[* 1]

COPY

SHORT FORM ORDER

INDEX
NO.: 2799-11

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 4-20-11; 7-7-11
SUBMITTED: 6-9-11; 7-7-11
MOTION NO.: 003-MOT D
004-MD

SAG HARBOR LAND, LLC,

Plaintiff,

-against-

SAG DEVELOPMENT PARTNERS, LLC, "JOHN DOE No. 1" through "JOHN DOE No. 2," inclusive, the names of the last 2 defendants being fictitious, the true names of said defendants being unknown to plaintiff, it being intended to designate fee owners, tenants or occupants of the mortgaged premises and/or persons or parties having or claiming an interest in or a lien upon the mortgaged premises, if the aforesaid individual defendants are living, and if any or all of said individual defendants be dead, their heirs at law, next of kin, distributees, executors, administrators, trustees, committees, devisees, legatees, and the assignees, lienors, creditors and successors in interest of them, and generally all persons having or claiming under, by, through, or against the said defendants named as a class, of any right, title, or interest in or lien upon the premises described in the complaint herein,

Defendants.

ESSEKS, HEFTER & ANGEL, LLP
Attorneys for Plaintiff
108 East Main Street
Riverhead, New York 11901

TWOMEY, LATHAM, SHEA, KELLEY, DUBIN & QUARTARARO, LLP
Attorneys for Defendant Sag Development Partners, LLC
33 West Second Street
Riverhead, New York 11901

Upon the following papers numbered 1-63 read on these motions for summary judgment and leave to amend ; Notice of Motion and supporting papers 1-21; 34-39 ; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 22-32; 40-63 ; Replying Affidavits and supporting papers 33 ; it is,

ORDERED that the branches of the motion by the plaintiff which are for summary judgment and the appointment of a referee are granted; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the motion by the defendant for leave to amend its answer is denied.

This is an action to foreclose a mortgage on commercial real property located in Sag Harbor, New York. The property is the former Watch Case Factory premises, which the defendant intends to develop into residential condominiums. The defendant purchased the property on January 6, 2006, from the Watch Case Factory Associates for $16 million. $4 million was paid at the closing, and $12 million was secured by a mortgage on the premises, $4 million of which was paid one month later on February 6, 2006. Repayment of the remaining $8 million was contingent upon the defendant obtaining approval from the New York State Department of Environmental Conservation (NYSDEC) of a final site management plan prior to January 5, 2009 (the three-year maturity date). Pursuant to a mortgage consolidation, extension, and modification agreement (CEMA) executed by the parties on January 6, 2006, if the defendant did not obtain approval of the site management plan by the three-year maturity date, it had the right to seek a reduction in the amount of the mortgage by obtaining an appraisal of the property without such approval and taking into account the environmental problems thereon.

On April 6, 2008, the parties entered into an amended and restated CEMA. That agreement, inter alia, eliminated the defendant's right to reduce the mortgage by obtaining an appraisal of the property and extended the maturity date to either January 6, 2011, or 90 days after approval of the site management plan, whichever was earlier. On January 28, 2009, the NYSDEC approved the site management plan subject to the defendant giving an environmental easement to the People of the State of New York. One of the requirements of the environmental easement was that all mortgage liens on the property be subordinate to it. The plaintiff refused to subordinate its mortgage to the environmental easement. As a result, the property could not be reclassified to "restricted residential" and the defendant could not obtain financing.

On June 24, 2009, the defendant borrowed $807,805.20 from the plaintiff, which was secured by a another mortgage on the property. The parties executed a second amended and restated CEMA, consolidating that amount with the defendant's previous indebtedness to the plaintiff. The maturity date of the second amended and restated CEMA was January 6, 2011, and included an option to extend the maturity date until January 6, 2012, upon notice to the plaintiff and payment of the accrued interest in the amount of $400,000 on or before December 6, 2010.

