

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part 13  
Justice

	x	Index Number <u>20501</u> 2007
ALLIED PROPERTIES, LLC,		Motion Date <u>February 6,</u> 2008
-against-		Motion Cal. Number <u>1</u>
FLUSHING SAVINGS BANK, FSB		Motion Seq. No. <u>1</u>
	x	

The following papers numbered 1 to 16 read on this motion by plaintiff for a preliminary injunction enjoining defendant Flushing Savings Bank, FSB (Flushing) from declaring a default against it and Efthimios Zisimopoulos a/k/a Tim Ziss, as guarantor, of a certain mortgage lien, and to direct defendant Flushing to issue a proper mortgage payoff statement, and to direct defendant Flushing to accept tender of the sum of \$5,011,179.67, representing the principal balance of the mortgage loan with interest through June 26, 2007, plus appropriate charges, and legal fees, an attendance fee and a per diem rate of interest to the date of closing, and to direct, pendente lite, defendant Flushing to issue an assignment or satisfaction of mortgage upon payment of the tendered amount, plus legal fees directly related to the preparation of the assignment or satisfaction, an attendance fee and a per diem rate of interest to the date of closing, on condition that plaintiff deposit the disputed additional amounts into court pending the hearing and determination of this matter, and to enjoin defendant Flushing, pendente lite, from filing a notice of pendency against the subject premises, commencing or prosecuting any foreclosure action, selling, transferring, leasing, encumbering or hypothecating the subject property.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-8
Reply Affidavits.....	9-11

Sur-Reply Affirmations ..... 12-16

Upon the foregoing papers it is ordered that the motion is determined as follows:

The entity known as 236 Cannon Realty, LLC (Cannon) financed the purchase of three properties in Bronx County, New York, from Flushing, evidenced by a note consolidation agreement, and a blanket mortgage modification and consolidation agreement, in the principal amount of \$6,350,000.00, plus interest. Cannon defaulted under the mortgage loan and thereafter entered into a forbearance agreement with Flushing. When Cannon later defaulted with respect to the forbearance agreement, Flushing commenced a foreclosure action against Cannon entitled Flushing Savs. Bank, FSB v 236 Cannon Realty, LLC (Sup Ct, Bronx County, Index No. 17135/2000) and a receiver was appointed.

Plaintiff and Cannon began negotiations regarding a possible ground lease for the properties, including an option for plaintiff to purchase the property after the end of the first year of the lease. On or about September 5, 2000, plaintiff entered into a ground lease, for a period of 45 years, commencing on September 1, 2000, with Cannon for the properties, subject and subordinate to Flushing's first mortgage. Pursuant to the ground lease, plaintiff agreed, among other things, as part of the rent, to cause the Flushing mortgage to be satisfied of record, or assigned or assumed by it, as soon as practicable following the execution of the lease, subject to the requirements of the entity providing plaintiff with financing to consummate the "transactions contemplated by [the] Lease." Plaintiff also agreed to assume the costs of operating and maintaining the properties, as well as other expenses. The ground lease granted plaintiff an option to purchase the properties on or after September 1, 2001, and provided that a deed was to be held in escrow for such transaction.

Upon execution of the ground lease, plaintiff sought and obtained Flushing's consent to its assumption of the Flushing mortgage, and plaintiff executed an assumption agreement and a note modification agreement dated September 14, 2000. Zisimopoulos, the principal of plaintiff, simultaneously executed a personal guaranty, purportedly guaranteeing the mortgage debt in the principal sum of \$6,173,897.21.

Under the assumption agreement, plaintiff agreed, among other things, to pay the unpaid balance of the indebtedness and "perform all the obligations under [the] Loan Documents in addition to the obligations imposed upon [Cannon}...." In consideration thereof, Flushing agreed that if there was no default under the loan documents then, and in that event, it would release, upon receipt of a certified copy of the deed of transfer by Cannon, as grantor,

to plaintiff, as grantee, Cannon and Djeka Saljanin, Cannon's principal, from the obligations of the loan documents. Flushing also agreed that such transfer would not constitute a violation of the loan documents as would "activate" the loan documents' due-on-sale clause.

The note modification agreement granted plaintiff, "during the balance of the Initial Term" of the consolidated mortgage note, the right to prepay the note, conditioned upon, among other things, the payment of a prepayment penalty to Flushing "in the amount of one (1%) of the amount so prepaid." The note modification agreement provided that the rights thereunder were "personal to [plaintiff] or a corporation, Limited Liability Company or to a partnership consisting of the [sic] TIM ZISS as the sole partner, sole member or sole stockholder."

Plaintiff and Cannon subsequently became involved in an action entitled Allied Properties, LLC v 236 Cannon Realty, LLC (Sup Ct, Bronx County, Index No. 23205/2002), regarding the ground lease, which litigation ultimately was settled pursuant to a stipulation of settlement filed with the clerk of Bronx County on May 8, 2007. The stipulation of settlement required, among other things, that plaintiff pay over \$5,700,000.00 to Cannon, in exchange for Cannon's execution of a deed, to be held in escrow, conveying the property to plaintiff, or to plaintiff's nominee or designee.

During the pendency of the Allied Properties action, Cannon commenced an action in federal court, asserting RICO claims against plaintiff's principals and other creditor principals related to the property. The federal action was dismissed on or about February 9, 2005.

Thereafter, in preparation for its proceeding under the stipulation of settlement in the Allied Properties action, plaintiff requested that Flushing provide it with a payoff statement so it could satisfy the Flushing mortgage lien. Plaintiff allegedly was under a contract with a third party for sale of the real properties and its leasehold interest, whereby the Flushing mortgage lien would be assigned to the purchaser. A closing of the sale was scheduled for August 17, 2007.

Flushing provided a payoff statement on or about June 26, 2007, indicating demands for certain amounts, including a demand for a prepayment penalty in the amount of \$253,204.47. However, shortly before the scheduled closing of August 17, 2000, Flushing allegedly advised plaintiff that it intended to revise the statement to reflect, among other things, an increased demand for a prepayment penalty, in an amount of approximately \$670,000.00. Flushing allegedly also advised plaintiff that it viewed the mortgage loan as having been renewed on the maturity date of May 1,

2006, for an additional seven-year term, and to the extent plaintiff sought to payoff the loan prior to the end of the extended term, it was entitled to assess a prepayment penalty in accordance with the yield maintenance formula<sup>1</sup> set forth in the note consolidation agreement. In response, plaintiff commenced this action and obtained the order to show cause dated August 16, 2007 to challenge certain of the demands made by defendant Flushing, including the assessment of the prepayment penalty. Plaintiff alleged that pursuant to the assumption agreement and other loan documents, it was not obligated to pay the prepayment penalty, late fees and "other charges" set forth in the June 26, 2007 payoff statement.<sup>2</sup> Plaintiff sought declaratory and injunctive relief and an award of monetary damages for breach of the assumption agreement.

The order to show cause provided for a stay of the commencement or prosecution of a foreclosure action, filing of a notice of pendency, and the sale, transfer, lease, encumbrance or hypothecating of the property, and directed defendant Flushing to issue an assignment or satisfaction upon payment of certain amounts, and plaintiff's depositing, into escrow or court, various other amounts, pending a hearing and determination of this action.

Meanwhile, defendant Flushing issued a revised payoff statement, dated August 15, 2007, seeking payment of various amounts, including \$4,895,275.39 in principal, \$51,604.36 in accrued interest, \$1,121.84 in per diem interest, \$28,180.33 to satisfy the deficiency in the escrow account, \$36,714.57 as an

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"The computation of 'yield maintenance' provides a lender with the monetary equivalent of the value represented by its "loss [of] the long term secured return it suffers when a loan is repaid" (478 PLI/Real 871, 891-892 [2002], Current Issues Concerning Mortgage Prepayment)" (Northwestern Mut. Life Ins. Co. v Uniondale Realty Associates, 11 Misc 3d 980, 981 [2006]).

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Although counsel for plaintiff asserts in his reply affirmation (¶ 6), dated December 14, 2007, that plaintiff disputes the "assignment fee" in the amount of \$36,714.57, assessed by defendant Flushing, plaintiff did not dispute such charge in the papers originally presented in support of the order to show cause. Nor does plaintiff allege in its complaint that such charge is invalid. In addition, counsel for defendant Flushing affirms, in his sur-reply affirmation dated January 8, 2008, that such fee was paid to defendant Flushing on August 17 (2007). Such affirmation may account for the failure of counsel for plaintiff to re-list the "assignment fee" as a disputed charge in his "Affirmation in Reply to Defendant's Sur-Reply."

assignment fee, a prepayment penalty in the amount of \$677,766.19, late fees incurred before October 1, 2000 in the amount of \$54,809.27, late fees incurred after October 1, 2000 in the amount of \$108,233.81 and other unspecified fees in the amount of \$136,847.47, purportedly due and owing defendant Flushing.

The property was sold by Cannon to a third party on August 17, 2007, at which time \$850,000.00 was paid into escrow, and checks totaling \$5,015,140.17 were tendered to defendant Flushing, representing payment of:

- 1) Principal in the amount of \$4,895,275.39
- 2) Accrued interest in the amount of \$51,604.36
- 3) Per diem interest in the amount of \$3,365.52
- 4) Escrow Deficit in the amount of \$28,180.33
- 5) Assignment Fee in the amount of \$36,714.57.

The remaining charges set forth on the August 15, 2007 payoff statement, totaling \$1,014,371.31 are still in dispute by the parties.<sup>3</sup>

Those branches of the motion seeking to enjoin preliminarily defendant Flushing from commencing or prosecuting any foreclosure action, and filing a notice of pendency, are denied as moot. The property has been sold, and prior to the sale, defendant Flushing did not commence a foreclosure action or file a notice of pendency.

With respect to the remaining branches of the motion, plaintiff seeks to stay enforcement of the disputed loan charges, i.e. a prepayment penalty, late fees incurred before and after October 1, 2000, and "other fees" purportedly representing the "convertible balance," under the mortgage loan, and to declare those charges unenforceable. Plaintiff alleges that pursuant to the assumption agreement and other loan documents, it is not obligated to pay defendant Flushing the disputed charges.

Under CPLR 3212, any party may move for summary judgment in any action, after issue has been joined. In this instance, although issue has not been joined as to any cause of action, the parties have treated the remaining branches of plaintiff's motion as, in effect, a motion for summary judgment with respect to plaintiff's claim for declaratory relief.<sup>4</sup> Because the parties

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See supra n 2.

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Defendant Flushing itself seeks affirmative relief (albeit without a proper notice of cross motion [see CPLR 2215; J.A. Valenti Elec. Co. v Power Line Constructors, 123 AD2d 604

have “`deliberately charter[ed] a summary judgment course,’” the court shall entertain the remainder of plaintiff’s motion as a motion for summary judgment in its favor.

Plaintiff asserts that although an option was granted under the note consolidation agreement to extend the term of the mortgage loan, neither it nor Cannon ever exercised such option, insofar as it was plaintiff’s intent to payoff the mortgage. Therefore, it argues that it is not obligated to pay the prepayment penalty set forth in the note consolidation agreement.

Defendant Flushing asserts that plaintiff extended the mortgage loan to May 1, 2013, by continuing to make payments to it after the initial maturity date of May 1, 2006. Defendant Flushing, however, has failed to demonstrate such payments constituted an election by plaintiff (or Cannon) to opt to renew the loan’s initial term for an additional seven-year term.

The note consolidation agreement, in relevant part, provides the “Lender shall, upon request of Borrower... extend the term of this Note for a seven (7)-year period (the ‘Extension Period’), which Extension Period shall commence on the Maturity Date and terminate on May 1, 2013,” upon condition that seven enumerated terms are met.

Such provision grants the Borrower the option to elect to renew the mortgage loan (upon compliance with seven terms), but does not impose an obligation on the Borrower to do so. Thus, it is clear that the renewal option is for the benefit of the Borrower only. The note consolidation agreement, furthermore, makes no mention of any unilateral right on the part of the Lender to deem any post-maturity date payments to be an exercise of the option on the part of the Borrower. The parties to the blanket mortgage modification and consolidation agreement anticipated that “post-due date” payments might be made by the Borrower, and specifically provided that: “By accepting payment of any amount secured hereby before or after its due date, neither Mortgagee nor any holder of the Note shall be deemed to waive its right either to require prompt payment when due of all other amounts payable hereunder or to declare a default for failure to effect such prompt payment.” In the absence of clear language evidencing an intention by the contracting parties to permit the Lender to deem any post-maturity payment to constitute an election by the Borrower to renew the

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(1986); Matter of Briger’s Estate, 95 AD2d 887 (1983)], i.e. directing plaintiff to pay the disputed charges and declaring that it be entitled to use the yield maintenance formula set forth in the note modification agreement in calculating the prepayment penalty.

mortgage for another seven-year term, it will not be implied by this court.

The note consolidation agreement allows for prepayment of the note before maturity, upon payment of, among other things, a premium calculated as follows:

"[a] sum equal to the amount by which (x) the amount which Lender would have earned in respect of the amount prepaid for the remaining portion of the term of this Note (the "Remaining Term") at the Effective Rate exceeds (y) the amount Lender will be able to earn in respect of the amount prepaid for the Remaining Term, at a rate equal to the yield for United States Treasury Bills of a term nearest to the Remaining Term, determined as of the date of the notice of prepayment."

The note consolidation agreement also allows for the Lender's recovery of such prepayment premium "if any Event of Default shall occur and the Maturity Date ... shall be accelerated," and deems any tender of monies to satisfy the mortgage loan, prior to a foreclosure sale of the properties and expiration of the period of redemption, to constitute a voluntary prepayment and an evasion of the payment terms (see generally Northwestern Mut. Life Ins. Co. v Uniondale Realty Assoc., 11 Misc 3d 980 [2006]).

It is undisputed that the mortgage loan was not paid off prior to the maturity date of May 1, 2006. With respect to the issue of whether any event of default occurred and the maturity date was accelerated prior to the maturity date, the blanket mortgage modification and consolidation agreement grants the mortgagee an option to elect to accelerate the mortgage upon the event of a default. It is unclear from these papers whether the mortgage was reinstated following the commencement of the foreclosure action under Index No. 17135/2000 (Sup Ct, Bronx County), and if so, whether a subsequent "event of default" occurred and whether defendant Flushing manifested its election to accelerate the mortgage's maturity date based upon such default (see generally Albertina Realty Co. v Rosbro Realty Corp., 258 NY 472 [1932]; Loiacono v Goldberg, 240 AD2d 476 [1997]).

Even assuming the mortgage was reinstated, the concession by counsel for defendant Flushing (in his sur-reply affirmation) that "no default was declared by Defendant [Flushing] against the Plaintiff," is not conclusive on the issues of whether there was any "Event of Default," as defined in the note and mortgage, subsequent to reinstatement and whether defendant Flushing elected to accelerate after reinstatement, but prior to the maturity date. The mortgage documents herein do not require written notice of default prior to acceleration (see Small Business Administration v

Mills, 203 AD2d 654 [1994]; Independence Community Bank v Omicron Industries, Inc., 9 Misc 3d 1119(A) [2005]; 1 Bergman on New York Mortgage Foreclosures § 4.05[1][a][n 1.1], at 4-20). Rather, the blanket mortgage modification and consolidation agreement, and the note consolidation agreement provide a waiver of presentment, demand, protest and notice.

Plaintiff also asserts that to the degree defendant Flushing is entitled to recover a prepayment penalty, defendant Flushing must apply the "discount" formula afforded to plaintiff (among others) in the note modification agreement, when calculating the penalty.

The note modification agreement, in relevant part, provides:

"1. That during the balance of the Initial Term of the Loan the existing Consolidated Mortgage Note dated April 4, 1999 made and executed by [Cannon] and [Flushing], and as assumed by Assumption Agreement dated September 14, 2000 made and executed by the BANK and ALLIED, ALLIED may prepay the Note in whole or in part (but only in multiples of \$10,000.00) provided, (I) Lender is given not less than ten (10) days prior written notice of the proposed prepayment, (ii) the prepayment is accompanied by payment in good funds of (A) interest accrued hereunder to the date of the prepayment, plus (B) a prepayment penalty in the amount of one (1%) percent of the amount so prepaid is paid to the BANK."

The phrase "Initial Term" found in this provision is not defined in the note modification agreement. Nevertheless, a reading of the loan documents together, clearly indicates that the parties thereto intended the "initial term" of the mortgage loan commenced on April 6, 1999 and ended on May 1, 2006. Plaintiff argues that its right to be afforded a preferential prepayment penalty was extended by virtue of defendant Flushing's acceptance of the payments following the May 1, 2006 maturity date without a formal demand for payment in full.

Plaintiff's argument is without merit. Nothing in the note modification agreement indicates that such preferential penalty would be extended beyond the initial term in the event of continued payments. In addition, plaintiff has made no showing that defendant Flushing waived its right to recover a prepayment penalty based upon the application of the yield maintenance formula (see Nassau Trust Co. v Montrose Concrete Prods. Corp., 56 NY2d 175 [1982])).

With respect to plaintiff's argument that defendant Flushing

is not entitled to the demanded late fees, the blanket mortgage modification and consolidation agreement provides for the imposition of a late charge in the amount of "five cents (\$0.05) for each dollar (\$1.00) so over due," "[i]f any payment due hereunder shall not be made by Mortgagor within ten (10) days of the date such payment is due and payable" (Schedule C, Article 1, ¶ 1.2). Plaintiff does not deny that late charges were incurred prior to the assumption agreement, but instead merely asserts that "to the extent that said charges were satisfied," defendant Flushing may not seek to collect them again. Plaintiff, however, has failed to demonstrate that it, or Cannon, actually satisfied the late charges incurred prior to the assumption agreement. As for the "Unpaid Late Charges after 10/10/00," plaintiff does not dispute the charges were incurred, but rather seeks an itemization of them. Plaintiff also seeks an itemization of the other disputed charges in the amounts of \$138,847.47 and \$5,224.00. Defendant Flushing asserts that such amounts represent the "convertible balance" owed under the mortgage loan documents.

Under these circumstances, the branch of the motion by plaintiff for summary judgment is denied, and defendant Flushing is directed to itemize those unpaid late charges incurred after October 10, 2000 and to account to plaintiff for the charges in the amounts of \$138,847.47 and \$5,224.00, within 30 days of service of a copy of this order with notice of entry.

Dated: June 6, 2008

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J.S.C.