

Velocity Commercial Capital, LLC v 61 Washington Ave., LLC

2021 NY Slip Op 32868(U)

December 17, 2021

Supreme Court, Kings County

Docket Number: Index No. 524070/19

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of December 2021.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.
-----X
VELOCITY COMMERCIAL CAPITAL, LLC,

Plaintiff,

-against-

61 WASHINGTON AVE., LLC, et al.,
Defendants.
-----X

DECISION AND ORDER

Index No. 524070/19

Mot. Seq. No. 4

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Order to Show Cause, Affidavits (Affirmations),
and Exhibits Annexed _____
Opposing Affidavit (Affirmation) _____
Affidavit/Affirmation in Reply and Exhibits Annexed _____

58-63
65-66
67-74

In this action to foreclose a commercial mortgage on a three-family residence located at 353 Monroe Street in Brooklyn, New York (the "property"), plaintiff Velocity Commercial Capital, LLC (the "plaintiff") moves in Seq. No. 4 for an order: (1) pursuant to CPLR 2104, enforcing the settlement agreement entered into by plaintiff and defendant 61 Washington Ave, LLC (the "defendant"); and (2) vacating the stay extant in this action upon the defendant's filing of a Commercial Mortgagor's Declaration of COVID-19-Related Hardship (the "hardship declaration") (NYSCEF Doc No. 55).

Background

On May 31, 2019, the defendant borrowed \$963,750 from the plaintiff, with such loan to be secured by a first-lien commercial mortgage on the property. The mortgage was recorded with the Office of the City Register on June 7, 2019. Shortly thereafter, the defendant defaulted under the terms of the mortgage loan by failing to make monthly payments due and owing to the plaintiff on and after July 1, 2019.

On November 4, 2019, the plaintiff instituted this action against the defendant (among others) to foreclose its mortgage lien, and concurrently filed a notice of pendency against the property. The defendant, although duly served with process, failed to interpose a timely answer or to timely appear in this action otherwise. On April 21, 2020, the defendant conveyed the property to nonparty 353 Monroe Street LLC (the "transferee") for no consideration (NYSCEF Doc No. 73). It appears that the transferee is an entity which was formed by one of the defendant's members, Miguel Sanfiz, shortly prior to the defendant's conveyance of the property to the transferee (NYSCEF Doc No. 43).

Meanwhile, on January 29, 2020, the plaintiff moved for leave to enter a default judgment as against the defendant (among others) and for an order of reference. On August 17, 2020, the defendant opposed the plaintiff's motion and, by way of cross motion, sought leave to interpose a belated answer. On October 20, 2020, the plaintiff opposed the defendant's cross motion. Since April 27, 2021, the action has been stayed upon the defendant's filing of the aforementioned hardship declaration.

On August 13, 2021, the plaintiff and the defendant, with each represented by counsel, entered into an out-of-court settlement agreement (NYSCEF Doc No. 60) (the “settlement agreement” or “SA”).¹ In the settlement agreement, the defendant acknowledged that it owed the plaintiff the aggregate sum of \$1,399,495.22 calculated as of July 29, 2021 (the “outstanding debt”), with interest and charges continuing to accrue (SA, ¶ 3.B). Under the terms of the settlement agreement, the plaintiff agreed to accept \$1,275,000 (the “base settlement amount”), if paid on or before August 28, 2021 (the “initial due date”), as a post-default short-payoff settlement for a discounted sum certain (SA, ¶ 3.C). The settlement agreement further provided that if the defendant failed to pay the base settlement amount by the initial due date, it could elect, on notice to the plaintiff’s counsel, to pay the base settlement amount 15 days later on September 12, 2021 (the “extended due date”) (SA, ¶¶ 3.C-3.D). If the defendant exercised the extension option, it would be required to pay immediately an additional amount \$20,000, which, together with the base settlement amount, would raise the total settlement amount to \$1,295,000 (the “extended settlement amount”), likewise as a post-default short-payoff settlement for a discounted sum certain (SA, ¶ 3.D). The defendant further agreed that if it failed to pay the base settlement amount (or the extended settlement amount, as applicable) by the initial due date (or the extended due date, as applicable), then:

“[The plaintiff] . . . may . . . proceed with the Action and [the defendant] . . . will withdraw its pending motion to vacate default and its opposition to [the plaintiff’s] motion, inter alia, for a default judgment and [the defendant] . . . will not in any way contest the Action, including, the motion

¹The settlement agreement, as filed with the Kings County Clerk, is signed by the defendant only.

for a default judgment; referee's computation; motion for final judgment and sale, and hereby consent[s] to the entry of a final judgment of foreclosure and sale and further agree[s] and acknowledge[s] that [it] currently [has] title to the [property], that [the defendant] will not assign title or any interest therein to the [property] to any third party at any time unless and until [the defendant] timely pays the [base] Settlement Amount (or the Extended Settlement Amount, if applicable) as set forth above."

(SA, ¶ 3.F).

Thereafter, the defendant failed to timely pay the base settlement amount. Likewise, the defendant failed to timely request an extension of the initial due date. By email, dated August 30, 2021, the plaintiff's counsel so notified the defendant's counsel (NYSCEF Doc No. 61).

By order to show cause, dated September 27, 2021, the plaintiff moved to enforce the terms of the settlement agreement and to vacate the stay extant upon the defendant's filing of the hardship declaration (NYSCEF Doc No. 63). The defendant opposed. On October 21, 2021, the Court reserved decision on the plaintiff's motion.²

Discussion

Pursuant to CPLR 2104, an "agreement between parties or their attorneys relating to any matter in an action . . . is not binding upon a party unless it is in a writing subscribed by her or her attorney." CPLR 2104 requires that "the agreement itself . . . be in writing, signed by the party (or attorney) to be bound" (*Kataldo v Atlantic Chevrolet Cadillac*, 161 AD3d 1059, 1060 [2d Dept 2018] [internal quotation marks omitted]).

² The Court has disregarded the defendant's post-submission filing (NYSCEF Doc No. 75) as an improper surreply.

Here, the defendant does not dispute that the settlement agreement complies with CPLR 2104. Rather, the defendant asserts that the settlement agreement is unenforceable for two reasons; first, that the plaintiff, in various ways, breached the implied covenant of good faith and fair dealing inherent in the settlement agreement; and second, that the \$20,000 stipulated sum for extending the initial due date was usurious either as a civil or as a criminal matter (*see* General Obligations Law § 5-521 [1] and [3]). Neither contention is meritorious.

The defendant's first contention is conclusively refuted by the extensive documentary proof submitted by the plaintiff (NYSCEF Doc. No. 68-74). The defendant's second contention misapprehends the substance of the settlement agreement as a post-default short-payoff settlement for a discounted sum certain. The amount to be paid by the defendant under the settlement agreement, whether paid at \$1,275,000 on the initial due date of August 28, 2021, or paid as a sum of \$1,295,000 under a 15-day extension through September 12, 2021, was, in each instance, less than the acknowledged post-default mortgage indebtedness of \$1,399,495.22 calculated as of July 29, 2021. As the plaintiff did not charge the defendant interest in excess of the legal rate (it actually charged the defendant the extended settlement amount which, in total, was less than what the latter owed under the mortgage loan after default), the settlement agreement was not usurious.

Conclusion

Based on the foregoing, it is hereby

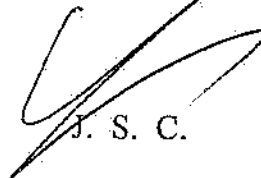
ORDERED that the plaintiff's motion in Seq. No. 4 is *granted in its entirety*; and it is further

ORDERED that the stay extant upon the defendant's filing of the hardship declaration is *vacated*.

The plaintiff's counsel is directed to electronically serve a copy of this decision and order with notice of entry on the other parties' respective counsel, and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

E N T E R,



HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE