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SHORT FORM ORDER

INDEX No. 09-48937

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 6-28-12
ADJ. DATE 7-19-12
Mot. Seq. # 004 - MG

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GRAND BANK FOR SAVINGS, FSB PROFIT SHARING PLAN,

Plaintiff,

- against -

ARAUJO FAMILIA, INC., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and JOHN DOE and MARY DOE (said names being fictitious, it being the intention of the Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claims an interest in or lien upon the premises being foreclosed herein),

Defendants.

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment and the appointment of a referee; Notice of Motion/ Order to Show Cause and supporting papers with Memorandum of Law 1 - 10; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers with Memorandum of Law 11 - 17; Replying Affidavits and supporting papers with Memorandum of Law 18 - 24; Other ____; it is,

ORDERED that this motion by plaintiff to dismiss the defense and counterclaim of defendant Araujo Familia, Inc. and the foreclosure claim and cross-claim of the intervening plaintiffs Ufuk Karali and Bayrak Karali, and for summary judgment in its favor on the complaint against defendant Araujo

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Familia, Inc. and the New York State Department of Taxation and Finance, and the appointment of a referee to compute is granted.

On November 24, 2008, Ufuk Karali and Bayrak Karali (collectively the "Karalis"), sold the commercial property commonly known as 322 West Montauk Highway, Hampton Bays, New York (the "Property") to defendant Araujo Familia, Inc. ("Araujo") for $1,200,000. Araujo borrowed $1,098,000 from the Karalis for the purchase, executing a 20-year note secured by a mortgage on the Property (the "purchase money mortgage"), with monthly payments of $8,845.41. On April 3, 2009, the Karalis entered into a Mortgage Purchase Agreement wherein the plaintiff purchased for a price of $370,167.17, the next sixty monthly payments due under the purchase money mortgage (the "Agreement"). On the same day, the Karalis executed and delivered an Allonge to the note, transferring all right, title and interest thereto to plaintiff, and executed an assignment of the mortgage assigning all beneficial interest thereto to the plaintiff. After the closing of title, plaintiff wired to Ufuk Karali $369,297.17, the net proceeds under the Agreement. The Karalis notified Araujo that the future mortgage payments were to made to the plaintiff.

Araujo defaulted in making the August 1, 2009 mortgage payment to the plaintiff and all payments due thereafter. Araujo also failed to pay the real estate taxes assessed on the Property which resulted in a tax sale certificate being issued for 2010/2011. On October 8, 2009, as required by the Agreement, plaintiff notified the Karalis of Araujo's default. Upon being notified of the default, pursuant to the mortgage default provision of the Agreement, the Karalis had fifteen (15) days within which to cure the Araujo's default. The Karalis had the option to: (1) repurchase the plaintiff's interest in the note and mortgage for a sum determined by the calculations set forth in paragraph 3 of the Agreement; or (2) bring and keep current the defaulted monthly mortgage payments. The Karalis failed to exercise either option, which constituted a default under the terms of the Agreement. Upon the Karalis' default, the Agreement provides that ownership of the note and mortgage vests and accrues entirely in the plaintiff, and the Karalis have no further rights to any proceeds thereunder.

In December 2009, plaintiff commenced the instant foreclosure action against Araujo. Issue was joined and a notice of appearance was filed by the New York State Department of Taxation and Finance in which it waived service of all but certain notices. In its answer, Araujo asserted an affirmative defense and counterclaim alleging that the Karalis had represented that there were no pending proceedings or administrative challenges when in fact the Karalis had been notified by the Town of Southampton of a preliminary assessment on the Property which could increase the tax liability in 2008 by $17,168.58. In reply to the counterclaim, plaintiff alleged several affirmative defenses including, *inter alia*, failure to state a cause of action (first affirmative defense), equitable estoppel, waiver and ratification (second affirmative defense), documentary evidence (fourth affirmative defense) and that as a bona fide purchaser or encumbrancer for value pursuant to Real Property Law § 266, it could not be held liable for any purported fraud committed by its predecessor-in-interest.

