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WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2003-34A,
Plaintiff,
v.
NAOMI KANOVSKY, NACHMAN M. KANOVSKY, HER HUSBAND, STATE OF NEW JERSEY, BOGNER SEITEL LUMBERCO INC., 5 HAYWARD ASSOCIATES LLC, NCC CAPITAL, LLC, CONTINENTAL FUNDING GROUP, LLC, CITIBANK, N.A. F/K/A CITIBANK, F.S.B.,
Defendants.

CONTINENTAL FUNDING GROUP, LLC,
Crossclaim Plaintiff,
v.
NAOMI KANOVSKY, NACHMAN M. KANOVSKY, HER HUSBAND, STATE OF NEW JERSEY, BOGNER SEITEL LUMBERCO INC., 5 HAYWARD ASSOCIATES LLC, NCC CAPITAL, LLC, CONTINENTAL FUNDING GROUP, LLC, CITIBANK, N.A. F/K/A CITIBANK, F.S.B.,
Crossclaim Defendants.

Continental Funding Group, LLC,
Third Party Plaintiff,
v.
LFE Development Corp.
Third Party Defendant.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
DOCKET No. F-021409-14

OPINION

Argued: September 29, 2017

Decided: October 13, 2017

Appearances: Fred R. Gruen for plaintiff (Gruen & Goldstein, attorneys)
Thomas Landrigan for defendants/crossclaim defendants (Cohen, LaBarbera & Landrigan, LLP, attorneys)

HON. EDWARD A. JEREJIAN, J.S.C.

This matter is before the court by way of a Motion for Summary Judgment, which was heard as a Motion to Strike the Answer, filed by Crossclaim Plaintiff Continental Funding LLC

(hereinafter "Continental") on August 31, 2017. Crossclaim Defendants Nachman and Naomi Kanovsky (herineafter, together with LFE Development Corp., "Defendants") filed an opposition on September 19, 2017.

Here, Crossclaim Plaintiff, Continental Funding LLC, has established the following uncontested material facts to demonstrate its right to foreclose.

1. On November 26, 2001, Kanovskys' entity, LFE Development Corp. (hereinafter "LFE") borrowed $2,300,000.00 from JDI Fallsburg, LLC (hereinafter "JDI") and signed a Note together with accompanying Guaranty of LFE owner Nachman Kanovsky.
2. Defendants defaulted in September 2002 by failing to pay to JDI the requisite funds.
3. On April 7, 2003, the Note was amended (the amendment is entitled the Compromise and Settlement Agreement) by the Kanovskys and JDI to extend the maturity date to September 30, 2003, provide for a discount in the event of early payment, and to add as additional security or collateral the Second Mortgage on the Kanovsky Residence and a third mortgage on property owned by a Kanovsky entity in Jersey City, New Jersey, and an Assignment to JDI of sale proceeds respecting a residential development project in New York State known as Regency Estates.
4. This Second Mortgage on the Kanovsky residence, dated April 7, 2003 and detailed in the Compromise and Settlement Agreement, was executed by Kanovskys in favor of JDI, covering the Kanovsky residence at 440 Fairview Avenue, Englewood, NJ 07631.
5. This Second Mortgage, Amended Note, and Guaranty were purchased by Continental from JDI on September 17, 2003. The Second Mortgage assigned to Continental was recorded on October 18, 2003 with the Registrar of Bergen County.
6. The Note is in default as the maturity date, extended in the Compromise and Settlement

Agreement to September 30, 2003, has passed.

7. On April 11, 2016, Continental was brought into the suit by way of an Amended Complaint filed by Plaintiff Wells Fargo Bank, to which Continental filed a Non-Contesting Answer, a Crossclaim against the Kanovskys, and a Third Party Complaint against LFE.
8. Notice of Intention in form complying with the requirements of the statute was sent on July 22, 2016 (more than 30 days prior to the commencement of suit).
9. Crossclaim Plaintiff filed the instant motion on August 31, 2017.

Defendants' opposition to the instant motion for summary judgment is predicated upon (1) the action being barred by the New Jersey statute of limitations which was tolled, not waived, as New York, not New Jersey, law governs the note and mortgage, (2) the action being barred by the doctrine of laches, the foreclosure of the Second Mortgage instigated thirteen years after default, (3) the violation by Continental of the Fair Debt Collection Practices Act, and (4) the contention that trial is necessary to uncover the flow of Regency Estates proceeds. Defendants also raise a Slander of Title claim.

The purpose of summary judgment is to "avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief." Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74 (1954). Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits... show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. 4:46-2(c).

In order to satisfy its burden of proof on a summary judgment motion, the moving party must show that no genuine issue of material facts exists. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528–29 (1995). Once the moving party satisfies its burden, the burden then shifts to the non-

moving party to present evidence there is a genuine issue for trial. Ibid. The non-moving party may not solely rely on denials or allegations made in an answer to defeat a motion for summary judgment. See Cortez v. Gindhart, 435 N.J. Super. 589, 606 (App. Div. 2014). Instead, the non-moving party must respond with affidavits meeting the requirements of R. 1:6-6 as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial.

In determining whether the existence of a genuine issue of material fact precludes summary judgment, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. Even if there is a denial of essential fact, the court should grant a motion for summary judgment if the rest of the record, viewed most favorably to the party opposing the motion, demonstrates the absence of a material and genuine factual dispute. See Rankin v. Sowinski, 119 N.J. Super. 393, 399–400 (App. Div. 1972).

The only material issues in a foreclosure proceeding are the validity of the mortgage, the amount of indebtedness, and the right of the mortgagee to foreclose on the mortgaged property. Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993); see also Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952) ("Since the execution, recording, and non-payment of the mortgage was conceded, a prima facie right to foreclose was made out"). If the defendant's answer fails to challenge the essential elements of the foreclosure action, plaintiff is entitled to strike defendant's answer. Old Republic Ins. Co. v. Currie, 284 N.J. Super. 571, 574 (Ch. Div. 1995); Somerset Trust Co. v. Sternberg, 238 N.J. Super. 279, 283 (Ch. Div. 1989).

Statute of Limitations

Whether or not this action is barred by statute of limitations turns on whether this action is

governed by New York or New Jersey law. Under New York law, waiver of the statute of limitations in the mortgage foreclosure context is not an indefinite waiver, rather, the waiver serves to toll the statute of limitations which begins to run anew from the date of the waiver. See N.Y. Gen. Oblig. Law 17-105. Conversely, under New Jersey law, the statute of limitations may be waived indefinitely by express agreement. See Markey v. Robert Hall Clothes of Paterson, Inc. 27 N.J. Super. 417, 421 (1953) (citing Freeman v. Conover, 95 N.J.L. 89, 92-93 (E. & A. 1920) (quoting Quick v. Corlies, 39 N.J.L. 11, 12 (1876) ("[Statute of Limitations] protection may, therefore, be waived by those who assent in legal form, and when acted upon, such waiver becomes an estoppel to plead the statute."))). As this action has been instituted long after both New York and New Jersey's relevant statutes of limitation have expired, whether this waiver is construed under New York law or New Jersey law is outcome determinative. See N.Y. CLS CPLR 213 (6 year statute of limitations for mortgage foreclosure action); see also N.J.S.A. 2:A:14-1 (6 year statute of limitations for actions on Promissory Notes).

In the instant case, there is an apparent conflict between the November 2001 Loan Note and the April 2003 Second Mortgage on the Kanovsky Residence. The November 2001 Loan Note specifies that New York law is to be applied, while the April 2003 Second Mortgage specifies that New Jersey law is to be applied. Defendants call to mind that where there is a conflict between the language of the Note and Mortgage, the terms of the Note, rather than the Mortgage, control. See e. g. Pritchard v. Curtis, 101 AD3d 1502, 1504 (NY 3d Dept. 2012); see also Gotlib v. Gotlib, 399 N.J. Super. 295 (App. Div. 2008). However, no conflict truly exists as the 2003 Compromise and Settlement Agreement controls.

Section 20 of the 2003 Compromise and Settlement Agreement makes it apparent that the parties intended it to supersede the terms and conditions of both the Note and Mortgage:

20. Subject to the Note and collateral loan documents emanating from the mortgage loan transaction with LFE as a borrower Kanovsky as a Guarantor and JDI as a Lender that occurred on or about November 26, 2001 hereinafter "Loan Documents" this Compromise and Settlement Agreement amending the Note inclusive of the collateral instruments referenced herein and in some instances identified as exhibits constitute the entire Agreement between the parties. **To the extent this Compromise and Settlement Agreement may be at variance with the terms and conditions of the note and collateral "loan documents", which remain in full force and effect, this Compromise and Settlement Agreement shall prevail and govern.** In all other respects the Note, Mortgage, Guaranty from Kanovsky and the other "Loan Documents" remain in full force and effect. Any prior understanding or representation of any kind preceding the date of this Agreement shall not be binding upon the parties, except to the extent incorporated in this Agreement. This Agreement may not be modified orally. In order for any proposed modification to be effective or binding on the parties any such modification must be in writing and executed by all parties to this Agreement. (emphasis added)

Section 23 of the 2003 Compromise and Settlement Agreement goes on to state that the Agreement and any disputes between the parties shall be subject to the laws of New Jersey and the exclusive jurisdiction of the Superior Court of New Jersey, Bergen Vicinage. Under the terms of

this superseding agreement, New Jersey law applies.

This court accepts the choice of New Jersey law made by the parties in the 2003 Compromise and Settlement Agreement. "Ordinarily, when parties to a contract have agreed to be governed by the laws of a particular state, New Jersey courts will uphold the contractual choice if it does not violate New Jersey's public policy." Instructional Sys. v. Comput. Curriculum Corp., 130 N.J. 324, 341 (1992) (citing Winer Motors, Inc. v. Jaguar Rover Triumph, Inc., 208 N.J. Super. 666, 671-72 (App. Div. 1986)). The Restatement (Second) of Conflicts of Laws § 187 (1969), also cited by the New Jersey Supreme Court in Instructional Systems v. Computer Curriculum Corp., provides further guidance by way of a two-step inquiry where the law of the chosen state shall apply except where:

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice; or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties.

In the instant matter, the choice of New Jersey law is neither violative of New Jersey public policy nor unreasonable nor does New York have a materially greater interest in determining the issues found herein.

The choice of New Jersey law in the instant case does not violate public policy as the Compromise and Settlement Agreement was signed knowingly and with the advice and input of independent counsel by Kanovskys and LFE, for the benefit of forbearance by JDI (predecessors in

interest to Continental) of then-pending foreclosure litigation, a material benefit negotiated for by Defendants. As the subject property is located in the state of New Jersey and Defendants are New Jersey residents, this state has a substantial relationship to both the parties and the transaction at hand. For those same reasons, New York does not have a materially greater interest in determining the particular issue at hand. Thus, the choice of New Jersey law is accepted.

The waivers of the statute of limitations can be found in both Section 15 of the Second Mortgage and Section 19 of the 2003 Compromise and Settlement Agreement. Section 15 of the Second Mortgage states that: "Mortgagor waives all present or future statutes of limitation with respect to any debt, demand or obligation secured by this Mortgage and any action or proceeding for the purpose for the purpose of enforcing this Mortgage or any rights or remedies contained in this Mortgage." Section 19 of the 2003 Compromise and Settlement Agreement contains the following: "A failure of JDI at any time to require full or partial performance by defendants of any provision of this Agreement shall in no way affect the full right of JDI to require such performance at any time thereafter. The waiver of JDI to any provisions for this Agreement shall not be taken or held to be a waiver of any succeeding breach of such provisions or as a waiver of the provision itself.", which this court holds to be a further waiver of the statute of limitations.

Even if the waiver contained in the Second Mortgage were not effective, the waiver of the statute of limitations contained in the 2003 Compromise and Settlement Agreement is sufficient to prevent the application of the New Jersey statute of limitations as a bar to Continental's claim, permitting this action to proceed.

For the foregoing reasons, the statute of limitations does not bar Continental's foreclosure action.

Laches

Defendants ask this court to apply the equitable doctrine of laches to prevent Continental from bringing this action as thirteen (13) years have passed since default, more than twice the period covered by the statute of limitations.

Laches is an equitable doctrine that operates as an affirmative defense, precluding relief when there is an "unexplainable and inexcusable delay" in exercising a right. Fox v. Millman, 210 N.J. 401 (2012) (quoting Cnty. Of Morris v. Fauver, 153 N.J. 80, 105 (1998). Laches is "invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party." Knorr v. Smeal, 178 N.J. 169, 180-81 (2003). Where a statute of limitations is applied mechanically according to fixed time limits, application of the equitable doctrine of laches "depends upon the facts of the particular case and is a matter within the sound discretion of the trial court." Mancini v. Twp. Of Teaneck, 179 N.J. 425, 436 (2004) (quoting Garrett v. Gen. Motors Corp., 844 F.2d 559, 562 (8th Cir.), cert. denied, 488 U.S. 908, 109 S. Ct. 259, 102 L. Ed. 2d 248 (1988)).

In the instant matter, this court declines to apply the doctrine of laches. Nachman Kanovsky and his entity LFE are sophisticated parties involved in real estate development that knowingly, with the advice of independent counsel, provided waivers to JDI as consideration for forbearance of then-pending foreclosure litigation. These waivers specifically contemplated that the failure of JDI to require performance in the immediate "shall in no way affect the full right of JDI to require such performance at any time thereafter." Inasmuch as this was a waiver of the statute of limitations, this was also a waiver by Kanovskys and LFE of the ability to assert the equitable doctrine of laches as an affirmative defense.

Second, the equitable doctrine of laches serves to protect a party where they have been

prejudiced by their adversary's failure to bring a claim within a reasonable period of time. In the instant case, Defendants were not prejudiced by the failure of JDI, and then Continental, to bring a claim; no evidence was destroyed, no witness has passed away or become infirm, and potential damages have not ballooned. Rather, as a direct result of JDI and Continental's failure to bring a claim Defendants were able to remain in their residence and were afforded over a decade to come up with the necessary funds to pay down the Loan Note.

Therefore, this court declines to apply the equitable doctrine of laches as a bar to Continental's foreclosure action.

Fair Debt Collection Practices Act

Defendants' argument that Continental's claims are precluded due to violations of the Fair Debt Collection Practices Act (FDCPA) is wholly without merit. It is readily apparent that Defendants are not consumers under the Act's definition as the debt was not incurred for personal, family, or household purposes, nor is Continental a "debt collector" under the Act as the debt they are seeking to collect is not owed to another.

15 USC § 1692(a)(3) provides the definition of "consumers" covered by the act: "The term 'consumer' means any natural person obligated or allegedly obligated to pay any debt." Further, 15 USC § 1692(a)(5) provides that debt means: "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for **personal, family, or household purposes**, whether or not such obligation has been reduced to judgment." Under these definitions, the FDCPA is inapplicable as the Defendants are not "consumers" as their debt was for business, not personal, family or household purposes.

Additionally, the FDCPA does not apply to this transaction as Continental Funding is not a

"debt collector" under the Act. The definition of debt collector in the statute, found at 15 USC § 1692(a)(6) and (6)(a), defines a debt collector as a person or entity that collects a debt that is due to another. See Henson v. Santander Consumer USA, Inc., 582 U.S. __, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (2017) (Holding that the FDCPA does not apply to debt collectors collecting a debt owed to themselves). As Continental purchased the Note, it is collecting the debt on behalf of itself and the FDCPA is inapplicable.

Therefore, the Defendants' FDCPA allegation fails.

Collateralization of the Loan Note

Defendants argue that even if this action is not barred by way of an affirmative defense, summary judgment is still inappropriate, and trial necessary, to examine the flow of money from the various Kanovsky owned development properties to Continental which have allegedly paid off or the proceeds of which are capable of paying off the underlying Loan Note.

Conversely, Continental argues that the April 2003 Note amendment makes it clear that Regency Estates proceeds were to be used to pay off the Second Mortgage, not the proceeds of any other Kanovsky development projects. Yet, the August 2003 Joint Venture Agreement dictated that Regency Estates proceeds were to first be used to pay off the Lycar mortgage. Continental has produced Federal Income Tax Returns which demonstrate that after its proceeds were used to pay off the Lycar mortgage, Regency Estates did not have leftover profit to apply to the Second Mortgage.

Defendants argue that these tax returns are fraudulent. It has produced public sale records in an effort to demonstrate millions of dollars of sale proceeds of Regency Estates, such that the Second Mortgage was or could be paid off using Regency Estate funds. However, there is no allegation that Continental prepared or filed the tax returns which were solely within the control of

Kanovskys and their partners. Defendants' claim regarding the Regency Estate proceeds boils down to the assertion that they had the ability to pay down the Note, but did not, an ineffective defense to the foreclosure proceedings.

Additionally, the public sale records do not reflect the costs to develop the properties and produce the proceeds, nor do they reflect the payments made toward the Lycar mortgage which resulted in Regency Estate's losses. On the contrary, the tax returns produced by Continental do reflect the losses of, and payments made by, Regency Estates, demonstrating that there were no profits allocated towards the Second Mortgage. After conducting, producing and reviewing thousands of pages of voluminous discovery there is no evidence suggesting that the tax returns are fraudulent and that trial is necessary. To the contrary, Defendants' claims are nothing more than bald assertions. Conclusory claims without explanation and "bald assertions are not capable of … defeating summary judgment," Ridge at Back Brook, LLC v. Klenert, 427 N.J. Super. 90, 97-98 (App. Div. 2014).

A party contesting a motion for summary judgment must do more than point to a potential factual dispute. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of material fact." Alfano v. Schaud, 429 N.J. Super. 469, 475 (App. Div. 2013) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202, 211 (1986)). Defendants have not supported their allegations with any evidence and have thus failed raise a genuine issue of material fact sufficient to prevent summary judgment when its allegation is weighed against Continental's claims made with the support of documentary evidence.

Therefore, Defendants' contention that trial is necessary to examine the Regency Estate proceeds fails

Slander of Title

Defendants' allegation of Slander of Title is of no moment. Continental has the right to foreclose on the mortgaged property. Continental has demonstrated proof of execution, recording, and non-payment of the note and mortgage, establishing its *prima facie* right to foreclose. Thorpe v. Floremoore Corp., 20 N.J. Super. 34 (App. Div. 1952). And, as has been stated previously, the action is not barred by statute of limitations or the doctrine of laches, Continental has the right to foreclose, and any statements, if made, are covered by litigation privilege.

Conclusion

Here, Crossclaim Defendant Nachman Kanovsky, a New York real estate developer, entered into the Compromise and Settlement Agreement as a sophisticated party capable of fully understanding the implications of consenting to the application of New Jersey law and waiving defenses including statute of limitation protections such that this action is not time barred.

Additionally, as Continental's delay in foreclosing on the note and mortgage was not intended to prejudice Defendants, and no prejudice did in fact result, the doctrine of laches in inapplicable and does not provide grounds for preventing this action. The Fair Debt Collection Practices Act is also inapplicable, as this loan was for a business purpose and thus not covered under the Act's definition of "debt." The Slander of Title claim must also fail as Continental has the right to foreclose.

Lastly, Defendants' attempt to defeat summary judgment by making the bald assertion that the Federal Income Tax Returns for Regency Estate are fraudulent and trial is necessary to determine whether the Second Mortgage was or could be repaid via Regency Estate proceeds fails. Defendants do not support their allegation with any evidence and thus do not demonstrate a genuine dispute as to a material fact.

Therefore, for the foregoing reasons, Plaintiff's motion for summary judgment and to strike the answer of Kanovskys and LFE is granted. An order accompanies this decision.