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The Honorable LaShann DeArcy Hall
United States District Court
Eastern District of New York
225 Cadman Plaza
East Brooklyn, NY 11201

Re: ***The Federal Savings Bank v. Manafort et. al., Case No. 1:21-cv-01400-LDH-SJB***

Dear Judge Hall:

On behalf of Defendants Paul J. Manafort, Jr. and Kathleen B. Manafort (collectively, "Defendants"), we write pursuant to Section III.A of Your Honor's Individual Practices to request a pre-motion conference. Defendants seek to file a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Brief Factual Background

On March 17, 2021, The Federal Savings Bank, filed a single-count Complaint pursuant to the New York Real Property Actions and Proceedings Law ("RPAPL"), NY RP ACT & PRO § 1301, *et seq.*, seeking a judgment of foreclosure and sale on mortgages encumbering Defendants' property located at 377 Union St., Brooklyn, NY 11231 (the "Property"). (ECF No. 1.)

Plaintiff alleges that on January 4, 2017, it issued two loans to the Defendants, one referred to as the "Project Loan" in the amount of $5,300,000.00 and another referred to as the "Building Loan" in the amount of $1,200,000.00 (together, the "Loans"). (*Id.* at ¶¶ 1, 9, 12.) Plaintiff alleges that Defendants executed a promissory note and mortgage for each of the Loans (referred to hereinafter as the "Project Loan __ [Note or Mortgage]" and the "Building Loan __ [Note or Mortgage]"), which required Defendants to make monthly payments of principal, interest and associated fees. (*Id.* at ¶¶ 10[1], 12-15.) Plaintiff further alleges that, upon a default, Plaintiff could require immediate payment in full of all amounts owing under the Loans. (*Id.* at ¶¶ 13, 15, 18.)

Plaintiff next claims that Defendants defaulted on the Loans by failing to make the required monthly payments beginning in November 2017, after which the full amounts of the Loans became due and payable. (*Id.* at ¶¶ 22, 24.) Plaintiff further claims that Defendants defaulted by failing to pay the outstanding amounts due by the Loans' maturity date of January 4, 2018. (*Id.* at ¶ 23.) Plaintiff alleges that the amount due is $7,183,600.80 for the Project Loan and $1,153,609.07 for the Building Loan. (*Id.* at ¶ 25-26.) Based on these allegations, Plaintiff seeks to foreclose on the

[1] This reference to "¶ 10" refers to both paragraphs number "10" on page 3 of the Complaint as Plaintiff's enumeration of the paragraphs is out of sequence.

Property. Plaintiff also seeks a money judgment in the amount of any "deficiency" resulting from the net proceeds of a foreclosure sale and the alleged amount due to Plaintiff. (*Id.* at ¶¶ 33.)

Plaintiff attaches some but not all the relevant loan documents to its Complaint, omitting key security instruments and provisions integral to its claim. Specifically, Plaintiff omits any reference to the provisions in the Project Loan Note and Mortgage that require Plaintiff to provide certain notices to Defendants prior to commencing foreclosure proceedings. (*See* ECF No. 1-2, § 11; ECF No. 1-3, § 24.) Plaintiff also fails to attach one of the loan documents that required Defendants to deposit $2,500,000 into an account as additional collateral for the Loans. Those funds were released to Plaintiff to apply to the Loans on April 21, 2021.

Law & Argument

Rule 12(b)(6) provides that a complaint must be dismissed if it fails to state a claim upon which relief can be granted. "[A] federal court sitting in diversity must test state-law claims against the standard in *Twombly* and *Iqbal*." *Tannerite Sports, LLC v. NBCUniversal News Grp., a division of NBCUniversal Media, LLC*, 864 F.3d 236, 247 (2d Cir. 2017). A complaint fails to state a claim under *Twombly* and *Iqbal* if it does not articulate "enough facts to state a claim that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court need not accept as true unsupported conclusions, unwarranted inferences, "bald allegations," or "legal conclusions." *Iqbal*, 556 U.S. at 662, 678, 681; *Twombly*, 550 U.S. at 555. And there must be a "showing rather than a blanket assertion of an entitlement to relief." *Twombly*, 550 U.S. at 556, n.3.

Here, Plaintiff's threadbare and conclusory allegations do not satisfy its pleading burden. As a result, the Complaint should be dismissed.

"Under New York state law, three elements must be established in order to sustain a foreclosure claim: (1) the proof of the existence of an obligation secured by a mortgage; (2) a default on that obligation by the debtor; and (3) notice to the debtor of that default." *Gustavia Home, LLC v. Hoyer*, 362 F. Supp. 3d 71, 79 (E.D.N.Y. 2019), *motion for relief from judgment denied*, No. 16CV4015PKCVMS, 2021 WL 1146087 (E.D.N.Y. Mar. 25, 2021). In evaluating whether a plaintiff has sufficiently alleged a default supporting a foreclosure claim under the RPAPL, "[n]o general allegations of default will be assumed to be true; rather, [t]here must be some proof in the form of an affidavit of a person with knowledge, or a complaint verified by a person with knowledge." *Gustavia*, 362 F. Supp. 3d at 79.

Plaintiff does not submit an affidavit regarding or otherwise verify the allegations in the Complaint. The Complaint also is factually and legally deficient because Plaintiff fails to adequately plead essential elements of its claim—namely the existence of a continuing default for the Building Loan and service of proper notice of the alleged default as required by the Project Note and Mortgage and the RPAPL.

"A plaintiff cannot foreclose on a mortgage if the debt it secures has been satisfied." *Reale v. Tsoukas*, 146 A.D.3d 833, 835, 45 N.Y.S.3d 148, 150 (2d Dep't 2017). In the instant action, after Defendants' alleged default under the Building Loan (for which Plaintiff alleges that $1,153,609.07 is due and owing), Plaintiff received $2,500,000 from a pledged account that it required Defendants to maintain as additional collateral. These funds are more than sufficient to pay the outstanding balance of the Building Loan. Because Plaintiff has received payment sufficient to pay the Building Loan in full, it cannot foreclose on the Building Loan Mortgage. *Id.*[2]

With respect to the Project Loan, Plaintiff fails to allege that it has satisfied the notice requirements under the terms of the Note and Mortgage and Section 1304(1) of the RPAPL. Under the RPAPL, proper notice "is a condition precedent to the commencement of a foreclosure action . . . [and] Plaintiff has the affirmative obligation to establish strict compliance with RPAPL § 1304." *Gustavia*, 362 F. Supp. 3d at 83 (citation and internal quotation marks omitted.) Additionally, satisfaction of a notice requirement in a security instrument is a condition precedent to maintaining an action on the instrument. *See, e.g., GMAC Mortg., LLC v. Bell*, 128 A.D. 3d 772, 773 (2015) (finding that the plaintiff's affidavit asserting service of notice of default was unsubstantiated and conclusory and the Supreme Court should have dismissed the complaint because the plaintiff "failed to satisfy a condition precedent to the commencement of [the foreclosure] action, since it failed to provide [defendants] with a notice of default in the payment of their mortgage obligation, as required by the terms of the subject mortgage."). Plaintiff makes no allegation that it complied with the notice requirements under the Project Note, the Project Mortgage, or RPAPL § 1304(1).[3]

Given Plaintiff's failure to adequately plead a basis for its foreclosure claim, Defendants respectfully request permission to move to dismiss Plaintiff's Complaint in its entirety.

We thank the Court for its consideration of this pre-motion conference request to file a Fed. R. Civ. P. 12(b)(6) motion to dismiss. We are available at the Court's convenience to appear and address any questions Your Honor may have.

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[2] Any contention by Plaintiff that it has discretion to instead apply the $2,500,000 to the Project Loan and maintain a default of both Loans would violate the duty of good faith and fair dealing, which prohibits a party from exercising contractual discretion in a manner that is arbitrary, unfair, unreasonable, or that frustrates the purpose of the parties' agreement. *See, e.g., Power Travel Int'l, Inc. v. Am. Airlines, Inc.*, 257 F. Supp. 2d 701, 706 (S.D.N.Y. 2003) (holding that "[B]ad faith and abuse of discretion exist '[w]here a party alleges frustration of its expectation or fundamental purpose in entering the contract," and "although a contract grants a party discretion to set a contractual term, this discretion does not go so far as to enable the party to eviscerate this term and frustrate a fundamental purpose underlying the agreement.") (internal citations omitted).

[3] Plaintiff's conclusory and unsupported allegation regarding the *Defendants' intentions* not to occupy the Property as their primary residence—presumably made to suggest that § 1304(1) does not apply—should be disregarded. *See, e.g., Iqbal*, 556 U.S. at 662, 678-79, 681 (unsupported conclusions, unwarranted inferences, "bald allegations," or "legal conclusions" need not be accepted as true).

Respectfully Submitted,

Rodney Perry
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Attorney for Defendants