On March 4, 2010, the plaintiff moved for summary judgment against Araujo seeking judgment on its complaint; Araujo opposed. By Order dated April 6, 2010 (Cohen, J.), the motion was denied with leave to renew after a conference. Judge Cohen found that although the plaintiff had made out a

prima facie case entitling it to summary judgment, Araujo had raised an issue of fact of misrepresentation regarding the taxes on the Property. Thereafter, by Judge Cohen's Order dated November 23, 2010, the Karalis were permitted to intervene in the action as co-plaintiffs, and filed a complaint against Araujo seeking a judgment of foreclosure and sale of the Property, and a cross-claim against the plaintiff seeking a declaration that paragraph 4 of the Agreement is null, void and unenforceable as a contract of adhesion and as procedurally and substantively unconscionable. In its answer to the Karalis' complaint, Araujo again asserts the affirmative defense and counterclaim of fraud/misrepresentation as to the real estate taxes and seeks recission of the note and mortgage. The Karalis deny the allegation and assert that Araujo failed to conduct its own due diligence with regard to the real estate taxes. Discovery has been conducted; the instant motion by plaintiff to, in essence, renew its prior motion for summary judgment ensued.

As set forth above, plaintiff previously made out its *prima facie* case entitling it to summary judgment on the complaint against Araujo by establishing the existence of a valid mortgage and default in payment (*see* April 6, 2010 Order [Cohen, J.]). In opposition to plaintiff's instant motion to renew, Araujo relies upon the same papers submitted in opposition to the initial motion, wherein it was argued that the Karalis had knowledge of a pending tax assessment on the Property which would increase the real estate taxes threefold, and failed to disclose this information prior to the Araujo's purchase and acceptance of the purchase money mortgage transaction. Additionally, in response to the plaintiff's interrogatories, Araujo claims that the Karalis fraudulently induced it to accept the purchase money mortgage. As to the plaintiff, Araujo does not allege that plaintiff had actual knowledge of the Karalis' alleged misrepresentations concerning the taxes, but rather alleges that the plaintiff knew or should have known of the potential existence of irregularities in the underlying loan transaction.

Plaintiff argues that because it is a holder in due course, the claims by Araujo that the Karalis misrepresented a material fact or fraudulently induced them to enter into the transaction are insufficient to overcome its *prima facie* entitlement to a judgment of foreclosure and sale and the appointment of a referee. This Court agrees.

Uniform Commercial Code § 3-302 provides that "[a] holder in due course is a holder who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." An assignee can be a holder in due course (*see* ***Pioneer Credit Corp. v Bon Bon Cleaners Corp.***, 38 AD2d 743, 329 NYS2d 350 [2d Dept 1972]).

Here, nothing has been presented to reveal that the plaintiff entered into the Agreement and accepted the assignment with notice of any defense or claim Araujo may have had to the underlying note and mortgage (*see* ***Three Feathers v Roemer***, 270 AD2d 769, 704 NYS2d 746 [3d Dept 2000]). The assertion that the Karalis fraudulently induced Araujo to enter into the purchase money transaction does not constitute a defense against the plaintiff. "[A]lthough it is well settled that an assignee of a mortgage takes it subject to the equities attending the original transaction (internal quotation marks and citation omitted), [the plaintiff] cannot be required to answer in damages for alleged misrepresentations committed by [the Karalis] in connection with the making of the [original] mortgage loan" (***US Bank***

National Assn v McPhearson, 33 Misc 3d 1219[A], 2012 NY Slip Op 50742[U], 2012 WL 1521862 [Sup Ct Queens County]; *see also* ***Three Feathers v Roemer***, *supra*). Furthermore, contrary to the argument by Araujo that there were red flags to alert plaintiff of irregularities in the underlying note and mortgage which should have put it on notice of a claim or defense is insufficient to prevent plaintiff from qualifying as a holder in due course. It is irrelevant what a reasonable credit union in plaintiff's position should have known or should have inquired about as only actual, subjective knowledge of a defense or claim, not constructive knowledge or suspicious circumstances, will prevent a holder from acquiring the status of a holder in due course (*see* ***In re AppOnline.com, Inc.***, 321 BR 614, *affd* 128 Fed. Appx. 171 [2004]; ***Cardarelli v Scodek Constr. Corp***, 304 AD2d 894, 758 NYS2d 188 [3d Dept 2003]). In any event, at the time the Agreement was entered into, Araujo was making the mortgage payments as agreed, and nothing has been presented to indicate that plaintiff actually knew Araujo would not be able to continue meeting its financial obligations thereunder (*see* ***Budget Financial Corp. v Bernstein***, 42 AD2d 893, 347 NYS2d 593 [1st Dept 1973], *affd* 35 NY2d 761, 362 NYS2d 147 [1974]). Moreover, the plaintiff was under no duty to investigate the status of the underlying note and mortgage, even if there existed suspicious circumstances which might indicate to some credit unions that an investigation was necessary (*see* ***DH Cattle Holdings Co. v Kuntz***, 165 AD2d 568, 568 NYS2d 229 [3d Dept 1991]).

