SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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JP MORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff, Decision and order

- against - Index No. 506742/13

ELOZER PORGES, BOARD OF MANAGERS OF THE BOMMER BUILDING CONDOMINIUM, NYC DEPARTMENT OF FINANCE-PARKING VIOLATIONS BUREAU, UNITED STATES OF AMERICA, REBECCA DOE, a woman who refused to identify her last name; ELENA CAIRE, JOSE PENA,

Defendants, December 2, 2015

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a judgement of foreclosure and sale. The defendants have opposed the plaintiff's motion seeking a judgement and foreclosure and sale on various grounds. Papers were submitted by both parties and after reviewing the arguments of all parties this court now makes the following determination.

This foreclosure action commenced on October 31, 2013 when the plaintiff, filed an action to foreclose on real property located at 263 Classon Avenue, Unit 5E, Brooklyn, New York. An order of reference and summary judgement were granted and the referee submitted a report detailing the amount owed. This motion seeking a judgement of foreclosure and sale followed. The

opposition raises various issues namely, that they do not owe the amount claimed, the interest has not been verified, the statute of limitations may have expired and that he does not recall signing a contract with the plaintiff.

Conclusions of Law

It is well settled that terms of a mortgage that contain rates of interest above the statutory rates of usury are not usurious when only applicable after default or maturity (Hicki v. Choice Capital Corp., 264 AD2d 710, 694 NYS2d 750 [2d Dept., 1999], see, also, Money Due After Default or Maturity, by Jeffrey Moerdler *New York Law Journal*, September 25, 2000). Of course, this rule permitting interest above the statutory rate of usury is only applicable where there will be no penalties for timely payment (Corvetti v. Hudson, 252 AD2d 787, 676 NYS2d 263 [3rd Dept., 1998]). As the court explained in Heelan v. Security National Bank, 73 Misc2d 1004, 343 NYS2d 417 [District Court Suffolk County 1973] this rationale "rests upon a good faith provision in the agreement devoid of intent to evade the usury laws" and that "while permitting the aforementioned charges might lead in some cases to abuses and excessive demands by creditor banks, still, absent the intent to evade the usury laws, the transaction will not be deemed usurious". In this case the note

clearly spells out that an increase in the interest rate only applies upon a default and that an additional two percent will be added. First, this rate does not exceed the statutory rate of 16% and in any event is clearly defined within the terms of the contracts signed by the defendant.

Turning to the issue the defendant claims he never signed a contract with the plaintiff, while that may be true, it is also true that a valid assignment took place. It is well settled that a mortgage may not be foreclosed unless the plaintiff maintains a legal or equitable interest in the mortgage (Wells Fargo Bank N.A., v. Marchione, 69 AD3d 204, 887 NYS2d 615 [2d Dept., 2009]). Thus, for a plaintiff to establish standing, and hence an equitable interest, it must be demonstrated that the plaintiff was both (1) the holder or assignee of the subject mortgage and (2) the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint (see, U.S. Bank, N.A. v. Collymore, 68 AD3d 752, 890 NYS2d 578 [2d Dept., 2009]). Thus, clearly at the time the action was commenced the plaintiff undisputedly maintained the right to bring the action. Indeed, as noted in Lincoln Savings Bank, FSB v. Wynn, 7 AD3d 760, 776 NYS2d 908 [2d Dept., 2004], an assignment permits the assignee to continue the foreclosure even

without any formal substitution.

Furthermore, the action was commenced within the applicable period and a referee was appointed by the court to determine the amount owed. Any issues concerning that amount should have been raised at the appropriate time. The failure to do so and to raise that issue now is an insufficient basis upon which to deny the plaintiff's motion. Moreover, the defendant has not presented any evidence in any manner challenging the conclusions of the referee or explaining the manner in which they are not accurate. These conclusory objections, therefore, are insufficient.

Therefore, based on the foregoing, the plaintiff's motion seeking judgement of foreclosure and sale is granted.

So ordered.

ENTER:

DATED: December 2, 2015
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

Nancy T. Sunshine
NANCY T. SUNSHINE
Clerk