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SHORT FORM ORDER

COPY

INDEX
NO.: 02509-17

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 8-1-17
SUBMITTED: 9-28-17
MOTION NO.: 001-MG
002-XMG; CASE DISP

STARR WITTY,

Plaintiff,

-against-

1725 FIFTH AVENUE CORP., ROBERT H. FRAMPTON, SUSAN VELTRY, JUDITH WALLACE, AND JOHN DOE #1 THROUGH JOHN DOE #5, THE PERSONS OR PARTIES INTENDED PERSONS OR CORPORATIONS, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR UPON THE PREMISES/LAND DESCRIBED IN THE COMPLAINT,

Defendants.

LAW OFFICES OF DANIEL A. ZAHN, P.C.
Attorneys for Plaintiff
1597 Grundy Avenue
Holbrook, New York 11741

LAW OFFICE OF MARK E. GOIDELL
Attorneys for Defendants 1725 Fifth Avenue Corp., Robert H. Frampton and Susan Veltry
666 Old Country Road, Suite 700
Garden City, New York 11530

GLYNN MERCEP AND PURCELL, LLP
Attorneys for Defendant Judith Wallace
North Country Road, P.O. Box 712
Stony Brook, New York 11790

Upon the following numbered 1-19 read on this motion and cross-motion to dismiss; Notice of Motion and supporting papers 1-5; Notice of Cross Motion and supporting papers 6-7; Answering Affidavits and supporting papers 8-17; Replying Affidavits and supporting papers 18; 19; it is,

ORDERED that the motion by the defendants 1725 Fifth Avenue Corp., Robert H. Frampton, and Susan Veltry for an order dismissing the complaint insofar as it is asserted against them is granted; and it is further

ORDERED that the cross motion by the defendant Judith Wallace for an order dismissing the complaint insofar as it is asserted against her is granted.

The corporate defendant, 1725 Fifth Avenue Corp. (the "corporation"), owns a parcel of real property located in Bay Shore, New York. A fire in May of 2003 severely damaged

the building on the property.[1] An insurance claim submitted to the plaintiff's fire-insurance carrier was paid in 2003 or 2004 (the "fire-insurance proceeds").

Pursuant to an agreement of sale dated November 17, 2003, the defendants Robert Frampton and Susan Veltry, who are attorneys, purchased all of the capital stock of the corporation from the plaintiff Starr Witty, and the defendant Judith Wallace. The purchase price was $600,000. Frampton and Veltry agreed to take title to the property subject to an existing mortgage in the amount of $104,513.06, and they executed separate promissory notes in favor of Witty and Wallace in the amount of $247,743.47 each. The promissory notes were secured by a mortgage on the property in the amount of $500,000. Thus, the two promissory notes were secured by one mortgage. Frampton and Veltry failed to make payments on the notes, and Witty commenced an action against them on her note in 2013 (the "note action"). That action is currently pending in this court (Index No. 64855-13).[2]

In May 2017, Witty commenced this action (1) to foreclose on the $500,000 mortgage, (2) to recover damages for breach of the agreement of sale, and (3) to recover damages for violation of Judiciary Law § 487. Frampton, Veltry, and the corporation (the "moving defendants") moved and Wallace cross moved to dismiss the complaint. Witty subsequently filed a supplemental summons and amended complaint, which is annexed to her opposition papers. The defendants have elected to apply their motions to the amended complaint. Accordingly, the court will do so.

The first cause of action is to foreclose on the mortgage. The defendants contend that Witty does not have standing to foreclose because she is not the holder of the Wallace note and that she may not foreclose on a mortgage in which she holds only a one-half interest. The plaintiff contends, in opposition, that Frampton and Veltry are in default under both notes; that Wallace's failure to pursue her remedies has no impact on Witty's standing; and that all interested parties have been joined in this action, including Wallace who has been joined as a defendant.

As the plaintiff correctly contends, if a mortgage and debt are held by more than one person, all should be joined in the foreclosure action; and, if one of those parties refuses to join the plaintiff, she may be joined as a defendant (**Rosen v 124 State Street Corp.**, 141 AD2d 812). (**Id**.). Contrary to the plaintiff's contentions, however, that rule is inapplicable to the facts of this case. That rule applies when the mortgage has matured and it is not necessary to declare the entire principal sum secured by the bond and mortgage immediately due and payable (*see*,

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[1]The building eventually collapsed and was removed from the property, which is now vacant.

[2]Wallace has not commenced and action against Frampton and Veltry on the note payable to her.

Frank v Jaffa, 181 Misc 517, 517-518). When, as here, the debt has not matured, the option to accelerate the principal may not be exercised by an owner of part of the bond and mortgage, but may be taken advantage of only by the owners of the entire bond and mortgage (*see*, **Kline v 275 Madison Ave Corp.**, 149 Misc 747, 751; **Beach v Tangler Hotel Co.**, 110 Misc 41, 43-45). Thus, one alone cannot elect to foreclose (**Frank**, *supra*).

The plaintiff contends that she is not seeking to accelerate the entire amount owed under the mortgage, but only that which is owed to her. In support thereof, she relies on **Creamer v Aultman** (445 So 2d 382), a Florida case that distinguishes **Frank**, **Kline**, **Beach**, and another New York case (**Seligman v Burg**, 233 App Div 221). In **Creamer**, one joint owner of a note and mortgage whose share of the debt was in default wanted to accelerate only his share of the debt. The court allowed him to do so as long as he joined the other joint owner of the note and mortgage, whose share of the debt was not in default, as a party to the mortgage-foreclosure action. The **Creamer** court found that it would be inequitable to allow the mortgagee whose debt was not in default to preclude the other mortgagee, whose debt was in default, from seeking to recover his share of the debt. To require both mortgagees to join in the decision to accelerate the debt and to foreclose would deprive the mortgagee whose debt was in default of a remedy if the other mortgagee never agreed to accelerate and foreclose.

Creamer is contrary to well-settled New York law; it is not binding on this court, and it is based on a unique set of facts that is not present here. Moreover, neither the plaintiff nor the **Creamer** court explains how only part of a note and mortgage can be accelerated without affecting the other mortgagee's security interest in the property. A foreclosure action results in the sale of the property securing the debt. If the proceeds of the sale are insufficient to satisfy in full the entire amount owed, the mortgagee who elected not to foreclose will be left with unsecured debt. While the **Creamer** court found that it would be inequitable to allow one mortgagee to deprive the other mortgagee of a remedy, Witty has already commenced an action on her note. She, therefore, will not be deprived of a remedy. Accordingly, the court declines to follow **Creamer** and adheres to the well-established New York rule.

The parties could have provided for the situation in which they now find themselves by drafting the mortgage to allow allowing Witty and Wallace to act separately. Nothing in the mortgage, however, allows them to do so. In fact, the mortgage contemplates that they act in concert. The term "mortgagee," which is used throughout the document, is defined as both Witty **and** Wallace, and the principal is defined as the sum of both notes ($500,000). Paragraph 5 of the mortgage provides, in pertinent part, "The whole of the aforesaid principal sum shall become due and payable at the option of the mortgagee." It is well settled that a contract is to be construed in accordance with the parties' intent (**MHR Capital Partners LP v Presstek, Inc.**, 12 NY3d 640, 645). That language, in particular, evinces the parties' intent that any acceleration of the debt be an acceleration of the entire debt with Witty and Wallace acting together as one "mortgagee." Accordingly, the first cause of action is dismissed.

The second cause of action alleges that the moving defendants breached the agreement of sale by failing to place the fire-insurance proceeds in escrow and use them to reconstruct the building on the property, by failing to pay the existing mortgage on the property, and by failing to pay the real-estate taxes on the property. The plaintiff contends that these obligations survived the closing.

A breach-of-contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached (**Gianelli v RE/MAX of New York, Inc.**, 144 AD3d 861 [and cases cited therein]). The plaintiff fails to specify which provisions of the agreement of sale required the moving defendants to pay the existing mortgage and real estate taxes on the property. The court's review of the record reveals that the agreement of sale required Frampton and Veltry to take title subject to the existing mortgage, which they did. However, nothing in the agreement of sale required them to make any payments on the existing mortgage. Thus, their failure to pay the existing mortgage was not a breach of the agreement of sale. The court's review of the record also reveals it was the mortgage, and not the agreement of sale, that required the corporation to pay the real estate taxes on the property. Any default under the mortgage is subsumed in the first cause of action for foreclosure, which has been dismissed.

