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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) ELEVENTH JUDICIAL CIRCUIT

FILED
2013 MAY 31

Capital Bank successor in interest by merger to Carolina National Bank & Trust Company,) Civil Action No. 2012-CP-32-2757

Plaintiff,

vs.

Attic Space Self Storage, LLC, James Michael Sequin a/k/a James Michael Seguin and Christy Duffell-Sequin a/k/a Christy Duffell-Seguin,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS' LIABILITY

RECEIVED
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SC Court of Appeals

This case concerns a disputed mortgage foreclosure. Defendant failed to make payments and Lexington County taxes came due. Plaintiff Capital Bank, successor in interest by merger to Carolina National Bank & Trust Company ("Capital Bank"). paid the taxes and thereafter filed this Summary Judgment Motion. The parties argued Plaintiff's Summary Judgment Motion, April 18, 2013. After a review of this matter and the written submissions from the parties and hearing arguments from counsel for Capital Bank and Defendants Attic Space Self Storage, LLC ("Attic Space"), James Michael Sequin a/k/a James Michael Seguin ("Mr. Seguin"), and Christy Duffell-Sequin a/k/a Christy Duffell-Seguin ("Mrs. Seguin", and collectively with Attic Space and Mr. Seguin, the "Defendants"), I hereby **GRANT** Capital Bank's Motion for Summary Judgment as to Defendants' liability:

FINDINGS OF FACTS:

1. On January 10, 2008, Attic Space executed a promissory note in favor of Capital Bank in the original principal amount of $510,000.00 with interest thereon ("Note").

2. To secure the Note, Attic Space executed a mortgage ("Mortgage") dated January 10, 2008, in favor of Capital Bank, on the subject real property located in Lexington County, South Carolina ("Property").

3. To further secure the Note, Mr. and Mrs. Seguin each signed a guaranty of the Note on January 10, 2008 (collectively, the "Guarantees").

4. In December 2011, Attic Space was two months behind in the monthly payments and had failed to pay the 2010 property taxes that had come due in January 2011.

5. Due to Attic Space's non-payment of the 2010 taxes, the Property was scheduled to be sold by Lexington County at tax sale on Monday, December 5, 2011.

6. Capital Bank paid the 2010 taxes on Friday, December 2, 2011, to prevent the Property from being sold.

7. Lexington County required Capital Bank to pay the 2011 taxes at the same time, which it did.

8. On April 19, 2012, Capital Bank sent a notice of default and acceleration to Defendants, demanding the entire balance owed under the Note as of that date, including the 2010 and 2011 property tax amounts:

Principal:	$ 457,070.09
Interest:	8,400.07
Late Charges:	969.50
Taxes Paid:	13,114.79
Appraisal & Review:	3,500.00
TOTAL:	$ 483,054.45

9. Defendants have not cured their defaults or paid the accelerated balance.

10. On July 2, 2012, Capital Bank filed this action seeking foreclosure of the Property and requesting a deficiency judgment against Defendants.

11. Defendants filed an Answer on August 1, 2012.

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12. In their Answer, Defendants admit they were two months behind on the subject loan but assert that they would have been able to make up their delinquency had Capital Bank not added the 2011 tax liability, which was not in default yet, to the amount demanded in the April 19th notice.

13. More specifically, Defendants assert that in April 2012, they may have been able to borrow funds from a family member to re-pay Capital Bank for the 2010 taxes paid on their behalf. Defendants did not furnish any evidence indicating (a) the family member had in fact agreed to make payment nor (b) that such family member was financially able to do so.

14. The Note subsequently matured during the pendency of this litigation on January 10, 2013.

15. Capital Bank filed the instant Motion for Summary Judgment on January 15, 2013, seeking summary judgment on its claims against Defendants and dismissal of any affirmative defenses against it.

