SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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LISPENARD, LLC, INDEX NO. 850032/2010

Plaintiff,

-against-

KENMARE SQUARE LLC, JACK JANGANA, JENNY JANGANA HAIM, JOYC JANGANA REISS, LISPENARD GROUP LLC, RONALD PASQUALE, JOHN J. PASQUALE, METROPOLITAN NATIONAL BANK, "JOHN DOE #1" THROUGH "JOHN DOE #2," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended to be tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

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JOAN A. MADDEN, J.

In this mortgage foreclosure action, defendant Kenmare Square Realty LLC ("Kenmare") moves for an order granting permission to interpose an amended answer with a supplemental counterclaim for an injunction "directing plaintiff to immediately provide Kenmare's new lender with an assignment of the Mortgage in the principal sum of $3.5 million (the 'Mortgage') on Kenmare's property at 23-25 Cleveland Place, New York, New York (the 'Property') upon (i) payment by Kenmare into an escrow account of the additional sums demanded by Plaintiff for default interest, and directing the immediate cancellation of the Amended Notice of Pendency filed by Plaintiff in this action on or about January 31, 2011." Plaintiff opposes the motion.

For the reasons discussed below, the court grants the motion to interpose the amended answer with a supplemental counterclaim, and will consider the supplemental counterclaim in

connection with the motion for injunctive relief.

It is well settled law, that in order to obtain a preliminary injunction, a party must demonstrate a probability of ultimate success on the merits, a danger of irreparable harm in the absence of an injunction, and a balance of the equities in its favor. See Aetna Insurance Co. v. Capasso, 75 NY2d 860, 862 (1990). Defendant Kenmare has made a sufficient showing of the three requirements so as to be entitled to such relief.

First, as to the probability of ultimate success on the merits, plaintiff alleges that Kenmare defaulted on the mortgage by failing to pay certain real estate taxes, and seeks a 24% default rate of interest on the accelerated balance of the loan, as well as legal fees in connection with this litigation. Plaintiff alleges that it purchased the mortgage in the amount of $3.5 million in October 2011, approximately four months before its maturity date. Plaintiff sent Kenmare a letter dated November 1, 2010 stating real estate taxes were in arrears, that this constituted a breach of the mortgage, and Kenmare had 30 days to make such payment. Plaintiff sent Kenmare a second letter dated December 6, 2010 stating it was in default of the mortgage by failing to pay past due real estate taxes and demanded payment of the entire unpaid principal of the loan balance. Plaintiff thereafter commenced this action, based on Kenmare's alleged failure to pay the taxes by November 30, 2010.

Kenmare alleges that a failure to pay real estate taxes does not provide a basis to foreclose on the mortgage and that the real estate taxes were in fact current based on an "in rem" agreement with the City of New York to pay any arrears on a monthly basis. Notwithstanding such agreement, Kenmare asserts that it is not in default on its obligation to pay real estate taxes, as a check for the full amount of the taxes was mailed to the Department of Finance of the City

of New York on November 29, 2011, and that the check was either lost, misplaced by the City or not recorded by the City in a timely fashion. Kenmare further alleges that it offered to stop payment on the check and mail a check for the taxes directly to plaintiff, but plaintiff did not respond and instead accelerated the mortgage and commenced this action to foreclose on the mortgage. It is undisputed that the real estate taxes were paid in full by replacement checks.

On the return date of the original Order to Show Cause, the parties stipulated that the disputed amount of interest would be placed in plaintiff's attorney's escrow account and that the closing would take place by March 31, 2011. When the closing did not take place prior to March 31, 2011, the parties entered into a second stipulation agreeing to extend the date to April 7, 2011, on the condition that Kenmare pay interest at the default rate of 24% from April 1, 2011 through April 7, 2001, together with $8,000 in attorneys fees, and that the disputed amount of interest be placed in plaintiffs' attorney's escrow account.[1]

The present dispute arose when defendant Kenmare did not close by April 7, 2011. Kenmare now seeks a determination on its motion for leave to serve an amended answer with a supplemental counterclaim and for a preliminary injunction alleging that the closing is now scheduled for Friday, April 22, 2011, and that its financing is only available until that date.

In Bay v. Bay, 9 NY2d 855 (1961), a case involving a foreclosure based on the failure to pay real estate taxes, the Court of Appeals reversed the Appellate Division decision for the reasons stated in the dissenting opinion. The dissenting opinion relied upon Graf v. Hope

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[1]The parties were engaged in a similar dispute with respect to a $9.5 million mortgage on a separate property, and entered into identical stipulations for Kenmare to obtain financing for each loan and close by March 31, 2011. With respect to the larger loan for $9.5 million, Kenmare was able to secure financing and close by March 31, 2001, but not with respect to the $3.5 million loan which is the subject of this motion.

Building Corp, 254 NY 1 (1930), and explained that in Graf,

> [a] distinction was sharply drawn both in the majority opinion by Judge O'Brien and in the dissenting opinion of Chief Judge Cardozo between an acceleration of maturity for nonpayment of an installment of principal or interest and an acceleration for nonpayment of taxes or assessments. The Graf case involved an acceleration for nonpayment of interest. The majority of the court held that a court of equity had no power to relieve from this type of acceleration in the absence of a showing of fraud, bad faith or unconscionable conduct on the party of the mortgagee. As the court pointed out, a clause authorizing acceleration for nonpayment of installments of interest or principal is part of the prescription of the terms of payment of the primary obligation. These terms are enforced as written, an election to accelerate in such a case being regarded, not as a forfeiture or penalty, but as simply fixing the date of maturity in accordance with the agreement of the parties. But a provision requiring the mortgagor to pay taxes stands upon a different footing from the obligation to pay the stipulated principal and interest to the mortgagee. It does not require the payment of anything to the mortgagee; it is a collateral undertaking, designed to protect the mortgagee against the impairment of his security by the accumulation of unpaid tax liens having priority over the mortgage lien. The clause authorizing acceleration for nonpayment of taxes is designed for the same ultimate purpose, namely, to deter the mortgagor from allowing the security to become impaired. With respect to such an acceleration clause, it is the settled law of this State, as the court recognized in the Graf case, that a court of equity has the power to grant relief if the default is cured and the security is restored unimpaired.

Bay v. Bay, 11 AD2d 615, 617 (4th Dept 1960) (dissent).

Based on the foregoing analysis, the court concludes that Kenmare has a strong likelihood of succeeding in defending this mortgage foreclosure action since it is based upon its alleged default in the payment of real estate taxes.

As to the issue of irreparable harm, Kenmare has sufficiently established that it will be irreparably harmed if it is not permitted to close and loses its financing. Specifically, Kenmare asserts that "despite the poor condition of the current real estate financing market, Kenmare has obtained financing from a lender that is ready, willing and able to pay the entire amount undisputedly due on the Mortgage, while placing the disputed amount into escrow." Kenmare

asserts it may not be readily able to find another lender willing to the finance the property and it could lose the property if plaintiff is permitted to proceed with foreclosing on the mortgage. In addition, Kenmare alleges that plaintiff is a "single-purpose 'shell' company whose only business purpose is holding the mortgage on this and the Lispenard properties, which upon receipt of a payoff of the Mortgage, will immediately 'upstream' the money to its principals and will no longer have any assets, such that a judgment against Plaintiff at a later time will be valueless." Kenmare notes that although it has repeatedly made this allegation during the course of this litigation, plaintiff has never disputed it.

Kenmare asserts that absent court intervention, it will be forced to make one of two "equally untenable choices." One choice is to pay the amount demanded by plaintiff, which includes more than $200,000 allegedly due for 24% default interest and late fees. Kenmare argues that if makes such payments, plaintiff "will immediately distribute the funds received, thereby rendering itself judgment-proof in the event that the Court later determines Kenmare was never liable for the 24% default interest." The second choice is for Kenmare to not make the demanded payment, at which point plaintiff will not permit the mortgage to be assigned, with the result that Kenmare will lose its financing with no assurance that it will be able to obtain new financing on favorable terms, and may ultimately lose the property in this foreclosure action.

As to the balancing of the equities, plaintiff has not made a sufficient showing that it will be harmed if the closing proceeds, as plaintiff will receive all undisputed sums to which it is entitled, including the full amount of the principal on the mortgage and the exit fee, with the disputed 24% default interest placed in escrow. Significantly, at oral argument, when the court inquired as to the prejudice to plaintiff, plaintiff's counsel simply responded that his client would

not be able to foreclose on the mortgage. Under theses circumstances, the equities balance in Kenmare's favor.

Turning to plaintiff's opposition, this court is unpersuaded by plaintiff's argument that the supplemental counterclaim is barred pursuant to the March 10, 2010 stipulation in which defendants withdrew with prejudice their counterclaims, including their counterclaims seeking injunctive relief. As to plaintiff's procedural arguments, it must be noted that the stipulation also provided that all pending motions, including the motion seeking injunctive relief, were adjourned to a date to be set by the court. Kenmare now requests that the instant motion be considered in conjunction with the original motion. The court grants this request. While the original counterclaims were withdrawn with prejudice and the court so ordered the stipulation, as the stipulation also provided that the motions were to be adjourned, and as there was no final disposition of the motions, the motions are still pending. Moreover, the stipulation did not prohibit Kenmare from asserting a counterclaim for injunctive relief based on subsequent events and actions. Thus, the supplemental counterclaim is properly considered in conjunction with Kenmare's instant motion for injunctive relief.

The court also finds that the supplemental counterclaim is not barred by res judicata. Although the supplemental counterclaim seeks the same injunctive relief as requested in the original motion, the legal bases for the counterclaims are distinct. The original counterclaim is based on champtery and breach of the implied covenant of good faith and fair dealing. On the other hand, the supplemental counterclaim essentially asserts a claim for breach of the implied covenant of good faith and fair dealing based on circumstances that arose after the answer with the original counterclaim was interposed and after the parties executed the stipulations. The

supplemental counterclaim alleges that plaintiff is relying on a non-existent default and refuses to assign the mortgage based on such purported default, and is preventing Kenmare from obtaining new financing which Kenmare alleges it was able to secure after April 7, 2011, unless Kenmare agrees to full payment of default interest. The supplemental counterclaim asks the court to exercise its equitable powers to prevent an injustice involving the forfeiture of a valuable property based on a questionable failure to comply with a collateral mortgage obligation.

The court also rejects plaintiff's argument that Kenmare's proposed supplemental counterclaim is without merit. Relying on the mortgage documents, plaintiff argues that Kenmare waived its right to assert both affirmative defenses and counterclaims with respect to the note and mortgage. Generally, a waiver of the right to assert a counterclaim will be enforced in the absence of fraud or negligence in the disposition of collateral. See Fleet Bank v. Petri Mechanical Co, Inc, 244 AD2d 523 (2nd Dept 1007). In an action to foreclose a mortgage, a waiver of affirmative defenses and counterclaims has been upheld. See Parasam v. DeCambre, 247 AD2d 283 (1st Dept 1998). However, there is no bar where the counterclaim is inextricably intertwined with claims asserted in the underlying action. See Yoi-Lee Realty Corp. v. 177th Street Realty Associates, 208 AD2d 186, 189-190 (1st Dept 1995); Sutter Fifty-Six Co. v. Fridecky, 93 AD2d 720 (1st Dept 1983). Here, Kenmare's supplemental counterclaim asserting that plaintiff breached the implied covenant of good faith and fair dealing by alleging a non-existent default of the mortgage, is inextricably intertwined with plaintiff's claim that Kenmare defaulted on the mortgage by failing to pay real estate taxes.

Finally, at oral argument, the parties were asked to address CPLR 5519(a) which provides for an automatic stay under certain circumstances. The applicability of that provision had

previously been raised by plaintiff in discussions with the court and defendants. Although plaintiff indicated that CPLR 5519(a)(5) may be applicable and it is not clear whether plaintiff will take an appeal, given the circumstances here where Kenmare alleges it has obtained financing that expires tomorrow, April 22, 2011, this court elects to err on the side of caution and exercises its discretion pursuant to CPLR 5519(c) to vacate any automatic stay pursuant to CPLR 5519(a) that is applicable.

Accordingly, plaintiff's motion is granted and the court is signing the proposed order submitted with plaintiff's papers.

DATED: April 21, 2011

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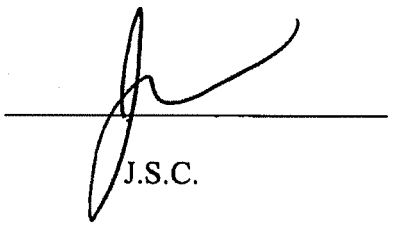

J.S.C.