

NOT TO BE PUBLISHED WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

EAST-WEST FUNDING, LLC,

Plaintiff,

v.

339 RIVER ROAD HOLDINGS, LLC,
f/k/a EDGEWATER THEATRES, INC.,
f/k/a EDGEWATER THEATRES, LLC,
HONGKUN USA REAL ESTATE
HOLDING, LLC, 339 RR OWNER LLC,
GENSLER ARCHITECTURE, DESIGN &
PLANNING, P.C., MUESER RUTLEDGE
CONSULTING ENGINEERS, PLLC, and
HIGH GROUND INDUSTRIAL, LLC.

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
DOCKET NO. F-691-22

OPINION

Argued: January 12, 2023 and March 13, 2023
Decided: March 31, 2023

Appearances: Shafron Law Group, LLC, (Jason Shafron, Esq., appearing) for Plaintiffs.
Cohn, Lifland, Pearlman, Hermann and Knopf (Jeffrey W. Herrmann, Esq.,
appearing), Greenberg Traurig, LLP (Cory Mitchell Gray, Esq., appearing), Norton
& Christensen, P.A., (Henry N. Christensen, appearing), Pashman, Stein, Walder,
Hayden, P.C., (Erik Corlett, Esq., appearing) for Defendants.

HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter comes to the Court by way of a motion for Summary Judgment, which was heard as a Motion to Strike the Answer, dated July 8, 2022, filed by Plaintiff East-West Funding, LLC (“Plaintiff”) by and through their original attorney Robert P. Travers of Robert P. Travers Law, LLC. On December 16, 2022, Shafron Law Group, LLC, (Jason Shafron, Esq., appearing)

substituted in for Plaintiff's counsel and argued the instant motion on Plaintiff's behalf. Opposition to the motion was filed on August 16, 2022, by Defendant 339 River Road Holdings, LLC, Hongkun USA Real Estate Holding, LLC and 339 RR Owner, LLC ("Defendant") by and through their attorneys Cohn, Lifland, Pearlman, Hermann, and Knopf (Jeffrey W. Herrmann, Esq., appearing), and joined by Greenberg Traurig, LLP (Cory Mitchell Gray, Esq., appearing). Subsequent objection was filed on August 18, 2022, by Defendant High Ground Industrial, LLC ("Defendant High Ground") by and through its attorneys Norton & Christensen, P.A., (Henry N. Christensen, appearing). An appearance was made on behalf of 339 River Road Partners, LLC, who was not a named defendant in the instant action, by and through its attorneys Pashman, Stein, Walder, Hayden, P.C., (Erik Corlett, Esq., appearing). The Court heard oral argument on January 12, 2023. Supplemental oral argument was heard on March 13, 2023.

A Term Loan Note for \$25,000,000.00 was executed in August 2018 in Plaintiff's favor. The first disbursement in the amount of \$10,000,000.00 was made on August 10, 2018. A second disbursement in the amount of \$15,000,000.00 was made on November 1, 2018. The interest rate on the Term Loan Note was fixed at a rate of 8.75% for the first year and adjusted to a rate of 9.75% at the start of the second year of the loan. For the first 360 days of the Term Loan Note, Defendant made interest-only payments. The Term Loan Note provided Defendant the option to request additional funds up to \$10,000,000.00.

In August 2019, Defendant exercised the option to request additional funding and received \$5,000,000.00, with two equal disbursements occurring on August 30, 2019, and September 18, 2019.

As of August 2019, Plaintiff provided a total loan amount of \$30,000,000.00. The encumbered property is represented on the Borough of Edgewater's official tax map as Block 91,

Lot 2, with the street address of 339 River Road, Edgewater, New Jersey 07020.

Identical terms defining an Event of Default were included in both Notes. As described in both Notes, Defendant would be considered in default if Defendant (i) failed to make a monthly payment after a twenty day grace period, (ii) failed to make payment other than the loan amount for a specified month after a ten day grace period, (iii) failed to adhere to any covenant or condition evidencing or securing either loan after having received notice thirty days prior from Plaintiff or (iv) failing to pay any matured balance on the Notes. In the event of Default, Plaintiff had the right to declare the entire amount of unpaid principal immediately due and payable and to take possession of the Mortgaged Premises.

Defendant defaulted after failing to pay real estate taxes due and owing on the encumbered property for the second, third, and fourth quarters of 2021. A protective advance was made by Plaintiff to pay delinquent real estate taxes in the amount of \$800,628.35.

A Loan Term modification was agreed to by the Parties in June 2020 and a subsequent Amended Loan Term modification was agreed to in January 2021.

A Notice of Default and Demand for Payment was sent to Defendant on September 7, 2021. Plaintiff instead alleges the appropriate Default Date is December 1, 2019, following the applicable twenty-day grace period.

In Defendant's opposition papers, Defendant includes facts previously unknown to the court. Defendant provides that on or about June 2, 2022, 339 River Road Partners, LLC, entered into a Purchase and Sale Agreement for the sale of the property for \$45,000,000.00, which would have enabled Defendant to pay of the amount of the loan owed to Plaintiff in full. Defendant then claims that on September 30, 2022, the attorney representing 339 River Road Partners, LLC in the purchase of the property met with the mayor of Edgewater and informed the mayor that the

property was to be sold for retail space. Defendant then alleges that Plaintiff's principal exerted control over the mayor and council to consider an amendment to rezone the portion of the Borough of Edgewater where the property was located into a low-density residential area. This would require the property be divided into multiple lots, thereby reducing its value. Allegedly, as a consequence of this action, the Buyer terminated the Agreement on November 29, 2022.

On March 13, 2023, a letter was submitted by 339 River Road Partners, LLC to inform the Court that a Memorandum of Understanding had been executed and 339 River Road Partners, LLC was to assume ownership control over Defendant 339 River Road Holdings, LLC. 339 River Road Partners, LLC states in this letter that the acquisition permits 339 River Road Partners, LLC to assume the position in the instant action held by Defendant 339 Rover Road Holdings, LLC. The letter then requests an "ordinary discovery schedule," to afford 339 River Road Partners, LLC to establish further defenses to the instant foreclosure.

Plaintiff alleges the total amount due and owing to Plaintiff is \$37,606,929.19 inclusive of interest but not including attorneys' fees, subsequent interest, late fees, or additional protective advances.

A party is entitled to summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. R. 4:46-2(c). The determination as to "whether there exists a genuine issue with respect to a material fact requires the Motion Judge to consider whether competent evidential materials presented, when viewed in the light most favorable to a non-moving party...are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. The Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995).

When a motion for summary judgment is made and supported as provided in this rule, the

nonmoving party “may not rest upon the mere allegations or denial,” made in an answer to defeat a motion for summary judgment, “but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial.” R. 4:46-5.

The defenses to foreclosure actions are narrow and limited. The only material issues in a foreclosure proceeding are the validity of the mortgage, the amount of indebtedness, and the right of the mortgagee to foreclose on the mortgaged property. Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993).

Therefore, where there is proof of execution, recording, and non-payment of the note and mortgage, a mortgagee has established a *prima facie* right to foreclose. Thorpe v. Floremoore Corp., 20 N.J. Super. 34 (App. Div. 1952). If the defendant’s answer fails to challenge the essential elements of the foreclosure action, plaintiff is entitled to strike defendant’s answer as non-contesting. Old Republic Ins. Co. v. Currie, 284 N.J. Super. 571, 574 (Ch. Div. 1995); Somerset Trust Co. v. Sternberg, 238 N.J. Super. 279, 283 (Ch. Div. 1989); see also R. 4:64-1(c)(3).

Here, Plaintiff argues there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. R. 4:46-2(c). The loan was properly recorded, and default occurred following a failure to pay on the requisite amount due on the loan. Defendant admits to agreeing to the note by paying the required amounts for numerous months prior to defaulting for nonpayment and Defendant failed to satisfy their contractual and tax obligations under both loans.

Defendant argues that the possible re-zoning of the property is germane to the foreclosure issue since the re-zoning will result in a diminution in value, rendering the property unmarketable to a purchaser. Defendant maintains this was a result of interference by Plaintiff’s principal and

because Plaintiff's principal acted with unclean hands, the instant motion should be denied. However, the Board of the Borough Edgewater has not voted to re-zone the property nor has the property been divided into multiple plots. Further, Plaintiff's principal is not a member of the board, nor does he retain any authority to make such decision, and as a result the newly discovered facts in support of Defendant's opposition are purely speculative and wholly nongermane.

In addition, Defendant also argues that this potential diminution in value due to Plaintiff's interference should reduce, or offset entirely, the amount due. The court rejects these arguments as it is an attempt to join non-germane claims to the instant action. R. 4:64-5 provides that only germane counterclaims may be pled in foreclosure actions without leave of the court. Germane issues in a foreclosure case are those that are material, and as mentioned prior the court has held the only germane issues when objecting to a foreclosure are the amount of indebtedness, validity of the mortgage, and the right of the mortgagee to foreclose on the mortgage premises. Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993). Defendant never requested leave to file a counterclaim in any papers, but only cites the doctrine of Unclean Hands as a basis on which the instant motion should be denied, which is improper. Furthermore, this court has held that summary judgment may still be granted despite an objection on the grounds of unclean hands if the party raising the objection fails to show interference with their rights under the original loan agreement. Murphy Prop. Acquisition, LLC v. Pfister Chem. Inc., 2019 N.J. Super. Unpub. LEXIS 1483 at 10, 11, citing Leisure Technology-Northeast, Inc., v. Klingbeil Holding Co., 137 N.J. Super. 353, 356, 349 A.2d 96 (App. Div. 1975) (internal citations omitted). Put simply, Defendant's claims of unclean hands are only germane if they directly relate to the original transaction that created the mortgage being foreclosed. Murphy at 13, citing Joan Ryno, Inc. v. First Nat'l Bank, 208 N.J. Super. 562, 570, 506 A.2d 762 (App. Div. 1986). The doctrine of unclean hands does not serve as

a defense to the instant foreclosure proceedings since it does not deal with the initial loan agreement, but rather a subsequent agreement to buy the property, therefore rendering it nongermane and immaterial. If a viable claim were to arise against Plaintiff's Principal for any alleged misconduct, then a separate action should be brought in the Law Division – Civil Part.

Defendant, in further support, argues that “a debtor may defend against enforcement of lender's rights where the lender has engaged in bad faith, misconduct or the like.” Nat'l Westminster Bank N.J. v. Lomker, 277 N.J. Super. 491 (App. Div. 1994), citing Ramapo Bank v. Betchel, 224 N.J. Super. 191, 198 (App. Div. 1988). Defendant's citation of this case is unfounded. First, this decision was originally rendered in the Superior Court of New Jersey, Law Division – Civil Part; not in relation to a foreclosure proceeding in Chancery Division – General Equity. Second, the claim in Westminster related to a partnership which executed a note that was secured to a mortgage on the property held by the partnership, but the partnership made attempts to sell the property to prevent default, and the action was brought thereafter against the partners to recover the personal guarantees. Westminster at 493-94. Third, unlike Westminster, and as noted by Plaintiff, there is a lack of evidence that some form of conspiracy or insider dealing occurred that resulted in the Buyer terminating an agreement to purchase the property. Therefore, this case is not applicable to the instant action and the court does not provide it weight to any defense raised.

339 River Road Partners is misguided in its argument as well. Even though the Memorandum of Understanding was executed resulting in 339 River Road Partners, LLC acquiring Defendant, there is no evidence which refutes the elements of a *prima facie* summary judgment action. As indicated in the loan agreement proffered by Plaintiff, the transfer of the interest of the debtor is prohibited without the consent of the Plaintiff. Presently, there is nothing indicating such consent was ever provided by Plaintiff. Further, a claim made by 339 River Road

Partners related to the diminution in value of the property, or the contractual agreement to purchase the property that Plaintiff allegedly disturbed, would not reduce the present debt but would rather constitute an independent source of recovery if proven.

Finally, there is the question as to whether the construction lien on the property held by Defendant High Ground Industrial, LLC, requires the motion for summary judgment be denied. Defendant High Ground filed their construction lien in or around February 2020 in Book V3511 page 1175 for the approximate sum of \$187,000.00 and argues that it should take priority over Plaintiff's loan. Defendant High Ground maintains that Plaintiff's mortgage is an advancement of funds for an equity investment rather than a mortgage loan. Defendant High Ground further claims Plaintiff's loan advancements and modifications are too reckless to be considered a loan. Plaintiff responds simply by stating that Defendant High Ground fails to refute any of the grounds on which Plaintiff holds a *prima facie* right to foreclose under R.4:64-1(c). The court rejects Defendant High Ground's argument as well as there is no representation that Plaintiff's loan was anything outside of a standard commercial loan constituting a mortgage on the property and a note reflecting the indebtedness. Defendant High Ground fails to identify in what ways Plaintiff's loan advances or modifications were "reckless," and how a reckless advance or modification embodies a "equity investment" under New Jersey Foreclosure Law or otherwise. Defendant High Ground's argument is without basis, and standard foreclosure principals apply as Plaintiff's loan is a typical commercial loan. Because Plaintiff's mortgage was recorded before Defendant High Ground's construction lien, Defendant High Ground's lien is appropriately subordinated to Plaintiff's mortgage.

For the foregoing reasons, and for those set forth on the record, and for good cause shown, Plaintiff's Motion for Summary Judgment, which was heard as a Motion to Strike the Answer, is

granted. Defendant's Answer shall be stricken as non-contesting as it fails to constitute any bona fide dispute regarding the validity and priority of Plaintiff's lien and fails to maintain a basis in fact or law and pursuant to R. 4:6-4(b).

This matter is to return to the Office of Foreclosure and proceed accordingly.

An Order accompanies this decision.

This Order has been prepared and filed by the Court.

EAST-WEST FUNDING, LLC,

Plaintiff,

v.

SUPERIOR COURT OF NEW JERSEY
Chancery Division: Bergen County

DOCKET NO. F-691-22

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ORDER

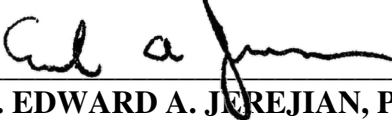
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named defendant but later developed an interest, by and through their attorneys Pashman, Stein, Walder, Hayden, P.C., (Erik Corlett, Esq., appearing);

And the Court having reviewed all submissions, and having heard the argument of all counsel and for good cause having been shown;

IT IS on this 31st day of March 2023, hereby **ORDERED**:

1. Summary Judgment is hereby granted in favor of Plaintiff; and
2. All Contesting Answers and Defenses are hereby stricken from the pleadings; and
3. Default is to be entered against Defendants and the matter shall return to the Office of Foreclosure and proceed as uncontested pursuant to R. 4:64; and
4. A copy of this Order shall be served upon all parties within seven (7) days of the date hereof.



HON. EDWARD A. JEREJIAN, P.J.Ch.

This Order has been prepared and filed by the Court.

EAST-WEST FUNDING, LLC,

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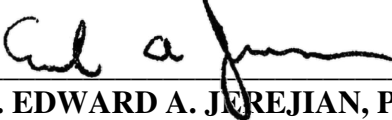
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