CONCLUSIONS OF LAW:

1. Capital Bank is entitled to summary judgment as to Defendants' liability on its claim for foreclosure in this matter. Summary judgment is appropriate only when there are no genuine issues of material fact and moving party is entitled to judgment as a matter of law. Evidence and inferences are viewed in a light most favorable to the non-moving party. First Savings Bank v Capital Investors, 316 S.C. 360, 450 S.E.2d 83, 86 (Ct. App. 1994). Attic Space argument that a family member might have been willing to pay if asked is too speculative and indefinite to create a genuine issue of fact. Such a statement is mere speculation on Attic Space's part. There is no evidence from the family member that he was (1) willing or (2) financially able to pay.(I'm not sure he would have given it to me; I'd like to think that he probably would have).

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2. The Note provides that Attic Space will be in default if Attic Space fails to make monthly payments on time, breaches any promise on any debt agreement with Capital Bank, or does or fails to do something that causes Capital Bank to believe that it will have difficulty collecting the amount owed.

3. Similarly, the Mortgage provides that Attic Space will be in default if Attic Space fails to make any payments when due or breaches any term or covenant of the Mortgage, or if Lender has a good faith belief that it is insecure or the prospect of payment is impaired or the value of the subject property is impaired.

4. In December 2011, Attic Space had failed to make its monthly payments due November 10, 2011, and December 10, 2011; had failed to pay the 2010 property taxes as it was required to do under the loan documents; and had caused Capital Bank's collateral to be at risk of being sold at tax sale.

5. Therefore, Attic Space was in default under the terms of the subject loan documents at that time.

6. Attic Space continued to be in default on its monthly payments after December 2011.

7. Attic Space did not make its payment due November 10, 2011, until February 22, 2012; its payment due December 10, 2011, until March 8, 2012; and its payment due January 10, 2012, until March 29, 2012.

8. As of April 19, 2012, Attic Space remained in default for its failure to make its monthly payments due February 10, 2012, March 10, 2012, and April 10, 2012.

9. Upon Attic Space's default, the Note provides that Capital Bank "may demand immediate payment of all [Attic Space] owe[s] [Capital Bank] under this note (principal, accrued

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unpaid interest and other accrued charges)."

10. Similarly, the Mortgage provides that upon Attic Space's default, Capital Bank "may accelerate the Secured debt" and that "all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable."

11. In accordance with these provisions, Capital Bank sent its notice of default and acceleration to Defendants on April 19, 2012, demanding payment in full of all the principal, accrued unpaid interest, and other accrued charges.

12. Therefore, Capital Bank rightfully accelerated the subject loan based on Defendants' default.

13. Furthermore, Capital Bank rightfully paid the property taxes for the Property and included those amounts in its notice of default and acceleration.

14. Attic Space was responsible for the payment of the property taxes under the loan documents.

15. The loan documents authorized Capital Bank to incur expenses to preserve or otherwise protect the Property and its value, and those expenses were to be added to Defendants' debt.

16. Attic Space was unable to pay the 2010 taxes as they came due in January 2011 or thereafter, causing the Property to be at risk of being sold by Lexington County at tax sale on Monday, December 5, 2011.

17. Defendants advised Capital Bank that Attic Space could not afford to make the overdue 2010 tax payment and asked Capital Bank for help with the payment.

18. To preserve and protect the Property and its value, Capital Bank paid the 2010 taxes in the amount of $6,944.42 so the Property would not be sold.

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19. Lexington County would not accept only the 2010 tax payment and required Capital Bank to pay the 2011 taxes in the amount of $6,170.37, along with the 2010 taxes, which it did.

20. Therefore, the April 19th notice properly included the 2010 and 2011 tax amounts as "other accrued charges" due and owing by Defendants on the subject loan.

21. Capital Bank also properly included appraisal fees in its April 19th notice.

22. The Mortgage provides that Defendants are to pay "all of Lender's expenses incurred in . . . any inventories, audits, inspections or other examination by Lender in respect to the Property.

23. An appraisal is an inspection or examination of the property, and, therefore, Capital Bank rightfully included its appraisal fees within the "other accrued charges" due and owing by Defendants on the subject loan in its April 19th notice.

24. The only defense raised by Defendants in this matter is that when they received the April 19th notice of default and acceleration, they might have been able to borrow funds from a family member to re-pay Capital Bank for the 2010 taxes paid on their behalf.[1]

25. This potential ability to repay the 2010 taxes is not sufficient to show that Defendants actually had the capacity to repay the 2010 property taxes.

26. Where a party seeks to specifically enforce a contract, that party is obligated to make tender, or in other words, be "ready, willing, and able to perform his obligations under the contract." Maccaro v. Andrick Dev. Corp., 280 S.C. 96, 101, 311 S.E.2d 91, 94 (Ct. App. 1984).

27. "[T]o constitute good tender, the law requires payment to be in money, for the

[1] Q. And he would have given you or loaned you the $7,000 to make up the 2010 taxes?

A. I'm not sure he would have given it to me; I'd like to think that he probably would have.

Seguin Dep. at 76:17-20.

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proper amount due, made to the proper person, at the proper place." Keels v. Pierce, 215 S.C. 339, 343, 433 S.E.2d 902, 905 (Ct. App. 1993); see also Boyd v. Liberty Life Ins. Co., 399 S.C. 401, 732 S.E.2d 180 (Ct. App. 2012) (finding that submission of a blank, voided check and authorization to draft checking account was not tender of the actual payment itself).

28. Here, Defendants seem to be seeking specific performance in the sense that they would like to proceed with the loan contract as though there had been no defaults.

29. However, Defendants weren't even sure they would have been able to obtain the funds to repay the 2010 taxes and certainly did not remit payment for the 2010 taxes to Capital Bank as required.

30. Therefore, Defendants did not properly tender the re-payment for the 2010 taxes to Capital Bank.

31. Even if Defendants had tendered re-payment for the 2010 taxes, this would not have been sufficient to cure Defendants' defaults at that time.

32. Defendants were behind on three monthly payments as of April 19th and do not assert that they could have caught up those payments at that time.

33. Had Defendants been able to secure the funds to re-pay the 2010 taxes, they would still be in default on the loan.

34. Therefore, Capital Bank was still entitled to accelerate the full balance due on the loan. See U.S. Bank Trust Nat'l Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009) (allowing acceleration based on established independent defaults and finding the separate disputed default was not controlling in light of the independent defaults).

35. "[A] tender of anything less than the *full accelerated amount* will not cure the default." Allendale Furniture Co., Inc. v. Carolina Commercial Bank, 284 S.C. 76, 79, 325

S.E.2d 530, 531 (1985) (emphasis in original); see also Bell, 385 S.C. at 377-78, 684 S.E.2d at 206 ("Once the Bells were deemed to be in default because of the missed November 2002 lump sum payment, or by virtue of the missed December 2002 and January 2003 monthly payments . . . Bank's legal right to declare the entire balance due and right to commence a foreclosure action could not be taken away or nullified by a partial tender.").

36. Because Capital Bank was entitled to accelerate the loan, Defendants were required to tender the full accelerated amount.

37. Even if the disputed amounts for the 2011 tax payment and appraisal fees were excepted from the full accelerated amount, Defendants were not able to tender the remaining balance, and therefore, they cannot use those disputed amounts to avoid the acceleration and foreclosure.

38. Defendants attempted to argue at the hearing on the Motion for Summary Judgment that Capital Bank's acceptance of payments after the April 19th notice of default and acceleration constituted a waiver of their default.

39. This argument fails procedurally and substantively.

40. First, this argument fails because Defendants did not plead waiver in their Answer as they were required to do.

41. Rule 8(b) of the South Carolina Rules of Civil Procedure provides that "[a] party shall state in short and plain terms the facts constituting his defenses to each cause of action asserted . . . ." Rule 8, SCRCP; see also RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004) (affirming striking of privilege defense where defendant plead the affirmative defense of privilege but failed to plead any facts in support of the defense).

42. Rule 8 also provides:

> In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, plene administravit or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, statute of limitations, **waiver**, and any other matter constituting an avoidance or affirmative defense.

Rule 8(c), SCRCP (emphasis added); see also 7 S.C. Jur. Estoppel and Waiver § 21 ("[W]aiver as a defense must be specifically pleaded along with the facts supporting the plea.").

