

STATE OF SOUTH CAROLINA)
)
COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

David A. Cox,)
)
Plaintiff,)

C/A No. 2020-CP-29-00730

v.)

ORDER

Lancaster Housing Group, LLC, Russell)
Sinacori, David Simonini, Allen E. Wiggins,)
as Trustee of Phoenix GST Trust and)
Ramsin, LLC,)
)
Defendants.)

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SC Court of Appeals

This matter comes before the court upon the parties’ cross motions for summary judgment. Plaintiff David A. Cox (“Cox”) seeks judgment in his favor as a matter of law on his first cause of action (suit on a note) and his second cause of action (foreclosure of a mortgage). Defendants oppose Cox’s motion and seek summary judgment in Defendants’ favor as to each of those claims. In addition, Defendants move for summary judgment as to Plaintiff’s third cause of action (conspiracy). After careful consideration of the parties’ submissions and arguments, I GRANT Cox’s motion and DENY Defendants’ motion as to the first two causes of action. I GRANT Defendants’ motion for summary judgment as to Plaintiff’s conspiracy cause of action.

Standard of Consideration

“Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations.” McAlhany v. Carter, 415 S.C. 54, 60, 781 S.E.2d 105, 110 (2015). Summary judgment should be granted where “the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law.” Rule

56(c) S.C. R. Civ. P.; Bowen v. Lee Process Sys. Co., 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000). A party seeking summary judgment has the burden of clearly establishing, with use of the record properly before the court, the absence of a triable issue of fact. Stanford Fire Ins. Co. v. Marine Contracting and Towing, 301 S.C. 418, 392 S.E.2d 460 (1990). Once the moving party shows a lack of evidentiary support for the nonmoving party's claims, the nonmoving party must come forward with facts showing there is a genuine issue for trial in order to avoid summary judgment. Baughman v. American Tel., 306 S.C. 101, 410 S.E.2d 537 (1991). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from that evidence in a light most favorable to the non-moving party. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

A mortgagee seeking to foreclose its mortgage is only required to prove "the existence of the debt and the mortgagor's default on that debt." U.S. Bank Trust Nat. Ass'n. v. Bell, 385 S.C. 364, 374, 684 S.E.2d 199, 205 (Ct. App. 2009). "Once the debt and default have been established, the mortgagor (borrower) has the burden of establishing a defense to foreclosure such as lack of consideration, payment or accord and satisfaction." Id. (citing Bandy v. Bandy, 187 S.C. 410, 413, 197 S.E.396, 397 (1938)).

Findings of Fact

Based upon the affidavits, admissions, answers to interrogatories and other submissions of the parties, I find that the following material facts are not in dispute:

1. Cox is a real estate developer, licensed general contractor and property owner in Lancaster, County, South Carolina. Cox owned several acres of land along Miller Street in Lancaster, including a 4.661 acre parcel designated as Lancaster County Tax Map Parcel 0081B-0K-011.00 (the "Property").

2. The Subject Property is located within an economically distressed area that was designated as an “Opportunity Zone” under 2017 federal legislation.¹ As part of an “Opportunity Zone,” the Property is eligible for federal tax credits and other incentives that are designed to encourage development.

3. In early 2018, Defendants Russell Sinacori and David Simonini approached Cox to express their interest in acquiring and developing the Property, in order to take advantage of the “Opportunity Zone” credits. Cox negotiated with Sinacori and Simonini over a period of several months, concerning a plan to construct, own and manage an affordable housing project upon the Property. The parties never reduced their negotiations for development of the Property to a written contract.

4. In May 2018, during the parties’ ongoing negotiations, Sinacori formed Lancaster Housing Group, LLC (“LHG”) for the purpose of owning the Property and managing the parties’ planned affordable housing project. Sinacori is the sole member of LHG.

5. On or about August 16, 2018, Cox sold the Property to LHG for \$500,000. LHG paid Cox \$100,000 at closing and executed a promissory note (“Note”) for the remainder of the purchase price (i.e. - \$400,000). The Note did not require Borrowers to make interim payments of principal or interest but, instead, provided the “the entire outstanding principal balance shall be due and payable on or before September 1, 2023.” The Note also provided:

In the event of (a) default in payment of any installment of principal or interest hereof as the same becomes due and such default is not cured within ten (10) days from the due date, or (b) default under the terms of any instrument securing this Note, and such default is not cured within fifteen (15) days after written notice to the maker, then in either such event the holder may without further notice, declare the remainder of the principal sum, together with all interest accrued thereon at once due and payable. . . .

¹ Tax Cuts and Jobs Act of 2017 (Pub. Law 115-97)

The unpaid principal of this Note and any part thereof, accrued interest and all other sums due under this Note and the Mortgage, if any, shall bear interest at the rate of Fifteen percent (15.00%) per annum after default until paid.

....

Upon default the holder of this Note may employ an attorney to enforce the holder's rights and remedies, and the maker, principal, surety, guarantor and endorsers of this Note hereby agree to pay to the holder reasonable attorney's fees not exceeding a sum equal to fifteen percent (15%) of the outstanding balance owing on said note, plus other reasonable expenses incurred by the holder in exercising any of the holder's rights and remedies upon default.

6. As security for the Note, LHG executed and delivered to Cox a mortgage covering the Property ("Mortgage"). Cox recorded the Mortgage with the Lancaster County Register of Deeds on August 17, 2018 at Book: Mort 3601 Page 299-303.

7. Among other provisions, the Mortgage provides:

... IT IS AGREED, that Mortgagor, and Mortgagor's heirs, successors and assigns, shall pay promptly all taxes assessed and chargeable against the Premises; and in default thereof, that the holder of this Mortgage may pay the same, and all amounts expended shall be secured by this Mortgage and be due and payable by Mortgagor to Mortgagee upon demand with interest at the rate set forth in the Note.

AND IT IS FURTHER AGREED, if all or any part of the Premises or any interest therein is sold, transferred or encumbered by Mortgagor without Mortgagee's prior written consent ... all sums secured by this Mortgage, shall, at the option of Mortgagee, be immediately due and payable.

8. Cox is the holder of the Note and the Mortgage.

9. In April 2019, LHG granted a second mortgage covering the Property to Ramsin, LLC. Cox was not consulted, and he did not give his prior written consent to the second mortgage.

10. LHG failed to pay 2018 property taxes and, in November 2019, the Lancaster County Delinquent Tax Collector sold the Property at public auction.

11. In early 2020, Cox discovered that the Property had been sold for delinquent taxes. Soon thereafter, he learned that LHG had granted a second mortgage covering the Property without obtaining Cox's prior written consent.

12. In April 9, 2020, Cox's attorney sent a certified letter to LHG's registered agent, declaring the Note and Mortgage in default as a result of (a) LHG's grant of a second mortgage without Cox's prior written consent; and (b) LHG's permitting the Property to be sold for delinquent taxes by the Lancaster County Delinquent Tax Collector (the "Notice of Default"). Through the Notice of Default, Cox declared all sums immediately due and payable and also declared that the balance due under the Note would bear interest at the Note's default rate of fifteen percent (15%) until paid in full. Defendants assert that service of notice on the registered agent was not sufficient notice to Defendants themselves.

13. Following its receipt of the Notice of Default, LHG secured the release of Ramsin's second mortgage on April 29, 2020. LHG did not comply with Cox's demand for payment of the accelerated debt, nor did it redeem the Property from the delinquent tax sale.

14. On September 30, 2020, Cox paid \$15,645.30 to the Lancaster County Delinquent Tax Collector to redeem the Property from the delinquent tax sale. The redemption period had not yet expired.

Conclusions of Law/Analysis

1. Cox was entitled to accelerate the Note and demand immediate payment of all sums due under that instrument in and before April 2020. The Note and Mortgage are "separate securities for the same debt." U.S. Bank Trust Nat. Ass'n. v. Bell, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009). By the express terms of the Mortgage, LHG agreed "if any part of the Premises or any interest is sold, transferred or encumbered by Mortgagee without Mortgagor's prior written consent . . . all sums secured by the Mortgage shall, at the option of Mortgagee, be immediately due and payable." Similarly, the Note provides, "[i]n the event of any (a) default in payment of any installment of principal or interest . . . or (b) default under the terms of any

instrument securing this Note . . . then in either such event the holder may without further notice, declare the remainder of the principal sum, together with all interest accrued thereon at once due and payable.”

LHG twice triggered Cox’s option to declare all sums due under the Note and Mortgage “immediately due and payable.” It first triggered Cox’s option to accelerate the debt when it granted a second mortgage to Ramsin, LLC in April 2019. It did so again when it allowed the Property to be sold for delinquent taxes in November 2019. Each of these events constituted a “sale, transfer or encumbrance” of the Property without Cox’s prior written consent, and each event entitled Cox to declare “all sums immediately due and payable” by the terms of the Mortgage.

2. Cox gave proper notice of his demand for payment of the accelerated debt through his April 9, 2020 Notice of Default. Cox’s Notice of Default was delivered by certified mail to LHG’s registered agent in April 2020. LHG argues that Cox’s Notice of Default was not proper notice because it was delivered to LHG’s registered agent, rather than “to the company.” The court rejects this argument for two reasons. First, as a matter of law, South Carolina’s Corporate Code requires every corporation to “continuously maintain” a registered agent in this state and “assumes that formal communications to the corporation will normally be addressed to the registered agent at the registered office.” S.C. Code §33-5-101 and official comment (Law. Co-op. 2006). Cox complied with the letter and intent of the Code by delivering his Notice of Default to LHG’s registered agent. Furthermore, the affidavit of Russell Sinacori establishes that LHG (and not just its registered agent) actually received Cox’s Notice of Default in April 2020. *See* Affidavit of Russell Sinacori, filed May 21, 2021 ¶ 13.

3. LHG defaulted on the Note and Mortgage when it failed to comply with Cox's demand for payment. After Cox elected to accelerate the debt, the full principal balance due under the Note became "immediately due and payable." By the express terms of the Note, and pursuant to Cox's Notice of Default, LHG had fifteen days to remit payment "in order to satisfy its remaining obligations under the Note and Mortgage." *See* Notice of Default (Ex. C to Cox Affidavit). When LHG failed to make payment within that fifteen-day period, it defaulted. *See* Note (default includes "default in payment of any installment of principal or interest hereof as the same becomes due.").

4. LHG's default in payment triggered the Note's "default interest rate." The Note provides that "the unpaid principal of this Note and any part thereof, accrued interest and all other sums due under this Note and the Mortgage, if any, shall bear interest at the rate of fifteen percent (15.00%) per annum after default until paid." When LHG failed to comply with Cox's April 9, 2020 demand for payment, it triggered the Note's default interest rate, commencing April 20, 2020. Cox is entitled to prejudgment interest at the default rate, both as to the principal balance due under the Note (\$400,000.00) and as to the additional sum of that Cox was required to pay (\$15,645.30) to redeem the Property from the Lancaster County delinquent tax sale.

5. Cox is entitled to judgment on the Note and is also entitled to foreclose his Mortgage. A mortgagee who has a note and a mortgage to secure the same debt has the option to either bring an action on the note or to foreclose the mortgage. Lever v. Lighting Galleries, Inc., 374 S.C. 30, 33, 647 S.E.2d 214, 216 (2007). Both remedies may be pursued "until the debt is satisfied." *Id.* at 36, 647 S.E.2d at 218. As holder of the Note and Mortgage, Cox is only required to prove "the existence of the debt and the mortgagor's default on that debt." U.S. Bank Trust Nat. Ass'n. v. Bell, 385 S.C. 364, 374, 684 S.E.2d 199, 205 (Ct. App. 2009). In this case, neither the

existence nor the amount of the debt is in dispute. LHG simply He is entitled to judgment in his favor for the amount of LHG's debt and is also entitled to foreclosure of his Mortgage.

6. Cox is entitled to entitled to recover his attorney's fees and costs. "In South Carolina, the authority to award attorney's fees can from only from a statute or be provided for in the language of a contract." Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001). Cox's note expressly provides:

Upon default the holder of this Note may employ an attorney to enforce the holder's rights and remedies, and the maker, principal, surety, guarantor and endorsers of this Note hereby agree to pay to the holder reasonable attorney's fees not exceeding a sum equal to fifteen percent (15%) of the outstanding balance owing on said Note, plus all other reasonable expenses incurred by the holder in exercising any of the holder's rights and remedies upon default.

By the terms of the Note, Cox is entitled to recover his reasonable attorney's fees as well as the costs of this action.

7. Defendants Simonini and Sinacori are entitled to dismissal of Cox's conspiracy cause of action. Under South Carolina law, a claim for conspiracy requires a showing of: (1) the combination or agreement of two or more persons; (2) to commit an unlawful act or lawful act by unlawful means; (3) together with an overt act in furtherance of the scheme; and (4) damages proximately resulting to the plaintiff. Paradis v. Charleston Co. School Dist., --- S.E.2d ---, 2021 WL 1992245 (S.C. Sup. Ct. May 19, 2021). Cox's conspiracy cause of action is based upon an allegation that Cox has been deprived of contractor's fees or a share of profits from development of the Property. In support of their motion as to this claim, Defendants have submitted affidavits that "no development exists on the subject property." Sinacori Affidavit ¶ 20. Because there has been no development of the property, Cox has not been deprived of any developer's fees. Cox cannot establish an essential element of his conspiracy cause of action, and Defendants are entitled to summary judgment as to that claim.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Cox is entitled to judgment in his favor as a matter of law, as follows:

1. Judgment against LHG for \$497,415.93,² as of August 15, 2021, with additional pre-judgment interest accruing at the rate of \$204.41 for each day thereafter until entry of a final judgment;
2. Foreclosure of Cox's Mortgage and sale of the Property through public auction;
3. Reasonable attorney's fees, in an additional amount to be determined; and
4. Costs of this action.

Defendants Sinacori and Simonini are entitled to judgment in their favor as a matter of law as to Cox's conspiracy cause of action.

Pursuant to Rule 53 S.C. R. Civ. P., this matter is hereby referred to William Tindall, Esquire, as Special Referee, for the following purposes:

- A. To execute and publish a Notice of Sale for the Property, pursuant to statute;
- B. To conduct a foreclosure sale of the Property, and to issue a deed to the successful purchaser at such sale;
- C. To issue such other writs or orders as may be necessary to place the purchaser of the Property in possession thereof;

² The monetary judgment is calculated as follows:

1. Principal Balance due under Note -	\$400,000.00
2. Default Interest (4/19/20 – 8/15/21) -	\$79,726.03
3. Tax Advance (Redemption) -	\$15,645.30
4. Default Interest on Tax Advance (10/1/10 – 8/15/21) -	<u>\$2,044.60</u>
	\$497,415.93

D. To determine the amount of attorney's fees and costs that shall be included as part of Cox's judgment;

E. To issue a report of sale and such other documents, pleadings and orders as the Referee determines are necessary or customary in foreclosure proceedings;

F. To issue such additional or supplemental orders as may be necessary to conclude this matter.

Appeal from this order or from any supplemental order(s) issued by the Referee shall be directly to the South Carolina Court of Appeals.

August ____, 2021

The Honorable Brian M. Gibbons
Circuit Court Judge
140 Main Street
Chester, SC 29706



Lancaster Common Pleas

Case Caption: David A Cox VS Lancaster Housing Group Llc, defendant, et al

Case Number: 2020CP2900730

Type: Order/Summary Judgment

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge