Community Preserv. Corp. v Affordable Hous. Corp.
2013 NY Slip Op 30611(U)
March 15, 2013
Supreme Court, New York County
Docket Number: 106296/10
Judge: Joan A. Madden
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SCANNED ON 3/29/2013

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. **PART 11**

Justice

Index Number : 106296/2010
COMMUNITY PRESERVATION
vs.
AFFORDABLE HOUSING CORP
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is granted and determined in accordance with the annexed decision. Settle order on notice. The cross-claim by defendant City is severed and shall continue.

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: March 15, 2013

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☒ **SETTLE ORDER** ☐ **SUBMIT ORDER**

☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SD

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X

THE COMMUNITY PRESERVATION CORPORATION, INDEX NO. 106296/10

Plaintiff,

-against-

AFFORDABLE HOUSING CORP., HENRY KATKIN, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THE CITY OF NEW YORK, CITY OF NEW YORK ACTING BY AND THROUGH ITS DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, NEW YORK CITY DEPARTMENT OF FINANCE, BANK OF NEW YORK, STELLAR BISCAYNE LP, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, and "JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, 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.

----------X

JOAN A. MADDEN, J.:

This is an action to foreclosure a commercial acquisition loan mortgage and a building loan mortgage, in the total amount of $4,950,000. Plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment for the relief demanded in the complaint, discontinuance of the action against defendant Stellar Biscayne LP, amending the caption to strike the "John Doe" defendants, striking the answer of defendant borrower Affordable Housing Corp. ("Affordable") and defendant guarantor Henry Katkin, and the appointment of a Referee to compute pursuant to CPLR 4301 and CPLR 4311. Plaintiff also seeks an order striking the answer of defendant The City of New York and the City of New York Acting by and Through Its Department of Housing Preservation and Development (collectively "defendant City"), or in the alternative severing the

City's cross-claim against co-defendant Affordable to foreclose the City's subordinate mortgage on the same premises in the original principal amount of $340,000.

Defendants Affordable and Katkin oppose the motion, and cross-move for an order compelling plaintiff to comply with their discovery demands, or alternatively an order dismissing the complaint and granting defendants judgment on their counterclaims. Defendant City opposes the motion in part, to the extent plaintiff seeks to sever the City's cross-claim to foreclose on its own subordinate mortgage.

The following facts are not disputed unless otherwise noted. On June 30, 2005, defendant Affordable executed an Acquisition Loan Note in the amount of $561,200 and a Building Loan Note in the amount of $4,388,800, both payable to plaintiff. The loans were secured by a mortgage on the property located at 306-310 West 142nd Street in Manhattan. The parties also executed a Building Loan Agreement, which provided that the funds from the loan were intended to be used for new construction of a seven-story elevator building with 26 units, "including 1 one bedroom, 24 two bedroom and 1 three bedroom apartments," and "seventeen underground parking spaces." At the same time, defendant Katkin, Affordable's president, executed a personal guaranty of Affordable's loan obligations.

The loan documents provided for a "Maturity Date" of January 2, 2007, defined as the date the "principal amount or the amount thereof outstanding, with all accrued interest thereon, shall be due and payable." The loan documents also provided for certain "Completion Conditions" regarding the construction of the building on the property, and for three six-month extensions of the Maturity Date in the event the Completion Conditions were not satisfied by the original Maturity Date.

On December 10, 2007, the parties executed an Amendment to the Acquisition Loan Note and an Amendment to Building Loan Note, which both extended the Maturity Date of the loans to January 1, 2009.

On October 20, 2009, the parties executed a Maturity Extension Agreement, stating that the "Loan matured by its terms, however, Lender is willing to extend the maturity date of the Loan subject to strict compliance by the Borrower and Guarantor with all of the terms and conditions set forth in this Agreement." The Maturity Extension Agreement "ratified and confirmed" the terms and conditions of the loan documents. Paragraph 2(a) of the Agreement extended the maturity date of the loan to September 30, 2010,

> provided (i) that an Event of Default as defined herein does not occur and (ii) subject to compliance with the following terms and conditions:
>
> (1) Monthly interest payments calculated at the rate set forth in the Loan Documents plus 150 basis points shall be paid commencing retroactively with the payment due on July 1, 2009 and continuing with each payment due to be paid on the first day of each and every month thereafter until the earlier of (i) the end of the Extension Period or (ii) an Event of Default hereunder. At no time shall interest be calculated at a rate less than 5.30%.
>
> (2) Borrower authorizes Lender to release $101,000 of retainage into a reserve account to be used, along with funds from Borrower's cash-in-lieu account, at Lender's sole discretion, for the payment of construction interest on the Loan, however, in accordance with paragraph 2(a)(1) above, Borrower will continue to pay construction interest out-of-pocket.
>
> (3) No later than July 31, 2010, Borrower shall have completed the constructing and furnishing of a model apartment for purposes of facilitating sales and viewing by prospective purchasers and shall have commenced sales of units at the Mortgaged Premises.
>
> (4) No later than September 30, 2010, Borrower and Guarantor shall deliver to Lender evidence in form satisfactory to Lender, in its sole and absolute discretion, that a temporary or permanent certificate of occupancy has been issued for the Mortgaged Premises; all construction at the Mortgaged Premises to be completed by September 30, 2010.
>
> (5) Borrower and Guarantor agree that in the event, no later than January 31, 2011, Borrower shall have entered into four (4) fully executed contracts of sale, with deposits, in form and substance acceptable to Lender in its sole and

absolute discretion, for the sale of units at the Mortgaged Premises, Borrower shall convert the balance of the units at the Mortgaged Premises into rental units.

(6) Borrower acknowledges that it has delivered to Lender the sum of $54,449.00, representing a non-refundable interest rate lock fee for a permanent loan.

Paragraph 5 of the Agreement lists the "Events of Default," which include a "payment default, including but not limited to, the failure of the Borrower and Guarantor to pay any of the sums required to be paid pursuant to this Agreement," and a "failure of the Borrower and Guarantor to comply with, or breach by said entity, of any of the terms, covenants or conditions contained in this Agreement, the Loan Documents or in any other document or instrument executed in connection with this Agreement or the Loan Documents (whether such noncompliance or breach occurs on, before, or after the date of this Agreement)."

Paragraph 6 is entitled "Consent to Receiver and Judgment of Foreclosure and Sale," and provides in pertinent part that "the Borrower and Guarantor hereby consent to and authorize the entry of a Judgment of Foreclosure and Sale against them for the foreclosure of the mortgage(s) securing the Loan and the sale of the Mortgaged Premises" and that "the Borrower and Guarantor waive the right to interpose any defenses and counterclaims in the Foreclosure Action and waive any right to vacate or appeal any Judgment of Foreclosure and Sale entered in the Foreclosure Action."

Paragraph 13(a) states in pertinent part that "[t]his Agreement may not be modified or terminated except by a writing signed by the parties hereto" and that "[t]he Borrower and Guarantor hereby acknowledge that, in executing this Agreement and the documents being executed simultaneously or in connection with this Agreement, it/they have not relied on any representation, warranty, promise, statement, covenant or agreement, express or implied, direct

or indirect, given or made by or on behalf of the Lender or otherwise, except as expressly set forth herein."

It is undisputed that defendant Affordable defaulted on its mortgage obligations by failing to make the payment due on January 1, 2010, and each payment due thereafter. On May 13, 2010, plaintiff commenced the instant action to foreclose on the mortgage. Defendant Affordable and Katkin answered asserting 15 affirmative defenses and two counterclaims. Defendant City answered asserting a cross-claim to foreclose the City's own Note and Mortgage in the amount of $340,000, which the City acknowledges is junior and subordinate to plaintiff's mortgage.

Plaintiff is now moving for summary judgment for the relief demanded in the complaint, and to strike defendants' answers, or alternatively to sever the second counterclaim of defendants Affordable and Katkin, and to sever the City's cross-claim against Affordable. Defendants Affordable and Katkin oppose the motion and cross-move for an order compelling plaintiff to comply with its discovery demands. Defendant City opposes the motion in part to the extent plaintiff seeks to sever its cross-claim against Affordable to foreclose on its own mortgage.

