SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: RAMOS PART 53

Justice

The MARION BLUMENTHAL TRUST, et al.,
Plaintiffs,

- V -

ARBOR COMMERCIAL MORTGAGE, LLC, et al.,
Defendants

INDEX NO. 600693/2008

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. 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

Motion is decided in accordance with accompanying Memorandum Decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

DATED: 7/9/13

J.S.C.

CHARLES E. RAMOS

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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The MARION BLUMENTHAL TRUST by MARION BLUMENTHAL and HOWARD S. WIENERKUR as Trustees, BRADFORD E. BERNSTEIN, and TAMARA M. BERNSTEIN,

Plaintiff, Index No. 600693/2008

-against-

ARBOR COMMERCIAL MORTGAGE LLC, ARBOR REALTY SR, INC., ADAM C. HOCHFELDER, and COLLEEN E. McDONALD,

Defendants.

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ARBOR COMMERCIAL MORTGAGE LLC and ARBOR REALTY, SR, INC.,

Defendants/Third-Party Plaintiffs

-against-

HERBERT MEADOW, AMY HOCHFELDER, and 1025 FIFTH AVENUE, INC.,

Third-Party Defendants.

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Hon. Charles E. Ramos, J.S.C.

In motion sequence 005, defendants and third-party plaintiffs Arbor Commercial Mortgage LLC and Arbor Realty SR, Inc. (together, "Arbor") move this Court pursuant to CPLR 3212 for partial summary judgment as to liability with respect to their counterclaims, cross-claims, and third-party claims.

Background

This action arises from a dispute regarding certain shares

of a cooperative apartment located at 1025 Fifth Avenue, New York, New York (the "Apartment"). In 1994, non-party George Blumenthal ("George"), husband of the plaintiff Marion Blumenthal ("Marion"), funded the purchase of the cooperative shares with respect to the Apartment. Upon purchase, the shares were placed in the Marion Blumenthal Trust (the "Trust"), which has at all relevant times, been the record owner of the cooperative shares and the associated proprietary lease. Marion and co-plaintiff Howard S. Weinerkur ("Howard")(the "Trustees") serve as co-trustees of the Trust.

The Trust acquired the Apartment in order to provide Herbert Meadow ("Herbert"), Marion's former spouse and father of her children, with a residence situated near his children. Herbert has resided in the Apartment for approximately nineteen years.

Plaintiff Tamara Bernstein ("Tamara") and third-party defendant Amy Meadow Hochfelder ("Amy") are Marion and Herbert's daughters. Tamara is married to plaintiff Bradford Bernstein ("Brad") and Amy was, until August 19, 2009, married to defendant Adam Hochfelder ("Hochfelder").

In early 2002, George indicated his desire to have the Trust sell the Apartment and requested that Brad and Hochfelder purchase it at a price equal to the acquisition cost. Brad and Hochfelder agreed to purchase the Apartment and to allow Herbert to continue residing there.

In May 2002, the parties completed the proposed sale by execution of the following documents: (1) Closing Statement and Closing Memorandum, (2) Contract of Sale, (3) Nominee Agreement, (4) Affidavit of Lost Stock Certificate and Proprietary Lease, and (5) Amendment to Trust Declaration.

Pursuant to the Nominee Agreement, the Trust retained legal title to the cooperative shares (the "legal interest") while Brad and Hochfelder acquired the "beneficial" ownership interest in the Apartment jointly as tenants in common. The Nominee Agreement refers to Brad and Hochfelder collectively as "Owner" and to Marion and Howard collectively as "Nominee." The Nominee Agreement contains the following relevant provisions:

> (1) . . . Promptly upon request made by Owner at any time, Nominee shall execute and deliver to Owner, or as Owner may direct, such documents, including, without limitation, an Affidavit of Lost Stock Certificate and Proprietary Lease, in form and content acceptable to the Corporation, as may be required in order to transfer the Legal Interest to Owner. Nominee shall also cooperate with Owner and use Nominee's good faith efforts to effectuate transfer of the Legal Interest to Owner.
>
> (5) Owner shall offer the Shares and Lease for sale upon the death of Herbert Meadow or at such earlier time as Herbert Meadow shall no longer reside in the Apartment . . .
>
> (7) . . . Nominee will also execute, acknowledge and deliver any and all other documents or instruments in respect of the Apartment, the Shares or the Lease which require the signature of the record owner thereof and which Owner requests Nominee so to execute, acknowledge and/or deliver, provided, however, that Owner shall not assign this Agreement or the Legal Interest, except as expressly provided herein or

> otherwise mortgage, pledge or encumber any of its interest hereunder or the Legal Interest.

The Trust filed tax and mortgage documents related to the transaction, but did not notify the cooperative of the sale.

