Padovano v Sooknandan
2014 NY Slip Op 33376(U)
December 24, 2014
Supreme Court, Kings County
Docket Number: 502683/12
Judge: Carolyn E. Demarest
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At a Commercial Division Part 7, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of December, 2014.

PRESENT:
HON. CAROLYN E. DEMAREST,
Justice.

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FRED PADOVANO,

Plaintiff,

- against -

ANGAAD SOOKNANDAN, JAIRRABRANDY REALTY ENTERPRISE, LLC, HAL MEVORAH, SANDY MEVORAH, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, JOHN DOE and JANE DOE, said names being fictitious and unknown to the Plaintiff, the persons or parties being the possible tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises,

Defendants.

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DECISION AND ORDER

Index No. 502683/12

The following papers read on this motion: Papers Numbered

Notice of Motion/Order to Show Cause/Petition/Cross Motion and Affidavits(Affirmations)Annexed	97-111
Opposing Affidavits (Affirmations)	112-120
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Affidavits(Affirmations)	
Other Papers (Memoranda of Law)	

[* 2]

Fred Padovano (plaintiff) moves, in sequence #3, for an order, pursuant to CPLR 3212, granting him summary judgment, striking the answer of Angaad Sooknandan (Sooknandan) and Jairrabrandy Realty Enterprise, LLC (Jairrabrandy) (collectively, the Sooknandan defendants), appointing a referee to compute the sums due and owing plaintiff, striking defendants John Doe and Jane Doe from the caption and awarding plaintiff motion costs.

Background And Allegations

In August 2002, Sooknandan purchased a former movie theater, located at 9304-10 Avenue L, in Brooklyn (the Property), from non-party 9304-10 Avenue L Realty Corp. (9304-10). Concurrent with the transaction, Sooknandan executed and delivered to 9304-10 a purchase-money note for the amount of $700,000 (the Note) and a mortgage (the Mortgage).

The Note set an annual interest rate of 10% and stipulated interest-only monthly payments of $5833.33, with the entire principal and any accrued interest coming due on September 1, 2005. It incorporated the Mortgage's terms and stated that the principal would become due, at the note-holder's option, upon any default.

The Mortgage, in § 5, required the mortgagor to "pay all taxes, assessments, water rates and sewer rents, now or hereafter levied or assessed or imposed against the Mortgaged Property." Section 21, titled "Events of Default," stated, in relevant part,

> "The Debt[1] shall become immediately due and payable at the option of Mortgagee upon any one or more of the following events . . . :

[1] The Mortgage defined "the Debt" as "said principal sum, interest and all other sums which may or shall become due under the Note or under this Mortgage."

[* 3]

"(a) if any portion of the Debt is not paid when same is due and payable within 90 days;[2]

"(b) if any of the Taxes or Other Charges are not paid when the same are due and payable; or within 30 days of notice by mortgagee

* * * *

"(d) if Mortgagor violates or does not comply with any of the provisions of this Mortgage and Security Agreement;

* * * *

"(g) if the Mortgagor or any Guarantor shall have failed to make payment of any installment of interest or principal on any Note to or in favor of Lender, or with respect to any other obligation for the payment of money in accordance with its respective terms within ten (10) days of the date said payment is due.

"(h) if the Mortgagor or any Guarantor shall have failed to observe or perform any covenant, condition or agreement with respect to the payment of monies on its part to be observed or performed pursuant to the terms of the Loan Documents, other than the payment of principal and interest which shall be governed by (g) above, and such default shall have remained uncured for a period of ten (10) days after notice thereof to the Borrower by the Lender."

Section 24 granted the mortgagee the right to collect expenses, including reasonable attorney's fees, of any actions taken to protect the interest in the Property, including foreclosure actions. Section 36 required the mortgagor to indemnify the mortgagee for, among other expenses,

[2] Text underlined in this quotation was inserted by hand.

[* 4]

costs incurred by the mortgagee due to "any failure on the part of Mortgagor to perform or comply with any of the terms of this mortgage." Section 37 stated, in relevant part,

> "Except for any notice required under applicable law to be given in another manner, (a) any notice to Mortgagor provided in this Mortgage or in the Note shall be given in writing by mailing such notice by certified mail, return receipt requested, or by sending such notice by a recognized overnight courier with postage, freight and any other charges paid, with a receipt therefor, addressed to Mortgagor at Mortgagor's address stated herein or at such other address as Mortgagor may designate by notice to Mortgagee as provided herein . . . ."