Because Araujo has not provided any factual evidence to impeach plaintiff as a holder in due course, there are no triable issues of fact to defeat plaintiff's entitlement to recover. Thus, having satisfied the requirements of UCC § 3-302, plaintiff, as a holder in due course, is deemed to have taken the note and mortgage free of the defenses raised by Araujo (*see* UCC 3-306; ***Three Feathers v Roemer***, *supra*). Hence, Araujo has failed to raise any question of fact as to its default on the mortgage (*see* ***LBV Properties v Greenport Dev. Co.***, 188 AD2d 588, 591 NYS2d 70 [2d Dept 1992]).

The Karalis' claim that they are entitled to the appointment of a referee and a judgment of foreclosure and sale is without merit. The Karalis defaulted under the terms of the Agreement, thus, pursuant to the terms thereof, the plaintiff's limited interest in the Property (i.e., sixty mortgage payments), ripened into a full interest in the Property, and forfeiture of their rights to any proceeds from the note and mortgage.

The circumstances which motivated the Karalis to sell the underlying note and mortgage, or a portion thereof, is not dispositive. The allegation by the Karalis that the plaintiff made an oral representation to purchase their full interest in the mortgage is not binding or enforceable as such purported representation was not reduced to writing and thus was "nothing more than negotiations, or an agreement to agree" (***Two Wall St. Assoc. Ltd. Partnership v Anderson, Raymond & Lowenthal***, 183 AD2d 498, 498, 583 NYS2d 436 [1st Dept 1992]; *see* ***Joseph Martin, Jr. Delicatessen v Schumacher***, 52 NY2d 105 [1981]; ***LaBarca v Altenkirch***, 193 AD2d 586 [2d Dept 1993]). Also not dispositive is the assertion by the Karalis that they relied upon the aforementioned oral agreement made prior to executing the Agreement. Such an assertion violates the parol evidence rule and is barred (***M & T Mortgage Corp. v Ethridge***, 300 AD2d 286, 751 NYS2d 741 [2d Dept 2002]).

Additionally, not persuasive is the claim by the Karalis that plaintiff exerted pressure and a "bait and switch" to fraudulently induce them to enter into an Agreement with unconscionable terms. The determination of unconscionability is a matter of law for the court to decide (***Emigrant Mortg. Co., Inc. v Fitzpatrick***, *supra*). The Karalis have not presented any evidence to indicate that they had an absence of meaningful choice as to whether to accept the terms of the Agreement (*see* ***Fremont Investment & Loan v Laroc***, 21 Misc 3d 1124[A], 873 NYS2d 511 [Sup Ct Queens County 2008]), citing ***King v Fox***, 7 NY3d 181, 818 NYS2d 833 [2006] and ***Gillman v Chase Manhattan Bank, N.A.***, 73 NY2d 1, 537 NYS2d 787 [1988]). There is nothing unconscionable about enforcing the terms of an agreement they willingly entered into (*see* ***Arias Indus., Inc. v 1411 Trizechahn Swig, LLC***, 294 AD2d 107, 744 NYS2d 362 [1st Dept 2002]). Even assuming, without deciding, that unconscionability is an affirmative defense to the underlying default, the Karalis failed to demonstrate that "no reasonable and competent person would accept [the] terms, which are so inequitable as to shock the conscience" (internal citations omitted) (***LaSalle Bank Nat. Assn v Kosarovich***, 31 AD3d 904, 906, 820 NYS2d 144 [3d Dept 2006]; *see also* ***Emigrant Mortg. Co., Inc. v Fitzpatrick***, 95 AD3d 1169, 945 NYS2d 697 [2d Dept 2012]). That the Karalis "may have struck a bad bargain does not excuse [their] default" (***LaSalle Bank NA v Kosarovich***, *supra* at 906). Hence, the Karalis' complaint and cross-claim cannot be sustained.

Accordingly, the plaintiff is entitled to summary judgment in its favor and against the defendants on its complaint and to summary judgment in its favor and against the co-plaintiff intervenors dismissing their foreclosure claim and cross-claim.

Submit Order of reference.

Dated: December 28, 2012

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION