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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 USE REAL ESTATE HOLDING, LLC, 339 RR OWNER LLC, GENSLER ARCHITECTURE, DESIGN & PLANNING, P.C., MUESER RUTLEDGE CONSULTING ENGINEERS, PLLC, and HIGH GROUND INDUSTRIAL, LLC.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY DOCKET NO. F-691-22 **OPINION**

Decided: May 22, 2024

Appearances: Shafron Law Group, LLC (Jason Shafron, Esq., appearing) for Plaintiff East-West Funding, LLC.
Pashman, Stein, Walder, Hayden, P.C. (Michael S. Stein, Esq., appearing) for 339 River Road Partners, LLC on behalf of Defendant 339 River Road Holdings, LLC; and Norton & Christensen, P.A. (Henry N. Christensen, Jr., Esq., appearing) for Defendant High Ground Industrial, LLC.

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

This matter is before the Court by way of multiple applications Objecting to the Amount Due at Final Judgment filed by Defendant 339 River Road Holdings, LLC ("339 RRH") by and through its attorneys, Pashman Stein Walder Hayden, P.C. (Roger Plawker, Esq., appearing), on May 30, 2023 and Defendant High Ground Industrial, LLC ("High Ground"), by and through its attorneys, Norton & Christensen, P.A. (Henry N. Christensen, Jr., appearing). Thereafter, the Court permitted the parties to file supplemental submissions in support of their respective

positions. 339 RRH filed Supplemental Opposition on October 13, 2023. On October 27, 2023, Plaintiff East-West Funding, LLC ("Plaintiff") filed a Supplemental Reply in Support of Final Judgment by and through its attorneys, Shafron Law Group, LLC (Jason T. Shafron, Esq., appearing). On the same date, High Ground filed Supplemental Opposition to Plaintiff's Motion for Final Judgment. On February 2, 2024, the Court granted leave to the parties to file further supplemental certifications in support of their respective positions.

OBJECTION TO AMOUNT DUE

The final judgment in a mortgage foreclosure action does not merely adjudicate the plaintiff's right to relief, but it also sets the amount due to plaintiff and directs the sale of the mortgaged premises in order to satisfy the debt. See Wells Fargo Bank, N.A. v. Garner, 416 N.J. Super. 520, 523 (App. Div. 2010); see also U.S. Bank, N.A. v. Hough, 416 N.J. Super. 286, 291 (App. Div. 2010), *rev'd on other grds.* 210 N.J. 187 (2012).

The final judgment application must include proof establishing the amount due, which may be submitted by affidavit or certification. See R. 4:64-2 and 1:4-4(b). Attached to the affidavit or certification must a be schedule containing the information set forth in Appendix XII-J of the Court Rules. See R. 4:64-2(c). In addition, Plaintiff must submit original or certified copies of the mortgage, evidence of indebtedness, claim of lien and any other document upon which the claim is based. See R. 4:64-2(a).

R. 4:64-1(d)(3) provides in pertinent part that a party "who disputes the correctness of the affidavit [of amount due] may file an objection stating *with specificity* the basis of the dispute and asking the court to fix the amount due." (emphasis added). R. 4:64-9 states that a notice of motion filed with the Office of Foreclosure must apprise the defendant of the requirement that "Any objection must address the subject of the motion and detail *with specificity* the basis of the

objection." (emphasis added). R. 4:64-9 further states: "On receipt *of a specific objection* to the motion, the Office of Foreclosure shall refer the matter to the judge in the county of venue, who shall schedule such further proceedings and notify the parties or their attorneys of the time and place thereof."

The Plaintiff has supplemented its submissions to the Office of Foreclosure with evidence to support its calculations of the amounts due. Thus, Plaintiff submitted proofs to the Court in compliance with R. 4:64-2 and R. 1:4-4(b). The original submission to the Office of Foreclosure and the supplemental materials submitted to this Court demonstrates the following:

1) The Unpaid Principal Balance as of February 29, 2024 totals $30,000,000.00.
2) The Net Interest through February 29, 2024 totals $15,289,757.30, is as follows:
    a. Interest for $25,000,000.00 Note:
        i. Interest from November 1, 2019, to November 30, 2019 totals $203,125.00, calculated using the Annual Interest Rate of 9.75%;
        ii. Default Interest from December 1, 2019, to February 29, 2024 totals $15,897,222.22, calculated using the Annual Default Interest Rate of 14.75%
    b. Interest for the $5,000,000.00 Note:
        i. Interest from November 1, 2019 to November 30, 2019 totals $36,458.33, calculated using the Annual Interest Rate of 8.75%;
        ii. Default Interest from December 1, 2019 to August 31, 2020 totals $525,173.61, calculated using a Default Interest Rate of 13.75%;
        iii. Default Interest from September 1, 2020 to February 29, 2024 totals $2,616,076.39, calculated using a Default Interest Rate of 14.75%.

c. The foregoing equals $19,278,055.56 Interest on the foregoing Notes.

d. As part of the Certification of Amount Due ("Amount Due Cert."), to calculate the Net Interest Total, Plaintiff reduced the Total Interest by the following amounts: $2,535,798.26 (payments made subsequent to default), $140,000.00 (rents collected subsequent to default), and $1,312,500.00 (interest reserve).

3) Advances through February 29, 2024 total $1,669,291.98, consisting only of real estate taxes paid by Plaintiff.

4) Interest on advances from October 14, 2021 to February 29, 2024 totals $414,026.70. These advances, when added to the principal, equal $47,373,075.98.

339 RRH and High Ground each submitted separate oppositions to Plaintiff's Motion for Final Judgment, as well as supplements to their respective submissions. First, 339 RRH specifically contends the inclusion of default interest as part of the calculation of the amount due because it asserts that Plaintiff had waived their right to same through multiple loan modification agreements. Second, High Ground proffers a similar argument as 339 RRH as to Plaintiff's inclusion of default interest and further argues that Plaintiff willfully interfered with a potential purchase and sale contract which would have paid Plaintiff in full as to the loan amount and applicable interest.

Default Interest

Defendants 339 River Road Holdings, LLC and High Ground Industrial, LLC put forth two arguments focus on the calculation of the default interest.

First, the Court will address Defendants' arguments which relate to alleged interference by Plaintiff and Plaintiff's principal in the mortgagor's attempt to sell the Property, thereby preventing the loan from being paid in full.

Defendants again seek to argue that Plaintiff should not be permitted to include default interest as part of its final amount due calculation because of its willful interference with a contract of sale, which would have paid off the loans in full. It is conceded in both Defendants' papers that this Court had previously ruled that this argument is not germane to the foreclosure. See East-West Funding, LLC v. 339 River Rd. Holdings, LLC, 2023 N.J. Super. Unpub. LEXIS 491, *8-13 (Ch. Div., Mar. 31, 2023).

Under established New Jersey law, Defendants are precluded from re-litigating the above issues, which were already decided by the Court on March 31, 2023. In New Jersey, the "law of the case" doctrine holds that "where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit." State v. Hale, 127 N.J. Super. 407, 410 (App. Div. 1974). New Jersey courts have applied the principle articulated in Hale to hold that a decision made by a trial court during one stage of the litigation is binding throughout the course of the action. See Pressler, Current N.J. Court Rules, comment 4 on R. 1:36-3 (2008).

Here, New Jersey's "law of the case" doctrine bars Defendants from raising arguments and issues already raised which were previously stricken by the Court's March 31, 2023 Order. The arguments Defendant raised with respect to the default interest, specifically regarding Plaintiff's alleged interference with a contract which may paid off the loans in full. It is procedurally improper for the Court to allow Defendant to utilize an objection to an amount due – a motion very narrow in scope – as a vehicle to simply re-litigate substantive issues that have already been ruled on.

In sum, the Court stated that in the context of a foreclosure case, the mortgagee need only establish its prima facie right to foreclose by presenting evidence of the execution, delivery, and the nonpayment of the amounts that are due. East-West Funding, LLC, 2023 N.J. Super. Unpub.

LEXIS at *7-9 (citing Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952)). Furthermore, R. 4:64-5 provides the permissible defenses to foreclosure actions, which are limited to challenging the validity or priority of the mortgage instrument itself or creating an issue with respect to the plaintiff's right to foreclose. R. 4:64-5. As such, the only issues in a foreclosure action are limited to the validity of the mortgage, the amount of indebtedness, and the right of the mortgagee to resort to the mortgage premises. Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993). Accordingly, when there's execution, recording and nonpayment, a prima facie right to foreclose is established. Thorpe, 20 N.J. Super. at 37.

Applying the above to Defendant's arguments, once again, it is clear that Defendant is raising non-germane issues that do not attack the prima facie elements of foreclosure or the existence of the loan itself or the execution delivering the nonpayment. The Court previously stated, and reiterates, that there is no basis for these arguments in the foreclosure action. East-West Funding, LLC, 2023 N.J. Super. Unpub. LEXIS at *8-12.

Next, the Court will address Defendants' more relevant arguments which relate to Plaintiff's forbearance of the accrual of default interest through two different loan modification agreements.

Defendant 339 RRH argues that "Plaintiff voluntarily, intentionally, and unequivocally waives its right to charge default interest" under a June 10, 2020 Loan Term Modification ("June 10 Agreement") and further affirmed the intent to waive same in a January 12, 2021 Amended Loan Term Modification ("January 12 Agreement"). (See Defendant 339 River Road Holdings, LLC Supplement Objection to Amount Due ("339 RRH Supplemental Objection") at 7.) With respect to the June 10 Agreement, 339 RRH asserts that Plaintiff agreed to the language of that agreement, which states in part, "any and all asserted defaults and the default event raised in the

Notice of Default shall be deemed to be abated and cured subject to Borrower's compliance with terms and conditions which follow." (See id.) While 339 RRH concedes that the conditions provided in the June 10 Agreement were not ultimately met, it still argues that Plaintiff waived compliance with same. (See id. at 8.)

In further support of its argument that Plaintiff waived the accrual of default interest under the June 10 Agreement, 339 RRH maintains that the January 12 Agreement – Plaintiff's own writing – establishes that Plaintiff intended to waive default interest even after 339 RRH defaulted under the June 10 Agreement. (See id. at 9.) 339 RRH argues that Plaintiff in fact stated in clear terms that it was not terminating the June 10 Agreement. (See id. at 10.)

Moreover, 339 RRH contends that despite the automatic termination language of the January 12 Agreement, the June 10 Agreement's waiver of default interest remains effective. (See id. at 10-11.) 339 RRH argues that a result of the agreements waiver language and Plaintiffs assent to same, as well as Plaintiff's complaint alleging that the September 7, 2021 notice of default was Plaintiff's effort to exercise its rights under the notes, that default interest could not begin to accrue until the date of the notice of default. (See id. at 11.)

In a supplemental certification of the final amount due submitted by 339 RRH ("339 RRH Final Amount Due Cert."), 339 RRH proffers to methods of calculating the amount due. The first calculation provided utilizes a default date of November 19, 2019 and applying the stated interest rates under the notes until September 7, 2021, at which point the default interest rate would apply. (See 339 RRH Final Amount Due Cert. ¶ 6.) In this calculation, 339 RRH argues that the final amount due should equal $44,167,781.53. In reaching this number, 339 RRH reduced the sum of the principal, interest accrued at both the regular and default interest rates, and tax advances by the amount of payments made since default, the amount remaining in the Interest Reserve, and the rent

collected by Plaintiff. (See id. at 3-6.) The second calculation, which 339 RRH has consistently argued should be the final amount due, utilizes a default date of November 19, 2019, but does not apply any default interest. This calculation results in a final amount due of $40,383,071.70. 339 RRH reaches this result by reducing the sum of the principal, interest accrued only at the regular interest rates under the notes, and tax advances by the amount of payments made since default, the amount remaining in the Interest Reserve, and the rent collected by Plaintiff. (See id. at at 7-10.)

Defendant High Ground Industrial, LLC joins in 339 RRH's argument that default interest should be waived due to Plaintiff's voluntary forbearance of accruing default interest under the June 10 Agreement and January 12 Agreement. High Ground argues in tantum with 339 RRH that default cannot have occurred prior to September 7, 2021 – the date Plaintiff communicated the notice of default. (See Defendant High Ground Industrial, LLC Supplemental Objection to Amount Due ("High Ground Supplemental Objection") at 11-12.)

High Ground adds to this argument by claiming that Plaintiff could not declare default or elect to claim a default rate of interest until the Interest Reserve, which consisted of amounts withheld from loan proceeds to satisfy interest payments, was depleted. (See id. at 4-6.) Due to there still being $1,312,500 remaining in the Interest Reserve at the time of the date of default Plaintiff alleges – December 1, 2019, this amount should have been applied to those interest payments from that date forward. (See id. at 6.) High Ground argues that this would carry the default date from December 1, 2019 to May 10, 2020. This, in conjunction with the preceding argument that the June 10 Agreement provides for Plaintiff's assent to the May 1, 2020 default being considered paid in full and Plaintiff's waiting to elect to exercise its right to foreclose, would mean that default interest could not have occurred until that date according to High Ground. (See id.)

In High Ground's supplemental certification of the final amount due ("High Ground Final Amount Due Cert."), High Ground contends that the final amount due should equal $39,044,919.63. (See High Ground Final Amount Due Cert. at 4.) Here, High Ground applies two different interest rates: (1) 9.8854% as the effective rate of non-default interest and (2) 14.9549% as the effective default rate of interest. Both of these are used by High Ground to determine outstanding interest on the total principal amount of $30,000,000. First, High Ground contends that "[a]ll interest accrued at the non-default rate has been paid by the borrower either directly or through application of the interest reserves through the date of November 30, 2023." (See id. at 5.) Next, High Ground argues that the effective default interest rate of 14.9549% is only applicable from September 8, 2021 to December 2, 2022. (See id.) High Ground ultimately reaches its proposed final amount due by adding the accrued interest, in accordance with the preceding interest rates, to the principal, advances made the Lender, interest on those advances, and search fees incurred by Plaintiff. (See id.)

Plaintiff's response to Defendants' arguments is clear: any waiver and forbearance of default interest and cured events of default were conditioned on 339 RRH's compliance with the Loan Term Agreements. With respect to the June 10 Agreement, Plaintiff insists that as a result of 339 RRH's failure to fully perform its payment obligations, the existing events of default were neither cured nor abated – citing the agreement in support thereof "any and all asserted defenses and the default raised in the Notice of Default, shall be deemed to be abated and cured subject to [Defendant's] compliance with terms and conditions [in the Loan Term Modification]." (See Plaintiff Reply Br. at 3.) In similar fashion, Plaintiff argues that the January 12 Agreement did not contain an express unconditional waiver of "the accrual of default interest, late fees, or penalties." (See id. at 4.) In sum, Plaintiff maintains that at no point was default interest waived as 339 RRH

failed to "full, timely and faithfully tender[] the payments said in the Loan Term Modification [Agreements]" and therefore, it is proper to include default interest as part of the calculation of the amount due.

Under New Jersey law, "where the terms of a contract are clear and unambiguous, there is no room for interpretation or construction and the courts must enforce those terms as written." Risikatv Olajide v. One Main Financial, 2017 WL 2705413 (App. Div. June 23, 2017) (internal citations omitted). When presented with an unambiguous contract, the Court should not look outside the "four corners" of the contract to determine the parties' intent, and parol evidence should not be used to alter the plain meaning of the contract. "The court has no right to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently." Connecticut General Life Ins. Co. v. Punia, 884 F. Supp. 148, 152 (D.N.J. 1995) (internal citations omitted).

In its supplemental opposition to the amount due, 339 RRH argues for the first time that default interest cannot be applied to amounts due and owing prior to the September 7, 2021 Notice of Default because such application cannot be reconciled with Section 9 of the original Loan Agreements, which states:

> **Upon continuance of any default** in the payment of any installment of interest and/or principal due hereunder, or of any portion thereof, or of any penalty, or upon any default in the performance of any covenant, agreement or condition contained in the Pledge Agreement securing this Note or the Loan Agreement beyond the time provided for in those Loan Documents, then, **at the option of the Lender, the whole principal sum with accrued interest shall become and be immediately due and payable** without further notice, demand or presentment for payment, and **thereupon interest on the principal sum shall thereafter be computed at the Default Rate.** (emphasis added)

As noted above, where the terms of a contract are unambiguous, the court will not make a better agreement. See Punia, 884 F. Supp. at 152. Here, Section 9 clearly states that upon default, the

Lender may apply default interest on the principal sum due. 339 RRH misinterprets this section to read that default interest can only be applied after the Lender has declared default. Plaintiff's Notice of Default references earlier correspondence, which includes the June 10 and January 12 Loan Term Modification Agreements, which in turn refers to the date of default. The language of the Loan Agreement undoubtedly states that default interest may be applied upon the continuance of default and makes no reference to the Notice of Default. To follow 339 RRH's interpretation of Section 9 would preclude Plaintiff from exercising its rights under the Loan Agreement to the benefit of Defendants.

When examining both Loan Term Modification Agreements, it is quite clear that any waiver and forbearance of default interest was condition on 339 RRH's continued compliance with the Loan Documents. First, the June 10 Agreement conditions the waiver of default interest, lates fees and penalties on 339 RRH's compliance with the terms and conditions of the June 10 Agreement. Specifically, it states, "*[p]rovided [339 RRH]* fully, timely and faithfully tenders the payments as aforesaid, *[Plaintiff] agrees to waive* the accrual of any default interest, late fees and any penalties, and the loan balance will accrue interest at the non-default rate set forth in the Notes and related loan documents." (emphasis added) This language cannot be read to mean that Plaintiff unconditionally waived any accrual of default interest. 339 RRH was required to maintain compliance with the terms and conditions of the June 10 Agreement in order to benefit from the waiver of default interest. Moreover, the first paragraph of the June 10 Agreement sets forth the obvious conditional nature of this Loan Term Modification. It states, "[t]his correspondence shall as a memorialization of amendatory terms and conditions agreed to by both [339 RRH] and [Plaintiff], and *which shall serve to conditionally cure* the events raised in the Notice of Default once duly executed by both parties." Immediately thereafter, in furtherance of the clear intent to

conditionally cure the defaults and waive default interest, the opening paragraph provides that "any and all asserted defenses and the default raised in the Notice of Default, shall be deemed to be abated and cured subject to [Defendant's] compliance with terms and conditions [in the June 10 Agreement]."

Second, the January 12 Agreement expressly states that under the June 10 Agreement, Plaintiff agreed to forbear exercising its rights, not waive default interest. Due to 339 RRH's failure to comply with the new terms of the June 10 Agreement, the January 12 Agreement provided that Plaintiff may terminate the January 12 Agreement if 339 RRH were to default again under the loan documents. Furthermore, under the January 12 Agreement, 339 RRH agreed and acknowledged that this new agreement did not "constitute an agreement to forgive any debt, but rather an agreement to *defer certain payments*. Nothing contained in this Agreement shall be construed to be a waiver by [Plaintiff] of any rights or remedies that [Plaintiff] is entitled to under the Loan Documents." (emphasis added) Importantly, the January 12 Agreement states that any delay by Plaintiff in exercising its rights as a result of any existing defaults is not a waiver of those defaults, not an agreement to forbear exercising its rights, nor a waiver, modification, or amendment of the terms and conditions of the Loan Documents. The January 12 Agreement, similar to the June 10 Agreement, contains a conditional provision, which states, "[i]f [339 RRH] fails to stay current with the Forbearance Period payments and regularly scheduled payments during the Repayment Period . . . , [the January 12 Agreement] will terminate automatically on the 5th business day following the [default]." Again, it is clear from the language of the January 12 Agreement that Plaintiff did not expressly waive the exercise of rights after an event of default. 339 RRH was required to fully and timely perform with the terms and conditions of the loan documents in order for Plaintiff to not exercise its rights. Due to 339 RRH's failure to do so, Plaintiff was entitled to

exercise its rights under the loan documents.

Significantly, Defendants, especially 339 RRH, concede that 339 RRH defaulted under both the June 10 and January 12 Agreements. In light of 339 RRH's failure to perform its obligations under the loan documents, it follows that Plaintiff, in exercising its rights under the same loan documents, would be entitled to apply the default interest rates. There is no express language in any of the loan documents which indicates that Plaintiff waived nor intended to waive its right to default interest.

In support of the Amount Due Schedule, Plaintiff has provided the necessary proofs required to show the calculation of the amount due, which typically includes past due principal, unpaid interest at the contract and default rates, late charges, and any other sums due under the loan documents. See Plaintiff Supplemental Certification of Amount Due; see also R. 1:4-4(b).

Therefore, given that the Plaintiff filed satisfactory proofs in compliance with the court rules, and given that Defendant has failed to offer any opposing proofs concerning the amount due *with specificity*, Defendant's objection is overruled, and this matter is remanded to the Office of Foreclosure to include the amount of $47,373,075.98 due at Final Judgment. An Order accompanies this decision.