Section 41, however, titled "Waiver of Notice," stated,

> "Mortgagor shall not be entitled to any notices of any nature whatsoever from Mortgagee except with respect to matter for which this Mortgage specifically and expressly provides for the giving of notice by Mortgagee to Mortgagor and except with respect to matters for which Mortgagee is required by applicable law to give notice, and Mortgagor hereby expressly waives the right to receive any notice from Mortgagee with respect to any matter for which this Mortgage does not specifically and expressly provide for the giving of notice by Mortgagee to Mortgagor."

No party contests the applicability of the Note and the Mortgage and their binding effect on Sooknandan.

9304-10 assigned the Note and Mortgage to plaintiff on October 7, 2002. Sooknandan transferred the Property to Jairrabrandy, a limited liability company of which he is managing member, on August 19, 2004.

Plaintiff, Sooknandan and Jairrabrandy entered into an extension and modification agreement on March 18, 2008 (the First Modification). The First Modification defined

[* 5]

Sooknandan and Jairrabrandy jointly as "the party of the second part" and stated that there was then due, under the Note, $700,000 with interest from March 1, 2008. It extended the Note's maturity date to April 1, 2010, with an interest rate of 11.15%, in return for payment, by the party of the second party, of $1 and other valuable consideration, but stated that all other terms of the Note and Mortgage were unaffected. The First Modification required "the party of the second part meanwhile pay said interest on the amount owing on said bond or Note pursuant to the terms thereof as modified herein and comply withal [sic] other terms of said Bond or Note and Mortgage except as modified herein." Sooknandan signed the First Modification both in his individual capacity and as Jairrabrandy's managing member.

Sooknandan's attorney sent plaintiff's attorney[3] a letter agreement on October 12, 2009, which plaintiff and Sooknandan executed on October 23, 2009 (the Letter Agreement). The Letter Agreement stated that plaintiff "has agreed to modify the loan to Jarrabrandy [sic] Realty Enterprise LLC" (and to dismiss a pending foreclosure action) by setting interest "so that the monthly amount due is $5,000.00" with a monthly payment of only $4000, but that $12,000 (apparently the deferred interest) would be added to the principal balance annually. It provided that, of an arrearage calculated at $102,400, the borrower would immediately pay $40,000, $50,000 would be added to the principal and the remaining $12,400 would be a "reduction credit" to the borrower. It provided for extension of the Mortgage by another year.

[3] Neither attorney here referenced represents the corresponding party in the instant action.

Plaintiff, Sooknandan and Jairrabrandy concurrently entered into another Extension and Modification Agreement, to which Jairrabrandy Enterprise LLC was a party (the Second Modification). The Second Modification extended the mortgage for another year, modified the interest rate "so that the monthly amount due is Five Thousand Dollars" and stipulated that monthly payments would be only $4000, with $12,000 added to the principal balance each year. The Second Modification does not, however, reflect the addition of $50,000 to the principal balance as indicated in the Letter Agreement. Sooknandan signed the Second Modification in both his individual capacity as a personal guarantor and as managing member of Jairrabrandy Realty Enterprise, LLC.

The Sooknandan defendants apparently failed to repay the principal and deferred interest by the April 1, 2011 maturity date set by the Second Modification.

Plaintiff commenced this action against the Sooknandan defendants, as well as various other parties with interests or potential interests in the Property, and demanded immediate repayment of all sums owed under the Note and Mortgage, as well as foreclosure upon and sale of the Property to satisfy such claims, with any deficiency to be paid by Sooknandan and Jairrabrandy. The ad damnum clause sought award of the $700,000 principal plus interest due, expenses of the action and sale, including reasonable attorney's fees, and costs to plaintiff of protecting the Property.

This court's April 9, 2014 order directed, among other things, plaintiff to file a note of issue by July 7, 2014.

(2)

Plaintiff now moves, in sequence #3, for an order, pursuant to CPLR 3212, granting him summary judgment, striking the Sooknandan defendants' answer, appointing a referee to compute the sums due and owing plaintiff, striking defendants John Doe and Jane Doe from the caption and awarding him motion costs.[4] Plaintiff argues that the First and Second Modifications rendered Sooknandan and Jairrabrandy jointly liable for the sums owed under the Note. He contends that, pursuant to the Note, the Mortgage, the Modifications and the Letter Agreement, the Sooknandan defendants owe him $750,000 in principal, plus interest from August 1, 2011, as well as $71,000 in deferred interest. He urges that he has introduced copies of the valid underlying documents, that he has established the Sooknandan defendants' default and that summary judgment must result unless they raise some factual issue. He stresses that a dispute over the precise amount owed presents no bar to summary judgment, as that may be computed by a referee.

Plaintiff argues that the Sooknandan defendants cannot rely on any notice issues, as the Mortgage required no notice of their default. He urges, in any case, that he sent them notice in a September 7, 2012 letter. Plaintiff contends that, though the complaint identified the underlying principal as $700,000, the Letter Agreement reflected that $50,000 of interest owed would be converted to principal. He requests that the complaint "be deemed to conform to the proof that the principal balance is indeed $750,000 or, alternatively, that the issue of

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[4] Plaintiff had previously moved, in sequence #2, for virtually identical relief. To permit further discovery, this court denied motion sequence #2 with leave to renew.

the amount due be left to the referee to hear and determine." Plaintiff states that, if insufficient evidence exists to establish the principal as $750,000, he will waive his claim to the $50,000 over the originally claimed $700,000 principal.

Plaintiff notes that, as nobody seemingly occupies or possesses the Property, no reason exists to maintain the John Doe and Jane Doe defendants in the action's caption.

Plaintiff supports his motion with his own affidavit. He recounts the facts and states that the Sooknandan defendants defaulted under the Mortgage and Note by failing to repay the balance, deferred interest and other costs, which became due on April 1, 2011. He identifies the amounts owed as the $750,000 principal with interest, deferred interest, and over $600,000 in costs that he paid in real estate taxes and water and sewer charges to avert tax-lien foreclosure.

(3)

The Sooknandan defendants, in opposition to plaintiff's motion, first argue that, as plaintiff missed the note-of-issue deadline set by the court's April 9, 2014 order, the action must be dismissed[5]. They contend that, if the action is not dismissed, factual questions preclude granting plaintiff summary judgment. New York law and the Mortgage terms, they assert, required plaintiff to provide them some notice before accelerating the amounts due under the Note. They urge that §§ 21 (h) and 37 of the Mortgage mandated notice by certified mail and 10 days to cure before a default was triggered. They contend, in any case, that

[5] Court records indicate that plaintiff attempted to file a Note of Issue on August 21, 2014, which was returned for "correction" and rejected by defendant on August 21, 2014.

"Plaintiff's allegation that no notice was required appears to be inconsistent with Plaintiff's claim that such notice was mailed to Defendants," and they claim that plaintiff introduces no evidence indicating when or how the purported notice was sent.

The Sooknandan defendants urge that a question of fact exists concerning whether the principal due and owing is $700,000 or $750,000 and that such a material fact may not properly be determined by a referee's computations. They urge that neither Modification refers to a $750,000 principal and that plaintiff's complaint identifies the principal as only $700,000. They characterize the Letter Agreement as "some memo from 2009," which must be precluded as parol evidence.

Defendants further argue that there is a factual question as to whether Jairrabrandy may be "personally liable" for any deficiency upon foreclosure. Jairrabrandy, the Sooknandan defendants urge, did not sign the Note, promise to pay, assume the debt or guarantee it. They assert that Jairrabrandy "did not receive any consideration for the alleged loan to Mr. Sooknandan" and that its ownership of the Property does not make it liable under the Note. The Sooknandan defendants contend that the First Modification reflected no explicit assumption by Jairrabrandy of the debt.

The Sooknandan defendants support their opposition with an affidavit from Sooknandan, who recounts that he is the managing member of Jairrabrandy and opines that factual questions mandate denying the motion. He iterates that Jairrabrandy did not sign the Note or Mortgage. Sooknandan further asserts that the Sooknandan defendants received no

[* 10]

notice from plaintiff of their default, and he states that "[t]his is particularly odd since in the past we worked out any issues as reflected by modification and extension agreements previously signed." He claims that he has not received from plaintiff any mortgage statements, payoff figures or transaction history.

(4)

Plaintiff, in reply, argues that the Sooknandan defendants must be deemed to have abandoned all arguments not raised in their opposition. He contends that the Sooknandan defendants' failure to timely pay the principal and interest due is governed by § 21 (g) of the Mortgage, which requires no notice to constitute a default, not § 21 (h), which requires notice of other defaults but explicitly does not apply to failures to pay principal or interest. Plaintiff contends that the issue of acceleration is moot in any case, as all amounts owed under the mortgage documents became fully due upon April 1, 2011, the final maturity date as specified by the Second Modification. Plaintiff stresses that § 37 merely provides for the method of notice and does not create any notice requirement.

Sooknandan, plaintiff argues, signed both of the Modifications as Jairrabrandy's managing member, thus binding it to their terms as well as to those of the underlying Note and Mortgage. If triable facts are found on this issue, however, plaintiff states that he would waive Jairrabrandy's deficiency liability.

Plaintiff acknowledges that the original Note concerned a principal of only $700,000, but urges that the Letter Agreement, executed in conjunction with the Second Modification,

provided for recapitalization of $50,000 of outstanding interest. He argues that the Letter Agreement must be read in conjunction with the Second Modification, and he stresses that the Sooknandan defendants' attorney at the time drafted those documents, thus requiring interpretation of any ambiguities in favor of plaintiff. Plaintiff states that, if the Letter Agreement is found ineffective, the $50,000 that it recapitalized, as well as the $12,400 that it forgave, must be considered as interest still outstanding under the Note, to be determined by a referee. Plaintiff requests allowing the complaint to conform to the proof, but states that, if factual questions are found concerning this issue, he would waive any right to the additional $50,000 as principal. Plaintiff concludes by urging that any dispute over the amount due may be settled by a referee under RPAPL 1321.

Discussion

(1)

Initially, the Sooknandan defendants urge that the action must be dismissed due to plaintiff's failure to file a note of issue by the July 7, 2014 deadline. CPLR 3216 allows dismissal for want of prosecution "only after the court or the defendant has served the plaintiff with a written notice demanding that the plaintiff resume prosecution of the action and serve and file a note of issue within 90 days after receipt of the demand" (*Docteur v Interfaith Med. Ctr.*, 90 AD3d 814, 815 [2011]; *see also Delgado v New York City Hous. Auth.*, 21 AD3d 522, 522 [2005]). Such a demand must also state that "failure to comply with the demand will serve as the basis for a motion to dismiss the action" (*Docteur*, 90 AD3d at 815).

Here, the April 9, 2014 order extended the note-of-issue deadline to July 7, 2014, 89 days after the date of the order, but contained no warning that failure to timely file the note of issue would constitute grounds for dismissal. Furthermore, the Sooknandan defendants make no showing that such order was ever served on plaintiff. Accordingly, no basis exists for dismissal under CPLR 3216.

(2)

A summary judgment movant must show prima facie entitlement to judgment as a matter of law by producing sufficient admissible evidence demonstrating the absence of any material factual issues (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires denying the motion, regardless of the sufficiency of any opposition (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). The opposing party overcomes the movant's showing only by introducing "evidentiary proof in admissible form sufficient to require a trial of material questions" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Considering a summary judgment motion requires viewing the evidence in the light most favorable to the motion opponent (*Vega*, 18 NY3d at 503). Nevertheless, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not

to resolve such issues" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]).

A foreclosure plaintiff makes a prima facie showing on a summary judgment motion by introducing the underlying note and mortgage as well as evidence establishing the defendant's default (*Deutsche Bank Natl. Trust Co. v Islar*, 122 AD3d 567, 2014 NY Slip Op 07468, *1 [2014]; *Emigrant Funding Corp. v Agard*, 121 AD3d 935, 936 [2014]; *Bank of N.Y. Mellon Trust Co. v McCall*, 116 AD3d 993, 993 [2014]). Here, plaintiff thus makes a prima facie showing to support summary judgment by introducing copies of the Note, Mortgage, First Modification, Second Modification and the Letter Agreement, each properly executed by Sooknandan, as well as an affidavit establishing default.

The Sooknandan defendants argue that Jairrabrandy cannot be held liable for any deficiency in this action because it never assumed any responsibility for the debt created by the Note and secured by the Mortgage. General Obligations Law § 5-705 provides that a grantee of real property shall bear no liability for an existing mortgage loan without a written, signed and acknowledged assumption of the debt, listing the amount of the assumed debt and executed either concurrently with the property's conveyance or in connection with a subsequent modification or extension of the loan (General Obligations Law § 5-705; *see also Dahan v Weiss*, 120 AD3d 540, 542 [2014]). A contract must be construed in accordance with the parties' intent, and "'[t]he best evidence of what parties to a written agreement intend is what they say in their writing'" (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436

[2013] [alteration in original], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *see also Kolbe v Tibbetts*, 22 NY3d 344, 353 [2013]; *MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009]).

Although plaintiff herein submits the First and Second Modifications, each of which bears an acknowledged signature of Sooknandan acting as Jairrabrandy's managing member, no language therein evinces a clear intent by Jairrabrandy to assume Sooknandan's debt under the Note. The Letter Agreement, executed contemporaneously with the Second Modification, modifying "the loan to Jairrabrandy Realty Enterprise LLC" was signed only by Sooknandan personally. Thus plaintiff fails to provide unequivocal proof of Jairrabrandy's assumption of liability under the Note. However, plaintiff has represented that he will waive pursuing any deficiency from Jairrabrandy if the issue cannot be resolved on this motion. Accordingly, plaintiff's claims that Jairrabrandy bears direct liability for the Note's debt is waived and the question as to whether Jairrabrandy assumed the debt poses no obstacle to summary judgment on this motion.

(3)

The Sooknandan defendants also argue that a factual question exists concerning whether plaintiff gave notice of the alleged default as required by the Mortgage. Plaintiff correctly asserts, however, that § 21 (h) of the Mortgage, which the Sooknandan defendants urge required notice of a default, specifically excluded defaults as to payments of principal

or interest. Those defaults would be governed by § 21 (g), which required no notice.[6] Accordingly, the Mortgage required no notice to the Sooknandan defendants concerning the defaults alleged herein. The issue appears moot, in any case, as the Note matured and the entire debt became due, absent any acceleration, on April 1, 2011.

(4)

Finally, the Sooknandan defendants argue that the Letter Agreement and plaintiff's contentions create a factual question as to whether the outstanding principal is $700,000 or $750,000. The Letter Agreement, which was executed by plaintiff and the maker of the Note personally, concurrently with the Second Modification, clearly indicated an intent to recapitalize $50,000 of outstanding interest, thus increasing the principal to $750,000. The Second Modification, while not incorporating this provision, contains no language contradicting this term, and, since defendant's counsel drafted the Letter Agreement, any ambiguity would have to be construed against the Sooknandan defendants as the drafting party (*see McGowan v Great N. Ins. Co.*, 105 AD3d 714, 715 [2013]; *DeAngelis v DeAngelis*, 104 AD3d 901, 903 [2013]; *Natt v White Sands Condominium*, 95 AD3d 848, 849 [2012]). Although the complaint's ad damnum clause, apparently mistakenly, seeks a $700,000 principal plus interest, the complaint is deemed conformed to the evidence herein demonstrating a $750,000 principal, as the recapitalization resulted from an agreement that Sooknandan must have known of, as one of its signers, and the Sooknandan defendants make

[6] Such defaults could, alternatively, be governed by § 21 (a), which also required no notice.

[* 16]

no showing of any prejudice resulting from such an amendment (*see* CPLR 3025 [c]; *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981] ["in the absence of prejudice to the defendant, a motion to amend the *ad damnum* clause, whether before or after the trial, should generally be granted"], *rearg denied* 55 NY2d 801 [1981]; *Ambra v Awad*, 62 AD3d 732, 735 [2009] [explaining that, because a defendant "was aware long before trial that the plaintiff's damages could far exceed" the amount demanded, the defendant "could not have been prejudiced by a posttrial increase in the ad damnum amount"]; *Matter of Denton*, 6 AD3d 531, 532-533 [2004] [holding that a court "may, sua sponte, relieve a petitioner of the failure to amend a pleading by deeming it amended to conform to the evidence presented at trial where . . . it would not result in prejudice to the opposing party"], *lv dismissed* 3 NY3d 656 [2004], *lv denied* 5 NY3d 714 [2005]). Nor is there any prejudice to Jairrabrandy since the Letter Agreement is signed by its managing member, who transferred title to the Property from himself to the LLC without paying off the Note, and, in any event, it has been relieved of liability for any deficiency under the Note.

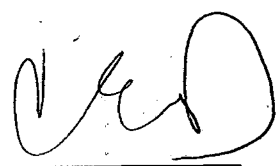
Conclusion

Accordingly, plaintiff's motion for summary judgment is granted, except that any claims asserting Jairrabrandy's direct liability for the debt embodied in the Note are deemed waived and Jarraibrandy's liability is limited to recovery upon foreclosure and sale of the mortgaged property. Plaintiff's complaint is deemed amended to conform to the evidence herein establishing that the underlying principal was increased, by

recapitalization of previously outstanding interest, to $750,000. The Court will appoint a referee to compute the sum due.

Settle order on notice.

ENTER:



Hon. Carolyn E. Demarest
J.S.C.