

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RTC COMMERCIAL ASSETS TRUST	:	CIVIL ACTION
1995 NP3-1,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
ASHME REALTY ASSOCIATES III, et al.	:	
	:	
Defendants.	:	NO. 96-4961

MEMORANDUM

Reed, J.

December 16, 1998

Plaintiff RTC Commercial Assets Trust 1995 NP3-1 brought this action against defendants ASHME Realty Associates III ("ASHME"), Samuel Eisenberg ("Eisenberg"), Heshy Singer ("Singer"), and Jack Kreiser ("Kreiser"), as partners of ASHME and against Eisenberg and Singer individually, seeking recovery for the non-payment of a promissory note and sums secured by a mortgage in connection with real property located in Philadelphia County, Pennsylvania. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 as the parties are of diverse citizenship and the amount in controversy is in excess of \$50,000.00,¹ exclusive of interest and costs.

Currently pending before the Court is the motion of plaintiff for summary judgment pursuant to Federal Rule of Civil Procedure 56 (Document No. 37), and the responses of the parties thereto. For the following reasons, the motion will be granted.

¹ Plaintiffs filed their complaint on July 12, 1996 in the United States District Court for the Eastern District of Pennsylvania. I note that this lawsuit was commenced before the jurisdictional amount in controversy requirement under 28 U.S.C. § 1331 increased to \$75,000.00. See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (enacted October 19, 1996, and effective January 17, 1997).

I. FACTUAL BACKGROUND

The following facts are based on the evidence of record viewed in the light most favorable to defendants, the nonmoving party, as required when considering a motion for summary judgment. See Carnegie Mellon Univ. v. Schwartz, 105 F.3d 863, 865 (3d Cir. 1997).

ASHME is a general partnership, formed under the laws of Pennsylvania, and has its principal place of business in Lakewood, New Jersey. On July 26, 1988, ASHME, through two of its general partners, Eisenberg and Singer, executed a promissory note together with a mortgage for real property located in Philadelphia County, Pennsylvania, in the amount of \$448,000.00 plus interest, and an assignment of rents, in favor of AmeriFederal Savings Bank ("Bank"). On this same date, ASHME, through Eisenberg and Singer, and the Bank entered into a Loan Agreement providing, *inter alia*, the latter with various remedies in the event of a default by ASHME. The Bank is located in Lawrenceville, New Jersey.

Payments on the note were to commence on August 1, 1988 with the entire balance of principal and interest to mature on May 1, 1992. On October 26, 1995, the Resolution Trust Corporation ("RTC"), which had been appointed as receiver of the Bank, assigned all the documents relating to the promissory note, the mortgage loan, the assignment of rents, and the loan agreement to plaintiff RTC Commercial Assets Trust 1995 NP3-1 ("Trust"). On July 12, 1996, the Trust commenced this action alleging that ASHME failed to comply with the terms of the promissory note and the mortgage, and thus ASHME defaulted under all the relevant loan documents by failing to pay the unpaid balance of principal and interest.

II. LEGAL STANDARD

Defendants have moved pursuant to Federal Rule of Civil Procedure 56 for summary judgment. Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted when, "after considering the record evidence in the light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Turner v. Schering-Plough Corp., 901 F.2d 335, 340 (3d Cir. 1990). For a dispute to be "genuine," the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations, or suspicions. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982).

III. DISCUSSION ²

It is undisputed that no payments were made on account of the loan after June, 1992. The dispute rests solely on the amount of damages due the Trust. For purposes of determining this motion for summary judgment, the parties have entered into a stipulation which addresses all of the issues before this Court. See Document No. 41. Accordingly, the amount of unpaid principal due is \$438,742.22. See Document 41, ¶ 1. The total interest

²In an earlier decision, this Court analyzed and decided the choice of law question, determining that New Jersey law applied. RTC Commercial Assets Trust 1995 NP3-1 v. Ashme Realty Assocs. III, 1997 WL 260424 at *3 (E.D. Pa. May 13, 1997).

through November, 1998, due is \$235,641.16 (\$232,579.08 through October 31, 1998 and an additional \$3,062.08 for November, 1998).³ See Document 41, ¶ 1. The attorney's fees are \$28,991.86, paid through October 1, 1998. See Document 41, ¶ 1. Thus, the total amount due through November, 1998 is \$703,375.24 See Document 41, ¶ 1. In addition, interest will continue to accrue at the per diem rate of \$100.67 starting December 1, 1998. See Document 41, ¶ 3. Finally, for the limited purposes of determining this motion for summary judgment, the Trust is not pursuing its claims to default interest and/or late charges. See Document 41, ¶ 4.

III. CONCLUSION

For the foregoing reasons, I will grant the motion. An appropriate Order follows.

³The interest was calculated using the Federal Home Loan Advance Rate for One Year Borrowing in accordance with the terms of the Promissory Note dated 7/26/1988. See Document 41, ¶ 2.

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ORDER

AND NOW, this 16th day of December, 1998, upon consideration of the motion of plaintiff RTC Commercial Assets Trust 1995 NP3-1 for summary judgment (Document No.37), the response of defendants thereto, the reply of plaintiff and the stipulation entered into by the parties for the purpose of resolving this motion (Document No. 41), it is hereby **ORDERED** that motion is **GRANTED** and Judgment in Mortgage Foreclosure be entered against defendants, ASHME Realty Associates, III (“ASHME”), Heshy Singer, as a partner of ASHME and individually, Samuel Eisenberg, as a partner of ASHME and individually, and Jack Kreiser, as a partner of ASHME, and in favor of plaintiff RTC Commercial Assets Trust 1995 NP3-1, foreclosing all right, title, lien and equity of redemption which defendants or anyone claiming under them have or had in the mortgaged premises located at 2010-20 Levick Street, 6304-18 Roosevelt Boulevard, 6320-30 Roosevelt Boulevard and 6332-50 Roosevelt Boulevard, all located in Philadelphia, Pennsylvania and fixing the amount due plaintiff under the mortgage as of December 1, 1998 at \$674,383.38, plus attorney’s fees in the amount of \$28,991.86 (for fees through October 1, 1998), for a total of \$703,375.24,

together with continued interest at the default rate of \$100.67 per diem from and after December 1, 1998 until the sale of the mortgaged premises together with the cost of this suit to be taxed.

IT IS FURTHER ORDERED that the mortgaged premises be sold to satisfy the said mortgage, interest, attorney's fees and cost of the plaintiff, and the at Writ of Execution issue for that purpose out of this Court directed to the United States Marshal, commanding them to make and conduct, consistent with 28 U.S.C. § 2001, et seq., on such terms and conditions as shall be advertised, a judicial sale of the Mortgaged Premises described in the complaint (Document No. 1), and out of the money arising from such sale that the Marshal pay the amount of the judgment as more fully set forth above, together with interest, attorney's fees and costs of the plaintiff, to the plaintiff or its attorneys, and cause title to pass to the successful buyer or his, her or its nominee or assignee at the foreclosure sale upon fulfillment by said buyer or its, his or her nominee or assignee of the published terms and conditions of the sale; and in case proceeds realized by said sale exceed the amount required to satisfy the aforesaid payments to the plaintiff, such excess proceeds shall be brought into this Court to abide further Order of this Court, and that the United States Marshal make a report of the aforesaid sale without delay as required by the rules of this Court.

IT IS FURTHER ORDERED that the plaintiff or its assignees or other purchaser or its, his or her nominee or assignee under the foreclosure sale duly recover against the defendants, and all persons holding by, or through, or claiming under them or any of them, possession of the Mortgaged Premises mentioned and described in the complaint, and that a

Writ of Possession issue thereof after foreclosure sale, subject to the terms and conditions of any valid leases in place at the time of the foreclosure sale.

IT IS FURTHER ORDERED that this Court hereby retains jurisdiction of the subject matter of this action and all of the parties thereto, for purposes of enforcing this judgment and expressly finds that there is no just reason for delaying the enforcement of this judgment or an appeal therefrom.

This is a final Order.

LOWELL A. REED, JR., J.