

Unity Bank v St. John's Dryden Realty Corp.

2017 NY Slip Op 32623(U)

December 18, 2017

Supreme Court, Tompkins County

Docket Number: 2014-0852

Judge: Eugene D. Faughnan

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At a Special Term of the Supreme Court of the State
of New York held in and for the Sixth Judicial
District at the TOMPKINS County Courthouse,
New York, on the 27TH day of October, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

UNITY BANK,

Plaintiff,

-vs-

ST. JOHN'S DRYDEN REALTY CORP.,
ST. JOHN'S CATERING CORP., DIMITRIOS K.
MICHELIS, GARRICK P. MONTENEGRO,
NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE,

Defendants.

DECISION AND ORDER

Index No. 2014-0852
RJI No. 2015-0143-M

APPEARANCES:

PLAINTIFF:

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CATALINOTTO, LLP
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Albany, NY12203

DEFENDANTS:
DIMITRIOS K. MICHELIS,
GARRICK P. MONTENEGRO

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court upon the motion of Plaintiff, Unity Bank, for deficiency judgment against all the above named Defendants. Defendants Dimitrios K. Michelis (“Michelis”) and Garrick P. Montenegro (“Montenegro”) opposed the motion, and filed a cross motion to deny Plaintiff’s motion, or in the alternative, partially vacate and modify the Judgment of Foreclosure and Sale, and/or direct the Referee to conduct a hearing with respect to the value of the property.¹ Oral argument was heard on October 27, 2017.

The Court has reviewed the evidence in the record, and considered the arguments of the parties. After due deliberation, the Court finds that Plaintiff’s motion for deficiency is DENIED, and Defendants’ cross motion finding that the referee’s sale fully satisfied the Judgment against Defendants is GRANTED.

Background facts

The instant foreclosure action involves two commercial loans. The first was made between Plaintiff and St. John’s Dryden Realty Corp. (St John’s Dryden) on June 23, 2006 in the amount of \$544,000. The other Defendants, St. John’s Catering Catering Corp. (St. John’s Catering), Michelis and Montenegro were guarantors on that loan. The second loan was between Plaintiff and St. John’s Dryden and St. John’s Catering on December 11, 2008 for \$200,000. Michelis and Montenegro were also guarantors on the second loan. The loans were secured by two parcels of land. Parcel One, known as 151-153 Dryden Road is improved by a 200 seat restaurant and parking lot. Parcel Two, known as 4 Ellis Drive, is a vacant lot. The restaurant which was operating on Parcel One was forced to shut down, and payments stopped being made

¹The remaining Defendants have not filed any opposition papers, or any motions. Therefore, for purposes of this Decision and Order “Defendants” will refer to Michelis and Montenegro.

on the loans. However, Defendants did not remove the restaurant equipment, hoping that it might aid in some resolution of the loan defaults.

Plaintiff filed a Summons and Verified Complaint on September 19, 2014, and on July 28, 2015 Plaintiff was granted Summary Judgment and a Referee was appointed. Plaintiff then moved for a Judgment of Foreclosure and Sale in October, 2015, but that application was ultimately withdrawn by Plaintiff in order to correct some errors in the property descriptions. Plaintiff subsequently submitted another motion for a Judgment of Foreclosure and Sale on Parcel One, which was granted on May 6, 2016. The Judgment of Foreclosure and Sale provided that if the proceeds from the sale of Parcel One were insufficient to satisfy the mortgage debt owed, and Plaintiff was successful in reforming the mortgage instruments with respect to Parcel Two, the Plaintiff could submit an application for Judgment of Foreclosure and Sale on Parcel Two. The Judgment also stated that “if the proceeds of the sale(s) of the aforementioned parcel(s) shall be insufficient to pay the amount reported due the plaintiff, or it is finally determined that plaintiff does not have a mortgage lien on [Parcel Two], then plaintiff [can pursue deficiency]”

The Referee’s Sale occurred on July 6, 2016. Plaintiff assigned its right to bid to AJB Commercial Realty, Inc. (“AJB”), a wholly owned subsidiary of Plaintiff, and AJB was the successful bidder. Plaintiff claims that no funds were actually realized by the Plaintiff, since the successful bidder was its subsidiary.

After the foreclosure sale on Parcel One, Plaintiff started efforts to make a motion to reform the legal description in Parcel Two. However, in the meantime, Tompkins County gave notice that it was planning to commence a foreclosure proceeding on Parcel Two for unpaid Town and County taxes for 2015 and 2016. Based upon the fair market value of Parcel Two, and the amount of unpaid taxes, as well as the cost involved in seeking to reform the mortgage, Plaintiff eventually determined to allow the County to foreclose on Parcel Two.

Thereafter, Plaintiff filed a motion for deficiency on February 6, 2017. The motion was given a return date of May 5, 2017.

Prior to the motion, Defendants retained new counsel, who filed a letter objecting to the motion for deficiency, and also requesting a hearing on the fair market value of the property. The Court issued a Letter Order, finding that Plaintiff's submission on fair market value was inadequate, and permitting both sides an opportunity to submit evidence on fair market value.

Plaintiff thereafter submitted a report from an appraiser who concluded that the fair market value of Parcel One was \$340,000, and \$54,500 for Parcel Two. Plaintiff amended its motion to account for the new fair market value evidence it submitted.

Meanwhile, Defendants also obtained an appraisal of Parcel Two. Defendants' appraiser valued Parcel Two at \$58,000. Defendants also submitted an affidavit estimating that the fair market value of the restaurant equipment on Parcel One is in the range of \$135,755 to \$81,453.

Defendants' cross motion argues that Plaintiff's application for deficiency is untimely, and that Plaintiff cannot pursue deficiency because it abandoned its rights to foreclose on Parcel Two. In the alternative, Defendants seek a hearing on the fair market value of the property.

Legal Analysis and Discussion

A. TIME FRAME TO BRING AN ACTION FOR DEFICIENCY

RPAPL § 1371 (2) provides that a motion for deficiency judgment must be made within 90 days after the delivery of the proper conveyance to the purchaser. *FDIC v. Suffolk Place Assocs.*, 270 AD2d 304 (2nd Dept. 2000). "The 90-day period is a provision in the nature of a statute of limitations, thus '[f]ailure by plaintiff to serve notice within the 90-day period is a complete bar to the entry of a deficiency judgment.'" *Cicero v. Aspen Hills II, LLC.*, 85 AD3d

1411, 1412 (3rd Dept. 2011), *quoting Amsterdam Sav. Bank v Amsterdam Pharm. Dev. Corp.*, 106 AD2d 797, 797 (3rd Dept. 1984); *Nat'l Bank v. Betar*, 207 AD 610 (3rd Dept. 1994).

When multiple parcels of land are subject to a mortgage (and the same foreclosure action), the Plaintiff must make a motion for deficiency within 90 days after the sale of each property is consummated, unless the trial court directs otherwise. *Sanders v. Palmer*, 68 NY2d 180 (1986). Should the mortgagee fail to timely “move for a deficiency judgment, ‘the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in action or proceeding shall exist.’” *Sanders*, 68 NY 2d at 185, *quoting* RPAPL § 1371(3); *see also Cicero, supra; Arbor Nat'l Comm. Mortg., LLC v. Carmans Plaza*, 305 AD2d 622 (2d Dept. 2003).

Here, the sale of Parcel One was consummated on July 6, 2016, and 90 days from that date would be October 4, 2016. However, Plaintiff did not file this motion until February 6, 2017. Since Plaintiff did not move for deficiency within 90 days of the consummation of the sale of Parcel One, it has effectively waived its right to deficiency.

Plaintiff argues that the tax foreclosure on Parcel Two, and the terms of the May 13, 2016 Judgment of Foreclosure and Sale, mandate a different calculation of the 90 day time limit. Specifically, Plaintiff contends that the Judgment contemplated the possibility of either a successful, or unsuccessful, attempt to reform the property description on Parcel Two—and at the conclusion of either, Plaintiff could pursue deficiency.² Plaintiff highlights that no time limitation was noted in the Judgment, and that the Judgment supersedes the 90 day requirement in RPAPL § 1371. Plaintiff also argues that the last day of redemption on Parcel Two was January 13, 2017, and that should be the measuring date for the 90 day limit, and that the action filed on February 2, 2107 was within 90 days of the last day of redemption. The facts do not support Plaintiff's position.

²Ultimately, Plaintiff did not pursue reformation, and now alleges it was moot as a result of the tax foreclosure on Parcel Two.

First, the Court does not agree with Plaintiff's reading of the terms of the Judgment. The Judgment states that if the sale of Parcel One is insufficient to satisfy the debt, "and if the plaintiff is successful in reforming the mortgage instrument with respect to a second parcel of real property... that the plaintiff be permitted to submit a Judgment of Foreclosure and Sale [on Parcel Two]." (emphasis added). Contrary to Plaintiff's contention, the Judgment did not make any provision for an unsuccessful reformation. The Judgment did not say that upon an unsuccessful attempt to reform the mortgage that the Plaintiff could pursue deficiency. Rather, the Judgment contemplated, and expressly stated, that Plaintiff could pursue a Judgment of Foreclosure and Sale on Property Two upon a successful reformation of the mortgage.³ After that, Plaintiff could pursue deficiency. But here, there was not even an unsuccessful reformation-Plaintiff simply chose not to pursue the reformation, concluding the value of Parcel Two did not justify the expense to reform the mortgage. The Judgment contemplated a successful reformation and Judgment of Foreclosure and Sale on Parcel Two before the Plaintiff could pursue deficiency. An exception was written in the Judgment that if it was determined that plaintiff does not have a mortgage lien on Parcel Two, it could still pursue deficiency. However, no determination was made with respect to the mortgage lien. Rather, Plaintiff voluntarily let the property go in a tax foreclosure. The Court concludes that Plaintiff's decision not to pursue the mortgage reformation does not equate to a "determination that plaintiff does not have a mortgage lien" on the property. Thus, the Judgment does not permit the Plaintiff to move for deficiency based upon the facts of this case.

Second, the Court agrees with Defendants that even though the May, 2016 Judgment did not specify a time for moving for deficiency, the Judgment did not abrogate the guidelines set forth in *Sanders*, or the time requirements of RPAPL § 1371. An affirmative declaration or order would have been needed to justify such a result. Thus, the 90 day time limit from the consummation of the sale of Parcel One on June 6, 2016 applies. Plaintiff failed to commence the action for deficiency within 90 days.

³Incidentally, the May 13, 2016 Judgment was submitted by Plaintiff upon Defendant's default, and contained the language Plaintiff chose.

Third, the Court does not agree that the last day of redemption on Parcel Two (January 13, 2017) is the proper date from which to measure the 90 days. RPAPL § 1371 and *Sanders*, *supra*, establish that the 90 days runs from the consummation of the sale of Parcel One. There is no support for the proposition that the 90 days starts from the subsequent expiration of the right of redemption on a separate parcel. To the extent Plaintiff advances the argument that the Judgment allowed Plaintiff to pursue the reformation of the mortgage on Parcel Two, and then that alternative became impossible with the tax foreclosure on Parcel Two, the Court has already considered that argument above and rejected it. That course only became impossible because Plaintiff chose not to pursue the reformation, and the Judgment allowed that path only upon a successful reformation of the mortgage on Parcel Two. And the Judgment did not specifically waive or alter the 90 day limits of RPAPL § 1371.

Accordingly, the Court concludes that Plaintiff has failed comply with RPAPL § 1371, by failing to make a motion for deficiency within 90 days of the consummation of the sale of Parcel One, and therefore, Plaintiff is not entitled to pursue deficiency against the Defendants.

B. Plaintiff's Failure to seek a Judgment of Foreclosure and Sale against Parcel Two

As a second ground to deny Plaintiff's motion for deficiency, Defendants argue that Plaintiff's failed to foreclose on all the collateral. The debt here was secured by the two parcels, but Plaintiff has only foreclosed on the first parcel. The foreclosure action, however, was against the two parcels. Plaintiff abandoned attempts to foreclose on Parcel Two. By omitting a portion of the mortgaged premises from the foreclosure, Plaintiff is now precluded from moving for deficiency. *See Matter of Silverman*, 10 B.R. 734 (Bankr. SDNY 1981). The failure to foreclose against Parcel Two, absent circumstances not present here, waived Plaintiff's right to pursue deficiency. *See e.g. Sanders; Joseph Parisi TTEE Parisi Enterprises, Inc. Profit Sharing Trust v. Black Meadow Estates, Inc.*, 208 AD2d 597 (2d Dept. 1004); RPAPL § 1371.

The Court concludes that Plaintiff did not pursue all the collateral available to it, and

therefore, cannot not pursue deficiency. Accordingly, Plaintiff's motion must be denied on that basis as well.

Conclusion

Based upon the foregoing discussion, Plaintiff's motion for deficiency is DENIED. Defendants' motion for an Order that the Referee's Sale satisfied the Judgment against the Defendants is GRANTED. In light of the Court's determinations, it is unnecessary to address Defendants' request for a hearing to determine the fair market value, or the request to vacate and modify the Judgment of Foreclosure and Sale.

This constitutes the Decision and Order of this Court.

Dated: December 18, 2017



HON. EUGENE D. FAUGHNAN
Supreme Court Justice