On October 9, 2012, Arbor loaned Hochfelder $1,100,000 (the "Loan"). In exchange, Hochfelder purported to grant Arbor a security interest in the Apartment as collateral for the Loan (the "Security Interest"). To complete the transaction, Hochfelder delivered the following documents to Arbor: (1) a promissory note bearing his signature and purporting to bear the signature of his then-wife, Amy (the "Note") (2) Pledge and Security Agreement purporting to bear notarized signatures of Amy, Brad, and Marion, (3) Occupancy Agreement purporting to bear notarized signatures of Amy, Brad, and Marion, (4) "Stock Power" agreement purporting to bear notarized signature of Marion Blumenthal, and an (5) "Authenticating Statement Authorizing the Filing of Financing Statement." The parties have stipulated for the purposes of this motion that Hochfelder forged Amy's, Marion's, and Brad's signatures on each of these documents.

In October 2002, Arbor filed New York Uniform Commercial Code ("UCC") financing statements, naming the Trust, Hochfelder, and Brad as debtors.

Between October 2003 and October 2006, Hochfelder extended the maturity date of the Loan four times, each time submitting an amended promissory note and pledge agreement to Arbor. In

connection with the fourth amendment to the Note, Hochfelder provided to Arbor separate affidavits from himself and Amy confessing judgment for nonpayment of the Loan. The parties have stipulated that Hochfelder forged Marion's, Brad's, and Amy's signatures on the amending documents.

In November 2006, Brad and Hochfelder conveyed their respective interests in the Apartment to their wives, Tamara and Amy, respectively. The conveyance was structured as a gift and made without consideration.

The Loan was not repaid. In January 2008, Arbor served notice that it intended to foreclose on its security interest and sell the Apartment in satisfaction of the unpaid debt, pursuant to the UCC.

On March 11, 2008, the Trust, Trustees, Brad, and Tamara filed this action by service of a summons and verified complaint dated March 6, 2008 coupled with a motion seeking a preliminary injunction staying the contemplated UCC sale of the Apartment. The parties subsequently stipulated to observe the terms of the proposed preliminary injunction.

For the purposes of this motion, the parties have stipulated that neither the plaintiffs nor third-party defendants Herbert and Amy (collectively, the "Plaintiffs") had actual knowledge of the Loan or any of the associated documentation prior to Arbor's service of notice of the intended UCC sale.

On May 16, 2008, Arbor entered judgment against Hochfelder and Amy on the confessions of judgment and served notice of entry of the judgment.

Hochfelder has not appeared in this action. By letter dated June 4, 2008, his counsel expressed Hochfelder's intention not to file an answer in this action.

On August 27, 2010 and again on February 8, 2010, Hochfelder was indicted by a grand jury and charged with multiple counts of larceny, forgery, falsifying business records, fraud, and other crimes unrelated to the transaction at issue in this action. Hochfelder ultimately pled guilty to numerous felonies contained in both indictments and was sentenced to serve two and two-thirds to eight years in prison and was ordered to pay $9.5 million in restitution pursuant to a plea bargain. The restitution order indicates that Arbor is owed $1.3 million of the total amount owed.

Standard of Review

Summary judgment is appropriate where the Court determines that there are no material triable issues of fact (CPLR 3212[b]). The proponent of the motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v NYU Med Center*, 64 NY2d 851, 853 [1985]). To defeat the motion, the opposing party must then come forward with proof

establishing the existence of triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Conclusory or unsupported allegations are insufficient to raise a triable issue of fact (*Amatulli by Amatulli v Delhi Const. Corp.*, 77 NY2d 525 [1991]).

If the party opposing the motion cannot present evidentiary proof in admissible form, he or she must come forward with an acceptable excuse for his or her failure to present evidence in an admissible form. (*Id.*) "A party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*Velasquez v. Gomez*, 44 AD3d 669, 650-51 [2d Dept 2007]).

Discussion

Arbor moves this Court pursuant to CPLR 3212 for summary judgment on its claims seeking (1) to establish that it holds a valid security interest in a one-half ownership in the Apartment, (2) to establish that the transfer of Hochfelder's ownership interest to Amy was a fraudulent conveyance subject to turnover, (3) to foreclose on the security interest, and (4) an order directing partition by sale of the Apartment and a division of the proceeds of such sale.

The plaintiffs and third party defendants (collectively, the "Plaintiffs") argue that Arbor is not entitled to the relief it

seeks because (1) the terms of the Nominee Agreement created a valid prohibition against assignment that prevented Hochfelder from pledging his ownership interest in the Apartment as security for the Loan, (2) Arbor is precluded from recovery in this Court because it was awarded a restitution order in the prior criminal proceeding, (3) the Loan was usurious, and (4) Arbor "comes before this court with unclean hands, because it inexplicitly squandered multiple opportunities to prevent Hochfelder's fraud."

