The Wheatley Harbor, LLC v Horseblock Equities, Inc.
2013 NY Slip Op 33024(U)
October 22, 2013
Supreme Court, Suffolk County
Docket Number: 22903/12
Judge: Paul J. Baisley
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[* 1]

Short Form Order

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

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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THE WHEATLEY HARBOR, LLC,

Plaintiff,

-against-

HORSEBLOCK EQUITIES, INC., CCS.COM USA, INC., THE SUPERVISOR OF THE TOWN OF BROOKHAVEN, MOHAMMED R. ESSANI, AHMED ESSANI,and "JOHN DOE" #1 through "JOHN DOE" #10, the last 10 names being fictitious and unknown to the plaintiff and intended to be persons or entities, if any, being possible tenants or occupants of said premises, and/or persons or entities having or claiming to have an interest in or lien upon the property described in the complaint subordinate to the lien of plaintiff,

Defendants.

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INDEX NO.: 22903/12
MOTION DATE: 5/16/13
MOTION NO.: 003 MD; 004 MD; 005 MG

PLAINTIFF'S ATTORNEY:
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Southampton, New York 11968

DEFENDANTS' ATTORNEY:
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742 Veterans Memorial Highway
Hauppauge, New York 11788

Upon the following papers numbered 1 to 34 read on this motion for summary judgment and to vacate an order : Notice of Motion/ Order to Show Cause and supporting papers 1- 7; 8-12; 19-24 ; ~~Notice of Cross Motion and supporting papers~~ ___; Answering Affidavits and supporting papers 13-18; 25-30 ; ~~Replying Affidavits and supporting papers~~ ___; ~~Other~~ ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion sequence nos. 003, 004 and 005 are consolidated herein solely for purposes of this determination; and it is further

ORDERED that the motion (motion sequence no. 003) of defendants Horseblock Equities, Inc., CCS.Com USA, Inc., Mohammed R. Essani and Ahmed Essani for summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that the motion (motion sequence no. 004) of defendants Horseblock Equities, Inc., CCS.Com USA, Inc., Mohammed R. Essani and Ahmed Essani to vacate an order of this court dated January 18, 2013 which granted the plaintiff's motion for the appointment of a receiver of rents for certain real property is denied; and it is further

ORDERED that the motion (motion sequence no. 005) of plaintiff for summary judgment on its complaint and dismissing the defendants' affirmative defenses, and for the appointment of a referee to compute is granted.

Plaintiff commenced this action to foreclose on two mortgages on commercial property. One mortgage encumbers the property owned by defendant CCS.Com, USA, Inc. ("CCS") known

as 435 East Sunrise Highway in Patchogue, New York (the "Patchogue Property"). The other mortgage encumbers the property owned by defendant Horseblock Equities, Inc. ("Horseblock") known as 3166 Horseblock Road in Medford, New York (the "Medford Property"). The mortgages were given to secure a loan as evidenced by a note in the amount of $650,000 made by non-party Columbia Capital Co. to defendants Horseblock and CCS (the "Columbia Note" and the "Columbia Mortgage").[1] Defendants Mohammed R. Essani and Ahmed Essani (hereinafter the "Essani Defendants" when referred to collectively) are principals of Horseblock and CCS.[2] Mohammed Essani, in his capacity as president of Horseblock, CCS and Hanifa Co., executed the Columbia Note and the Columbia Mortgage which was subordinate to the mortgage on the Hanifa Property held by Astoria Federal Savings and Loan Association (the "Astoria Mortgage").

On October 30, 2007 the Columbia Mortgage was assigned to the plaintiff. On the same day, pursuant to a Commitment Letter, Horseblock, CCS and Hanifa borrowed $1,020,000 from plaintiff which amount was the aggregate sum of the $650,000 due on the Capital Note plus an additional loan in the principal sum of $370,000. The $370,000 loan, as evidenced by a demand mortgage note (the "Demand Note") was secured by a subordinate mortgage on the Patchogue Property and the property located at 1515 Montauk Highway in Mastic, New York (the "Mastic Property"). This subordinate mortgage is hereinafter referred to as the "Gap Mortgage." The Mastic Property, Medford Property and Patchogue Property were also pledged as collateral to secure the $1,020,000 loan as evidenced by the terms of a wraproud promissory note (the "Wraparound Note"). Mohammed Essani and Ahmed Essani each signed a guaranty which unconditionally guaranteed payment of the Wraparound Note.

The Wraparound Note provides for interest only monthly payments at a rate of 12% per annum commencing November 30, 2007, until the maturity date of October 30, 2008, at which time the principal sum and any unpaid interest was due and payable in full. In the event of a default in payment, the Wraparound Note provides for interest to accrue at a rate of 24% per annum during the period of such default and until the entire sum payable was paid in full.

In its complaint filed on July 30, 2012, plaintiff alleges that sporadic payments of interest and principal were made on the Wraparound Note, however, the defendants failed to pay the principal balance and interest which became due on the October 30, 2008 maturity date. Plaintiff further alleges, and it is not disputed, that no agreement has been executed by the parties for an extension of the maturity date or for a forbearance. Plaintiff seeks to foreclose on "the mortgaged Premises described on Exhibits A and B annexed...." The court notes that Exhibit A contains the metes and bounds description of the Medford Property, and Exhibit B contains the metes and bounds description of the Patchogue Property.

Horseblock, CCS, and the Essani Defendants (hereinafter the "Movants" when referred to collectively) have submitted an amended answer with eight affirmative defenses: the Gap Mortgage and Wraparound Note are not enforceable as the documents were not executed by all

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[1] A third party to the loan, Hanifa Co., not a party herein, also mortgaged its real property located at 234 William Floyd Parkway in Shirley, New York to secure the loan (the "Hanifa Property"). This mortgage, as discussed below, was previously released and, thus, not a subject of this action.

[2] Mohammed and Ahmed Essani are also principals of Hanifa Co.

necessary parties (first affirmative defense); the statute of limitations has expired on the Capital Mortgage (second affirmative defense); release of part of the Gap Mortgage (third affirmative defense); lack of standing with regard to the ownership of the Capital Note and Capital Mortgage (fourth affirmative defense); criminal usury with regard to the default interest rate (fifth affirmative defense); waiver of any default interest (sixth affirmative defense); acting in concert to defraud (seventh affirmative defense); and payments made in cash or by money order are not reflected in the payment history provided by the plaintiff (eighth affirmative defense).

On August 13, 2012, the plaintiff moved for the appointment of a temporary receiver of rents and profits for the Medford Property and by order dated January 18, 2013 the motion was granted. The order set forth that the appointment was made without notice as the mortgage, upon default in payment, provided therefor.

The Movants now seek summary judgment (motion sequence no. 003) dismissing the complaint as asserted against them on the ground that this foreclosure action may not proceed based upon their first, second, fifth, and eighth affirmative defenses. The Movants also seek an order setting aside the order appointing the temporary receiver (motion sequence no. 004) on the ground that their counsel was not served with the plaintiff's motion seeking the appointment, and on the same grounds relied upon in support of their motion for summary judgment. The plaintiff opposes both motions, and moves for summary judgment (motion sequence no. 005) on the claims in its complaint for foreclosure and deficiency judgments, together with a dismissal of the affirmative defenses asserted against it, and for the appointment of a referee to compute the amounts due.

It is well established that in an action to foreclose a mortgage, a *prima facie* case is made by the plaintiff's production of the note and mortgage and proof that the mortgagors and any guarantors defaulted in payment or other material terms set forth in the mortgage (*see Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *Garrison Special Opportunities Fund, L.P. v Arthur*, 82 AD3d 1042, 918 NYS2d 894 [2d Dept 2011]; *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]). Here, the plaintiff established its entitlement to summary judgment on its complaint for foreclosure and sale and a deficiency judgment against Horseblock and CCS by submitting the relevant mortgages, the underlying notes, and evidence of a default under the terms thereof. The plaintiff further established its entitlement to summary judgment on its pleaded demands for a deficiency judgment against the guarantors, the Essani defendants, by the production of the written guarantees signed by each of them together with the other loan documents listed above and proof of defaults *(see Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; *Solomon v Burden*, 104 AD3d 839, 961 NYS2d 535 [2d Dept 2013]; *Baron Assoc., LLC v Garcia Group Enter.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]). The plaintiffs have also established a *prima facie* showing that the first, second, fifth and eighth affirmative defenses relied upon by the Movants to support their motion for summary judgment are without merit. It is thus incumbent upon the Movants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of any affirmative defenses (*see Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). They have failed to do so.

Inadequate to raise an issue of fact necessitating a trial is the unsubstantiated assertion in the first affirmative defense that the mortgage is unenforceable because it was not executed by the proper parties necessary to bind the corporate defendants. The Movants have not submitted any documentation to establish that one president's signature on the documents was insufficient. Furthermore, in making no less than sixteen payments on the Wraparound Note over a two-year period, without objection, Horseblock and CCS, as a matter of law, ratified the indebtedness and waived any right they might have had to repudiate their obligations thereunder (*see Banque Nationale de Paris v 1567 Broadway Ownership Assocs.*, 214 AD2d 359, 625 NYS2d 152 [1st Dept 1995]). Thus, summary dismissal of the first affirmative defense is warranted.

In their second affirmative defense, the Movants contend that the time in which to foreclose on the Columbia Mortgage expired on April 29, 2012, as the Columbia Note matured on April 29, 2006. This argument misses the mark.

The statute of limitations period applicable to an action on a note, the payment of which is secured by a mortgage upon real property, is six years (CPLR 213[4]). The six-year period begins to run when the plaintiff first has the right to foreclose on the mortgage, that is, the day after the maturity date of the underlying debt (*CDR Creances S.A. v Euro-American Lodging Corp.*, 43 AD3d 45, 837 NYS2d 33 [1st Dept 2007]). Further, it is well settled that the note is evidence of the indebtedness which terms, if inconsistent with the terms of the mortgage, control (*see Adler v Bwerkowitz*, 254 NY 433, 173 NE 574 [1930]; *Zausmer v Suozzi*, 23 Misc 2d 783, 198 NYS2d 482 [1960], *affd as modified*, 11 AD2d 791, 205 NYS2d 967 [2d Dept 2006]; *see also Small Business Admin. v Mills*, 203 AD2d 654, 610 NYS2d 371 [2d Dept 1994]).

Here, upon execution of the Wraparound Note, the primary obligations of the Movants were controlled by its terms, not the terms of the Capital Note. Moreover, the Wraparound Note explicitly provides that the "covenants, conditions and agreements contained in....[the Capital Mortgage] are hereby made a part of this instrument. The Capital Mortgage provides that Horseblock, CCS and Hanifa Co. agree to pay the $650,000 indebtedness, and that the principal and any unpaid interest is due on the October 30, 2008 maturity date. Thus, contrary to the Movants' arguments, the action is not time-barred as the Statute of Limitations on the Wraparound Note does not expire until, at the earliest, October 31, 2014.[3] Therefore, the plaintiff is entitled to summary dismissal of the second affirmative defense.

The Movants have failed to make a showing that the subject loan and the mortgage securing it were void as usurious. Criminal usury applies to interest on a loan at a rate exceeding 25% per annum (Penal Law §19.40). However, "the defense of usury does not apply where, as here, the terms of the mortgage and note impose a rate of interest in excess of the statutory maximum only after default of maturity" (*Kraus v Mendelsohn*, 97 AD3d 641, 641, 948 NYS2d 119 [2d Dept 2012]; *Miller Planning Corp. v Wells* 253 AD2d 859, 860, 678 NYS2d 340 [2d Dept 1998]). Therefore, the fifth affirmative defense of criminal usury is summarily dismissed.

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[3]Although the Movants contend that they have not been credited with cash payments that were made, it is not disputed that partial payments were made on the Wraparound Note in 2009, thereby effectively extending the Statute of Limitations into 2015 (*see Saljanin v Vuksanaj*, 284 AD2d 525, 727 NYS2d 145 [2d Dept 2001]).

The Movants, in support of their motion for summary judgment dismissing the plaintiff's complaint, have not addressed their other affirmative defenses. Thus, the third, fourth, sixth and seventh affirmative defenses are treated as abandoned (*see US Bank, N.A. v Flynn*, 27 Misc 3d 802, 897 NYS2d 855 [Sup Ct, Suffolk County 2010, Whelan, J.]). In any event, the court has examined each of these affirmative defenses and finds that they are without merit.

The application by the Movants to vacate the order appointing the temporary receiver is denied. The Movants' argument that neither they nor their counsel received notice of the motion seeking the appointment is unavailing. The mortgage agreement at issue contains a provision which specifically authorizes the appointment of a receiver upon an application by the mortgagee to foreclose the mortgage. Consequently, the plaintiff, as mortgagee, was entitled to the appointment of a receiver without notice and without regard to the adequacy of the security (*see* Real Property Law §254 [10]; *Maspeth Federal Sav. & Loan Ass'n v McGown*, 77 AD3d 890, 909 NYS2d 642 [2d Dept 2010]; *Naar v Litwak & Co.*, 260 AD2d 613, 688 NYS2d 698 [2d Dept 1999]). While a court of equity may vacate the appointment of a receiver under appropriate circumstances (*see Naar v Litwak & Co.*, *supra*), the Movants have failed to demonstrate any reason for this court to exercise its discretion to do so.

Accordingly, defendant's motion sequence no. 003 and motion sequence no. 004 are denied, and plaintiff's motion sequence no. 005 is granted.

Submit order.

Dated: October 22, 2013

PAUL J. BAISLEY, JR.

J.S.C.