SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 11

Index Number : 850001/2011

LISPENARD, LLC

vs.

LISPENARD GROUP LLC

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and cross-motion are determined in accordance with the annexed decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: April 23, 2012

HON. JOAN A. MADDEN J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

[ ] SUBMIT ORDER/ JUDG. [ ] SETTLE ORDER/ JUDG.

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

LISPENARD, LLC,

Index No. 850001/11

Plaintiff,

- against -

LISPENARD GROUP LLC, JACK JANGANA, JENNY JANGANA HAIM, JOYCE JANGANA REISS, RONALD PASQUALE, JOHN J. PASQUALE, KENMARE SQUARE LLC, CRIMINAL COURT OF THE CITY OF NEW YORK; CITY OF NEW YORK; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,

"JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.
-- X

JOAN A. MADDEN, J.:

Plaintiff Lispenard, LLC moves, pursuant to CPLR 3212, for an order (1) striking defendants' answer and affirmative defenses; (2) granting summary judgment to the extent of declaring plaintiff's entitlement to an award of default rate interest, pursuant to the note and mortgage that are the subject of this action, and to the funds now held in escrow (Escrow Fund); and (3) directing the escrow agent to pay the proceeds of the Escrow Fund, together with any accrued interest to plaintiff.

Defendant Lispenard Group LLC (Lispenard Group) cross-moves for summary judgment directing that all funds in the Escrow Fund be paid to it.

Factual Background and Allegations

On December 20, 2006, Lispenard Group, as mortgagor, entered into a mortgage with Metropolitan National Bank (Metropolitan), as mortgagee, in the principal amount of $8 million, pursuant to which Lispenard Group executed a promissory note for the same amount (Affidavit of Joyce Jangan Reiss [Reiss], a member of Lispenard Group, sworn to June 23, 2011 [Reiss Aff.], ¶ 5). This was followed by a second mortgage and promissory note, dated February 2, 2010, between these same parties, in the amount of $1.1 million, which were consolidated, pursuant to a "Consolidation Agreement," to form a single indebtedness consisting of a mortgage (Mortgage) and promissory note (together, Loan Documents) (*id.*, ¶¶ 6-7).

On October 29, 2010, Metropolitan assigned the Loan Documents to plaintiff (Exhibit A-G to Affidavit of Cyrus Sakhai, sworn to June 10, 2010 [Sakhai Aff.]). According to Lispenard Group, at the time of the assignment, it had timely made all payments due under the Loan Documents and was preparing to pay off its remaining obligations on the then upcoming maturity date of February 2, 2011 (Reiss Aff., ¶¶ 10, 27).

By letter dated November 1, 2010, counsel for plaintiff wrote to Lispenard Group, stating that it was the assignee of the Mortgage, and that Lispenard Group was in default because of overdue late charges in the amount of $10,793.58. In addition, real estate taxes were in arrears and unpaid. Plaintiff afforded Lispenard Group 30 days within which to pay the late charges and taxes (*id.*, ¶ 9; Exhibit C to Reiss Aff).

According to Reiss, to comply with plaintiff's demand, on November 29, 2010, she mailed a check in the amount of $129,377.12, made out to the "NYC Department of Finance," and sent by first class mail to "PO Box 92, New York, New York 10008-0092" for the unpaid

real estate taxes to the City of New York (City) (Reiss Aff., ¶ 11; Exh D to Reiss Aff.). Additionally, she states that, on December 1, 2010, Lispenard Group paid the late charges and made the December Mortgage payment (Reiss Aff., ¶ 12).

Notwithstanding Reiss's assertion, plaintiff contends that, on December 6, 2010, its counsel sent a letter to Lispenard Group declaring a default in the Mortgage by its failure to pay past due real estate taxes of $134,441,85, inclusive of interest and penalties, and, based on the default, it declared the entire unpaid principal due, together with interest and late charges (Exhibit C to Sakhai Aff.). According to Lispenard Group, the purported default notice and acceleration of maturity of the indebtedness were nullities, because the letter was mailed to the wrong address – it was sent to 42 North Station Plaza in Great Neck instead of 45 North Station (Reiss Aff., ¶ 13).

Lispenard Group states that, by letter dated December 17, 2010, its counsel responded to the November 1, 2010 letter, but not to the December 6, 2010 letter (because of the wrong address), explaining that the defaults had been cured, including the Mortgage payment due on December 2, 2010, and the late charges of $10,793.58, and that the real estate taxes that had been due had also been paid (*id.*, ¶ 14; Exhibit B (b) to Sahkai Aff.).

In response, by letter dated December 21, 2010, counsel for plaintiff acknowledged the payment of the late charges, but claimed that the real estate taxes remained delinquent. By letter dated December 23, 2010, counsel for Lispenard Group advised plaintiff's counsel that it had already forwarded the real estate taxes to the City (on November 29, 2010) enclosing copies of supporting documentation. Counsel stated that the City was slow in processing real estate tax payments and offered to stop payment, and issue a replacement check. Counsel disputed the

contention that its client was in default, and offered to provide additional information to demonstrate that Lispenard Group had complied with its obligations under the Mortgage (*id.*, ¶¶ 15-17). In response (by letter dated December 29, 2010), plaintiff's counsel stated that the "record continues to show that taxes for both properties are in arrears with no notation of payment being received or awaiting clearance." The other property referred to is the mortgage in the amount of $3.5 million, with the borrower being Kenmare Square LLC, on the premises located at 23-25 Cleveland Place, New York, New York, which is the subject of a related action, also in this court, entitled *Lispenard, LLC v Kenmare Square LLC, et al.*, Index No. 850032/10 (Kenmare Action). Plaintiff hand delivered a replacement check, dated January 21, 2011, to the City, and it is recorded as having been paid on January 28, 2011 (Exh. D to Sahkai Aff.).

Plaintiff commenced this action on December 29, 2010, seeking foreclosure and sale of the Mortgaged premises. It also filed a notice of pendency on the Mortgaged premises. Defendants include (among others) Lispenard Group, as mortgagor; Jack Jangana, Jenny Jangana Haim, Reiss, and Kenmare Square LLC, as guarantors of the Mortgage indebtedness; The City, the Criminal Court of the City, and the Environmental Control Board of the City, based on any claim they may have in the Mortgaged premises.[1] The complaint is based on the allegation that defendants failed to comply with the terms of the Mortgage in that they failed to timely remit real estate taxes. By reason of the alleged default, plaintiff elected to declare the entire balance of principal with interest due and payable. The amounts allegedly due are $9.1 million as principal, $91,000 as an "exit fee" of 1% of the principal balance, and default interest from December 6,

[1]The complaint does not state why Ronald Pasquale and John J. Pasquale are named as co-defendants.

2010 at 24%. It is this default interest which remains the sole issue in this action.

By so-ordered stipulation, filed March 16, 2011, the parties agreed as follows: (1) plaintiff is to provide the necessary documentation so that Lispenard Group may proceed with the closing of a proposed re-financing of the Mortgage that was to be held on or before March 31, 2011; (2) at the closing, Lispenard Group is to pay to plaintiff the principal amount of the Mortgage, a contractually provided exit fee, non-default interest in the amount of $175,174.56 through March 10, 2011 and $1,769.44 per diem through the date of closing, and any other amounts undisputedly due, and is to pay into escrow, or deposit with the Court, the amount of $498,478.68 (Escrow Fund), which represents the disputed additional sums demanded by plaintiff for default interest through March 31, 2011; (3) at the closing, plaintiff will deliver documents cancelling the lis pendens; (4) all motions then pending were adjourned until a date to be set by the court; (5) plaintiff withdrew its claim for attorney's fees; and (6) defendants withdrew their counterclaims, their fifteenth affirmative defense, and claims against the law firm Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., plaintiff's counsel and escrow agent of the Escrow Fund.

The grounds for plaintiff's motion for summary judgment are that (1) defendants failed to timely pay the real estate taxes, and the maturity date of the loan passed without full payment; (2) pursuant to the Mortgage, defendants waived the right to interpose affirmative defenses; (3) there are no triable issues of fact nor viable defenses for an award of interest at the default rate provided for in the Loan Documents; and (3) the Court is without equitable authority or jurisdiction to relieve defendants of their contractual financial obligations.

In opposition to plaintiff's motion, and in support of its own motion for summary

judgment, Lispenard Group argues that (1) plaintiff is not entitled to the Escrow Fund because Lispenard Group did not default on its obligations under the Loan Documents; (2) the passage of the maturity date does not provide plaintiff a basis for relief under the foreclosure complaint; and (3) its affirmative defenses were not waived.

Determination

In effect, plaintiff is seeking reargument of this court's decision, dated April 21, 2011 (Kenmare Decision), in the related Kenmare Action, because to find in its favor would entail reversing many of the determinations made therein. The court declines to do so. For the reasons stated in the Kenmare Decision, as well as for the reasons discussed below, plaintiff's motion is denied, and Lispenard Group's cross motion is granted.

Discussion

Plaintiff contends that the acceleration of the maturity date, due to the failure to pay real property taxes, triggered the accrual of interest at the default rate of 24%. It contends further that mailing a check to the City, and then actually paying the tax arrears late, in January 2011, is inconsequential, because plaintiff accelerated the loan on December 6, 2010 (Affirmation of Peter Sullivan, Esq., ¶ 6). In so arguing, plaintiff relies principally on three provisions of the Loan Documents. Section D of the Note provides:

> "Default Rate. After an Event of Default (as hereinafter defined) or maturity of this Note, whether upon the maturity Date, by acceleration or otherwise, until the entire outstanding Principal Amount shall be paid in full, the outstanding Principal Amount shall, without further notice, bear interest, and Borrower shall pay interest, at the lesser of (i) 24% per annum; or (ii) the highest lawful rate (herein referred to as the 'Default Rate')."

The Note, in the section entitled "Acceleration," provides, in part:

> "The entire principal amount of this Note, plus all unpaid interest accrued thereon,

> shall become immediately due and payable, at the option of the Bank, without protest, presentment, notice or demand, all of which are expressly waived by the undersigned, upon the occurrence of any one of the following specified events, with respect to Borrower or any guarantor of Borrower's obligations hereunder (an 'Event of Default') . . . (ii) default in the payment or performance of any other obligation to Bank . . . ."

Section 3.2 of the Consolidation Agreement provides, in part:

> "(a) Payment of Taxes, Etc. Subject to subsection 3.2(b) hereof, mortgagor shall pay all taxes . . . of every character (including penalties and interest), now or hereafter levied or assessed upon or against the Mortgaged Property or levied or payable in lieu of taxes (the 'Taxes') prior to the date upon which any fine, penalty, interest, or cost may be added thereto or imposed for the nonpayment thereof . . . ."

Because payment of taxes is an obligation under Section 3.2 of the Consolidation Agreement, failure to perform that obligation is arguably an Event of Default under the note, to the extent that it is deemed an "obligation to Bank."

As a preliminary matter, plaintiff contends that defendants waived the right to assert any affirmative defenses. Because the defense is "inextricably intertwined" with the main claim, however, the court may consider the defense (*All 4 Sports & Fitness, Inc. v Hamilton, Kane, Martin Enters., Inc.*, 22 AD3d 512 [2d Dept 2005]; *Yoi-Lee Realty Corp. v 177th St. Realty Assoc.*, 208 AD2d 185 [1st Dept 1995]).

Lispenard Group claims to not have defaulted under the Loan Documents. According to Reiss, to comply with plaintiff's November 1, 2010 demand – that it cure within 30 days the amounts owed as late charges and taxes – on November 29, 2010, she mailed a check in the amount of $129,377.12, made out to the "NYC Department of Finance," and sent by first class mail to "PO Box 92, New York, New York 10008-0092" for the unpaid real estate taxes to the City (Reiss Aff., ¶ 11; Exh D to Reiss Aff.). Additionally, she states that, on December 1, 2010,

Lispenard Group paid the late charges and made the December Mortgage payment (Reiss Aff., ¶ 12). Reiss states further that, by letter dated December 23, 2010, counsel for Lispenard Group advised plaintiff's counsel that it had already forwarded the real estate taxes to the City (on November 29, 2010) enclosing a copy of the payment documents. Counsel offered to stop payment on the check and issue a replacement check, and also offered to provide additional information to demonstrate that Lispenard Group had complied with its obligations under the Mortgage (*id.*, ¶¶ 15-17).

Plaintiff's argument – that the assertion that Lispenard Group mailed the check to the City is based on a conclusory assertion, lacking documentary evidence – is without merit. The explanation given by Reiss in her affidavit is very fact specific and, thus, not conclusory. Moreover, she attached copies of the purported mailing to the City. Furthermore, the record contains evidence that counsel offered to provide additional information as to payment to plaintiff, but there is no evidence that plaintiff accepted this offer. Even if the late payment to the City of the real estate taxes were deemed a default, as "an obligation to Bank," the circumstances of the default does not warrant the imposition of default interest, and this determination is consistent with controlling precedent.

In *Bay v Bay* (9 NY2d 855 [1961]), the plaintiff sought to foreclose a mortgage which was due and payable in 10 years, and which provided that the entire principal would become due at the option of the mortgagee after default in the payment of any tax, water rate or assessment for 30 days after notice and demand. The defendant failed to pay the 1958-59 county tax and the 1958-59 school tax, and after failing to cure upon the requisite 30 days notice, the plaintiff declared the entire principal due. In reversing the Appellate Division, which had granted

summary judgment to the plaintiff, the Court of Appeals did not issue its own opinion, but reversed for the reasons stated by the dissenting opinion in the Appellate Division. In that opinion, a distinction was made between a default in the payment of taxes, "in breach of the mortgagor's collateral undertaking to protect the mortgagee's security," and a "default in the payment of principal or interest upon the primary obligation" (from dissenting opinion, 11 AD2d 615, 619 [4th Dept 1960], *revd on dissent below* 9 NY2d 855, *supra*).

The dissent in *Graf v Hope Bldg. Co.* (254 NY 1 [1930]) by the then Chief Judge Cardozo also noted a distinction between the payment of interest and the payment of taxes which "is merely as an assurance of security" (*id.* at 10). Plaintiff cites *Graf v Hope Bld. Co.* in numerous places in its memoranda of law for the proposition that a mortgagor who defaults is bound by the terms of the contract, and "cannot be relieved from the default in the absence of fraud, estoppel, bad faith, oppressive or unconscionable conduct, or waiver by the lender" (Plaintiff's Memorandum in Support, at 21). *Graf v Hope Bld. Co.* predates the Court of Appeals decision in *Bay v Bay, supra*, and, as stated in *Karas v Wasserman* (91 AD2d 812 [3d Dept 1982]), "it seems clear that the evolving subsequent case law has largely adopted the reasoning of Chief Judge Cardozo's dissenting position in *Graf* (254 NY 1, 8-15, *supra*) that the equitable remedy of foreclosure may be denied in the case of an inadvertent, inconsequential default in order to prevent unconscionably overreaching conduct by a mortgagee" (91 AD2d at 812 [citations omitted]; *see also Fairmont Assoc. v Fairmont Estates*, 99 AD2d 895, 895-96 [3d Dept], *lv denied* 62 NY2d 602 [1984]; *see also Matter of In Rem Foreclosure Action No. 31*, 136 Misc 2d 522 [Sup Ct, NY County 1987], *citing Massachusetts Mut. Life Ins. Co. v Transgrow*, 101 AD2d 770 [1st Dept 1984]). Such is the case here. As discussed above, Lispenard Group

supports its claim that it timely sent the requisite payment to the City with documentation and plaintiff did not avail itself of the opportunity to see further supporting evidence. Moreover, at the time of the assignment, Lispenard Group was preparing to pay off its remaining obligations on the then upcoming maturity date of February 2, 2011, which was then three months away (Reiss Aff., ¶¶ 10, 27). On these facts, plaintiff seeks 24% default interest amounting to $498,478.68.

Plaintiff counters that the court does not have the authority to "deprive it of its rights under the mortgage," because the threat of forfeiture of defendants' property was settled, and is no longer at issue, and that the obligation to pay default rate interest is neither a penalty nor a forfeiture, but an agreed upon financial obligation. To be sure, *Bay v Bay, supra,* and *Karas v Wasserman, supra*, involved the issue of foreclosure of the property, and not a claim for default interest. These decisions are relevant, however, because, as noted by plaintiff itself, the "escrow account for default rate interest had merely been substituted for the property in foreclosure" (Plaintiff's Memorandum in Support, at 5).

In support of its claim of entitlement to default interest, plaintiff cites *Brainerd Mfg. Co. v Dewey Garden Lanes* (78 AD2d 365 [4th Dept], *appeal dismissed* 53 NY2d 701 [1981]), but that decision actually supports the cross motion. The Court ruled that "the circumstances surrounding the landlord's cancellation of a long-term commercial lease because of the tenant's breach of certain terms thereof" did not "warrant equitable intervention." In so ruling, the Court noted that the breach was material and that the tenant had "virtually provoked the cancellation by ignoring the landlord's legitimate demands." Therefore the tenant could not "call upon a court of equity for assistance by complaining that the consequences of cancellation are severe" (*id.* at

367-68). Here, however, Lispenard Group did not ignore plaintiff's demands, and expeditiously sought to address the issue of the real estate taxes.

Plaintiff also cites *Key Intl. Mfg. v Stillman* (103 AD2d 475 [2d Dept 1984], *affd as mod* 66 NY2d 924 [1985]) for the proposition that "the doctrine of insubstantial or de minimis default has no application in measuring performance of the terms of commercial paper when, as here, the issue does not involve a forfeiture, but merely the enforcement of the agreed upon financial obligations of the parties' contract" (Plaintiff's Memorandum in Support at 10). In *Key Intl. Mfg. v Stillman,* the Court noted that the plaintiff's breach, thereby activating the contract's acceleration clause, could not "be viewed as trivial or inconsequential" in that the "obligation to make timely replacement of the letters of credit was an essential component of the agreement and the acceleration provision was the subject of extensive give and take negotiations" (103 AD2d at 478).

The Court stated further that it was "obviously designed to protect Stillman [the lender] by giving him a sufficient period of time to draw on the expiring letters of credit in the event of a default" (*id.* at 478). Furthermore, the Court described the breach as a "failure of [this] magnitude" and that "[s]ubstantial noncompliance with the terms of an option clause cannot be rewarded by a judicial forgiveness that redounds to the detriment of the other party to the contract" (*id.*). This scenario is far different from the circumstances presented here, as discussed above. A court is "not bound to strictly enforce the acceleration clause in the mortgage agreement" and is "authorized to review the circumstances attending the tardy payment" (*Fairmont Assoc. v Fairmont Estates*, 99 AD2d at 896).

Finally, in its memorandum of law, plaintiff offers a second ground upon which it seeks

judgment: "the failure to pay the loan in full on the maturity of the loan on February 2, 2011" (Memorandum in Support, at 6). This allegation is not contained in the complaint, and the Court declines plaintiff's request that it, sua sponte, deem the pleadings amended "[to] whatever extent necessary" (Reply Affirmation of Peter Sullivan, Esq., at 2).

Accordingly, it is

ORDERED that the motion by Lispenard, LLC is denied; and it is further

ORDERED that the cross motion by Lispenard Group LLC for summary judgment is granted and the complaint is dismissed in its entirety as against all defendants and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., as escrow agent, is directed to release and return the amount held in the Escrow Fund, together with any accumulated interest, to Lispenard Group LLC within 30 days of receipt of a copy of this decision and order with notice of entry.

DATED: April 23 2012

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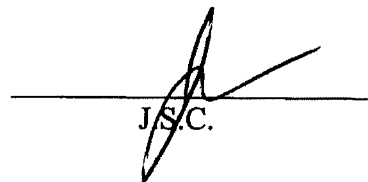

J.S.C.