STATE OF NEW YORK
SUPREME COURT COUNTY OF FULTON

NBT BANK, N.A.,

Plaintiff,

-against-

PINE BROOK GOLF CLUB, INC., FULTON COUNTY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, CITY OF GLOVERSVILLE, NATHAN LITTAUER HOSPITAL ASSOCIATION,

Defendants.

DECISION AND ORDER

Index No. 01110
RJI No. 17-1-2013-0282

Appearances:

For Plaintiff:

Scott R. Almas, Esq. & Paul A. Levine
Lemery Greisler LLC
Albany, New York

Jennifer F. Beltrami, Esq.
Fidelity National Law Group
New York, New York

For Defendants:

Anthony Casale, Esq.
City Attorney
Gloversville, New York
Attorney for Defendant City of Gloversville

Linda L. Donovan, Esq.
OVERTON, RUSSELL, DOERR & DONOVAN
Clifton Park, New York
Attorney for Defendant NLHA

Giardino, J.:

Plaintiff, among other things, has moved for summary judgment pursuant to CPLR § 3212 against defendants City of Gloversville and Nathan Littauer Hospital Association. Plaintiff also seeks a preliminary injunction pursuant to CPLR § 6301. In addition, plaintiff has moved for default judgment pursuant to CPLR § 3215 against defendants Pine Brook Golf Club, Inc.,

Fulton County Economic Development Corporation and the New York State Department of Taxation and Finance.

On January 22, 2013, plaintiff filed a verified complaint seeking foreclosure of the mortgaged premises located at 280 South Main Street, Gloversville, New York. In response, defendant, Nathan Littauer Hospital Association (hereinafter NLHA), served an answer, dated February 21, 2013, requesting that plaintiff's complaint be dismissed, as to NLHA, and asserted an affirmative defense. Thereafter, defendant, City of Gloversville (hereinafter City), served an answer, dated February 27, 2013, claiming plaintiff's complaint should be denied. Defendant, Fulton County Economic Development Corporation (hereinafter FCEDC) served a notice of appearance and limited waiver in foreclosure, dated February 19, 2013. Defendants Pine Brook Golf Club, Inc. (hereinafter Pine Brook), New York State Department of Taxation and Finance (hereinafter Taxation and Finance) and FCEDC failed to file an answer to the complaint.

The property at issue was the subject of a deed, dated September 10, 1946, between RHV Realty Corporation and Pine Brook Golf Club, Inc. Thereafter, the deed was recorded in the Fulton County Clerk's Office on October 17, 1946 in Book 285 of Deeds at Page 271. In 1996, Pine Brook executed and delivered to NBT's predecessor a note for business purposes in the amount of $275,000.00 and, as security for the payment, Pine Brook delivered a mortgage. In 2005, Pine brook executed and delivered to NBT a note for business purposes in the amount of $70,000.00 and, as security for the payment, they delivered a mortgage. Subsequently, by Mortgage Consolidation Agreement, the notes were combined into a single obligation and secured by a single mortgage in the amount of $302,000.00. On February 19, 2010 Pine Brook again executed and delivered to NBT a note for business purposes in the amount of $91,109.03 and, as security for the payment, they delivered a mortgage. In addition, Pine Brook, by

Amended and Restated promissory Note, dated February 19, 2010, combined and restated its obligations under all prior notes to NBT into a single promissory note in the amount of $325,000.00. Lastly, by Consolidation, Extension and Modification Agreement, dated February 19, 2010, all three of the mortgages were combined into a single mortgage lien.

The proponent of a summary judgment motion is obligated to make a prima facie showing of its entitlement to judgment as a matter of law by tendering admissible evidence demonstrating the absence of a material question of fact (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Andrew R. Mancini Associates, Inc. v Mary Imogene Bassett Hosp., 80 AD3d 933, 935 [2011]; Rought v Price Chopper Operating Co., Inc., 73 AD3d 1414, 1414 [3d Dept 2010]). If the moving party meets its initial burden, the burden then shifts to the nonmoving party to produce evidence sufficient to demonstrate a material issue of fact to avoid summary judgment (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; U.W. Marx, Inc. v Koko Contr, Inc., 97 AD3d 893, 894 [3d Dept 2012]). A court reviewing a motion for summary judgment must view the evidence in the light most favorable to the nonmoving party (see Vega v Restani Constr. Corp., 18 NY3d 449, 503 [3d Dept 2012]; Winne v Town of Duanesburg, 86 AD3d 779, 780 [3d Dept 2011]).

Plaintiff, the moving party, asserts that defendants NLHA and City have no valid interest in the premises and that their answers should be stricken. The deed at issue contains the following language:

> "And the party of the second part, said Pine Brook Golf Club, Inc., hereby accepts the conveyance of the aforedescribed property subject to the conditions, restrictions and reservations hereinbefore specified that the same shall be used by it for a private golf course only, and hereby agrees to carry out the terms and provisions thereof, and it further agrees that, in the event said premises are no longer maintained and used for a period of one year as a private golf course, it will transfer said premises without charge to the City of Gloversville for public

recreational purposes, if the City of Gloversville will accept and use said lands for that purpose, and in the event said City will not accept said lands for said purpose, it, Pine Brook Golf Club, Inc., will transfer said lands without charge to the Nathan Littauer Hospital Association to be used by it in carrying out its corporate purposes, and if thereafter said Hospital Association should sell said property, it shall be at public sale."