43. Furthermore, Rule 12 provides that "**[e]very** defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, **shall** be asserted in the responsive pleading thereto . . . ." Rule 12(b), SCRCP (emphasis added).

44. Defendants were required to affirmatively set forth **all** defenses and the **facts** supporting those defenses in their Answer.

45. However, Defendants' Answer does not set forth any affirmative defenses and does not reference the fact that payments were accepted after the April 19th acceleration notice.

46. Defendants' failure to affirmatively plead waiver is deemed a waiver of the right to assert such defense at this point in the litigation. See Plyler v. Burns, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (2007) ("Generally, 'a failure to plead an affirmative defense is deemed a waiver of the right to assert it.'"); see also Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 616, 703 S.E.2d 221, 225 (2010) (holding that defendants "cannot benefit from an affirmative defense that was never pled"); Madren v. Bradford, 378 S.C. 187, 192-93, 661 S.E.2d 390, 393 (Ct. App. 2008) (affirming trial court's denial of a motion to dismiss based on an affirmative defense that was not pled in the defendant's answer and counterclaim based on Rules 8 and 12 of the SCRCP).

47. Therefore, Defendants are barred from asserting the defense of waiver as it was not plead in accordance with the South Carolina Rules of Civil Procedure.

48. Second, even if Defendants were not barred from asserting a waiver defense, such a defense would not provide Defendants any relief from this foreclosure action because Capital Bank's acceptance of payments after the April 19th notice does not constitute a waiver as a matter of law.

49. The Mortgage specifically provides:

> The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's rights to require full and complete cure of any existing default.

Mortgage at p. 4, § 17.

50. The April 19th notice similarly provides:

> If you make any partial payments toward the outstanding obligations under the Note in the future, those partial payments will be applied to the total, accelerated balance pursuant to the terms of the Loan Documents, and Lender's acceptance and application of any partial payments toward the total accelerated balance will not constitute a waiver of the foregoing defaults under the terms of the Loan Documents or of Lender's rights and remedies arising from the foregoing defaults.

51. Here, Defendants made three payments after the April 19th notice of default and acceleration: May 9, 2012 (for the payment due February 12, 2012); June 8, 2012 (for the payment due March 10, 2012); and July 10, 2012 (for the payment due April 10, 2012).

52. Based on the language in the Mortgage and the April 19th notice, Defendants were on notice that Capital Bank would accept and apply those payments to the total accelerated balance without waiving the Defendants' default or Capital Bank's remedies arising therefrom. See Caulder v. Lewis, 287 S.C. 372, 338 S.E.2d 837 (1986) (allowing lender to foreclose despite accepting two late payments after the lender gave notice of its intent to foreclose if future

payments were late); 27 S.C. Jur. Mortgages ¶ 86 ("[A]ccepting one or two late payments will not give rise to waiver . . . ").

53. Therefore, Capital Bank's acceptance of these three payments after Defendants' default is insufficient to constitute waiver that would prevent Capital Bank's foreclosure of its Mortgage.

54. Therefore, Capital Bank's Motion for Summary Judgment on its claim for foreclosure is granted as to Defendants' liability.

55. Capital Bank is entitled to foreclose the Property and proceed with a hearing on the issue of the amount of its damages.

CONCLUSION

Based on the foregoing, Capital Bank's Motion for Summary Judgment on its claim for foreclosure is granted as to Defendants' liability. Therefore, it is hereby

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ORDERED that Capital Bank's Motion for Summary Judgment on its claim for foreclosure is hereby granted as to Defendants' liability;

ORDERED that Defendants' affirmative defenses to Capital Bank's claim for foreclosure are hereby dismissed;

ORDERED that Capital Bank is entitled to foreclose the Property; and

ORDERED that Capital Bank be allowed to proceed with a hearing on the issue of the amount of its damages at a later date.

AND IT IS SO ORDERED.

James O. Spence

The Honorable James O. Spence
Master-in-Equity, Lexington County

May 15, 2013

Lexington, South Carolina

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