Cadlerock Joint Venture, L.P. v MacPherson
2013 NY Slip Op 31991(U)
August 19, 2013
Sup Ct, Suffolk County
Docket Number: 12-2945
Judge: Jerry Garguilo
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[* 1]

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SHORT FORM ORDER

INDEX No. 12-2945

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 3/14/13
ADJ. DATE 5/29/13
Mot. Seq. #002 - MD

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CADLEROCK JOINT VENTURE, L.P.

Plaintiff,

- against -

DONALD MACPHERSON,

Defendant.

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-18; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 19; Replying Affidavits and supporting papers 20-21; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212, granting summary judgment in its favor and against the defendant, is denied.

This action, brought on by notice of motion pursuant to CPLR 3213, is to recover the accelerated amounts allegedly due on a promissory note in the amount of $172,500.00, executed on behalf of the defendant in favor of First National Bank of Arizona, the plaintiff's predecessor in interest, on or about October 25, 2006.

By order dated August 7, 2012, the court denied the plaintiff's motion for summary judgment in lieu of complaint (CPLR 3213), noting that resort to evidence extrinsic to the note was necessary in order to establish the plaintiff's entitlement to judgment. The court's statement of the facts and of the arguments presented relative to that motion follows.

> Pursuant to the terms of the note, which was executed in connection with the defendant's purchase of residential real property located in Southampton, New York and secured by a second mortgage on the property, the defendant was obligated to make monthly payments of principal and interest in the amount of $1,958.88 beginning on December 1, 2006, with all outstanding amounts due on November 1, 2021. Section 4 of

14

the note provides, in part, as follows:

> **4. BORROWER'S FAILURE TO PAY AS REQUESTED**
>
> * * *
>
> **(B) Notice from Note Holder**
>
> If I do not pay the full amount of each monthly payment on time, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date I will be in default. That date must be at least 10 days after the date on which the notice is mailed to me or, if not mailed, 10 days after the date on which it is delivered to me.
>
> **(C) Default**
>
> If I do not pay the overdue amount by the date stated in the notice described in (B) above I will be in default. If I am in default, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount * * *.

Section 5 provides as follows:

> **5. THIS NOTE SECURED BY A MORTGAGE**
>
> In addition to the protections given to the Note Holder under this Note, a Mortgage, dated **October 25, 2006**, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. *That Mortgage describes how and under what conditions I may be required to make immediate payment in full of all amounts that I owe under this Note* [emphasis added].

Section 1 defines "Note Holder" to include the lender and "anyone who takes this Note by transfer and who is entitled to receive payments under the Note."

The plaintiff alleges that, following the execution of the note, First National Bank of Arizona assigned the note to First National Bank of Nevada, which assigned the note to Residential Funding Company, LLC, which assigned the note to LaSalle Bank, N.A., which assigned the note to the plaintiff in or about January 7, 2009. The various assignments are reflected in allonges which the plaintiff claims are "permanently affixed" by staple to the note. The plaintiff also claims that it was assigned the second mortgage on or about April 8, 2009.

According to the plaintiff, the defendant last made payment on the note on June 29, 2007, and has since defaulted by failing to timely pay principal, interest, and other

charges as required. By letter dated August 12, 2009, New Falls Corporation–ostensibly the plaintiff's loan servicer–advised the defendant that he was in default and demanded that the defendant cure the default within 10 days after receipt of the letter. The defendant did not respond. By letter dated October 2, 2009, New Falls Corporation advised the defendant of the plaintiff's election to declare the entire outstanding principal balance and accrued interest immediately due and payable. Again, the defendant failed to make any payment.

On or about November 30, 2009, the plaintiff commenced an action in the United States District Court, Southern District of New York, to recover the amounts allegedly due. Although the plaintiff was initially able to secure a judgment against the defendant, it was determined by the United States Court of Appeals for the Second Circuit that diversity jurisdiction was lacking, and the parties subsequently agreed to vacate the judgment and to dismiss the action without prejudice. This action followed.

In determining that the note did not qualify for CPLR 3213 treatment, the court observed that "section 5 of the note expressly requires that reference be made to the mortgage to define the conditions which must be satisfied before the plaintiff may require immediate payment in full of all amounts due under the note."[1] The court directed, therefore, that the action be converted to a conventional action and that the

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[1] Paragraph 20 of the mortgage provides, in relevant part, as follows:

20. LENDER'S RIGHTS IF BORROWER FAILS TO KEEP PROMISES AND AGREEMENTS

If all of the conditions stated in subparagraphs (A), (B), and (C) of this Paragraph 20 are satisfied, Lender may require that I pay immediately the entire amount then remaining unpaid under the Note and under this Mortgage. Lender may do this without making any further demand for payment. This requirement shall be called "Immediate Payment In Full."

* * *

Lender may require Immediate Payment In Full under this Paragraph 20 only if all of the following conditions are satisfied:

(A) I fail to keep any promise or agreement made in this Mortgage, including the promises to pay when due the amounts that I owe to Lender under the Note and under this Mortgage; and

(B) Lender gives to me, in the manner described in Paragraph 15 above [*i.e.*, by certified mail], a notice that states:

(i) The promise or agreement that I failed to keep;

(ii) The action that I must take to correct that failure;

(continued...)

moving and answering papers be deemed, respectively, the complaint and the answer.

Now, the action having been so converted and issue having effectively been joined, the plaintiff again moves for summary judgment, this time pursuant to CPLR 3212.[2]

To recover on a promissory note, the plaintiff is required to establish the existence of the note and the defendant's failure to make payment in accordance with its terms (*e.g.* ***Raico v Concorde Funding Group***, 60 AD3d 834, 875 NYS2d 251 [2009]). If the plaintiff establishes the required elements, the burden shifts to the defendant to establish by admissible evidence the existence of a triable issue of fact with respect to a bona fide defense (*e.g.* ***Quest Commercial v Rovner***, 35 AD3d 576, 825 NYS2d 766 [2006]).

Upon review, the court finds an issue of fact, sufficient to defeat summary judgment, whether the plaintiff failed to comply with a condition precedent permitting acceleration of the debt by neglecting to give notice in accordance with the terms of the subject note and mortgage. When a party sends a default notice pursuant to the provisions of a contract such as a note or mortgage, it must strictly comply with those provisions.

> In the law of negotiable instruments or bills and notes there are certain conditions such as agreed upon notice provisions which require strict compliance before courts will act. This is particularly true where notice is determined by agreement rather than created by statute * * *. For the notice requirement is not merely some vestigial ceremonial remain, which evolved from medieval England to add luster to our legal system. It has a vital purpose. The acceleration clause of a promissory note is not unlike the sword of Damocles hanging over a borrower's head as a constant threat to at least financial imposition if not economic ruin. The declaration of a default which prompts acceleration

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[1](...continued)

> (iii) A date by which I must correct the failure. That date must be at least 10 days from the date on which the notice is mailed to me;
>
> (iv) That if I do not correct the failure by the date stated in the notice, I will be in default and Lender may require Immediate Payment In Full * * * [and]

(C) I do not correct the failure stated in the notice from Lender by the date stated in that notice.

[2] Notwithstanding that successive summary judgment motions by the same party are disfavored in the absence of newly discovered evidence or sufficient cause (***National Enters. Corp. v Dechert Price & Rhoads***, 246 AD2d 481, 667 NYS2d 745 [1998]; ***La Freniere v Capital Dist. Transp. Auth.***, 105 AD2d 517, 481 NYS2d 467 [1984]; ***Marine Midland Bank v Fisher***, 85 AD2d 905, 447 NYS2d 186 [1981]), it is generally recognized that when a plaintiff's CPLR 3213 motion is denied, it is without prejudice to a new summary judgment motion following joinder of issue (***Schulz v Barrows***, 263 AD2d 565, 693 NYS2d 658 [1999], *affd* 94 NY2d 624, 709 NYS2d 148 [2000]; ***Technical Tape v Spray-Tuck, Inc.***, 146 AD2d 517, 536 NYS2d 457, *lv dismissed* 74 NY2d 791, 545 NYS2d 106 [1989]).

> is therefore a drastic act. Thus, before the sword falls, it is the purpose of the default notice to give the borrower one final chance to avoid default and the harsh effect of acceleration. It is an act of charity and fairness agreed upon by the parties. It therefore must be strictly construed for "[s]tability of contract obligations *must not be undermined by judicial sympathy*" (*Graf v Hope Bldg. Corp.*, 254 NY 1, 4 [emphasis added])–not only for stability of contract, but other reasons as well.

(***Dale v Industrial Ceramics***, 150 Misc 2d 935, 936-937, 571 NYS2d 185, 186 [1991]). Here, the plaintiff acknowledges that both the August 12 and October 2 "notices" were sent by New Falls Corporation. As the defendant correctly notes, the obligations imposed by the note and the mortgage to provide such notice fall upon the "Note Holder" or the "Lender." The note defines "Note Holder" to include the Lender, *i.e.*, First National Bank of Arizona, and "anyone who takes this Note by transfer and who is entitled to receive payments under the Note"–including, presumably, the plaintiff. The mortgage identifies the "Lender" as First National Bank of Arizona and, implicitly, its successors and assigns (*see also* Real Property Law § 254 [2]). The plaintiff does not dispute that New Falls was neither the Note Holder nor the Lender, but claims that New Falls was its "servicing agent." There is nothing in the record, however, to indicate that the defendant had ever been notified that New Falls was authorized to act on the plaintiff's behalf (*see* ***Manufacturers & Traders Trust Co. v Korngold***, 162 Misc 2d 669, 618 NYS2d 744 [1994]). Certainly, the representation in the notices themselves that New Falls was the plaintiff's "servicer" does not avail the plaintiff, as the declarations of an agent cannot be used to prove an agency relationship (***Lexow & Jenkins v Hertz Commercial Leasing Corp.***, 122 AD2d 25, 504 NYS2d 192 [1986]). The plaintiff's reference to the deposition testimony of Edward Yasher, the plaintiff's account officer, is likewise unavailing; while that testimony does make reference to a letter purporting to advise the defendant as to the plaintiff's purchase of the defendant's mortgage and to identify New Falls as the plaintiff's "servicer," the plaintiff offers no proof if, when, by or even to whom the letter was sent. Consequently, as it appears that the giving of notice in compliance with paragraph 20 of the mortgage was a condition precedent to acceleration of the amounts due under the note, and as it does not appear that the plaintiff ever advised the defendant that New Falls was authorized to act as its agent, the plaintiff is not entitled to summary judgment (*see* ***Manufacturers & Traders Trust Co. v Korngold***, *supra*; *see also* ***Siegel v Kentucky Fried Chicken of Long Is.***, 67 NY2d 792, 501 NYS2d 317 [1986]; ***HSBC Mtge. Corp. (USA) v Erneste***, 22 Misc 3d 1115[A], 880 NYS2d 224 [2009]).

Dated: 8/19/13

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION