SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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ELIZON DB TRANSFER AGENT LLC,

Plaintiff, Decision and order

- against - Index No. 512350/2022

1711 EAST 15 STREET LLC, BENZION EISENBERG, SPRINGLAND ENTERPRISES, LLC, MR. SUPER INC., NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT AUTHORITY TRANSIT ADJUDICATION BUREAU, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE AND "JOHN DOE" #1 THROUGH "JOHN DOE" #10, THE LAST TEN (10) NAMES BEING FICTITIOUS AND UNKNOWN TO THE PLAINTIFF, THE PERSONS OR PARTIES INTENDED BEING THE TENANTS, OCCUPANTS, PERSONS OR PARTIES, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE MORTGAGED PREMISES DESCRIBED IN THE VERIFIED COMPLAINT,

Defendants, January 11, 2023

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3212 seeking summary judgement. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On July 21, 2020, the plaintiff loaned the defendant 1711 East 15 Street LLC five million dollars. The loan was secured by a mortgage on real property located at 1711 East 15th Street in Kings County. Further, the defendant Eisenberg executed a promissory note to the plaintiff in the amount of $5,000,000. The defendant was required to make monthly interest only payments until July 2021 when the entire amount was due. The defendant

failed to make any interest payments from April 2021 and failed to return the five million dollars loaned.

The plaintiff instituted this lawsuit seeking to foreclose on the above noted property. The complaint asserts causes of action for foreclosure and a declaratory judgement. All of the defendants defaulted except for defendant Eisenberg. Eisenberg served an answer and has asserted a counterclaim the plaintiff misapplied escrow funds which induced the default by preventing the defendant from making payments. Specifically, the defendant argues the plaintiff frustrated defendant's efforts to restructure the debt to return plaintiff's loan. The plaintiff has now moved seeking summary judgement arguing there are no questions of fact and the court should award judgement in plaintiff's favor. As noted, the defendant opposes the motion.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021).

It is well settled that where a party introduces evidence of the existence of a loan, personal guarantees and the defendant's failure to make payments according to the terms of the instruments then summary judgement is proper (see, JPMorgan Chase Bank N.A., v. Bauer, 92 AD3d 641, 938 NYS2d 190 [2d Dept., 2012]). In this case, the plaintiff submitted the affidavit of Katherine Meagher a vice president of the plaintiff who stated that she reviewed the plaintiff's records in connection with the loans extended. She further stated that all the documents she reviewed were maintained in the regular course of business and all such records were made near their occurrence with someone who had knowledge at that time and that the plaintiff's standard practice is to keep such records in the ordinary course of business (see, Affidavit of Katherine Meagher [NYSCEF Doc. No. 119]). Thus, the plaintiff has established the admissibility of the records relied upon since Ms. Meagher had knowledge of the plaintiff's practices and procedures (see, Cadlerock Joint Venture L.P. v. Trombley, 150 AD3d 957, 54 NYS3d 127 [2d Dept., 2017]). Therefore, the plaintiff established its entitlement to summary judgement.

The defendant has not presented any evidence raising questions of fact whether the debt has been paid. Rather, the defendant argues that when the loan was initiated $200,000 was impounded to provide for interest payments and that there was

enough to cover interest payments through February 2021. Further, defendant argues that in December 2020 he sought to restructure the debt and requested a verification of mortgage from plaintiff which was produced in March 2021 and which demonstrated the defendant was current in all payments due. Thus, the defendant argues that first this demonstrates no default existed and more importantly that if the verification of mortgage had been provided immediately when requested then the defendant could have restructured the debt avoiding the default. In essence, the defendant asserts the default was manufactured by the plaintiff and summary judgement cannot be awarded.

First, the default is based upon the fact no interest payments were made commencing April 2021 and that none of the principal has been paid back. The defendant's counterclaim fails to address these issues at all. Thus, the defendant failed to make the necessary interest payments and failed to repay the amount loaned. The mere fact the plaintiff provided a mortgage verification from March 2021 raises no questions about the repayment of interest or principal after that date. The defendant's obligation to repay principal and interest existed regardless of whether or not the defendant was able to restructure the debt. The counterclaim does assert that the plaintiff misappropriated escrow funds and provided a false accounting and that "defendants could not secure the refinancing

as a result of the misappropriate escrow funds and the false accounting" (see, Answer, ¶129 [NYSCEF Doc. No. 111]). The allegations of affirmative misconduct on the part of the plaintiff essentially asserts an allegation of tortious interference with a prospective business relation. To establish this tort the defendant must demonstrate the plaintiff engaged in culpable conduct which interfered with a prospective contractual relationship between the defendant and a third party (see, Lyons v. Menoudakos & Menoudakos P.C., 63 AD3d 801, 880 NYS2d 509 [2d Dept., 2009]). Culpable conduct has been defined as conduct that is a crime or an independent tort and includes physical violence, fraud, misrepresentation and economic pressure (Smith v. Meridian Technologies Inc., 52 AD3d 685, 861 NYS2d 687 [2d Dept., 2008]). The counterclaim asserts the plaintiff misapplied escrow funds by paying taxes that were not yet due and by paying insurance premiums that did not need to be paid. The counterclaim further asserts the plaintiff misapplied escrow funds and provided a false accounting with "calculated intent" and with "reckless disregard for the truth" (see, Answer, ¶¶124,125, 126 [NYSCEF Doc. No. 111]).

Notwithstanding the above allegations there are no facts presented which raise questions whether the plaintiff in any way interfered with the defendant's ability to obtain financing. Thus, on November 25, 2020 Spencer Savings Bank presented a

preliminary term sheet concerning restructuring the existing debt (NYSCEF Doc. No. 179). That refinance never occurred. In an email dated September 19, 2022 Andrew French, a vice president of Spencer Savings Bank responding to an inquiry regarding the verification of mortgage in particular and the refinance in general noted that "looks like we did receive it in and started the underwriting process. However, it never was sent for approval or closing. Looks like we never received all of the docs. And we were looking to cut it" (Email dated September 19, 2022 [NYSCEF Doc. No. 156]). Thus, there is no evidence at all that any of plaintiff's actions had anything to do with the failure to obtain a restructuring of the debt. Indeed, there are no questions of fact in this regard. Likewise, there are no questions of fact that an improper accounting was filed. Other than conclusory assertions within the counterclaim there is no evidence supporting such allegations. Further, there is no evidence that the misapplication of escrow funds, if any, had anything to do with the defendant's failure to obtain such debt restructuring.

The defendant further argues that the plaintiff has already exercised a remedy, namely foreclosing upon defendant's equity interest in 1711 East 15th Street LLC and that such remedy forecloses any relief contemplated here (see, Affidavit of Benzion Eisenberg, ¶170 [NYSCEF Doc. No. 170]). First, if the defendant has no ownership interest in the entity then the

defendant has no standing to pursue any defenses regarding this foreclosure since it is no longer a member of the entity. In any event, merely securing rights of ownership pursuant to the UCC does not foreclose this lawsuit. Of course, the plaintiff cannot recover more than it is owed and a hearing will be required to evaluate the worth of the shares obtained through the UCC foreclosure.

Therefore, based on the foregoing, the motion seeking a default against all defendants except Eisenberg is granted without opposition. The motion seeking summary judgement against Eisenberg is granted. The parties must attend a hearing where the precise amount of the shares will be evaluated and the exact amount defendant repaid will be determined. Thus, the only issue that remains is the amount that remains outstanding and the amount to which the plaintiff is entitled.

So ordered.

ENTER:

DATED: January 11, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC