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| JDM Capital Funding, LLC v Horseblock Rd. Props., LLC |
| 2011 NY Slip Op 32471(U) |
| August 16, 2011 |
| Sup Ct, Suffolk County |
| Docket Number: 10-15351 |
| Judge: Joseph Farneti |
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 8-30-10
MOTION DATE 9-8-10
ADJ. DATE 6-2-11
Mot. Seq. # 001 - MD
002 - MG

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JDM CAPITAL FUNDING, LLC, :
: :
Plaintiff, :
: :
- against - :
: :
HORSEBLOCK ROAD PROPERTIES, LLC, :
JPEC LAND DEVELOPMENT, LLC, :
C.A.S.S. HOLDINGS, LLC :
DEBRA FERNANDEZ :
EUGENIO FERNANDEZ :
RICHARD WEINSTEIN :
NEW YORK STATE DEPARTMENT OF :
TAXATION AND FINANCE :
THE PHEN GROUP, LLC, :
EUGENE FERNANDEZ, AS TRUSTEE OF :
THE EUGENE FERNANDEZ REVOCABLE :
LIVING TRUST U/A/D 11/18/04 :
OLD FIELD PROPERTIES, LLC, :
LAKE AVENUE PROPERTIES, LLC, :
GLOBAL HOME II, LLC, :
HALF HOLLOW ESTATES, LLC, :
THALER AND GERTLER LLP :
"JOHN DOE NO. 1" TO "JOHN DOE NO. XXX," :
inclusive, the last thirty names being fictitious and :
unknown to plaintiff, the persons or parties :
intended being the tenants, occupants, persons or :
corporations, if any, having or claiming an interest :
in or lien upon the premises described in the :
complaint, :
Defendants. :
-----X

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BECKER & POLIAKOFF, LLP
Attorney for Defendants Horseblock Road
Properties, LLC, JPEC Land Development, LLC,
C.A.S.S. Holdings, LLC, Debra Fernandez, Eugenio
Fernandez, Richard Weinstein, The Phen Group,
LLC, Eugene Fernandez, As Trustee of the Eugene
Fernandez Revocable Living Trust U/A/D 11/18/04,
Old Field Properties, LLC, Lake Avenue Properties
LLC, Global Home II, LLC, Half Hollow Estates,
LLC
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New York, New York 10006

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Upon the following papers numbered 1 to 50 read on these motions for an order of reference and for an injunction; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; 24 - 36; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16 -18; 19 - 23; 37 - 40; Replying Affidavits and supporting papers 41 - 50; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by plaintiff for an order of reference and the motion (#002) by plaintiff for an order pursuant to CPLR 6301 are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (#001) by plaintiff for an order of default against non-appearing defendants, an order granting summary judgment on its complaint on the issue of liability and striking the answers of the appearing defendants, an order of reference appointing a referee to compute, and an amendment of the caption of this action is denied; and it is further

ORDERED that the motion (#002) by plaintiff for an order pursuant to CPLR 6301 enjoining defendant Horseblock Road Properties LLC from conveying the property located at Horseblock Road, Yaphank, New York, and enjoining said defendant, its agents, assigns, and contract vendees from interfering with the security interest of plaintiff in all collateral including, without limitation, the removal of sand from said premises is granted.

This is an action to foreclose a mortgage on commercial property. Plaintiff allegedly extended loans in the outstanding principal amount of \$12,800,000.00 to defendants The Global Home Group, LLC (“Global Home Group”), The Phen Group, LLC (“Phen Group”), Eugene Fernandez, as Trustee of the Eugene Fernandez Revocable Living Trust U/A/D 11/18/04 (“Trust”), Oldfield Properties, LLC (“Oldfield”), Lake Avenue Properties, LLC (“Lake Avenue”), Global Home II, LLC (“Global Home II”), Half Hollow Estates, LLC (“Half Hollow”), and Horseblock Road Properties, LLC (“Horseblock”) that are the subject of this action and two other related actions. Said loans were made pursuant to a Loan Agreement, dated August 4, 2006, which was amended by a “First Amendment to Loan Agreement” dated March 22, 2007. The loan agreements were further amended by an “Amended and Restated Master Loan Agreement,” dated February 25, 2009, between plaintiff and the borrower defendants Global Home Group, Phen Group, Trust, Oldfield, Lake Avenue, Global Home II, Half Hollow, and Horseblock (“borrower defendants”) and the guarantor defendants Horse Block, C.A.S.S. Holdings, LLC (“CASS”), JPEC Land Development, LLC (“JPEC”), Debra Fernandez, Eugenio Fernandez and Richard Weinstein (“guarantor defendants”). Plaintiff has commenced three separate foreclosure actions with respect to mortgages obtained through these agreements, *JDM Capital Funding, LLC v Half Hollow Estates, LLC* under Index number 15350/2010, *JDM Capital Funding, LLC v Horseblock Road Properties, LLC* under Index number 15351/2010, and *JDM Capital Funding, LLC v Old Field Properties, LLC* under Index number 15352/2010.

In the instant action, plaintiff seeks to foreclose a “mortgage, assignment of rents, and security agreement” (“mortgage”) securing a guaranty of payment of the debt under the original loan agreement up to the amount of \$2,750,000.00. The mortgage, dated January 29, 2007, was executed in plaintiff’s favor by Eugene Fernandez as manager of defendant Horseblock and filed in the Office of the Suffolk County Clerk on December 22, 2008. The guaranty was also purportedly executed on the same date. The mortgage is on property located at Horseblock Road, Yaphank, New York. A

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Reaffirmation of Secured Guaranty, dated February 25, 2009, was executed by Eugene Fernandez as manager of defendant Global Home Group on behalf of defendant Horseblock. The mortgage was modified by a "Mortgage Modification Agreement" dated February 25, 2009 and filed on April 23, 2009 in the Office of the Suffolk County Clerk. Said modification agreement was executed by Eugene Fernandez on behalf of defendant Horseblock.

Defendant Horseblock allegedly defaulted on its payments due on May 1, 2009 and thereafter. The borrower and guarantor defendants allegedly failed to cure the default and plaintiff elected to accelerate the loan. Plaintiff subsequently commenced the instant action for a judgment of foreclosure against the borrower and guarantor defendants, the New York State Department of Taxation and Finance for possible unpaid franchise taxes, and Thaler & Gertler, LLP as subordinate judgment holder.

The borrower and guarantor defendants served an answer denying, among other things, their default. They also asserted affirmative defenses including that the global economic collapse of 2008 to 2009 was a "force majeure" that none of the parties to the subject agreements could reasonably have anticipated and which excused defendants' performance of their obligations under said agreements; and that plaintiff failed to negotiate with defendants in good faith to most fairly mitigate each party's damages. Some of their other affirmative defenses were failure to state a cause of action, unclean hands, and the doctrines of waiver, estoppel and laches. Defendant Thaler & Gertler, LLP ("T & G") served its answer admitting that it holds judgment as against certain defendants in this action and seeking surplus monies from a mortgage foreclosure sale of the mortgaged premises.

Plaintiff now moves for an order of default against the non-appearing defendants, summary judgment on its complaint on the issue of liability and striking the answers of the appearing defendants, an order of reference appointing a referee to compute, and an amendment of the caption of this action deleting defendants "John Doe No. I" to "John Doe No. XXX."

In order to establish *prima facie* entitlement to summary judgment in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of default (*see Capstone Business Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*id.* quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997], *lv dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]).

Plaintiff's submissions in support of its motion include the mortgage, reaffirmation of secured guaranty, mortgage modification agreement, the amended loan agreement of February 25, 2009, the summons and complaint, the aforementioned answers, and affidavits of service of the summons and complaint. In addition, plaintiff submits the affidavit dated July 30, 2010 of Dennis Diczok ("Diczok"), plaintiff's vice president, stating that due to default in payment beginning with the payment due on May 1, 2009, the mortgage debt was accelerated by plaintiff, the mortgage debt remains in default, and there is presently due and owing to plaintiff \$2,750,000 plus interest.

Here, plaintiff has failed to submit a copy of the original guaranty dated January 29, 2007, referred to in the reaffirmation of secured guaranty dated February 25, 2009, and executed at the same time as the subject mortgage. A mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation (*see FGB Realty Advisors, Inc. v Parisi*, 265 AD2d 297, 696 NYS2d 207 [2d Dept 1999]). There is no evidence that the reaffirmation of secured guaranty supplanted the guaranty. Paragraph 2 of the section entitled “Agreement” on page 2 of the reaffirmation of secured guaranty specifically provides that “[t]he obligations evidenced by the Guaranty continue outstanding, and the execution and delivery to Lender of this Reaffirmation does not constitute the creation of a new obligation or the extinguishment of the obligation evidenced by the Guaranty but constitutes only a reaffirmation thereof.” Therefore, plaintiff has failed to make a *prima facie* showing of entitlement to judgment (*compare Inland Mtge. Capital Corp. v Realty Equities NM, LLC*, 71 AD3d 1089, 900 NYS2d 79 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681[2d Dept 2010]).