The defendant advised the plaintiff that it was exercising the option by a letter dated January 3, 2011, which was accompanied by a promissory note in the amount of $400,000. The plaintiff rejected the defendant's attempt to exercise the option and declared the entire

balance due and owing on January 6, 2011. The defendant defaulted, and this action ensued. The plaintiff moves for summary judgment and the appointment of a referee. The defendant opposes the motion and moves to amend its answer to include fraud in the inducement and promissory estoppel as affirmative defenses.

The plaintiff has established, prima facie, its entitlement to judgment as a matter of law by producing the mortgage, the mortgage note, and proof of the defendant's default thereunder (*see*, **Daniel Perla Assoc., LP v 101 Kent Assoc., Inc.**, 40 AD3d 677). In opposition, the defendant contends that the plaintiff wrongly rejected its exercise of the option to extend the maturity date of the mortgage loan and that the plaintiff has acted unconscionably and in bad faith. The defendant contends that the plaintiff's principals repeatedly assured it that they would "work with" the defendant to extend the maturity date of the loan and to obtain the required environmental approvals, including that they would "sign off" on the environmental easement. The defendant contends that the plaintiff used such assurances to induce it to modify the original mortgage to eliminate the appraisal language, which could have potentially reduced the mortgage amount to zero. The defendant further contends that disclosure is necessary to discover facts essential to its opposition.

The court finds that the defendant did not validly exercise the option to extend the maturity date of the mortgage loan. An option contract is an agreement to hold an offer open (**Ittleson v Barnett**, 304 AD2d 526, 528). In order to validly exercise an option, the provisions of the contract must be strictly complied with in the manner and within the time specified (**Id.**; **D.A.D. Rest. v Anthony Operating Corp.**, 139 AD2d 485, 486). Here, the defendant did not strictly comply with the terms of the option agreement. Its notice to the plaintiff was late and unaccompanied by the required $400,000 payment. In the absence of an express understanding to the contrary, the presumption is that money was the medium of payment (*see*, **N.E.D. Holding Co. v McKinley**, 246 NY 40, 44; **160 Chambers St. Realty Corp. v Register of the City of New York**, 226 AD2d 606, 607; **Skaneateles Sav. Bank v Herold**, 50 AD2d 85, 88-89, *affd* 40 NY2d 999). Thus, the defendant's tender of a $400,000 promissory note was insufficient to constitute payment of the requisite $400,000.

In view of the fact that the plaintiff was not contractually obligated to extend the maturity date of the mortgage unless the defendant validly exercised the option, the court finds that the plaintiff did not act in bad faith (*see*, **Connecticut National Bank v Peach Lake Plaza**, 204 AD2d 909, 910). Moreover, the evidence is insufficient to establish that the plaintiff agreed to forego or delay foreclosure even if the option was not validly exercised (*compare*, **Nassau Trust Co. v Montrose Concrete Products Corp.**, 56 NY2d 175).

The doctrine of unconscionability has little applicability in the commercial setting and is primarily a means with which to protect the commercially illiterate consumer beguiled into a grossly unfair bargain by a deceptive vendor or finance company (**Master Lease Corp. v Manhattan Limousine, Ltd.**, 177 AD2d 85, 90). To establish unconscionability, the defendant must show both a lack of meaningful choice and the presence of contractual terms that

unreasonably favor one party (**Gillman v Chase Manhattan Bank**, 73 NY2d 1, 10). Given the commercial setting of this transaction, the court finds that the plaintiff has failed to establish a lack of meaningful choice, nor do the contractual terms unreasonably favor the plaintiff.

The defendant's contention that the plaintiff's assurances induced it to modify the original mortgage to eliminate the appraisal language appears to be a fraud-in-the-inducement argument. Fraud in the inducement, however, is not a defense in an action to foreclose a mortgage (*infra*).

Finally, the mere hope that evidence sufficient to defeat summary judgment may be uncovered during discovery is not enough to deny the motion (**Lightfoot v City of New York**, 279 AD2d 457, 458). Accordingly, the court finds that the defendant has failed to raise a triable issue of fact in opposition to the plaintiff's prima facie case.