A. The Security Interest

The requirements of UCC 9-203(b) and 9-310(d) having otherwise been satisfied, it is incumbent on this Court to determine whether the terms of the Nominee Agreement permitted Hochfelder to pledge his interest in the Apartment as security for the Loan. The parties dispute whether the restrictive language in paragraph (7) of the Nominee Agreement (the "Restrictive Covenant") barred Hochfelder from pledging, assigning, or otherwise encumbering his interest in the Apartment.[1]

Anti-assignment clauses in contracts that expressly prohibit assignment are valid and enforceable (*Allhusen v Caristo Const. Corp.*, 303 NY 446, 452 [1952]). Whether an anti-assignment clause renders a subsequent assignment void or the breach of a personal covenant not to assign depends on the expressed intent of the

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[1] *See supra* at 3.

parties (*C.U. Annuity Serv. Corp v Young*, 281 AD2d 292 [1st Dept 2001]).

Where the agreement in question contains express language that any assignment would be void, language to the effect that an assignee would acquire no rights as the result of an assignment, or indicates that the nonassigning party has no obligation to recognize the assignee, the subsequent assignment is void (*Macklowe v 42nd St Dev Corp,* 170 AD2d 388, 389 [1st Dept 1991]; *Sullivan v International Fidelity Ins. Co.*, 96 AD2d 555 [2nd Dept 1983]). Conversely, if the agreement does not indicate that violations of the anti-assignment provision will be void, the wronged party may only seek damages for breach of an obligation not to assign (*Allhusen*, 303 NY at 452; *Macklowe*, 170 AD2d at 389).

The anti-assignment language in paragraph (7) of the Nominee Agreement, which operates to limit the language in paragraph (1), expressly prohibits assignment and relieves the Trust of its obligation to "execute, acknowledge and deliver documents . . . which require signature of the record owner" in the event that Brad or Hochfelder assigns or otherwise encumbers his respective interest in the Apartment. The Nominee Agreement does not indicate that such assignment would be void. Therefore, Hochfelder's grant of the Security Interest breached the Restrictive Covenant but is not void under New York law.

Nonetheless, pursuant to the terms of the Restrictive Covenant, Hochfelder's breach relieved the Trust of its duty to effectuate the transfer of the Legal Interest required to merge the legal and beneficial interests of the Apartment. Pursuant to the first sentence of paragraph (5) of the Nominee Agreement, the Owner shall offer the Apartment for sale upon Herbert's death or at such time as he no longer occupies the Apartment. Until that time, Arbor cannot compel foreclosure or sale of the Apartment without the cooperation of the Trust, irrespective of its Security Interest.

Because Arbor is not entitled to foreclosure and any ownership interest held by Amy is subject to Arbor's security interest pursuant to UCC 9-201, this Court need not determine whether the transfer of Hochfelder's ownership interest to Amy was a fraudulent conveyance subject to turnover.

B. Preclusion

The Plaintiffs assert that Arbor "could have refused at virtually any stage to participate in [Hochfelder's] criminal case . . . [i]t could have declined to provide Grand Jury testimony and/or otherwise assist the District Attorney" (Opp at 19) in order to preserve its right to pursue civil remedies in this Court. The Plaintiffs conclude that because Arbor participated in the criminal action and received a restitution judgment, it is precluded from proceeding in this Court on the

grounds of *res judicata*, collateral estoppel, judicial estoppel, "election of remedies," and unjust enrichment. This position is incorrect both as a matter of fact and law.

Arbor provided testimony and business records in the criminal proceeding pursuant to a Grand Jury subpoena. Refusal to do so would have subjected Arbor to charges of criminal contempt (Milstein Reply Aff, Ex. A). Arbor did not, therefore, have the option to refuse to cooperate with the District Attorney as the Plaintiffs contend. Furthermore, Arbor's right to pursue civil remedies is preserved as a matter of law.

Section 60.27(6) of the Penal Law provides that:

> [a]ny payment of restitution pursuant to this section shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment.

This provision explicitly preserves Arbor's right to pursue civil remedies in spite of the restitution order. In enacting Section 60.27(6), the New York legislature no doubt sought to encourage crime victims to participate fully in criminal prosecutions without fear of incurring further pecuniary loss. The Plaintiffs' assertion that Arbor, the victim of a serious crime, should have refused to participate in the criminal prosecution of that crime, is frivolous and runs contrary to public interest.

