SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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TITAN CAPITAL ID, LLC,

Plaintiff,

- v -

TOMTAB, LLC,ANASTASIOS BELESIS, TABITHA BELESIS, U.S. SECURITIES AND EXCHANGE COMMISSION, BOARD OF MANAGERS OF THE 60 BEACH CONDOMINIUM, JOHN DOE #1 THROUGH #10

Defendants.

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INDEX NO. 850149/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER OF REFERENCE

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48[1]

were read on this motion to/for JUDGMENT - SUMMARY.

The motion for summary judgment by plaintiff is granted and the cross-motion by defendants Tomtab, LLC, Tabitha Belesis, and Anastasios Belesis (collectively, "Defendants") for summary judgment dismissing this action is denied.

Background

This foreclosure action concerns an apartment owned by Tomtab, LLC ("Tomtab") located at 60 Beach Street in Manhattan. Plaintiff claims that Tomtab executed a note for $4.1 million in May 2016 and entered into a mortgage encumbering the apartment. Plaintiff claims that the note and mortgage were extended four times and matured on May 19, 2018. Plaintiff contends that despite all amounts coming due on that date, Tomtab failed to make any payments.

[1] The Court did not consider the sur-reply (NYSCEF Doc. No. 49) which was filed without permission. In any event, the Court does not see the significance of the deed correction for purposes of this decision. As will be discussed below, there is no dispute that a corporate entity is the property owner.

In opposition and in support of its cross-motion, Defendants claim that the Belesis (Tabitha and Anastasios) acquired title to the property in 2009 and insist that they have resided in the apartment since that time. Defendants point out that at the closing with plaintiff, a correction deed was entered into showing the conveyance of the property from Tabitha and Anastasios to Tomtab. Tabitha and Anastasios also executed a guaranty for the note at issue. Defendants argue that the case should be dismissed because plaintiff failed to send the RPAPL 1303 and 1304 notices.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that

fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

In this case, there is no dispute that Tomtab failed to meet its obligations under the note and mortgage. The question is whether the occupants of a property are entitled to notices under RPAPL 1303 and 1304 where they used an LLC to obtain a loan secured by a residential property.

RPAPL 1304 provides that "Notwithstanding any other provision of law, with regard to a home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, or borrowers at the property address and any other address of record, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type." The provision then describes the exact language a lender must send in the notice (*id.*).

There is no question that the RPAPL 1304 notice is inapplicable to the instant action and plaintiff was under no obligation to send this notice. RPAPL 1304(6)(i) defines a home loan as one in which "[t]he borrower is a natural person." Because Tomtab is a corporate entity, it was not required to have received a 90-day notice.

RPAPL 1303 is a closer question. This statute provides that: "1. The foreclosing party in a mortgage foreclosure action, involving residential real property shall provide notice to:(a) any mortgagor if the action relates to an owner-occupied one-to-four family dwelling; and (b) any tenant of a dwelling unit in accordance with the provisions of this section."

As an initial matter, Defendants did not produce a lease showing that they are tenants of the property and, therefore, they are not entitled to a notice pursuant to RPAPL 1303(1)(b). The Court also finds that Defendants were not entitled to notice under RPAPL 1303(1)(a). This

section applies to "an owner-occupied" dwelling. A plain reading of the statute compels the conclusion that Tomtab was not entitled to a RPAPL 1303 notice because, as a corporate entity, it does not and cannot occupy the apartment.

The Court cannot infer from the statutory scheme that notices should be sent to the members of a corporate entity that owns an apartment where those members happen to reside in the unit. The purpose of the RPAPL 1303 notice-- the Home Equity Theft Prevention Act ("HEPTA")—is to provide homeowners with greater protections when confronted with foreclosure (*see First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 165, 899 NYS2d 256 [2d Dept 2010]). While Defendants were certainly entitled to transfer title to the property to a corporate entity, they may not utilize the corporate form for their own advantage and then seek notices that were intended to aid natural person homeowners. Other portions of this statute require lenders to give information about potential places to seek assistance and warn them about rescue scams (*see* RPAPL 1303[3]). Clearly, the statute was intended to help the average homeowner take steps to avoid foreclosure-- it was not intended as a way for individuals sophisticated enough to create an LLC to avoid paying a note worth over $4 million.

The Court also observes that the affidavit of Lance Friedman (submitted by Defendants) compels the Court to grant plaintiff's motion. Mr. Friedman claims that he advises people and companies with debt financings (NYSCEF Doc. No. 26, ¶ 3). He insists that he inquired with a private lender ("Silver Arch") whether they could help Defendants with refinancing and admits that Silver Arch did not refinance residential units (*id.*). Mr. Friedman contends that Silver Arch suggested that a deal might be reached if an LLC was created (*id.* ¶ 4).

Plaintiff then got involved and Mr. Friedman bizarrely claims that "Subsequent to the site visit to the Property and despite knowledge that neither [plaintiff] nor Silver Arch should

proceed with the debt financing they continued with the loan knowing full well the deceit of their actions, and in addition to knowing that Tomtab LLC nor the guarantors, Tabitha and Thomas Belesis had the income or financial wherewithal to pay the obligation satisfactorily" (*id.* ¶ 6).[2]

This affidavit, *submitted by Defendants,* shows that they obtained funding from a lender that is traditionally hesitant about loaning money involving residential properties. In fact, Defendants created an LLC so that they could get the funding. Rather than refinance with a traditional home loan, Defendants decided to form a corporate entity to seek capital. There is absolutely nothing wrong with this approach, but it shows that the Defendants deliberately chose to transfer title to an LLC to refinance via a note that required full payment in a year (*see* NYSCEF Doc. No. 17). This was not a typical home loan with a fifteen or thirty-year mortgage; instead, it resembled a commercial loan and simply secures the apartment as collateral. Defendants deliberately chose to enter into a complex commercial transaction where they created an LLC in order to execute a loan. That removes them from the protections of RPAPL 1303 and 1304.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted and the answer and affirmative defenses of defendants Tomtab, LLC, Tabitha Belesis and Anastasios Belesis are severed and dismissed; and the cross-motion by these defendants is denied; and it is further

ORDERED that Elaine Shay 800 Third Avenue NY NY 10022 212 520-2690 is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to

[2] While not dispositive, the Court observes that Mr. Friedman's claim that this is part of a "loan to own" strategy is besides the point. Defendants received over $4 million from plaintiff—the fact that they later defaulted does not transform the loan into a "scheme to be unjustly enriched." If Defendants were unable to make the payment on the maturity date, then they should not have entered into the agreement.

Plaintiff for principal, interest and other disbursements advanced as provided for in the note and mortgage upon which this action is brought, and to examine whether the mortgaged property can be sold in parcels; and it is further

ORDERED that the Referee *may* take testimony pursuant to RPAPL § 1321; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of $350 shall be paid to the Referee for the computation of the amount due and upon the filing of her/his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale

within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein; and it is further

Next Conference: December 3, 2019 at 2:15 p.m. If plaintiff has moved for a judgment of foreclosure and sale before the conference, then plaintiff can seek an adjournment. Please consult the part's rules for information about how to obtain an adjournment. An appearance is required if a motion for a JFS has not been made; counsel appearing for plaintiff must come prepared to explain the delay or interest may be tolled.

6/21/19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION	
	X	GRANTED	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE