| **Rosentiial & Rosenthal, Inc. v Mawash Realty Corp.** |
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| 2010 NY Slip Op 34117(U) |
| December 29, 2010 |
| Supreme Court, New York County |
| Docket Number: 116411/09 |
| Judge: Joan A. Madden |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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ROSENTHAL & ROSENTHAL, INC.,

Plaintiff,

INDEX NO. 116411/09

-against-

MAWASH REALTY CORP., MICHAEL WALDMAN, Individually and as Executor of the Estate of SHERWOOD WALDMAN, WALTER SAKOW, BOARD OF MANAGERS OF THE NEW THEATRE CONDOMINIUM, PARKING VIOLATIONS BUREAU, NEWMARK & COMPANY REAL ESTATE, INC., TRIANGLE DEVELOPMENT CORPORATION a/k/a TRIANGLE DEVELOPMENT OF DELAWARE, DON LEE, KATHIE LEE, ENVIRONMENTAL CONTROL BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, UNITED STATES OF AMERICA, and "JOHN DOE #1" through "JOHN DOE #10," the last ten names being fictitious and unknown to the Plaintiff, the person or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgage premises described in the verified complaint,

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NEW YORK
COUNTY CLERK'S OFFICE

Defendants

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JOAN A. MADDEN, J.:

In this mortgage foreclosure proceeding, plaintiff Rosenthal & Rosenthal, Inc. ("Rosenthal") moves for an order: 1) pursuant to CPLR 3212, striking the answer and affirmative defenses of defendants Mawash Realty Corp. ("Mawash") and Michael Waldman, Individually and as Executor of the Estate of Sherwood Waldman ("Waldman"); 2) pursuant to CPLR 3212 awarding plaintiff summary judgment against defendants Mawash and Waldman; 3) pursuant to RPAPL 1321 appointing a referee to ascertain and compute the amount due to

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plaintiff, and to determine whether the mortgage premises may be sold in one parcel; 4) deleting the references to John Does Nos. 1-10 and Newmark & Company Realty Estate, Inc., in the caption of all future papers; and 5) awarding plaintiff the costs and disbursements of this motion, including its reasonable attorney's fees. Defendants Mawash and Waldman oppose the motion in its entirety.

Defendant Waldman submits an affidavit in opposition to the motion. The following facts, however, are not disputed. On or about June 15, 2004, defendants Waldman and Mawash borrowed $4,000,000 from plaintiff Rosenthal, as evidenced by a Promissory Note dated June 15, 2004. As security for that loan, Waldman and Mawash simultaneously executed, acknowledged and delivered to Rosenthal, a Mortgage, Security Agreement and Assignment of Leases and Rents dated June 15, 2004, whereby Waldman and Mawash gave Rosenthal a first mortgage against condominium units 6C and PH-16B located at 240 East 10th Street, New York, New York, and the property known as 237 East 10th Street, New York, New York (the "first mortgage"). The first mortgage was duly recorded in the Office of the City Register of the County of New York on July 30, 2004, and was subsequently modified by amendments in June 2006, January 2007 and December 2007, and extension agreements in January 2007 and December 2007.

On or about May 1, 2007, Waldman and Mawash borrowed $2,500,000 from plaintiff, as evidenced by a promissory note dated June 1, 2007. As security for the loan, Waldman and Mawash executed, acknowledged and delivered to plaintiff, a mortgage, security agreement and Assignment of Leases and Rents dated May 1, 2007, and gave plaintiff a second mortgage against the same mortgaged premises as the first mortgage (the "second mortgage"). The second

mortgage was duly recorded with the Office of the City Register of the County of New York on July 16, 2007, and was subsequently amended in July 2008. It is not disputed that on February 1, 2010, Waldman and Mawash made a partial payment of $700,000, which was applied towards the reduction in the principal amount of the $4,000,000 promissory note dated June 15, 2004. In consideration of such partial payment, plaintiff released Condominium Unit PH-16B located at 240 East 10th Street, New York, New York from the lien of plaintiff's mortgages.

On November 20, 2009, plaintiff commenced the instant action to foreclose on both the first and second mortgages. Defendants Waldman and Mawash served and filed an answer asserting a first affirmative defense of failure to state a cause of action, a second affirmative defense based on documentary evidence, and a third affirmative defense of failure to comply with the statutory requirements of RPAPL Article 13.

In opposing plaintiff's motion, defendants argue the following: 1) summary judgment is premature since defendants are entitled to discovery; 2) summary judgment should be denied under the principles set forth in Nassau Trust Co. v. Montrose Concrete Products, 56 NY2d 175 (1982); 3) it is procedurally improper for plaintiff to foreclose two mortgages on the same properties in the same lawsuit as though they were equal, without identifying the priority of the mortgages, or providing for how and out of what portion of the proceeds plaintiff is requesting they be paid; and 4) defendants are not in default since they made a partial payment on February 1, 2010. None of the foregoing arguments is sufficient to defeat plaintiff's motion.

Even though defendants made a partial payment, such payment did not relieve them of their obligations under the mortgages. In connection with the $700,000 payment, defendant Waldman executed a letter dated February 1, 2010, expressly acknowledging that "[t]he above

amounts are being paid to Rosenthal without prejudice to its right to continue to immediately seek the balance of the Loans all of which are now due and payable."

Defendants' reliance on Nassau Trust Co. v. Montrose Concrete Products, supra, is misplaced. In that case, the borrower's unrefuted affidavit was sufficient to establish triable issues of fact as to the meritorious defense of estoppel. Here, however, Waldman's affidavit fails to raise an issue of material fact as to any viable defense.

Defendants also objects that it is procedurally improper for plaintiff to foreclose on the first and second mortgages together in the same action "as though they were equal." Defendants cite to no statute or case law holding that, where as here, the plaintiff holds both a first and second mortgage on the same property, the mortgages cannot be consolidated into one judgment of foreclosure. This is not a case in which a separate lien holder claims that it has mortgage that take priority over plaintiff's mortgage. See e.g. Bank of New York v. Resles, ___ AD3d ___, 2010 WL 4608340 (1st Dept 2010) (in action to foreclose first and second mortgages that were consolidated, defendant objected that it held a separate second mortgage that took precedence over plaintiff's second mortgage). While defendants cite to RPAPL §§ 1351(3) and 1354(3), those provisions provide for payment of a subordinate mortgage from surplus monies after a foreclosure sale, and are generally employed when the subordinate mortgage is held by a mortgagee who is separate from the foreclosing mortgagee. Nothing in those provisions precludes plaintiff from consolidating and foreclosing on its two mortgages in this one action.

Finally, the absence of discovery does not require denial of plaintiff's motion, as defendants fail to show that facts essential to oppose the motion are in plaintiff's exclusive knowledge, or that discovery might lead to facts relevant to a viable defense. See Woods v. 126

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Riverside Drive Corp, 64 AD3d 422, 423 (1st Dept 2009); Duane Morris LLP v. Astor Holdings, Inc., 61 AD3d 418 (1st Dept 2009).

Based on the foregoing, plaintiff's motion is granted, and the court is signing the Order of Reference annexed to plaintiff's motion papers as Exhibit L.

DATED: December 29, 2010

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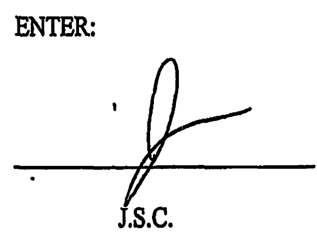

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