The defendant seeks to amend its answer to include fraud in the inducement and promissory estoppel as affirmative defenses. Generally, leave to amend a pleading should be freely granted in the absence of prejudice or surprise, and the court should not examine the merits or legal sufficiency of the proposed amendment unless it is palpably insufficient or patently devoid of merit on its face (**Giunta's Meat Farms, Inc. v Pina Constr. Corp.**, 80 AD3d 558, 559).

In **Jo Ann Homes at Bellmore, Inc. v Dworetz** (25 NY2d 112), the Court of Appeals held:

> [A] foreclosure action is a "proceeding in a court of equity which is regulated by statute" . . . Nevertheless, it is well settled that such a proceeding is unlike other equity actions in several ways. Thus, while equity acts only *in personam*, an action for foreclosure "is in the nature of a proceeding *in rem* to appropriate the land". . . Just as this court sustained the legality of a mortgage where the note was illegal . . . , we now conclude that a mortgage may not be set aside solely because the underlying transaction was tainted by a fraudulent representation. The trial court, which was the court of equitable jurisdiction in this instance, chose not to sustain the defense of fraud in the foreclosure proceeding and neither common sense nor precedent warrants a contrary determination.

In view of the foregoing, the court finds that the defense of fraud in the inducement is unavailable to the defendant as a matter of law (*see also*, **Gizzi v Hall**, 300 AD2d 879, 882 [fraud is not a defense in an action to foreclose a mortgage]; Dyke v Peck, 279 AD2d 841, 844 [same]). Moreover, when a party is represented by counsel, subsequent allegations of fraud are generally unpersuasive (**Shultis v Reichel-Shultis**, 1 AD3d 876, 877). It is undisputed that the defendant was represented by counsel from January 6, 2006, when it purchased the

property, through all of the subsequent agreements, including the one that is the subject of this foreclosure action.

To the extent that a mortgagee makes promises in bad faith on which the mortgagor relies to his or her detriment, the mortgagee can be estopped from foreclosing on the mortgage (**Friesch-Groningsche Hypotheebank Realty Corp. v Ward Equities**, 188 AD2d 397, 398).

The defendant's proposed promissory estoppel defense alleges that, from October 2008 until the parties executed the second amended and restated CEMA in June 2009, one of the plaintiff's principals affirmatively promised and advised the defendant that the plaintiff would work with and convince its counsel to allow the defendant to obtain the necessary approvals to develop the property and to obtain construction financing by agreeing to sign off on the environment easement required by the NYSDEC. The defendant alleges that it detrimentally relied on such statements. This defense falls short of establishing an estoppel because it is devoid of any facts explaining how the defendant prejudicially changed its position in reliance on the plaintiff's assurances (**Connecticut National Bank v Peach Lake Plaza**, *supra* at 910). Indeed, the defendant cannot show detrimental reliance. The record reveals that, on April 6, 2008, the parties entered into the first amended and restated CEMA, in which the defendant gave up its right to seek a reduction of the mortgage by obtaining an appraisal of the property and the maturity date of the mortgage loan was extended until January 6, 2011. When the parties entered into the second amended and restated CEMA on June 24 2009, the defendant did not assume any additional responsibilities or give up any additional rights. What the second amended and restated CEMA did was to give the defendant an option to extend the maturity date of the mortgage loan for an additional year until January 6, 2012. As previously discussed, the defendant did not validly exercise that option, and the plaintiff did not act in bad faith in refusing the extend the maturity date of the mortgage. The court finds that, under these circumstances, the proposed promissory estoppel defense is palpably insufficient or patently devoid of merit on its face (**Giunta's Meat Farms, Inc. v Pina Constr. Corp.**, *supra* at 559).

In sum, the branches of the plaintiff's motion which are for summary judgement and the appointment of a referee are granted, and the defendant's motion to amend its answer is denied. Settle order of reference.

HON. ELIZABETH HAZLITT EMERSON

Dated: September 8, 2011

J.S.C.