City of New York v Quincy Marcus 504 Dev. Corp.
2021 NY Slip Op 32866(U)
December 23, 2021
Supreme Court, Kings County
Docket Number: Index No. 511071/21
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 23rd day of December, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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THE CITY OF NEW YORK,

Plaintiff,

- against -

Index No. 511071/21

QUINCY MARCUS 504 DEVELOPMENT CORP.; CITY OF NEW YORK DEPARTMENT OF FINANCE; NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; S.J. FUEL CO.; ALEXANDRA PERDOMO; and "JOHN DOES" #S 1-100, said names being fictitious, said persons or entities intended to be tenants and/or occupants and/or contract vendees of the Premises, and/or the holders of an interest in the subject Premises which is junior and subordinate to the liens of the Plaintiff,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	21-30, 32 198-224, 226-228
Opposing Affidavits (Affirmations)	198-224, 226-228 233-234
Reply Affidavits (Affirmations)	233-234

Upon the foregoing papers in this action to foreclose a commercial mortgage on six parcels of property in Brooklyn at: (1) 66 Lewis Avenue (Block 11588, Lot 38); (2)

116 Marcus Garvey Blvd. (Block 1769, Lot 41); (3) 277 Quincy Street (Block 1803, Lot 76); (4) 336 Throop Avenue (Block 1776, Lot 44); (5) 67 Stuyvesant Avenue (Block 1599, Lot 4); and (6) 16 Menahan Street (Block 3313, Lot 4) (collectively, the Properties), defendant Quincy Marcus 504 Development Corp. (Quincy Marcus or Borrower) moves (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 213 (4) and 3212 and RPAPL 1501 (4): (1) granting it summary judgment on its counterclaims and dismissing the complaint with prejudice based on the statute of limitations and lack of standing; (2) cancelling and discharging the mortgage, which was recorded in the City Register's office on July 13, 2007 under City Register File No. (CRFN) 2007000359592; (3) directing the City Register to cancel the mortgage; (4) cancelling the note secured by the mortgage; (5) dismissing plaintiff's second affirmative defense asserted in its reply to Quincy Marcus' counterclaim; and (6) awarding it costs and disbursements.

Plaintiff The City of New York (the City) cross-moves (in mot. seq. two) for an order: (1) granting it summary judgment based on Quincy Marcus' defaults under the note and mortgage, pursuant to CPLR 3211 and 3212; (2) striking and dismissing Quincy Marcus' answer, affirmative defenses and counterclaim "on the grounds that Plaintiff's instant foreclosure action was timely commenced as a result of the statute of limitations being revived . . ." (*see* NYSCEF Doc No. 198); (3) discontinuing the action as against defendants Alexandra Perdomo and the John Doe defendants and amending the caption to

remove those parties; (4) appointing a referee to compute the amounts due to the City under the note and mortgage; (5) granting the City a default judgment against all non-appearing defendants, pursuant to CPLR 3215; and (6) denying Quincy Marcus' summary judgment motion.

Background

On May 11, 2021, the City commenced this foreclosure action by filing a summons, a verified complaint and a notice of pendency against the Properties. The complaint alleges that the City is the "holder" of a June 20, 2007 note in the original principal amount of $3,741,674.00 executed by Quincy Marcus in favor of the original lender, BPD Bank, which was secured by a mortgage on the Properties (complaint at ¶¶ 9-10). The note allegedly provides for interest at 1.25% per annum and that the principal balance was due and payable on October 1, 2008, the maturity date of the loan (*id.* at ¶¶ 11-12).

Regarding the City's standing to foreclose, the complaint alleges that the note and mortgage "were assigned to the Plaintiff, CITY, by assignment of Mortgage Instrument dated January 5, 2021 and recorded February 23, 2021 at CRFN 2021000065281" (*id.* at ¶ 17). Notably, the complaint was filed with exhibits, including: (1) a copy of the June 20, 2007 note executed by Caryil Bernard on behalf of Quincy Marcus without any endorsement or allonge (*see* NYSCEF Doc No. 3); (2) a copy of the mortgage; and (3) a January 5, 2021 Assignment of Mortgage from Grupo Popular, S.A. as successor in

interest by merger to Grupo Investments Corp., as successor in interest by merger to BPD Bank, as "assignor" to the City as "assignee," which was recorded with the City Register's office on February 23, 2021 at CRFN 2021000065281. Notably, the January 5, 2021 Assignment of Mortgage states that the Assignor assigns the mortgage "together with the Note described in said Mortgage and the monies due or to be due thereon" (*see* NYSCEF Doc No. 5).

The complaint alleges that Quincy Marcus defaulted under the mortgage by failing to pay the $3,741,674.00 principal balance of the loan plus interest *on the maturity date* and that "by virtue of said defaults, plaintiff City has elected and does hereby elect that the whole of the principal sums outstanding be declared due and payable on the Note and Mortgage" (*id.* at ¶¶ 19-21). The complaint alleges that "no other action, at law or otherwise, has been instituted for the recovery of the sum of money secured by said Mortgages, or any part thereof" (*id.* at ¶ 27). Importantly, the complaint alleges that Quincy Marcus "has acknowledged the sums due under the Mortgage loan in writing within the last six years and has continued to carry the Mortgage loan as a valid debt on its books and records" (*id.* at ¶ 18).

On July 15, 2021, Quincy Marcus answered the complaint, denied the material allegations therein, including that it acknowledged the sums due under the mortgage in writing within the last six years, as alleged in paragraph 18 of the complaint. However, Quincy Marcus admitted that "no monies were paid on the October 1, 2018 maturity date

. . ." (answer at ¶ 19). Quincy Marcus asserted the following affirmative defenses: (1) the action is barred by the statute of limitations; (2) the City lacks standing to foreclose; and (3) the City failed to satisfy conditions precedent to foreclosure.

Quincy Marcus also asserted one counterclaim seeking to cancel the mortgage, pursuant to RPAPL 1501 "on the ground that the enforcement of the Mortgage is barred by the applicable statute of limitations" (*id.* at ¶ 34). The counterclaim alleges that this foreclosure action was filed on May 11, 2021, Quincy Marcus is the owner of record of the Properties, the maturity date of the note is October 1, 2008, which was not extended, "[p]ayments have never been made on the Note and Mortgage[,]" "[s]ince the Note and Mortgage were signed, Quincy Marcus has not agreed in writing to pay the obligations under either the Note or Mortgage," the six-year statute of limitations began to run on October 1, 2008, the maturity date of the loan and the period of time to enforce the note and mortgage "has expired" (*id.* at ¶¶ 33-54).

On August 2, 2021, the City filed its reply to Quincy Marcus' counterclaim in which it denied the material allegations therein and asserted affirmative defenses, including that Quincy Marcus failed to serve a statutory notice of claim upon the City (second affirmative defense) and that Quincy Marcus "acknowledged the mortgage loan indebtedness in writing within the six-years' period prior to Plaintiff filing its mortgage foreclosure proceeding" and identified a June15, 2015 letter in which Quincy Marcus requested further advances on the construction loan "thereby acknowledging the

mortgage loan debt in writing," 2018 emails to the City in which Quincy Marcus allegedly "made written promises to pay the mortgage indebtedness" and "by carrying said mortgage loan indebtedness on its 2018 tax returns and on its 2014, 2015, 2016, 2017 and 2018 audited financial statements . . ." (City reply at ¶ 15).

The other defendants failed to answer or otherwise respond to the complaint.

Quincy Marcus' Summary Judgment Motion

On September 2, 2021, prior to any discovery, Quincy Marcus moved for summary judgment dismissing the complaint, the City's second affirmative defense (failure to serve a notice of claim) and granting its counterclaim, pursuant to RPAPL 1501 (4), for an order canceling and discharging the mortgage and note based on the statute of limitations. Quincy Marcus contends that this foreclosure action is barred by the six-year statute of limitations and is also subject to dismissal based on the City's lack of standing.

Quincy Marcus submits an affidavit from its president, Cheryl Ighodaro (Ighodaro), who attests that Quincy Marcus has owned the Properties since June 20, 2007, "[t]he Mortgage Loan Documents were signed and were dated June 20, 2007" and "[n]o payments were ever made on the Mortgage Loan Document." Ighodaro further avers that "[a]fter the Mortgage Loan Documents were signed, Quincy Marcus never made another promise (in writing or otherwise) to pay either the Note or the Mortgage so as to extend

the Mortgage Loan Documents to be within the statute of limitations." Ighodaro asserts that "the Maturity Date of the Mortgage Loan Documents is October 1, 2008 [and t]his action was commenced on May 11, 2021 – more than twelve and half years after the Maturity Date of the Mortgage Loan Document."

Quincy Marcus submits a memorandum of law arguing that it established prima facie that this action was commenced more than six years after the maturity date, and thus, the burden shifts to the City to prove that the statute of limitations was tolled or is otherwise inapplicable. Quincy Marcus asserts that its standing defense is another ground for dismissal since the complaint only annexes an unendorsed copy of the note and "the pivotal standing issue is if the Note was properly transferred *prior* to the commencement of this action." Finally, Quincy Marcus argues that the City's second affirmative defense to its counterclaim alleging that Quincy Marcus failed to file a notice of claim should be dismissed because "General Municipal Law § 50-e only applies to tort claims."

The City's Opposition and Summary Judgment Cross Motion

The City opposes Quincy Marcus' summary judgment motion and cross-moves for an order granting it summary judgment on the complaint and dismissing Quincy Marcus' counterclaim, an order of reference, a default judgment and other relief.

The City submits an affidavit from Kerry LaBotz (LaBotz), the Assistant Commissioner of Preservation Finance of the Department of Housing Preservation and Development (HPD), who attests that she is "fully familiar with all of the facts and

circumstances surrounding this action based on [her] personal knowledge, the actions of employees, and from books and records maintained by Plaintiff City."

LaBotz asserts that Quincy Marcus "admits in its motion papers and in . . . its Answer its execution of the Note and Mortgage and its default in non-payment of the principal balance upon maturity" and accordingly "there is no issue of fact that the Defendant has defaulted under the Note and Mortgage." Regarding the City's standing to foreclose, LaBotz attests that "both the Note and Mortgage were assigned to the Plaintiff, CITY, pursuant to the Assignment of Mortgage Instrument dated January 5, 2021 and recorded February 23, 2021 at CRFN 2021000065281[,]" as alleged in paragraph 17 of the verified complaint. LaBotz submits a May 18, 2007 commitment letter from the City HPD advising Quincy Marcus that it will make the $3,741,674.00 construction and mortgage loan with Banco Popular as co-lender and a June 20, 2007 Construction Loan Participation Agreement. LaBotz asserts that these documents "all evidence that HPD funded the loan for the full loan amount of $3,741,674.00 . . ." and notes that paragraph 4 of the Construction Loan Participation Agreement explicitly provides that BPD Bank "shall take and continue to hold title to the Loan Documents in its name but shall hold the same as nominee for HPD."

LaBotz further attests that "[d]ocumentary evidence shows that Defendant's claim that no payments have been made under the loan is incorrect" and references "a [March 22, 2021] payoff letter that had been prepared by HPD's Fiscal Unit that shows that at

least $13,052.92 in interest had been collected by BPD Bank, its successors and assigns, under the loan." Notably, however, the March 22, 2021 payoff letter merely identifies the $13,052.92 figure as "Construction Interest Received" without any indication that the sum was, in fact, "collected by BPD Bank, its successors and assigns, under the loan" after the October 1, 2008 maturity date of the loan.

LaBotz further asserts that "the Defendant furnished Plaintiff with numerous written acknowledgements and promises of its mortgage loan indebtedness which would revive the Statute of Limitations" and annexes: (1) a May 7, 2018 email from Cargil Bernard of Precise Management, Inc. to Heidi Anderson of HPD advising that "[w]e will reimburse HPD the $18k for interest instead of seeking new approvals"; (2) copies of Quincy Marcus' 2014 through 2018 Financial Statements, "Note 3" of which identifies "Long-Term Debt" of $3,741,674.00 with the notation "Note Payable due April 30, 2038"; (3) a July 24, 2018 email from Cargil Bernard of Precise Management, Inc. to Heidi Anderson of HPD enclosing Quincy Marcus' Audited Financial Statements for 2014 through 2018; (4) Quincy Marcus' 2018 tax returns; and (5) a June 5, 2015 letter from Cargil Bernard (on Quincy Marcus letterhead) to Ms. Nieves Baez Read of Grupo Popular Investments, Inc. advising that "[w]e are requesting a release of $284,315.16 which represents balance of HPD construction loan for the Quincy Marcus 504 Development project."

While LaBotz argues that Note 3 of Quincy Marcus' annual financial statements

"acknowledges in writing the City's $3,741,674.00 mortgage loan as a long-term debt" she fails to explain the accompanying notation "Note Payable due April 30, 2038." LaBotz argues that Schedule L to Quincy Marcus' 2018 tax returns carries mortgage loans in the aggregate amount of $5,277,931.00, which "matches" the loan at issue here combined with another unrelated mortgage loan. LaBotz contends that Quincy Marcus "further acknowledged the loan in writing when it requested in a June 5, 2015 letter to Grupo Popular Investments, Corp. release of $284,315.16" which "represents the balance of the HPD construction loan for the Quincy Marcus 504 Development project."

LaBotz asserts that Quincy Marcus' summary judgment motion "should also be denied in order to allow the parties to engage in discovery, as the numerous documents that have already been attached to Plaintiff's cross motion directly contradicts the Defendant's blanket assertion that it had made no written promises or acknowledgments of the debt." Specifically, LaBotz argues that by a June 5, 2015 letter, Quincy Marcus "requested release of loan funds" and that the City needs discovery regarding "the circumstances relating to that advance and any correspondence or promises regarding repayment of that advance" because "[i]t is possible there were promises made regarding this advance." LaBotz further argues that the City needs discovery "from the defendant and assignor relating to any payments, receipts, correspondence and agreements . . . exchanged between itself, or the assignor's merged entities with the Defendant."

The City also submits a memorandum of law asserting that Quincy Marcus'

motion should be denied pursuant to CPLR 3212 (f) "because there are additional facts essential to justify opposition to the Defendant's motion for Summary Judgment that may exist but which are unavailable to the Plaintiff" and may be in the possession of Quincy Marcus and/or BPD Bank, or one of the Banco Popular entities.

Quincy Marcus' Reply

Quincy Marcus, in opposition to the City's summary judgment cross motion and in further support of its summary judgment motion, submits a memorandum of law arguing that its moving papers established, prima facie, that this foreclosure action is barred by the six-year statute of limitations, and that the City failed to satisfy its burden of proving that the action is not time-bared. Quincy Marcus claims that the documents submitted by the City do not prove that the statute of limitations was revived.

Quincy Marcus asserts that the May 7, 2018 email from Quincy Marcus' management that states "we will reimburse HPD the $18k for interest instead of seeking new approvals" and Quincy Marcus' June 2015 request for an advance do not acknowledge the entire debt, much less an obligation to pay it. Quincy Marcus argues that its financial statements and its 2018 tax return "do not acknowledge an obligation to pay the Mortgage Loan Document" because General Obligation Law (GOL) § 17-105 requires both an acknowledgement of the debt and a promise to pay the *entire* indebtedness. Quincy Marcus contends that a financial statement or tax return that merely lists the mortgage as a liability does not constitute an express promise to pay the

mortgage debt. Finally, Quincy Marcus argues that the March 22, 2021 payoff letter produced by the City is not authenticated as a business record and does not revive the statute of limitations because "[n]o date is set forth when this purported payment was made"

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Under CPLR 213 (4), an action to foreclose a mortgage is governed by a six-year

statute of limitations (*Oakdale III, LLC v Deutsche Bank Nat'l Tr. Co.*, 189 AD3d 1685, 1687 [2020]). "The statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment, or *from the time the mortgagee is entitled to demand full payment*, or from the date the mortgage debt has been accelerated (*Plaia v Safonte*, 45 AD3d 747, 748 [2007] [emphasis added]). Thus, if the borrower fails to pay the loan upon the maturity date, the six-year statute of limitations begins accruing from the date of maturity (*see Notarnicola v Lafayette Farms, Inc.*, 288 AD2d 198, 199 [2001] [holding that "(b)ecause Turturro never exercised his option to accelerate the entire mortgage debt, the mortgage matured on March 25, 1982, the date of the last scheduled payment (and) the Statute of Limitations expired on March 25, 1988"]).

Here, Quincy Marcus established that the six-year statute of limitations began to run on the debt on October 1, 2008, the maturity date of the loan. Since the City did not commence this action until May 11, 2021, more than 12 years after the loan matured, Quincy Marcus has met its initial burden of demonstrating, prima facie, that this foreclosure action is untimely. The burden then shifted to the City to present admissible evidence establishing that this action was timely commenced or to raise a question of fact as to whether this action was timely commenced (*U.S. Bank Nat. Assoc. v Martin*, 144 AD3d 891, 892 [2016]).

The City, in opposition, has raised triable issues of fact warranting discovery as to whether the statute of limitations was revived by partial payments and Quincy Marcus'

express acknowledgements and promises to pay the mortgage debt after the maturity date. The documents produced by the City contradict Quincy Marcus' assertion that it made no written acknowledgments of the debt after the 2008 maturity date and require discovery.

"'In order that a part payment shall have the effect of tolling the time-limitation period, under the statute or pursuant to the contract, it must be shown that there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder'" (*Sudit v Eliav*, 181 AD3d 955, 957 [2020] [quoting *Lew Morris Demolition Co. v Bd. of Ed. of City of New York*, 40 NY2d 516, 521 (1976)] [holding that release payment to plaintiff's attorney when defendants' purchased the property did not toll the statute of limitations or acknowledge that the debt was still owed because "plaintiff failed to produce a written agreement or any other evidence that the tender of the release payment was intended to be a partial payment against or acknowledgement of a further debt"]; *see also Roth v Michelson*, 55 NY2d 278, 281 [1982] [holding that "(i)t is a long-standing common-law rule that, if part payment of a debt otherwise outlawed by the Statute of Limitations is made

under circumstances from which a promise to honor the obligation may be inferred, it will be effective to make the time limited for bringing an action start anew from the time of such payment"]). "The circumstances of such a payment may be proven by extrinsic

evidence" (*Educ. Res. Inst., Inc. v Piazza*, 17 AD3d 513, 514 [2005]). "For example, copies of cancelled checks and accompanying memoranda, the debtor's books and records or an admission may demonstrate partial payment and a desire to remit the remaining sum" (*id.* at 514).

General Obligations Law (GOL) § 17-101 provides that "[a]n acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the [CPLR]." Under GOL 17-105 (1), "a [written] promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage . . . either with or without consideration" makes the time limited for the commencement of the action "run from the date of the . . . promise."

Here, the City produced documentary evidence that raises triable issues as to whether or not the statute of limitations was revived by Quincy Marcus' partial payment, Quincy Marcus' written acknowledgement of the mortgage loan and an unqualified acknowledgment of more being due, from which a promise may be inferred to pay the remainder. Quincy Marcus' 2014 through 2018 financial statements acknowledge

the City's $3,741,674.00 mortgage loan as a long-term debt and contain the notation "Note

Payable due April 30, 2038[,]" which suggests that the maturity date of the City's mortgage loan was somehow extended beyond the October 1, 2008 maturity date. While Quincy Marcus is correct in arguing that the May 7, 2018 email from Quincy Marcus' management agreeing to "reimburse HPD the $18k for interest instead of seeking new approvals" and Quincy Marcus' June 2015 request for an advance do not acknowledge the entire mortgage debt, they do raise questions of fact as to whether there is additional documentation that may be uncovered during discovery of a new or continuing contract between the parties and/or an unqualified acknowledgment by Quincy Marcus of the entire mortgage debt and a promise to pay the remainder. Because there are triable issues of fact as to whether or not this foreclosure action is time-barred, the parties' summary judgment motion and cross motion for summary judgment, an order of reference and a default judgment are denied with leave to renew at the conclusion of discovery. Accordingly, it is hereby

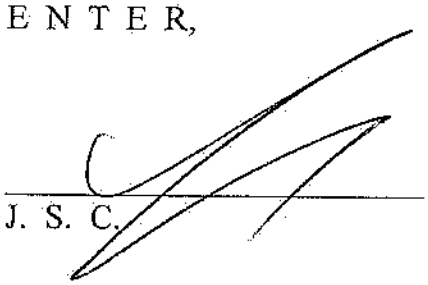
ORDERED that Quincy Marcus' summary judgment motion (mot. seq. one) is denied with leave to renew at the conclusion of discovery; and it is further

ORDERED that the City's cross motion (mot. seq. two) is only granted to the extent that this action is discontinued as against defendant Alexandra Perdomo and the "John Doe" defendants and the caption is hereby amended accordingly; the City's cross motion

for summary judgment, an order of reference and a default judgment against the non-appearing defendants is otherwise denied with leave to renew at the conclusion of discovery.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE