Lanza v JNRS Realty, LLC
2014 NY Slip Op 31730(U)
June 27, 2014
Sup Ct, Suffolk County
Docket Number: 10-18516
Judge: Thomas F. Whelan
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[* 1]

SHORT FORM ORDER

INDEX No. 10-18516

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2/26/14
ADJ. DATES 6/6/14
Mot. Seq. # 003 - MG
CDISP Y____ N x

JOSEPH LANZA and STEVEN LANZA, Plaintiffs, -against- JNRS REALTY, LLC, TOWN SUPERVISOR OF THE TOWN OF BROOKHAVEN, KAREN ZAHN, COMMISSIONER OF TAXATION AND FINANCE, WORKMEN'S COMPENSATION BOARD OF THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEIL SIMS, ROBERT CIACCIO JOHN DOE 1 through JOHN DOE 5 being and intended to be tenants or other persons being in possession of the premises or having any claim subordinate to the claim of the plaintiffs herein, Defendants.	KLEIN & VIZZI, LLP Attys. For Plaintiffs 370 Sunrise Hwy. - Ste. B West Babylon, NY 11704 RICHARD SIMON, ESQ. Atty. For Defs. Sims, Ciaccio & JNRS 39 Lakebridge Dr. Kings Park, NY 11754 TOWN ATTORNEY Town of Brookhaven Attys. For Def. Town Supervisor 1 Independence Hill Farmingville, NY 11738

Upon the following papers numbered 1 to 8 read on this motion by the plaintiff for summary judgment and an order of reference; Notice of Motion/Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 6-8; Replying Affidavits and supporting papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#003) by the plaintiffs for summary judgment against the answering defendants and, in effect, default judgments against the remaining known defendants, the deletion of the unknown defendants and the appointment of a referee to compute amounts purportedly due and owing under the subject mortgage, is considered under CPLR 3212 and RPAPL § 1321 and is granted to the extent set forth below.

The plaintiffs are the assignees of a mortgage note and mortgage executed on November 6, 2000 by the corporate defendant, JNRS Realty, LLC and certain written guarantees of the obligations of JNRS under the terms of the mortgage documents. The mortgage encumbered certain commercial

property owned by the mortgagor, LLC defendant, which was leased to a car dealership known as Suzuki 112 LLC. By its terms, the mortgage note matured on November 5, 2005 and the entire principal became due on that date.

Defendants, Neil Sims and Robert Ciaccio, along with Suzuki 112, LLC and a non-party corporation, Lanza Brothers Auto, Ltd., Inc., were each guarantors of the $640,000.00 mortgage loan made on November 6, 2000 by Ford Motor Credit Corporation to defendant, JNRS Realty, LLC. The record further reflects that under the terms of the written guarantees, each guarantor was made jointly and severally liable with the others for any default of the mortgagor, JNRS Realty, LLC under the terms of the subject note and mortgage. By correspondence dated February 28, 2007, the original mortgagee, Ford Motor Credit Company, advised the individual guarantors of the default status of the loan and that legal action would ensue unless payment of the outstanding mortgage balance in the amount of $470,029.90 was made. The threatened legal action was however, averted on August 22, 2007, when a branch manager of a new corporate entity known as the Ford Motor Credit Company, LLC, assigned the subject note, mortgage and written guarantees to the plaintiffs in exchange for payment of $471,750.45, an amount reflective of the outstanding mortgage balance demanded by the original mortgagor in its February 28, 2007 demand letter.

Upon the written assignment of the note, mortgage and written guarantees, the plaintiffs commenced this action in May of 2010. Therein, the plaintiffs seek foreclosure of the subject mortgage and deficiency judgments against two of the six guarantors of the mortgage, namely, defendants Sims and Ciaccio. By the instant motion, the plaintiffs seek summary judgment on their complaint and the appointment of a referee to compute amounts allegedly due under the terms of the subject note and mortgage. The claims against answering defendants, JNRS Realty, LLC, Sims and Ciaccio include an adjudication of their liability for any deficiency in amounts owed after the public sale of the mortgaged premises under either the note or under the terms of the written guarantees executed by defendants Sims and Ciaccio. The plaintiffs also seek summary judgment on their complaint against all other defendants served with process, notwithstanding that such defendants failed to appear herein by answer (*cf.*, CPLR 3212[b]).

Answering defendants, JNRS Realty, LLC, Sims and Ciaccio, oppose the instant motion by the plaintiffs and assert the sole affirmative defense set forth in their answer, namely, that the plaintiffs alone are responsible for the default of the corporate mortgagor JNRS Realty, LLC in its payment obligations. These defendants contend that the plaintiffs' engagement in various acts of self dealing, and corporate looting, by which the plaintiff's wrongfully drained the LLC of its assets, and their breaches of the LLC's operating agreement governing should work to estop the plaintiff from enforcing its contractual remedies.

For the reasons stated below the motion is granted.

Entitlement to a judgment of foreclosure may be established, as a matter of law, where the plaintiff produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact (*see* ***Solomon v Burden***, 104

AD3d 839, 961 NYS2d 535 [2d Dept 2013]; ***US Bank Natl. Ass'n v Denaro,*** 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Citibank, N.A. v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]; ***HSBC Bank v Shwartz,*** 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; ***US Bank N.A. v Eaddy***, 79 AD3d 1022, 1022, 914 NYS2d 901[2010]; ***Zanfini v Chandler***, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]). To establish prima facie entitlement to judgment as a matter of law on the issue of liability with respect to a guaranty, a plaintiff must submit proof of the underlying note, the guaranty and the failure of the defendant to make payment in accordance with the terms of those instruments (*see* ***Solomon v Burden***, 104 AD3d 839, 961 NYS2d 535 [2d Dept 2013], *supra*; ***US Bank Natl. Ass'n v Denaro,*** 98 AD3d 964, *supra*; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, *supra*).

Here, the moving papers established the plaintiff's entitlement to summary judgment on its first cause of action to the extent it asserts claims against the answering defendants as such papers included copies of the consolidated note and mortgage and other loan documents, including the Consolidation, Modification and Extension Agreement and the written guaranty of defendant Phillips executed on December 26, 2005, together with due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***Solomon v Burden***, 104 AD3d 839, *supra*; ***US Bank Natl. Ass'n v Denaro,*** 98 AD3d 964, *supra*).

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiffs' prima facie showing or in support of an affirmative defense asserted in their answer, if any, or one otherwise available (*see* ***Flagstar Bank v Bellafiore,*** 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]). Notably, self-serving and conclusory allegations do not raise issues of fact and do not require plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see* ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movants' papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see* ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also* ***Madeline D'Anthony Enter., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). A review of the opposing papers submitted by the answering defendants here reveals that the same were insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiffs' claims for foreclosure and sale and insufficient to demonstrate any bona fide defense to the plaintiffs' claim for a judgment of foreclosure and sale (*see* ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]).

Rejected as unmeritorious are the defendants' claims that any default in payment on their part is excusable due to wrongful conduct on the part of the plaintiffs. To support this defense the ansering defendants rely upon conduct on the part of the plaintiff that is allegedly violative of other non-

contemporaneous agreements and contracts executed by the parties. Such reliance is, however, is misplaced.

As a general rule, contracts remain separate unless their history and subject matter show them to be unified thus controls (*see* ***County of Suffolk v Long Is. Power Auth.***, 100 AD3d 944, 954 NYS2d 619 [2d Dept 2012]). Only contemporaneous instruments between the same parties relating to the same subject matter are entitled to be read together and interpreted as forming part of one and the same transaction (*see* ***131 Heartland Blvd. Corp. v C.J. Jon Corp.***, 82 AD3d 1188, 921 NYS2d 94 [2d Dept 2011]; ***Davimos v Halle***, 60 AD3d 576, 877 NYS2d 20 [1st Dept 2009]). Where a defendant asserts as an affirmative defense and/or counterclaim a foreclosing plaintiff's breach of a collateral contract independent of the note and mortgage and/or other breaches duties which may be remedied under tort law, none of which bear upon the validity of the note and mortgage, such breaches will not a motion for summary judgment by the plaintiff in its foreclosure action (*see* ***Umansky v Seaboard Indus., Inc.***, 45 AD2d 1051, 358 NYS2d 22 [2d Dept 1974]).

Here, the record is devoid of any proof that the Operating Agreement and other agreements relied upon the defendants were contemporaneous writings by the same parties regarding the same subject matter thereby entitling them to be read together as to all matters of construction and intent such that a material breach of the Operating and other agreements on the part of the plaintiffs would relieve the defendants of their obligations under the mortgage and guarantees (*see* ***County of Suffolk v Long Is. Power Auth.***, 100 AD3d 944, *supra*; ***Schonfeld v Thompson***, 243 AD2d 343, 663 NYS2d 166 [1st Dept 1997]; ***Umansky v Seaboard Indus., Inc.***, 45 AD2d 1051, *supra*). In addition, none of conduct complained of by the defendants implicate any invalidity in the note and mortgage or the plaintiffs' entitlement to enforce the terms thereof (*see* ***Umansky v Seaboard Indus., Inc.***, 45 AD2d 1051, *supra*).

Even if it was otherwise, any viable claim as to the plaintiff's breach of a separate and independent agreement provides a defendant with no defense to the plaintiff's claim for enforcement of its contractual remedies under the terms of the note and mortgage, although it may provide a potential set-off equal to the amount of damages recoverable on such a claim if it is affirmatively advanced (*see* ***31 Heartland Blvd. Corp. v C.J. Jon Corp.***, 82 AD3d 1188, *supra*; ***Gelmin v Sequa Capital Corp.***, 269 AD2d 492, 707 NYS2d 108 [2d Dept 2000]; ***Harris v Miller***, 136 AD2d 603, 523 NYS2d 586 [2d Dept 1988]; ***Umansky v Seaboard Indus., Inc.***, 45 AD2d 1051, *supra*).

The plaintiffs are thus entitled to an award of summary judgment dismissing the defendants' affirmative defense and the counterclaim which is premised solely thereon, and to an award of summary judgment on its complaint against the answering defendants.

The plaintiffs are not entitled to summary judgment against the remaining known non-defendants, as issue has not been joined with respect to these defendants due to their failure to answer the summons and complaint (*see* CPLR 3212; ***Shaibani v Soraya***, 71 AD3d 1121, 898 NYS2d 72 [2d Dept 2010]). However, the moving papers sufficiently established the plaintiffs' entitlement to a default judgment against them, entry of which must abide by the computation of amount due by a referee appointed under RPAPL § 1321. Accordingly, the defaults of all such defendants are hereby

fixed and determined (*see* CPLR 3215; RPAPL § 1321]). Since the plaintiffs have been awarded summary judgment against the answering defendants and have established a default in answering by the remaining defendants, the plaintiffs are entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see* RPAPL § 1321; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***LaSalle Bank, NA v Pace,*** 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd*, 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]).

In view of the foregoing, the plaintiffs' motion is granted and they are awarded summary judgment dismissing the affirmative defense and counterclaims of the answering defendants, JNRS Realty, LLC, Sims and Ciaccio. The plaintiffs are further awarded summary judgment on their complaint against these answering defendants. The plaintiffs' further request to drop as party defendants the unknown defendants listed in the caption is granted pursuant to CPLR 1024. The plaintiffs are also awarded default judgments against the remaining known defendants pursuant to CPLR 3215 and RPAPL § 1321 and the appointment of a referee to compute. Said referee shall be designated by the court in a separate order which the plaintiff shall submit upon a a copy of this order.

The plaintiff is directed to settle an order appointing a referee to compute, so providing and further providing all other matters attendant with such appointment that are required by applicable statutes and rules.. Such order must include a copy of this order, and provide not less than fifteen days notice of the settlement date to counsel for all appearing parties.

DATED: 9/27/14

THOMAS F. WHELAN, J.S.C.