The plaintiff fails to specify which provisions of the agreement of sale required Frampton and Veltry to place the fire-insurance proceeds in escrow and to use them to reconstruct the building on the property. The court's review of the record reveals that the fire-insurance proceeds are dealt with in paragraph 5 of the agreement of sale under the heading "Closing Documents." That paragraph provides, in pertinent part, as follows:

> "At the closing Seller shall execute and deliver to Purchaser:
>
> * * *
>
> (e) insurance proceeds as provided in Paragraph 2, which proceeds, until completion of construction, shall be held in escrow and disbursed only for the purposes of construction, rebuilding and related expenses, in accordance with a periodic schedule as construction proceeds[.]"

The aforementioned language merely required someone (and it is unclear who) to hold the fire-insurance proceeds in escrow "until completion of construction" and to disburse them "only for the purposes of construction, rebuilding and related expenses." Any breach thereof occurred in 2003 or 2004, when the fire-insurance proceeds were paid. This action was commenced in 2017, well beyond the six-year statute of limitations applicable to contract actions (*see*, **CPLR** 213 [2]). The plaintiff contends that her contract claim is timely because the moving defendants had a continuing duty to repair or reconstruct the building on the property. However, nothing in the agreement of sale required them to repair or reconstruct the building.

In view of the foregoing, the plaintiff's claim that the moving defendants breached the implied covenant of good and fair dealing fails because the implied obligation is only in aid and in furtherance of other terms of the agreement, and the plaintiff has not alleged any applicable terms of the agreement of sale to support it (*see*, **Trump on the Ocean, LLC v State of New York**, 79 AD3d 1325, 1326). The plaintiff's remaining contentions, that there are "many additional facts" and "many more breaches" of the agreement of sale, are too vague and conclusory to support a breach-of-contract claim. Accordingly, the second cause of action is dismissed.

The third cause of action alleges that Frampton and Veltry, who are attorneys, violated Judiciary Law § 487 by concealing, withholding, and failing to produce the originals and/or copies of all of the documents evincing the transaction between the parties in the related action on the note (Index No. 64855-13).

Preliminarily, the court notes that any failure to produce documents in the note action should have been raised and resolved in that action. The plaintiff has proffered no explanation for her failure to seek sanctions in that action pursuant to CPLR 3126. Presumably, it is because CPLR 3126 does not provide for treble damages.

Judiciary Law § 487 provides that an attorney who is guilty of any deceit or collusion, or who consents to any deceit or collusion, with intent to deceive the court or any party is guilty of a misdemeanor and that the injured party may recover treble damages from such attorney in a civil action. Contrary to the plaintiff's contentions, Judiciary Law § 487 only applies to an attorney who is acting in his or her capacity as an attorney. It does not apply to a party who is represented by counsel and who happens to be an attorney (**Oakes v Muka**, 56 AD3d 1057, 1058). Frampton and Veltry were represented by counsel in the note action. The mere fact that they are attorneys is insufficient to impose liability on them (*see*, **Crown Assocs., Inc. v Zot**, LLC, 83 AD3d 765, 768, *citing* **Oakes v Muka**, *supra*).

The plaintiff does not specify what documents, if any, were concealed, withheld, or not produced by Frampton and Veltry. The record in the note action reveals that complete copies of the note, the agreement of sale, and the mortgage were attached to the plaintiff's complaint. It, therefore, appears that she was in possession of all of the relevant documents.

The plaintiff contends that Frampton and Veltry deceived her by sending her checks for less than the full amount of the monthly payments due under the note. The plaintiff is alleging a breach of contract, specifically a breach of the terms of the promissory note. When, as here, the plaintiff is essentially seeking enforcement of her bargain, she should proceed under a contract theory (*see*, **Sommer v Federal Signal Corp.**, 79 NY2d 540, 552, *citing* **Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.**, 70 NY2d 382, 389-390). The plaintiff has already pleaded a cause of action for breach of contract in the note action. Accordingly, the third cause of action is dismissed.

Finally, the moving defendants' jurisdictional claim, has been rendered academic by the amended affidavits of service submitted by the plaintiff to which the moving defendants raise no objection.

Dated: December 12, 2017

J.S.C.

HON. ELIZABETH HAZLITT EMERSON