Plaintiff's argue that the abovementioned deed's conveyance to NLHA and City is void as a violation of the rule against perpetuities (hereinafter RAP) because their interests in the premises were not certain to vest within the permissible perpetuities period of twenty-one (21) years from creation.

First, with regard to defendant City, the City advised the Court that on July 24, 2012 the City's Common Council passed a resolution rejecting any rights it may have in operating the property at issue for public recreational purposes. Therefore, the Court finds any interest defendant may have had in the property to be waived.

Defendant's NLHA affirmative defense states that NLHA has a "potential/reverter interest" in the subject premises based upon the language in the deed at issue and the fact that the golf course ceased to be operated as a private golf course for the requisite period of time. In addition, defendant's further asserted that plaintiff failed to take action to obtain NLHA's consent or subordinate its interest prior to accepting the mortgages being foreclosed. Now, defendant's in opposition to plaintiff's motion, claim that the priority of the parties interests must be determined and that the RAP does not apply because the City's or NLHA's interest is an option.

"Prior to 1958, the perpetuities period was two lives in being plus actual periods of minority" (Symphony Space, Inc. v Pergola Properties, Inc., 88 NY2d 466, 475 [1996]; see Real Property Law former § 42; Seitz v Faversham, 205 NY 197, 200 [1912]).

However, "[w]here, as here, the parties to a transaction are corporations and no measuring lives are stated in the instruments, the perpetuities period is simply 21 years" (Symphony Space, Inc. v Pergola Properties, Inc., 88 NY2d at 481; see Metro. Transp. Auth. v Bruken Realty Corp., 67 NY2d 156, 161 [1986]). Furthermore, it is well established that a "fee limited on a fee must, to be valid, be on a contingency which, if it should occur, must happen within the period prescribed in [Real Property Law former § 42], namely, not more than two lives in being at the creation of the estate" (Edward John Noble Hosp. of Gouverneur v Bd. of Foreign Missions of Presbyt. Church in U.S., 13 Misc 2d 918, 921 [Sup Ct 1958]).

In 1946, RHV Realty Corporation conveyed the property to Pine Brook to be used as a private golf course only; however, in the event said premises was no longer maintained and used for a period of one year as a private golf course, then the property was to be transferred to the City for public recreational purposes, if the City would accept and use said lands for that purpose, but in the event the City would not accept said lands for said purpose, then it was to be transferred to NLHA to be used by it in carrying out its corporate purposes. Here, the above mentioned contingencies in the deed could occur at any remote date without reference to lives in being in 1946. Furthermore, "neither could it be then known whether the event would occur, and if it did, when that would be" (see Lipetz v Papish, 283 AD 1065, 1065 [2d Dept 1954], affd 308 NY 787 [1955]. Therefore, the Court finds that the future interest which the grantor attempted to create is void, and defendant Pine Brook has a fee simple absolute in the property at issue (see Edward John Noble Hosp. of Gouverneur v Bd. of Foreign Missions of Presbyt. Church in U.S., 13 Misc 2d at 9921).

It is well settled that "[e]ntitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact" (HSBC Bank USA v Merrill, 37 AD3d 899, 900 [3d Dept 2007]; see Phelps Corp. v Jones, 108 AD3d 814, 815 [3d Dept 2013]; Pritchard v Curtis, 95 AD3d 1379, 1380 [3d Dept 2012]). Here, plaintiff tendered, among other things, the Amended and Restated Promissory Note, dated February 19, 2010, the Consolidation, Extension and Modification Agreement, dated February 19, 2010 and the affidavit of Michael J. Fitzgerald, a commercial workout officer, which asserts that defendant Pine Brook has defaulted. Therefore, the Court finds that plaintiff has set forth a prima facie case establishing its entitlement to a judgment of foreclosure. Defendant Pine Brook failed to submit an answer. Accordingly, plaintiff is to submit a proposed order of reference for the Court's review.

Lastly, as mentioned above, defendants Pine Brook, Taxation and Finance and FCEDC failed to file an answer to the complaint. Defendant FCEDC solely served a notice of appearance and limited waiver in foreclosure. The Court finds that plaintiff demonstrated its entitlement to default judgment by submitting proof of service upon defendants Pine Brook, Taxation and Finance and FCEDC, the facts supporting its claim, and defendants' default (see CPLR 3215 [f]; Dayco Mechanical Services, Inc. v Toscani, 94 AD3d 1214 [3d Dept 2012]; 333 Cherry LLC v. Northern Resorts, Inc., 66 AD3d 1176, 1178–1179 [3d Dept 2009]).

For the foregoing reasons, plaintiff's motion for summary judgment, pursuant to CPLR § 3212, is granted with regard to defendants City and NLHA; plaintiff's motion for default judgment as to defendants Pine Brook, FCEDC and Taxation and Finance is granted; and plaintiff is to submit a proposed order of reference.

This writing constitutes the Decision and Order of the Court. The transmittal of copies of this decision and order by the Court shall not constitute notice of entry.

Signed this 27 day of August, 2013, at Johnstown, New York.

HON. RICHARD C. GIARDINO
Acting Justice of the Supreme Court

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