

NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. Justice

PART 48

Centecul vs. Yippie Holdings et al.

INDEX NO. 107802/09 MOTION DATE MOTION SEQ. NO. 006

The following papers, numbered 1 to , were read on this motion to/for Notice of Motion/Order to Show Cause - Affidavits - Exhibits Answering Affidavits - Exhibits Replying Affidavits

No(s). No(s). No(s).

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the accompanying memo decision

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

Dated: 12/23/14

JEFFREY K. OING J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

-----x
CENTECH LLC,

Plaintiff,

-against-

YIPPIE HOLDINGS, LLC, NATIONAL AIDS
BRIGADE, INC., DEVAN HOLDINGS LLC, 9
BLEECKER LLC, IRWIN DANA BEAL a/k/a
DANA BEAL, and JOHN DOE #1 through #20

Defendants.
-----x

Index No.: 107802/2009

Mtn. Seq. No. 006

DECISION AND ORDER

JEFFREY K. OING, J.:

Plaintiff Centech LLC ("Centech") moves pursuant to (1) CPLR 3212 for an order granting it summary judgment of foreclosure, and pursuant to (2) CPLR 3211(b) to strike and dismiss all the defenses and counterclaims of defendants Yippie Holdings LLC, National Aids Brigade, Inc., Irwin Dana Beal, and 9 Bleecker LLC.

Background

Centech commenced this action to foreclose on a consolidated mortgage dated August 18, 2004 against defendant mortgagors National AIDS Brigade Inc ("NAB") and Yippie Holdings LLC ("Yippie"). The mortgage secured a \$1.4 million note on a Manhattan property located at 9 Bleecker Street (Block 529, Lot 46) (the "Property") (Einig Affirm., Exs. A-B). Pursuant to the Third Modification and Extension Agreement dated August 1, 2007 (the "modification agreement"), Yippie and NAB acknowledged their default and agreed to make the principal payment of \$1.4 million together with all unpaid and accrued interest in full on December

1, 2007 (Id., Ex. C, ¶¶ 3, 4[a]). This payment was never made as confirmed by Centech in the subsequent Forbearance Agreement dated January 28, 2009 (Id., Ex. D ["Borrower has not paid Lender any sums in connection with the Loan Documents or otherwise since the occurrence of the Existing Defaults"]).

Defendant 9 Bleecker LLC's ("9 Bleecker") interest in this proceeding is based on a certain claimed right of first refusal on the subject Property that 9 Bleecker contends has priority over the mortgage at issue here. 9 Bleecker acquired the Property in 2002 and then in 2004 deeded it to NAB and Yippie in exchange for \$1.2 million and a tax deduction in the amount of \$600,000 as a charitable contribution to NAB, a tax-exempt entity. The indenture, dated August 18, 2004, contained a right of first refusal in 9 Bleecker's favor for fifteen years, setting the purchase price at \$1.8 million (the "indenture") (Halligan Affirm., Ex. A). According to 9 Bleecker, the right of first refusal was recorded prior to the mortgage and survives any foreclosure.

Defendant Irvin Dana Beal ("Beal") is a former resident of the Property. Beal claims he is the intended third-party beneficiary of the transaction between 9 Bleecker and NAB and Yippie because his end-goal, known to 9 Bleecker, was that NAB and Yippie would take title to the Property and eventually convey it to a new "Yippie Museum" (the "museum") that Beal would

construct on the Property. The Property apparently is the historic site of the New York City headquarters of the Yippies, or the "Youth International Party," a New Left movement from the 1960s and a locus of progressive political organizing, especially in connection with drug policy reform. Beal intended to be a director and "historian-in-residence" of the museum and continue to live on site (Beal Aff., ¶¶ 5-7, 11). According to Beal, Yippie and NAB were intended to be "pass-through" entities (Id., ¶¶ 11-12).

Discussion

To establish a prima facie right to foreclose, a plaintiff must produce the mortgage documents underlying the transaction and undisputed evidence of nonpayment (Red Tulip, LLC v Neiva, 44 AD3d 204, 209 [1st Dept 2007]). Here, Centech has met its burden by submitting the mortgage, note, modification agreement and forbearance agreement (Einig Affirm., Exs. A-D). In the third modification agreement, defendants NAB and Yippie specifically acknowledged that:

- (a) The principal sum of One Million Four Hundred Thousand 00/100 (\$1,400,000.00) Dollars (the "Principal Sum") is now due and owing on the Loan Documents, without offsets, claims or defenses, and Mortgagor is in default on its obligations
....

(Einig Affirm., Ex. C, ¶ 3[a])

In opposition, defendants do not deny that Yippie and NAB defaulted on the mortgage. Instead, they assert defenses of, inter alia, unclean hands, conversion, breach of the covenant of good faith and fair dealing, and fraud. Given that Centech has met its burden by presenting the mortgage, note, modification and forbearance agreements, the burden shifts to defendants to raise a triable issue of fact regarding, inter alia, their affirmative defenses in order to defeat summary judgment (Washington Mut. Bank, F.A. v O'Connor, 63 AD2d 696 [2d Dept 2009]).

Here, defendants fail to raise any factual issues, but only offer vague, unsubstantiated and conclusory allegations of collusion between Centech and 9 Bleecker to foreclose on the property in order for 9 Bleecker to exercise its right of first refusal. The principle is well-settled that "[c]onclusory assertions will not defeat summary judgment" (Freedman v Chemical Const. Corp., 43 NY2d 260, 264 [1970]). To the extent that defendants assert that more discovery is needed, mere hope or speculation that evidence sufficient to defeat summary judgment may be uncovered by additional discovery is not a sufficient basis to deny the motion (Bailey v New York City Transit Auth., 270 AD2d 156, 157 [1st Dept 2000]) (summary judgment cannot be avoided absent evidentiary basis suggesting discovery may lead to relevant evidence). Defendants' affirmative defenses of conversion, good faith, and unclean hands are merely stated as

conclusions of law without any supporting facts. Indeed, defendants' contention that Centech intended to foreclose on the property from the outset is contradicted by the several extensions of repayment that Centech provided to NAB and Yippie.

Turning to 9 Bleecker's right of first refusal, the indenture provides that:

... the party of the first part [9 Bleecker], and its successors and assigns, shall have the right of first refusal in the event that, within fifteen (15) years following the date of Closing herein, the Property is to be sold by the party of the second part [NAB and Yippie]. This right of first refusal shall provide the party of the first part, and its successors and assigns, thirty (30) days written notice, after the event of a contract having been signed for the sale of the Property to a bona fide third party purchaser, for the party of the first part, and its successors and assigns, to elect to acquire the Property for a purchase price equal to the lesser of the price set forth in the third party contract or [\$1.8 million] Dollars. The party of the second part shall deliver the Property to the party of the first part, and its successors and assigns, vacant and free and clear of all Tenants and other occupants. The closing shall occur within sixty (60) to ninety (90) days after the party of the first part, and its successors and assigns, elect to acquire the Property. The written notice forwarded to the party of the first part, and its successors and assigns, shall contain a copy of the contract of sale between the owner and the third party purchaser.

If the party of the first part, and its successors and assigns, do not elect to acquire the Property within such thirty (30) day period pursuant to the terms set forth, the party of the second part may retain the Property or sell it to the third party purchaser pursuant to the specific terms of the third party contract, provided that the party of the first part's, and its successors and assigns' rights pursuant to this provision shall remain in effect with respect

to any future sales of the Property for the duration of the fifteen (15) year period after the date of Closing. (Halligan Affirm., Ex. A). The issue, here, is whether 9 Bleecker's right of first refusal is triggered by a judicial foreclosure sale or whether it only applies in the event that defendants NAB and Yippie sell the property directly. This issue appears to be one of first impression in the First Department. The Third Department in Huntington National Bank v Cornelius, 80 AD3d 245 (2010) addressed a similar question. There, the parties' agreement provided that the right of first refusal would be triggered "in the event that either party purchases the entire property and within 20 years thereafter 'offer[s] it for sale'" (Id. at 249). The Third Department concluded that because "the referee, on behalf of the court, is the seller for purposes of the foreclosure action," the right of first refusal was not triggered given that "defendant [was] not offering the property for sale" (Id.). The Appellate Court reasoned that the word "offer," as used therein, "was intended to cover a conscious and voluntary choice by the owner to make the property available for sale," whereas a "foreclosure is an involuntary process resulting in a forced sale" (Id.). The Appellate Court, however, cautioned that:

In so concluding, we do not find that a right of first refusal can never ripen at a judicial foreclosure sale. Different language in an agreement may well create such right...

(Id., fn. 2).

Here, although the language of the right of first refusal granted 9 Bleecker differs from the language considered in Huntington National Bank, supra, this right, likewise, only applies if "the Property is to be sold by the party of the second part," i.e., NAB and Yippie. Thus, as written, the right is simply not triggered upon the sale of foreclosure by the referee, who is clearly not "a party of second part." This reading is supported by the fact that the "party of the first part" is defined as 9 Bleecker LLC and "its successors and assigns," and that the "party of the second part" is only defined as NAB and/or Yippie. If 9 Bleecker intended its right of first refusal to include a sale of foreclosure, it should have provided for that type of transaction in the parties' agreement. 9 Bleecker cannot ask this Court to now rewrite its agreement. Under these circumstances, 9 Bleecker's right of first refusal is no bar to Centech's foreclosure proceedings.¹

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment of foreclosure is granted against defendants Yippie Holdings LLC and National AIDS Brigade, Inc.; and it is further

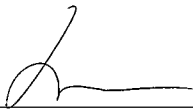
¹The indenture also provides that the right of first refusal "shall remain in effect with respect to any future sales of the Property for the duration of the fifteen (15) year period after the date of the Closing." Given the facts in this action, this Court makes no finding of the future enforceability of the right of first refusal upon the purchaser of the Property at foreclosure.

ORDERED that defendants' affirmative defenses of unclean hands, conversion, breach of the covenant of good faith and fair dealing and fraud are hereby stricken; and it is further

ORDERED that this action is discontinued as against all John and Jane Does and Devan Holdings LLC as these defendants have not been served and/or appeared in this action; and it is further

ORDERED that this action is referred to a Special Referee or JHO to hear and report, or if the parties so-agree to hear and determine, the amount due to plaintiff for principal and interest under the mortgage as set forth in the complaint, and for any other amounts that may be due and owing plaintiff, including reasonable costs and attorneys' fees.

Dated: 12/23/14



HON. JEFFREY K. OING, J.S.C.