M E M O R A N D U M

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS - IAS PART 6

By: **Lane, J.**

GABRIEL GATTO,

Plaintiff,

-against-

DOUG SMITH a/k/a MARION D. SMITH, et al.,

Defendants.

Index No. 2572/11

Motion
Date October 16, 2012

Motion
Cal. Nos. 7 and
Restored motion per
SFO July 11, 2012

Motion
Sequence Nos. 3 and 4

Plaintiff's motion for an order granting summary judgment in favor of plaintiff pursuant to CPLR 3212 and striking the answer and affirmative defenses by defendants Doug Smith a/k/a Marion D. Smith, Kim Smith, and United Crane & Rigging Services, Inc., the appointment of a referee to compute and report the amount due plaintiff pursuant to RPAPL 1321, and amendment of the caption herein to delete "JOHN DOE #1-10" AND "JANE DOES 1-10" and plaintiff's motion for the appointment of a receiver to collect rents and preserve the mortgaged premises that is the subject of the foreclosure action, all for the benefit of the plaintiff pending the determination of this action and as more fully outlined by the annexed proposed order are hereby consolidated solely for purposes of disposition of the instant motions and are hereby decided as follows:

Summary judgment is a drastic remedy and will not be

granted if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v. Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk Co. v. Klein, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4th Dept 2000]).

Plaintiff established a prima facie entitlement to

foreclose on eight(8) mortgages, by demonstrating the existence of the mortgages and notes, ownership of the mortgages, and the defendants' default in payment (see, Campaign v. Barbra, 23 AD3d 327 [2d Dept 2005]; First Trust National Association v. Pinter, 264 AD2d 464 [2d Dept 1999]).

The court finds that plaintiff has not established that the first affirmative defense of failure to state a cause of action upon which relief may be granted should be dismissed. Despite plaintiff's contentions, the first affirmative defense of failure to state a cause of action is properly interposed in the answer according to the most current legal precedent in the Appellate Division, Second Department (see, Butler v. Cantinella, 58 AD3d 145 [2d Dept 2008]).

The court finds that plaintiff has established that the second affirmative defense of failure to satisfy condition precedent including lack of proper notice of default should be dismissed. CPLR 3013 requires that statements in a pleading be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense. Defendants have failed to state the conditions precedent and only makes a claim of lack of proper notice of default. In the instant case, plaintiff establishes that no prior notice is required and notwithstanding, a notice of acceleration was served.

The court finds that plaintiff has established that the

third affirmative defense of failure to comply with truth in lending act disclosure requirements and violations of New York Laws should be dismissed. This defense fails to satisfy the requirements of CPLR 3013 in that no facts are pled at all. As such, the defense shall be dismissed.

The court finds that plaintiff has established that the fourth affirmative defense of waiver should be dismissed. Plaintiff establishes that pursuant to the terms of the Notes and Mortgages, none of the Notes or Mortgages, or lender's/mortgagees's rights or remedies thereunder, may be waived unless such waiver is in writing signed by the parties. Plaintiff establishes that there was no such writing.

The court finds that plaintiff has established that the fifth affirmative defense of Statute of Frauds should be dismissed. Pursuant to New York's Statute of Frauds, General Obligations Law § 5-701, an agreement, promise, or undertaking is void unless it is memorialized in writing and subscribed by the party to be charged. Plaintiff established that the Notes and Mortgages were executed and delivered and attaches copies of the Notes and Mortgages.

The court finds that plaintiff has established that the sixth affirmative defense that the alleged guarantees are not enforceable for lack of consideration should be dismissed. It is well-established law that "where one party agrees with another party that, if such party for a consideration performs a certain act [for] a third person, he will guarantee payment of the

consideration by such person, the act specified is impliedly requested by the guarantor to be performed and, when performed, constitutes a consideration for the guarantee" (Columbus Trust Company v. Campolo, 110 AD2d 616 [2d Dept 1985] [internal citations omitted]). Plaintiff established that in consideration of the making of the loan in the amount of $140,000.00 by plaintiff to defendant Smith that was evidenced by Note H and secured by Mortgage H, on September 15, 2009, simultaneously with defendant Smith's execution and delivery of Note H and Mortgage H to plaintiff, defendants Kim Smith, Glenn D. Smith and United Crane & Rigging Services Inc. (collectively, "Guarantors") executed and delivered guarantees whereby Guarantors guaranteed all of defendant Smith's obligations under Note C, Note D, Note E, Note F, Note G, Note H, Mortgage C, Mortgage D, Mortgage E, Mortgage F, Mortgage G and Mortgage H (collectively, the "Guaranteed Notes and Mortgages"). Plaintiff also proved that at the times Guarantors executed and delivered the Guarantees to plaintiff, the aggregate principal amount outstanding under the Guaranteed Notes and Mortgages was $460,000.00 and that plaintiff would not have extended the additional credit in the amount of $140,000.00 to defendant Smith and therefore exposed himself to the additional risks unless Guarantors agreed to execute and deliver the Guarantees to plaintiff. In sum, plaintiff proved that since the Guarantees were executed and delivered by Guarantors at the time plaintiff made the $140,000.00 loan to defendant Smith, and the proceeds of said loan were disbursed to

defendant Smith, the consideration defendant Smith received from said new loan of $140,000.00 is sufficient consideration for the Guarantees.