Plaintiff also seeks a preliminary injunction enjoining defendant Horseblock from conveying the Horseblock Road property and enjoining said defendant, its agents, assigns, and contract vendees from interfering with the security interest of plaintiff in all collateral including, without limitation, the removal of sand from said premises. In his affidavit dated August 9, 2010, Diczok states that the Horseblock property consists of 36 acres of undeveloped land. In addition, he states that he has recently had several conversations with Eugene Fernandez (“Fernandez”), principal of mortgagor and fee owner of the property, and that Fernandez advised him, subsequent to the commencement of this action, that it was his intention to convey the property for the development of the land into an organic vegetable farm and that approximately one acre of the property was to be excavated to construct a fish farm/hatchery as a source of fertilizer for the vegetable farm. Diczok also states that Fernandez indicated that the excavation would require removal of approximately 70,000 tons of sand and that he estimated a profit of \$350,000 from the sale of the sand. Diczok believes that Fernandez intends to or has already conveyed the property to Bluegreen Farms, which he believes is also controlled by Fernandez. He submits a copy of a letter dated July 13, 2010 from the Town of Brookhaven Department of Planning, Environment and Land Management indicating that a site plan has been conditionally approved with respect to a project of Bluegreen Farms at Yaphank.

Diczok argues that plaintiff will be irreparably harmed by the removal of sand and the excavation of the property inasmuch as said actions will leave a huge, empty pit at the site and severely erode the value of the property, chill bidding at the foreclosure sale, and significantly increase the likelihood of a deficiency judgment, which plaintiff will be unable to recover. He emphasizes that plaintiff has not consented to the conveyance of the property by the mortgagor or any other entity and has not consented to the excavation of the property for the construction of a vegetable farm and related fish/farm hatchery, which consent is required pursuant to paragraphs 1.09 and 1.08 (a) of the mortgage.

In opposition to the request for a preliminary injunction, Fernandez submits his affidavit dated September 21, 2010 indicating that he devised the business plan in the Fall of 2008 to convey the property to Bluegreen Farms and to sell the sand on the property, with the support of plaintiff, and that it was all made for the purpose of a global settlement, which plaintiff refused to consummate.

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To be entitled to a preliminary injunction, the moving party has the burden of demonstrating: (1) a likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities in the movant's favor (*see* CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862, 552 NYS2d 918 [1990]; *Dixon v Malouf*, 61 AD3d 630, 630, 875 NYS2d 918 [2d Dept 2009]; *Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 643, 808 NYS2d 418 [2d Dept 2006]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*see Dixon v Malouf*, 61 AD3d at 630; *Ruiz v Meloney*, 26 AD3d 485, 486, 810 NYS2d 216 [2d Dept 2006]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 781 NYS2d 684 [2d Dept 2004]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the court (*see Dixon v Malouf*, 61 AD3d at 630; *Ruiz v Meloney*, 26 AD3d at 486). The existence of an issue of fact should not be the sole ground for denial of the motion (*see* CPLR 6312 [c]; *Stockley v Gorelik*, 24 AD3d 535, 536, 808 NYS2d 282 [2d Dept 2005]).

Here, plaintiff has shown irreparable injury if the property is transferred and developed as contemplated, and Fernandez fails to indicate in his submissions in opposition that work on the project has stopped. The status quo will not be preserved absent a preliminary injunction (*see Stockley v Gorelik*, 24 AD3d at 536). Thus, plaintiff is entitled to a preliminary injunction pending the determination of the action (*see* CPLR 6301; *S.J.J.K. Tennis, Inc. v Confer Bethpage, LLC*, 81 AD3d 629, 916 NYS2d 789 [2d Dept 2011]; *Winchester Global Trust Co. Ltd. v Donovan*, 58 AD3d 833, 873 NYS2d 130 [2d Dept 2009]). The borrower and guarantor defendants have not raised issues of fact warranting an evidentiary hearing (*see* CPLR 6312 [c]).

"Prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court" (CPLR 6312 [b]). The sum fixed by the court for the undertaking must be sufficient to compensate the party being enjoined for the damages and costs sustained by them as a result of the issuance of the preliminary injunction in the event that it is later determined that the requester was not entitled to the injunctive relief (CPLR 6312 [b]; *Carter v Konstantatos*, 156 AD2d 632, 549 NYS2d 131 [2d Dept 1989]). The absence of an undertaking renders the preliminary injunction voidable (*Olechna v Town of Smithtown*, 51 AD2d 1036, 381 NYS2d 321 [2d Dept 1976]). Counsel for plaintiff suggests that the undertaking be the estimated profit from the sale of the sand, \$350,000.00. Counsel for Horseblock suggests that the undertaking be the estimated value of the property and the planned project, \$8.8 million. The Court fixes the undertaking of plaintiff in the sum of eight hundred thousand (\$800,000.00) dollars.

Accordingly, the Court denies plaintiff's request for an order of reference and grants its request for a preliminary injunction. The preliminary injunction shall be effective immediately upon service of a copy of this order upon defendants Horseblock Road Properties, LLC and Eugene Fernandez together with proof of filing of an undertaking, pursuant to CPLR 6312 (b), in the sum of eight hundred thousand (\$800,000.00) dollars.

Dated: August 16, 2011


 Hon. Joseph Farneti
 Acting Justice Supreme Court

___ FINAL DISPOSITION X NON-FINAL DISPOSITION