MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK **PART 17**
COUNTY OF QUEENS **HON. ORIN R. KITZES**

----------x

FIRST AMERICAN INTERNATIONAL BANK,

Plaintiff,

-against-

Index No.: 20414/11
Motion Date: 03/14/12
Motion No. 24
Seq. No. 1

SPOILED TRUCKS & CARS CORP., MOHAMMAD TAGHI NOORI, CAPITAL ONE DEVELOPMENT LLC, AND "JOHN DOE#1" THROUGH "JOHN DOE #12" the last twelve names being fictitious and unknown to First American International Bank, 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. **Dated: March 21, 2012**

----------x

Plaintiff moves for an order awarding Plaintiff summary judgment on the first cause of action in Plaintiff's Complaint; (ii) striking each of the defenses included in the Defendants' Answer to the Complaint; (iii) appointing a referee to compute the amount due to Plaintiff.

According to the complaint and Plaintiff's evidence, this action involves a loan by plaintiff to defendant Spoiled Trucks, made on or about November 16, 2006. The aggregate amount of the Loan was not to exceed two million seven hundred thousand ($2,700,000.00) dollars. Spoiled Trucks secured this loan with a mortgage on certain real property it owned located at 81-05 Queens Boulevard in Elmhurst. The purpose of the Loan was to consolidate Spoiled Trucks' existing mortgages on the Property, and provide Spoiled Trucks with a revolving line of credit. The Loan was to mature on December 1, 2008 (the "Maturity Date"). Spoiled Trucks also had the option to extend the Maturity Date for two three-month periods, provided that certain terms and conditions were met by Spoiled Trucks. On or about November 16, 2006, Spoiled Trucks executed a consolidated mortgage note in the original principal amount of $2,700,000.00. On or about November 16, 2006, Spoiled Trucks executed the consolidated mortgage (the "Consolidated

Mortgage"), in order to secure payment of the Consolidated Mortgage Note. Contemporaneously with the Consolidated Mortgage, Spoiled Trucks and Plaintiff entered into the Consolidation, Modification and Extension Agreement (the "CMEA"), pursuant to which all existing mortgages secured by the Property were consolidated into the Consolidated Mortgage, constituting a single first lien on the Property. On or about December 1, 2006, the Consolidated Mortgage and CMEA were recorded in CRFN: 2006000665334 in the Office of the City Register of the City of New York. Plaintiff funded the Loan in the amount of $2,700,000.00 on November 16, 2006. In order to further secure payment of the Loans to Plaintiff, Defendant Noori executed a Guaranty on November 16, 2006 (the "Noori Guaranty") in connection with the Loan.

Spoiled Trucks failed to pay the Loan in full on the Maturity Date. Thereafter, Plaintiff extended the Loan from time to time, with the latest extension expiring on April 1, 2011. However, Spoiled Trucks failed to pay the Loan in full on April 1, 2011. On May 11, 2011, counsel to Plaintiff notified Spoiled Trucks, in a letter, of several events of default under the Loan Documents, including, Spoiled Trucks' failure to pay the Loan in full on April 1, 2011, and Spoiled Trucks' unauthorized transfer of the Property to Capital One. In the May 11, 2011 letter, Plaintiff also notified Spoiled Trucks that no further extensions of the Maturity Date would be given in connection with the Loan, and that all amounts due under the Loan Documents were due immediately. Finally, in the May 11 letter, Plaintiff notified Spoiled Trucks that if full payment of the amounts due under the Loan Documents was not received by June 1, 2011, that Plaintiff would take appropriate steps to enforce its rights and remedies under the Loan Documents. Spoiled Trucks failed to pay the Loan in full on June 1, 2011, and Plaintiff considers this an event of default. In addition, during the process of discussing Spoiled Trucks' request for further extensions, Plaintiff learned that its collateral for the Loan, the Property, was transferred to Capital One by Spoiled Trucks' and Plaintiff did not give its consent to the transfer. Plaintiff considers this transfer to be an event of default. Plaintiff repeatedly notified Spoiled Trucks, as borrower, and Noori, as guarantor, of these events of default. Finally, as of June 1, 2011, the total amount owed by Spoiled Trucks to Plaintiff is $2,831,906.27, which includes, principal, interest, and fees Based on these failures to make payments, on August 30, 2011, Plaintiff commenced the instant action for Foreclosure of Mortgage. Thereafter, Plaintiff made the instant motion, which is opposed by Defendants.

In moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default. Wells Fargo v. Webster, 61 A.D.3d 856, 856 (2d Dept. 2009), *citing* Republic Natl. Bank of N. Y. v. O'Kane, 308 A.D.2d 482, 482 (2d Dept. 2003), *quoting* Village Bank v. Wild Oaks Holding, 196 A.D.2d 812, 812 (2d Dept. 1993). In Wells Fargo, *supra*, the Second Department held that plaintiff bank sustained its initial burden of demonstrating its entitlement to judgment as a matter of law by submitting proof of the existence of the note, mortgage, and

consolidation agreement, and the defendants' default in payment. *Id.* Once plaintiff's burden has been met, it becomes incumbent on the defendants to demonstrate, by admissible evidence, the existence of a triable issue of fact as to a bona fide defense. *Id*.

Here, the Court finds that Plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law on its claims for foreclosure of the Mortgage, and demonstrated that there are no material issues of fact in dispute with respect to these claims. More specifically, Plaintiff has submitted to the Court copies of the duly executed Commitment Letter, Note and Mortgage and Guaranty, and affidavit of Selina Xu, an employee of Plaintiff who is responsible for the administration of the subject Loan, and was responsible for corresponding with defendant Spoiled Trucks & Cars Corp. concerning the Loan. Additionally, she reviewed Plaintiff's books and records relating to the subject Loan. In her affidavit, Ms. Xu sets forth the facts set forth above. Moreover, the Commitment Letter sets forth the following: "No statements agreements or representations, oral or written which may have been made either by the Bank or by any employee, agent or broker, with respect to this commitment letter or the Loan, shall be of any force or effect, except to the extent stated in this commitment letter, and all prior agreements and representations in respect to this commitment letter and the Loan are merged herein so that this commitment letter shall contain the entire agreement with respect to the Loan." Plaintiff has established that Defendants Spoiled Trucks have failed to make, or cause to be made, payment in accordance with the terms of the Note and Mortgage.

Defendants oppose this motion and claim that Plaintiff's motion for summary judgment is devoid of any competent, reliable evidence establishing that defendants are in default of their loan obligations as a matter of law. According to them, the motion contains absolutely no documentary corroboration of that conclusory allegation and the facts set forth by Plaintiff and submitted in defendants' opposition affidavit establish triable issues that preclude summary judgment. Furthermore, Plaintiff's employee's affidavit includes only one self-serving, unsubstantiated letter sent after the fact by outside litigation counsel declaring that the loan term had previously expired. But the retroactive deadline claimed in the litigator's letter was not consistent with the Plaintiff's conduct since it never previously communicated this deadline to defendants and, even after the litigator attempted to make a record that is contrary to the course of dealings and the documents, the Plaintiff continued to accept loan payments from defendants, as it had for years following the close of the loan term.

Defendants also claim that facts regarding the long-standing, complex relationship between Plaintiff and defendants, which explains the commercial reasons why Plaintiff acceded to the on-going extension of the loan term for years and creates issues of fact concerning the defenses of waiver, estoppel, unclean hands and good faith reliance. These facts are set forth in the affidavit of Mr. Noori. and submitted documents.

In pertinent part, Mr. Noori states that, defendants were induced to enter into the initial

lending relationship with Plaintiff by its promise to provide construction financing for the development of the Property after refinancing it. Mr. Noori points out that the Xu Affidavit is devoid of any mention of the Bank's promise to extend construction financing after the initial refinancing. He also claims that Plaintiff recognized that the source of repayment of the loan would be proceeds of future sales at the development project and that the loan was thus intrinsically tied to the forthcoming construction financing that the Bank would provide. He also states that a joint venture arrangement was created, defendant Capital One Development, on February 6, 2008. Spoiled Trucks and Capital One Construction are both members of Capital One Development, and Spoiled Trucks thereafter transferred ownership of the Property to Capital One Development on April 4, 2008. Plaintiff was well aware of all of this throughout the transfer of the Property and subsequent payments to Plaintiff. Moreover, despite having promised construction financing of approximately $8-$10 million to induce the loan and having been aware of the steps taken to develop the Property, including the developmental deal and demolition work, Plaintiff ultimately refused to provide the financing. As a result, construction of the Property continues to be delayed due to an inability to secure alternative financing.

He also states that Plaintiff waived any claim that the loan term expired because it consistently accepted payments on the loan for years after the initial term came due. From December 2008 through September 2009, the Bank accepted the monthly payments made on the loan without any effort to claim or enforce the end of the loan term. Furthermore, he states that Plaintiff never provided notice that the loan was deemed to be in default. Rather, Plaintiff sent extensions of the loan, on or about October 21, 2009, that stated that the loan will mature on November 1, 2009, yet, on November 3, 2009 and December 7, 2009, Plaintiff continued to accept monthly payments made on the loan. He also states that on or about December 22, 2009 and December 31, 2009, Plaintiff sent Spoiled Trucks notices of default stating that "payment in the amount of $2,827,162.48 is presently due" and that "the Loan is in default, and has been accelerated," respectively. Again on or about January 15, 2010 and January 29, 2010, the Bank sent Spoiled Trucks notices of default stating that "payment in the amount of $2,819,652.06 is presently due" and that "the Loan is in default, and has been accelerated," respectively. However, on February 24, 2010, Plaintiff continued to accept monthly payments on the loan. On or about February 1, 2010 and March 1, 2010, the Bank sent Spoiled Trucks notices of default stating that "payment in the amount of $2,829,083.57 is presently due" and that "the Loan is in default, and has been accelerated," respectively. In addition, on August 2, 2010, the Bank sent Spoiled Trucks a notice of default providing that "payment in the amount of $116,273.97 is presently due." Nevertheless, the Bank again continued to accept monthly payments on the loan submitted during the period of April 2010 through March 2011. On May 11, 2011, outside counsel for the Bank sent a letter to Spoiled Trucks notifying Spoiled Trucks of the purported occurrence of material events of default under the loan documents. In particular, the letter acknowledges that the loan had been

extended "from time to time," but claimed without any basis whatsoever that "the latest extension [had run] on April 1, 2011 . . . [and] no further extensions of the maturity date will be given." Defendants had never received any prior notice of any purported April 1, 2011 deadline, and in its letter counsel provided no basis for its claim that such a deadline had existed. Based on Mr. Noori's affidavit and the documentary evidence, defendants claim Plaintiff's conduct and treatment of the loan raises triable issues of material fact concerning whether the loan is in default.

The Court finds that Defendants have failed to raise an issue of fact regarding Plaintiff's entitlement to summary judgment in its favor. Initially, the Court notes that Defendants do not allege that they have made the payment demanded in the May 11, 2011 letter. In any event, the documentary evidence proves that the Loan matured. According to its terms, the Loan matured on December 1, 2008 and Spoiled Trucks had the opportunity to obtain two three month extensions upon the payment of a fee. On April 28, 2009 Plaintiff and Spoiled Trucks entered into a Credit Addendum for the Loan, extending the term of the Loan to November 1, 2009. Thus, the Loan matured no later than November 1, 2009. Thereafter, as was its right, Plaintiff temporarily forbore from exercising its rights and remedies under the Loan Documents. During this period, Plaintiff accepted partial payments of the amounts due in connection with the Loan. At no time, however, did any of the Defendants tender, as they were required to, the entire amount due and owing to Plaintiff. In any event, by April 2011, it was clear that Plaintiff had elected to exercise its rights and remedies and sent such to Defendant Spoiled Trucks. Plaintiff's acceptance of partial payment cannot constitute a waiver of the right to foreclose, or an indefinite extension of the Loan's maturity date.

Furthermore, Defendants' claim of lack of notice is not material and in any event, is contradicted by documentary evidence both sides have submitted. First, absent language in a mortgage to the contrary, there is no requirement in New York that a defaulting commercial borrower be given written notice of the default, or the opportunity to cure the default prior to the Lender's commencing a foreclosure action. See, 1-4 Bergman on New York Mortgage Foreclosures, § 4.04A ("The general rule is that demand for payment is not a prerequisite to commencement of a mortgage foreclosure action.") Thus, as a matter of law, defendants' claims of lack of notice are no bar to summary judgment. Moreover, defendants have explicitly waived the right to receive notice here. The Note provides, in relevant part, that: "I [Spoiled Trucks] and any other person who has obligations under this Note waive the rights of presentment, notice of dishonour and protest. . . .'Notice of dishonour' means the right to require you to give notice that the amounts due have not been paid." In any event, as is clear from the Xu and Noori affidavits, Defendants actually received the very notice they are complaining of. Moreover, under New York law, the Summons and Complaint in this case also provided legally sufficient notice of the default. Clayton Nat'l, Inc. v. Guldi, 307 A.D.2d 982 (2d Dep't 2003.)

Similarly, Defendants' claim that Plaintiff's continued acceptance of the monthly loan

payments creates issues of material fact of waiver and estoppel is rejected. Each of the Loan Documents specifically bars such a defense. Moreover, Defendants have failed to put forward sufficient facts to establish their waiver and estoppel defenses. The bare assertion that certain representatives of the mortgagee made such a promise is not enough to create an issue of fact. *See*, Flintkote Co. v. Bert Bar Holding Corp., 114 A.D.2d 400 (2d Dep't 1985.) In this regard, the facts set forth by Mr. Noori do not relate to the loan the borrower's and guarantor's default on their obligations under the Loan Documents. Nor do his assertions overcome the integration clause contained in the commitment letter which provides, among other things that "all prior agreements and representations n respect to this commitment letter and the Loan are merged herein so that this commitment letter shall contain the entire agreement with respect to the Loan." The Court notes that to the extent Defendants rely upon any representations made by bank employees, that are not in the loan documents, such reliance is misplaced. Furthermore, to the extent Plaintiff waived any of its rights, any such waiver was fully and effectively withdrawn by Plaintiff's counsel's May 2011 letter to Spoiled Trucks.

Defendants' final argument against summary judgment is that Plaintiff is not entitled to summary judgment because it has unclean hands is also rejected by this Court. As an initial matter, unclean hands is not a defense to a mortgage foreclosure action. *See* La Jolla Bank, FSB v Whitestone Jewels, LLC, No. 13920/09, 2011 NY Slip Op. 33362(U) at 9 (N.Y. Sup. Ct. Queens County Dec. 7, 2011.) Regardless, even if Defendants could raise unclean hands as a defense on this motion, that defense is barred by the agreements between the parties. Neither the commitment letter nor any of the Loan Documents make mention of any proposed construction financing for Spoiled Trucks. The integration clause precludes any claim or defense by Spoiled Trucks based on alleged oral representations that occurred prior to the October 30, 2006 date of the commitment letter. In any event, Spoiled Trucks has specifically waived its unclean hands defense since the April 28, 2009 loan extension specifically stated it was, in part, entered into so that Spoiled Trucks could obtain construction financing from another Lender.

Based on the above, the Court finds Defendants have failed to raise an issue of fact that prevents the granting of this motion. Accordingly the motion is granted, in its entirety.

Settle order

ORIN R. KITZES, J.S.C.