Plaintiffs' contention that Arbor's recovery should be limited to so-called "out-of-pocket" losses is similarly unavailing. While the law cited demonstrates that restitution

orders issued pursuant to Penal Law 60.27 should be limited to actual "out-of-pocket" losses, it does not indicate that damages sought via a separate civil proceeding are so limited. On the contrary, "Penal Law 60.27(1) secures a victim's independent, parallel right also to pursue a defendant civilly should there be a deficiency in the restitution amount" (*People v Wein*, 294 AD2d 78, 85 [1st Dept 2002]).

C. Usury

The Plaintiffs seek to invoke usury as a complete defense to the Loan. The parties dispute whether the Plaintiffs have standing to bring a defense of usury and whether the loan was usurious.

Where a lender enters into a usurious transaction, the borrower may be relieved of all further obligation to pay both principal and interest (*Pemper v Reifer*, 264 AD2d 625, 626 [1st Dept 1999]). "The ability to cancel a usurious transaction and keep the borrowed money is a 'peculiar privilege upon the actual borrower,' stemming in part from the notion that the borrower is a victim of the lender (*Seidel v 18 East 17th Street Owners, Inc.*, 79 NY2d 735, 741 [1992]). Thus, only the borrower, or those in privity of interest with the borrower, have standing to claim that a loan was usurious (*id.*). A stranger to the loan has no standing to bring the defense (*Thorer & Hollander, Inc. v Fuchs*, 241 D 359 [1st Dept 1934).

Pursuant New York General Obligations Law 5-501(6)(a), "no law regulating the maximum rate of interest which may be charged, taken or received, except section 190.40 and section 190.42 of the penal law, shall apply to any loan or forbearance in the amount of [$250,000] or more, other than a loan or a forbearance secured primarily by an interest in real property improved by a one or two family residence." The exception for a loan secured primarily by an interest in real property improved by a one or two family residence does not apply in this instance because shares in a cooperative apartment are personal, not real, property under New York law. Outside the exception noted above, the maximum interest permitted under New York penal law is 25%.

As Hochfelder's spouse, Amy was in privity of interest with Hochfelder at the time the Loan was issued and therefore has standing sufficient to assert the defense of usury. Nonetheless, Arbor has demonstrated that the Loan was not usurious as a matter of law. The Promissory Note provides for an annual interest rate of 18%. The Plaintiffs argue that a $44,000 origination fee (Bernstein Aff., Ex. D), $15,000 in legal fees, and $4,130 title insurance costs paid by Hochfelder should be re-characterized as additional interest pursuant to New York Banking Law 14-a(2) and 3 NYCRR 4.1.

This argument is unpersuasive for several reasons. First, "origination fees, points and other discounts" are deemed

interest only "when applied to any loan or forbearance secured primarily by an interest in real property improved by a one- or two- family residence" (3 NYCRR 4.2). Assuming *arguendo*, that Banking Law 14-a(2) and 3 NYCRR 4.1 did apply, 3 NYCRR 4.1 provides that fees for title insurance and legal services "actually and necessarily rendered" are not deemed interest. Even if the $44,000 origination fee were re-characterized as interest, and this Court does not make a legal conclusion on this point, the effective interest rate would be 21.33%. Therefore, the loan is not usurious as a matter of law.

D. Unclean Hands

The Plaintiffs assert that Arbor should be estopped from foreclosing on Hochfelder's interest in the Apartment because Arbor "comes before this court with unclean hands, because it inexplicitly squandered multiple opportunities to prevent Mr. Hochfelder's fraud," yet they fail to demonstrate that Arbor had any duty to uncover the fraud. It is clearly established law in New York that a lender does not have a duty of care to ascertain the validity of the documentation presented by an individual who claims to have the authority to act on behalf of a borrower corporation or entity (*LZG Realty, LLC v HDW 2005 Forest, LLC*, 87 AD3d 727, 729 [2nd Dept 2011]). Therefore, the Plaintiffs equitable arguments are unavailing in the face of established legal principles.

E. Other Defenses

This Court has examined the remainder of the Plaintiffs' arguments and found them without merit.

Accordingly, it is

ORDERED THAT the defendant and third-party plaintiffs motion for summary judgment is granted in part to the extent of granting partial summary judgment in favor of defendant on the first counterclaim determining the extent of its security interest in the apartment; and it is further

ADJUDGED and DECLARED that the defendant and third-party plaintiffs Arbor Commercial Mortgage LLC and Arbor Realty SR, Inc. have a valid security interest in the one-half beneficial interest of the apartment held by Amy Meadow located at 1025 Fifth Avenue, New York, New York; and it is further

ORDERED that the remainder of the defendant and third-party plaintiffs' motion for summary judgment is denied; and it is further

ORDER that the parties shall attend a status conference at 60 Centre Street, Part 53, New York, New York on August 6, 2013 at 10:30 a.m.

Dated: July 9, 2013

ENTER:

J.S.C.

CHARLES E. RAMOS