The court finds that plaintiff has established that the seventh affirmative defense that the loans that are the subject of the instant foreclosure proceeding are usurious should be dismissed. It is well-established law that the essential elements of usury are: a contract founded on a loan of, or forbearance to collect money and an intent by the lender to charge the borrower more than the legal rate of interest at the time the loan or forbearance agreement was made (see, Freitas v. Geddes Sav. & Loan Ass'n, 63 NY2d 254 [1984]).

The Court held in Greenfield v. Skydell, 186 AD2d 391 [1st Dept 1992],

> We find that there is an issue of fact as to whether the transaction at issue was usurious. Intent is an essential element of usury (Freitas v. Geddes Sav. & Loan Assn., 63 NY2d 254, 262). A defendant seeking to interpose the defense of usury must prove all of the essential elements thereof by clear evidence (Giventer v. Arnow, 37 NY2d 305, 309). The court will not assume that the parties entered into an unlawful agreement, and when the terms of the agreement are in issue, and the evidence is conflicting, the lender is entitled to a presumption that he did not make a loan at a usurious rate (Giventer v. Arnow, 37 NY2d 305, 309, supra). Moreover, in this case, the usurious nature of the transaction does not appear upon the face of the instrument, and

> "[i]t is the prevailing view that where usury does not appear on the face of the note, usury is a question of fact" ([***2] Freitas v. Geddes Sav. & Loan Assn., supra, at 262). In this case, no stated rate of interest appears upon the face of the note; it is a note for $280,000 payable in two months. To establish usury, facts extrinsic to the document must be referred to.

New York General Obligations Law § 5-501 and New York Banking Law § 14-a sets the legal maximum legal rate of interest at 16% per year. In the instant case, plaintiff established that none of the notes has a rate of interest above 16%.

Via, inter alia, the affidavits of defendants, Doug Smith a/k/a Marion D. Smith, Kim Smith, and United Crane & Rigging Services, Inc., the closing statements for several of the mortgage transactions, which documents indicate that origination fees were charged which may bring the interest rate above the legal limit, defendants established a triable issue of fact as to whether the loans were usurious.

The court finds that plaintiff has established that the eighth affirmative defense of unclean hands should be dismissed. It is well-established law that, generally, unclean hands is not recognized as a defense to a foreclosure. "New York law ordinarily permits an unclean hands defense only when plaintiff's reprehensible conduct is "directly related to the subject matter in litigation and the party seeking to invoke the (unclean hands) doctrine was injured by such conduct" (Mallis v. Bankers Trust Co., 615 F2d 68 [2d Cir 1980][internal citations omitted]). In

the instant case, there is no claim of resulting damages by defendants. As such, this affirmative defense shall be dismissed.

Plaintiff demonstrated that the amendment of the caption is warranted and that defendants would not be prejudiced (see, Alaska Seaboard Partners, LP v. Low, 294 AD2d 318 [2d Dept 2002]).

The amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

GABRIEL GATTO,

Plaintiff, Index No. 2572/11

-against-

DOUG SMITH a/k/a MARION D. SMITH, KIM SMITH, GLENN D. SMITH, UNITED CRANE & RIGGING SERVICES, INC., GREEN COMPLEX, INC., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, PARKING VIOLATIONS BUREAU, UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE,

Defendants.

Plaintiff's motion for the appointment of a receiver to collect rents and preserve the mortgaged premises that is the subject of the foreclosure action, all for the benefit of the plaintiff pending the determination of this action and as more fully outlined by the annexed proposed order is hereby determined as follows:

Pursuant to Real Property Law § 2454(10):

> Mortgagee entitled to appointment of receiver. A covenant "that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver," must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness.

Pursuant to RPAPL 1325(1):

> Where the action is for the foreclosure of a mortgage providing that a receiver may be appointed without notice, notice of a motion for such appointment shall not be required.

Plaintiff established that pursuant to the express terms of the mortgages, plaintiff is entitled to the appointment of a receiver without regard to the sufficiency of the property and or any other security for the indebtedness secured by the mortgages. Plaintiff established that the mortgages state that in an action to foreclose the mortgages, the mortgagee is entitled to the appointment of a receiver, and that the mortgagee is entitled to the appointment of a receiver without regard to the adequacy of the security and regardless of proving the necessity for the appointment. As such, plaintiff is entitled to

the appointment of a receiver herein.

Settle order.

Dated: December 20, 2012

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Howard G. Lane, J.S.C.