In moving for summary judgment in a mortgage foreclosure action, plaintiff establishes a prima facie right to foreclose by producing the mortgage, the assignment, if any, the unpaid note, the guaranty agreement, and evidence of default. See Endeavor Funding Corp v. Allen, 102 AD3d 593 (1st Dept 2013); Deutsche Bank National Trust Co v. Gordon, 84 AD3d 443 (1st Dept 2011); Red Tulip, LLC v. Nevia, 44 AD3d 204 (1st Dept 2007), lv app dism 10 NY3d 741 (2008); CitiFinancial Co (DE) v. McKinney, 27 AD3d 224 (1st Dept 2006); LPP Mortgage, Ltd v. Card Corp, 17 AD3d 103 (1st Dept), lv app den, 6 NY3d 702 (2005); Bank of America, N.A. v.

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Tatham, 305 AD2d 183 (1st Dept 2003). Once plaintiff satisfies that burden, it is incumbent on the party opposing foreclosure to come forward with evidence sufficient to raise a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of plaintiff. See Nassau Trust Co v. Montrose Concrete Products Corp, 56 NY2d 175, reargmt den 57 NY2d 674 (1982); CitiFinancial Co. (DE) v. McKinney, supra; Mahopac National Bank v. Baisley, 244 AD2d 466 (2nd Dept 1997), lv app dism 91 NY2d 1003 (1998). With respect to a defendant who has guaranteed the mortgage debit, if the guaranty is clear and unambiguous on its face, and by its language, is an absolute and unconditional guaranty of payment with waiver of all defenses, the guarantor is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement. See CitiBank, N.A. v. Plapinger, 66 NY2d 90 (1985), reargmt den 67 NY2d 647 (1986); National Westminster Bank USA v. Sardi's Inc, 174 AD2d 470, 471 (1st Dept 1991).

Here, plaintiff has established its prima facie entitlement to judgment as a matter of law by uncontested proof of the notes, the mortgage, the unconditional guaranty and the mortgagor's default. See CitiFinancial Co. (DE) v. McKinney, supra; LPP Mortgage, Ltd v. Card Corp, supra; Bank of America, N.A. v. Tatham, supra. Plaintiff's Vice President and Deputy Counsel, Helen Rudolph, submits an affidavit that the mortgagor, defendant Affordable, defaulted on its mortgage obligations by failing to make the payment due on January 1, 2010, and each payment due thereafter.

In opposing plaintiff's motion, defendants Affordable and Katkin do not deny that money is owed, that Affordable defaulted on the mortgage, or that Katkin personally executed an unconditional guaranty of the mortgage debt. Rather, Affordable and Katkin argue that material

issues of fact exist as to whether plaintiff "failed to pay interest on the loans from the reserve fund established for that purpose pursuant to agreement between the parties"; whether plaintiff's "failure to make those interest payments from the reserve fund caused the default that resulted in the acceleration of the loans and ultimately precluded the ability of the defendants to refinance the loans"; and whether plaintiff "wrongfully attempted to induce Defendants to sell the Premises under threat of acceleration of the loans." Defendants also argue that summary judgment is premature based on plaintiff's failure to comply with their discovery demands served more than 22 months ago.

To support these arguments, defendants submit an affidavit from Katkin stating that on October 20, 2009, plaintiff and Affordable entered into a Maturity Extension Agreement, which extended the maturity date of the loans to September 30, 2010, and "provided for the creation (and funded) of a reserve account in the amount of $101,000.00 . . . whose purpose was to pay construction interest on the Loans and I was advised at the time that it would be done." Katkin asserts that plaintiff "failed/refused to fund further Loan advances/requisition(s) after Defendants executed the Extension Agreement," and as a result defendants "were unable to continue and complete construction of the Premises" and "were prevented from complying with obligations to Plaintiff under the Mortgage and Note." Katkin further asserts that in or about January 2010, plaintiff "agreed to utilize funds from the Interest Reserve in lieu [of] Loan payment by Defendant [Affordable] . . . until Plaintiff was ready to recommence Loan advances of loan requisitions," and that in reliance on that "agreement" defendant Affordable "did not make the January 2010 installment payment on the Loans." Katkin also asserts that plaintiff "demanded that Defendants infuse an additional $600,000 of equity in the Project and fund an

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additional $250,000 to the Interest Reserve," and "advised Defendants that they should 'sell' the Project." Katkin states that Affordable "refused to comply with Plaintiff's demands," and as a result, plaintiff "accelerated the payment of the Loans and commenced" this action. Katkin also relies on the counterclaims for damages asserted in the answer, and states that he "has more than $1,500,000 dollars of personal funds invested in the Project."

