendelsohn*, 97 AD3d 641, 641 [2nd Dept 2012][citation and internal quotation marks omitted]).

The Koustis defendants make a series of allegations of fraudulent concealment regarding the loan secured by the House. To the extent that they allege that Doral Bank concealed facts from them, their claims are barred by the *D'Oench, Duhme* doctrine¹, and its codification in 12 USC § 1823(e), "prohibits claims based upon agreements which are not properly reflected in the official books or records of a failed thrift" (*LibertyPointe Bank v 75 East 125th, LLC*, 2013 WL 582254 [Sup Ct, New York County 2013]). § 1823(e) is applicable to third party assignees, and transferees of FDIC, such as plaintiff here (*United Cent. Bank v Team Gowanus, LLC*, 2012 WL 550737 [ED NY 2012]; *Aurora*

¹*D'Oench, Duhme & Co. v FDIC*, 315 US 447 (1942).

Loan Servs. LLC v Sadek, 809 F Supp 2d 235, 242 [SD NY 2011];
Point Dev., Inc. v FDIC, 961 F Supp 449, 458-459 [ED NY 1997]).
Thus, so much of the Koustis defendants' answer as asserts a
claim for unclean hands (Seventh Affirmative Defense) is
dismissed, as is their counterclaim for failure to disclose the
details of the loans. For the foregoing reasons the court denies
so much of their cross-motion as seeks to assert a Fifteenth
Affirmative Defense that the contracts contain clauses that are
unconscionable, oppressive and unreasonable.

The Koustis defendants fail to offer any facts to support
their remaining affirmative defenses, which are dismissed.

It is therefore ORDERED that the motion for summary judgment
is granted to plaintiff 72nd Ninth LLC (1) upon its complaint as
against defendants 753 Ninth Ave Realty LLC, 212 East 72nd Street
LLC, Evanthia Koustis, Marina Koustis, and Sofia Koustis, and (2)
dismissing the answer and counterclaim of defendants 753 Ninth
Avenue Realty LLC, 212 East 72nd Street LLC, Evanthia Koustis,
Marina Koustis and Sofia Koustis; and it is further

ORDERED that the motion of plaintiff 72nd Ninth LLC for a
default judgment against defendant Admiral Energy Corp. is
granted; and it is further

ORDERED that the action is severed and dismissed as
abandoned against defendants New York State Department of
Taxation and Finance, The City of New York Environmental Control

Board, Paragon Oil Burner Service & Repair Company, Inc.,
Duocolony Fuel Corp., Criminal Court of the City of New York, and
John Doe #1 through John Doe #12; and it is further

ORDERED that the cross-motion is denied.

Settle judgment on notice to all parties.

ENTER:



Dated: April 20, 2017

Ellen M. Coin, A.J.S.C.