Mae v Shiraz Assoc. Corp.
2011 NY Slip Op 33519(U)
December 13, 2011
Supreme Court, Nassau County
Docket Number: 8044/10
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

x

FANNIE MAE,

Plaintiff(s),

-against-

SHIRAZ ASSOCIATES CORP., PEOPLE OF THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN AND JANE DOES 1 - 100,

Defendant(s).

The names of the John and Jane Doe Defendants being fictitious and unknown to the plaintiff, the persons and entities being parties having an interest in or lien against the premises sought to be foreclosed herein, as owner, licensee, occupant or otherwise.

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Index No. 8044/10

Motion Submitted: 10/3/11
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause........................X
Answering Papers..X
Reply...XX
Briefs: Plaintiff's/Petitioner's.......................................X
Defendant's/Respondent's.................................

Motion by plaintiff for an order: (a) pursuant to CPLR § 3212(b) granting it summary judgment against defendant Shiraz Associates Corp. ("Shiraz"), striking the answer of Shiraz and dismissing the counterclaims of Shiraz pursuant to CPLR §§ 3211(a)(7); and (b) pursuant to RPAPL § 1321 appointing a referee and directing the referee to ascertain and compute the amounts due is determined as hereinafter provided.

Plaintiff commenced this action to foreclose a Multifamily Mortgage, Assignment of Rents and Security Agreement dated September 24, 2008. The mortgage was given as security for a commercial loan in the principal sum of $880,000.

The mortgage encumbers premises knows as 298 Main Street, Hempstead, New York.

The premises is improved by an apartment building consisting of 14 units. Fannie Mae is the holder of the mortgage pursuant to an Assignment.

Plaintiff moves for summary judgment on the grounds that defendant defaulted under the obligations by failing to make the required payments, by failing to pay all taxes when due and by failing to keep the premises insured. Defendant's failure to cure these defaults despite demand (see Notices of Default) prompted Fannie Mae to accelerate the loan and declare the entire balance of principal due and payable.

In support of its motion, plaintiff submits various documentation including the mortgage, note and evidence of default; an affidavit of Joey Davenport, an Assistant Manager of Fannie Mae; and a reply affidavit of Thom Ruffin, a Director of Special Servicing of Greystone Servicing Corporation, Inc. ("Greystone").

Plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law by submitting the relevant mortgage, the underlying note and evidence of default. (***Swedbank, AB v. Hale Borrower, LLC***, 932 N.Y.S.2d 540, 2011 N.Y. Slip Op. 08345 (2d Dept., 2011); *see* ***Rossrock Fund II, L.P. v. Osborne***, 82 A.D.3d 737, 82 A.D.3d 737, 918 N.Y.S.2d 514 (2d Dept., 2011); ***Wells Fargo Bank, N.A. v. Cohen***, 80 A.D.3d 753, 755 [2d Dept., 2011]).

Consequently, the burden shifts to defendant to establish by admissible form the existence of a triable issue of fact with respect to a *bona fide* defense (***Quest Commercial, LLC v. Rovner***, 35 A.D.3d 576, 825 N.Y.S.2d 766 (2d Dept., 2006); *see* ***Neuhaus v. McGovern***, 293 A.D.2d 727, 728, 741 N.Y.S.2d 436 [2d Dept., 2002]), and not one based upon conclusory allegations. (***Layden v. Boccio***, 253 A.D.2d 540, 686 N.Y.S.2d 763 [2d Dept., 1998]).

In opposition, defendant submits an affidavit of Ali Reza Shaibani, the president of Shiraz; copies of various payments of principal and interest in the amount of $5,628.14; printouts of insurance payments and real estate payments ; and a Conditional Waiver of Tax Imposition Deposits ("Agreement") dated December 18, 2009.

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In sum, defendant claims that it has fully complied with the mortgage, note and agreement and has never been in default thereunder. Further, defendants believe that the instant motion is "frivolous and for the sole purpose of attempting to obtain additional interest at the default rate and to claim additional legal fees" (Affidavit of Shaibani ¶ Twenty-third).

In response, plaintiff contends that defendant's new assertions are meritless. First, it argues that although Shiraz, in ¶ "Fifth" of the opposition affidavit of Ali Reza Shaibani, alleges that "every payment of principal and interest" has been made, the defendant's assertion glosses over the failure of Shiraz to have made payments when the Second Default Notice was sent to it on March 3, 2010 and its failure to have cured its default within the cure period when the Third Default Notice that accelerated the indebtedness was sent to it on March 16, 2010. Indeed, the default of Shiraz is set forth in the "printout from the plaintiff" annexed to the Shaibani Affidavit at the end of Exhibit C.

Furthermore, Shiraz fails to acknowledge (i) the "charge backs" of various principal and interest payments and payments of sums required by the Agreement, which Shiraz made by checks that did not have sufficient funds to clear and (ii) the lateness of various principal and interest payments that Shiraz tendered, which triggered imposition of late charges that were not paid by Shiraz. Shiraz has offered no documentary evidence indicating that it timely paid the January 2010, February 2010 and March 2010 monthly payments.

While Shiraz conclusively alleges that this commercial mortgage loan was not to contain escrow provisions, plaintiff notes that ¶ 7(a) of the Mortgage provides for the mortgagor's obligation to pay sums that will be held in escrow for the payment of real estate taxes and insurance premiums as same become due and the documentary evidence demonstrates that Shiraz initially complied with this requirement by: (i) funding the Escrow Account with $6,903.68 at the September 24, 2008 Closing and (ii) by then paying required sums into escrow for the first four (4) months that Shiraz made payments on this loan.

It has been held that "when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene" (***First Fed. Sav. Bank v. Midura***, 264 A.D.2d 407, 694 N.Y.S.2d 121 (2d Dept., 1999), *quoting* ***New York Guardian Mortgagee Corp. v. Olexa***, 176 A.D.2d 399, 401, 574 N.Y.S.2d 107 [3d Dept., 1991]). Once a default has been declared and a loan had been accelerated, a mortgagee is not required to accept a tender of less than full repayment as demanded (*see* ***Albertina Realty Co. v. Rosbro Realty Corp.***, 258 N.Y. 472, 180 N.E. 176 (1932); ***Albany Sav. Bank v. Seventy-Nine Columbia St.***, 197 A.D.2d 816, 603 N.Y.S.2d 72 [3d Dept., 1993]; ***First Fed. Sav. Bank v. Midura, supra***).

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A valid tender requires an actual proffer of all mortgage arrears *(see **Home Sav. of Am. v. Isaacson**,* 240 A.D.2d 633, 659 N.Y.S.2d 94 (2d Dept., 1997); ***Bank of N.Y. v. Midland Ave. Dev.***, 193 A.D.2d 641, 597 N.Y.S.2d 458 [2d Dept., 1993]), but such a tender will cure a default only prior to notice of acceleration (*see **Dime Sav. Bank v. Glavey***, 214 A.D.2d 419, 625 N.Y.S.2d 181 (1st Dept., 1995) *lv to app denied* 87 N.Y.2d 802 (1995), *cert denied* 517 U.S. 1221 (1996) *reh denied* 518 U.S. 1046 [1995])

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Moreover "[a] dispute as to the exact amount owned by the mortgagor to the mortgagee may be resolved after a reference pursuant to RPAPL § 1321, and the existence of such a dispute does not preclude the issuance of summary judgment directing the sale of the mortgaged property" (***Long Island Savings Bank of Centereach FSB v. Denkensohn***, 222 A.D.2d 659, 635 N.Y.S.2d 683 (2d Dept., 1995), *quoting* ***Crest/Good Mfg. Co. v. Baumann***, 160 A.D.2d 831, 832, 554 N.Y.S.2d 264 [2d Dept., 1990]; ***Layden v. Buccio, supra***).

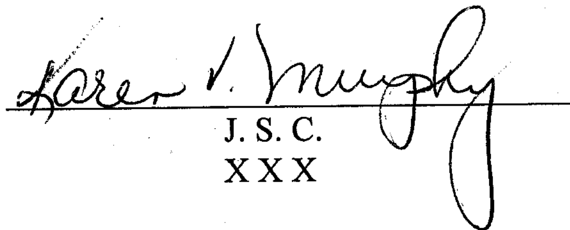
A referee to compute in a mortgage foreclosure action is authorized to resolve disputes as to the exact amount owned by the mortgagor to the mortgagee, including claimed overpayments or credits; the referee may also exercise discretion in determining that the mortgagee was not entitled to collect interest at the default rate. (***Central Mortgage Company v. Acevedo***, ___N.Y.S.2d___, 2011 WL 5107236 [N.Y. Sup.]).

Furthermore, contrary to defendant's contention, the motion need not be denied as premature on the ground that discovery has not been completed. Defendant has failed to demonstrate that further discovery might lead to relevant evidence (*see **CPLR 3212(f)***); ***Swedbank, AB v. Hale Borrower, LLC, supra; Cortes v. Whelan***, 83 A.D.3d 763, 764, 922 N.Y.S.2d 419 [2d Dept., 2011]).

In view of the foregoing, the motion for summary judgment is granted.

The foregoing constitutes the Order of this Court.

Dated: December 13, 2011
Mineola, N.Y.



J. S. C.
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