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Nebari Natural Resources Credit Fund I, LP v Speyside Holdings LLC
2022 NY Slip Op 50164(U) [74 Misc 3d 1217(A)]
Decided on February 28, 2022
Supreme Court, Suffolk County
Emerson, J.
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Decided on February 28, 2022

Supreme Court, Suffolk County

Nebari Natural Resources Credit Fund I, LP, Plaintiff,**against**

Speyside Holdings LLC, SPEYSIDE HOLDINGS II LLC, CEM III LLC, SRG HORSEBLOCK II LLC, SRG HORSEBLOCK IV LLC, SGD GROUP HOLDINGS II LLC, SGD GROUP HOLDING III LLC, EUGENE FERNANDEZ, ANTHONY WILLIAMS, DUNCAN GOLDIE-MORRISON, AND JOHN DOES 1-50, THE NAMES OF THE LAST 50, DEFENDANTS, BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF, INTENDED TO DESIGNATE PARTIES WITH LIENS THAT ARE SUBJECT AND SUBORDINATE TO THE LIEN OF THE MORTGAGE BEING FORECLOSED HEREIN AND TENANTS, LESSEES, OR OCCUPANTS OF PORTIONS OF THE MORTGAGED PREMISES DESCRIBED IN THE COMPLAINT, Defendants.

Index No. 616939-21

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Elizabeth H. Emerson, J.

Upon the following papers read on this motion to dismiss; Notice of Motion and supporting papers 22-36; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 54-57; Replying Affidavits and supporting papers 65; it is,

ORDERED that this motion by the defendants for an order dismissing the complaint is denied; and it is further

ORDERED that the defendants are directed to serve and file their answer within 20 days after service upon them of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to complete a preliminary conference stipulation and order and send a copy of same to chambers.

The defendant LLCs own two parcels of real property. One is a working quarry located in Highland Mills, New York (the "Quarry property"), and the other is vacant land located in Yaphank, New York (the "Yaphank property"). On February 25, 2020, the plaintiff loaned the defendants \$17 million to pay off an existing \$10 million loan that was in default, to partially pay down other debt, and to provide working capital for the operation of the quarry. The new \$17 million loan was secured by mortgages on both parcels of real property, pledges of all of the assets of the defendant LLCs, pledges by the individual defendants of their membership interests in the defendant LLCs, and "bad boy" guarantees by the individual defendants. The defendants defaulted on the loan, and the plaintiff sought to foreclose, pursuant to UCC article 9, on the individual defendants' membership interests in the LLCs. The defendants

sought to enjoin the sale and commenced an action in this court (Index No. 604646-21), inter alia, for injunctive relief. By an order dated May 28, 2021, their motion for a preliminary injunction was denied, and they appealed. By a decision and order dated July 2, 2021, the Appellate Division, Second Department, stayed the sale of the individual defendants' membership interests in the defendant LLCs pending hearing and determination of the appeal. This action ensued.

The complaint contains three causes of action: to foreclose the mortgages on the Quarry and Yaphank properties, to foreclose the plaintiff's security interests in the personal property on the Quarry and Yaphank properties, and to recover any deficiency from the individual defendants under the "bad boy" guarantees. The defendants move to dismiss the complaint. In support of dismissal, the defendants raise some of the same arguments that they raised in support of their motion for a preliminary injunction in the prior action. Insofar as those arguments were rejected by this court, they will not be discussed here. The court adheres to its prior determinations with regard thereto.

The defendants' main argument in support of dismissal is that this action violates the one-action rule found in RPAPL 1301, which requires the holder of a note and mortgage to elect one of two alternate remedies: either proceed at law to recover on the note or proceed in equity to foreclose on the mortgage (**Gizzi v Hall**, 309 AD2d 1140, 1141). RPAPL 1301 embodies the [*2]equitable principle that, once a remedy at law has been resorted to, it must be exercised to exhaustion before a remedy in equity, such as foreclosure, may be sought (**Aurora Loan Servs., LLC v Lopa**, 88 AD3d 929, 930). The purpose of the statute is to avoid multiple lawsuits to recover the same mortgage debt (**Id.**).

Contrary to the defendants' contentions, RPAPL 1301 does not bar this action. A disposition of collateral pursuant to UCC article 9 (i.e., the individual defendants' membership interests in the LLCs) is not an action on the note. It is not even a judicial proceeding (*see*, **1258 Assoc Mezz II LLC v 12E48 Mezz II LLC**, Sup Ct, New York County, May 18, 2020, Nervo, J., Index No. 651812/20). Moreover, when a security agreement covers both personal and real property, UCC 9-604 (a) allows the secured party to proceed against the personal property (the membership interests) without prejudicing any of its rights with respect to the real property.

Likewise, a prayer for a deficiency judgment in a foreclosure complaint does not constitute a separate action for a money judgment in violation of the election-of-remedies doctrine (**Aurora Loan Servs., LLC v Lopa**, *supra*). RPAPL 1371 (2) permits the plaintiff in a foreclosure action to make a motion in that action for leave to enter a deficiency judgment (**Id.**). A cause of action for a deficiency judgment is incidental to the principal relief demanded against the mortgagor in a foreclosure action (**Id.**; *see also*, **LibertyPointe Bank v 7 Waterfront Prop., LLC**, 94 AD3d 1061, 1062). Accordingly, the court finds that RPAPL 1301 does not apply.

An obligation whose performance is secured by a mortgage may be that of the mortgagor or of some other person (**Restatement [Third] of Property**[Mortgages] § 1.3). Moreover, consideration is not necessary to the enforceability of a mortgage (**Id.** § 1.2). A mortgage securing the obligation of a person other than the mortgagor is valid, whether or not the mortgagor receives any identifiable benefit in return (**Id.** § 1.3). Thus, contrary to the defendants' contentions, it is not necessary for the owners of the Yaphank property to have received a benefit in order for the mortgage on that property to be enforceable. It was enough that the owners of the Quarry property received the proceeds of the loan.

The defendants' contention that General Obligations Law § 5-526 (1) applies to the loan is raised for the first time in the defendants' reply papers and, therefore, has not been considered by the court. The defendants' remaining contentions raise issues of fact, which are better left to be decided on a motion for summary judgment or at trial. Accordingly, the motion is denied.

Dated: February 28, 2022
J.S.C.

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