Defendants' arguments are not persuasive. Katkin's vague and unsubstantiated statements as to plaintiff's purported "agreement" to use funds from the reserve account "in lieu of" defendants' loan payments until plaintiff recommenced loan advances, are contrary to the clear and express provisions of the Maturity Extension Agreement. Under paragraph 2(a)(2) of the Maturity Extension Agreement, which created the reserve account, the funds in that account were to be used for "construction interest on the Loan." That provision, however, explicitly stated that the determination of whether such interest was to be paid out of the reserve was at the " Lender's *sole discretion*" and that "Borrower will *continue to pay* construction interest out-of-pocket" (emphasis added).

Thus, since the use of the funds in the reserve account was at plaintiff's "sole discretion," plaintiff had absolutely no obligation to make payments from that account on Affordable's behalf. Moreover, since Affordable was still required to "continue to pay construction interest out-of-pocket," the creation of the reserve account did not relieve Affordable of its obligation to make monthly payments. As to Katkin's statement that plaintiff commenced this foreclosure action based on defendants' refusal to add equity to the construction project, defendants do not dispute that Affordable defaulted on its mortgage obligations when it failed to make the January 2010 payment and each payment due thereafter.

"It is the well-settled law of this State that "a mortgagor is bound by the terms of his contract as made and cannot be relieved from his default, if one exists, in the absence of waiver by the mortgagee, or estoppel, or bad faith, fraud, oppression or unconscionable conduct on the latter's part.'" Citidress II v. 207 Second Avenue Realty Corp, 21 AD3d 774, 777 (1st Dept 2005) (quoting Nassau Trust Co v. Montrose Concrete Products Corp, supra at 183). In view of the clear and express terms of the loan documents, defendants' vague and unsubstantiated statements as to plaintiff's alleged wrongdoing are insufficient to raise a material issue of fact as to a bona fide defense. Moreover, while summary judgment can be denied when a defendant has a viable counterclaim arising from the same underlying transaction as is involved in the main action, and the counterclaim is inseparable or inextricably intertwined with that transaction, see Yoi-Lee Realty Corp. v. 177th Street Realty Assocs, 208 AD2d 185 (1st Dept 1995), defendant Katkin's vague and unsubstantiated allegation that he invested $1,500,000 of his own money in the project, is insufficient to defeat plaintiff's motion.

Defendants Affordable and Katkin also argue that summary judgment is premature based on plaintiff's failure to respond to their discovery demands. The absence of discovery does not require denial of plaintiff's motion, as defendants have not made an adequate showing that facts essential to oppose the motion are in plaintiff's exclusive knowledge, or that discovery might lead to facts relevant to a viable defense. See Woods v. 126 Riverside Drive Corp, 64 AD3d 422, 423 (1st Dept 2009), lv app den 14 NY3d 704 (2010); Duane Morris LLP v. Astor Holdings, Inc, 61 AD3d 418 (1st Dept 2009); Bank of America, N.A. v. Tatham, supra.

Based on the foregoing, defendants Affordable and Katkin have failed to come forward with evidence sufficient to defeat plaintiff's motion, and their cross-motion to compel discovery

is denied. As to the City's cross-claims to foreclose their subordinate mortgage, the Court finds that the cross-claim should be severed and shall continue on its own, since the City has not yet moved for any affirmative relief with respect to its cross-claim. In the event the City moves for summary judgment on its cross-claim (or a default judgment, if appropriate), and prevails, the City may move for relief pursuant to RPAPL 1351(3) or RPAPL 1354, if appropriate.

The court, therefore, concludes that plaintiff's motion is granted to the extent plaintiff is entitled to summary judgment of foreclosure, dismissal of the answer by defendants Affordable and Katkin, including their counterclaims, discontinuance of the action as against defendant Stellar Biscayne LP, amendment of the caption to strike the names "John Doe #1" through John Doe #12," the appointment of a Referee to compute, and severance of the City's cross-claim to foreclose on its own subordinate mortgage. The cross-motion by defendants Affordable and Katkin is denied in its entirety.

Settle order on notice, including a copy of this decision.

DATED: March 15, 2013

ENTER:

J.S.C.