

New York Community Bank v 176 W. 86 St. Corp.

2024 NY Slip Op 31181(U)

April 2, 2024

Supreme Court, New York County

Docket Number: Index No. 850025/2023

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III PART 32

Justice

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INDEX NO. 850025/2023

NEW YORK COMMUNITY BANK,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 003

- v -

176 W. 86 ST. CORP., DARIUSH ISRAELI, JOSEPH NOORMAND, YAFFA SEDAGHAT KAMAL, DAVID SEDAGHAT KAMAL, AHAMED SAJJAD, WEST SIDE MBV 204, LLC, BOARD OF MANAGERS OF THE PACKARD CONDOMINIUM, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, U.S. SMALL BUSINESS ADMINISTRATION, JOHN DOE

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 80, 81, 82, 128, 129, 131, 132, 133, 134, 135, 136, 137, 138, 140, 141, 142

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This is an action to foreclose on a consolidated, extended and modified commercial mortgage encumbering two parcels of real property located at 176 West 86th Street a/k/a 529/535 Amsterdam Avenue, Commercial Units A and B, New York, New York. The mortgage was given by Defendant 176 W. 86 ST. CORP (“Corp.”) to Plaintiff and secures a loan, memorialized by a mortgage note, in the original principal amount of \$2,000,000.00. The note and mortgage, both dated March 27, 2015, were executed by Defendant Dariush Israeli (“Israeli”) as Treasurer of Corp. Concomitantly therewith, Defendants Israeli, Joseph Noormand, Yaffa Sedaghat Kamal and David Sedaghat Kamal (“Guarantors”) executed a guaranty of recourse obligations.

Plaintiff commenced this action and pled in the complaint that Defendant Corp. defaulted in making monthly installment payments beginning on October 1, 2022. Defendants’ pre-answer motion to dismiss pursuant to CPLR §3211 was denied. The only answer served and filed stated that it was for “Defendant 176 W. 86th St. Corp., by its attorneys, Castro Law Group PLLC”. Although counsel who verified the answer claimed to be the attorney for the Guarantors as well, nothing in the answer reveals it was made on behalf of the guarantors. Defendant Corp. answered and pled eleven affirmative defenses.

Now, Plaintiff moves¹ for summary judgment against the appearing Defendant, to strike their answers and affirmative defenses, for a default judgment against the non-appearing parties, for an order of reference and to amend the caption. Defendants Corp. and Guarantors oppose the motion and cross-move for summary judgment dismissing Plaintiff's complaint. Plaintiff opposes the cross-motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of mortgagors' default in repayment (see *U.S. Bank, N.A., v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Based on the affirmative defenses in the answer, Plaintiff was also required to demonstrate, *prima facie*, its standing (see *eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]) and its substantial compliance with any contractual pre-foreclosure notice requirements (see *eg Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [2d Dept 2020]).

Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (see CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). Plaintiff's motion was supported with an affidavit from Lawrence Rosenblum ("Rosenblum"), the President of Plaintiff as well as supporting documentation. The affidavit, based on Rosenblum's personal knowledge of the events, established the mortgage, note, and evidence of mortgagor's default and was sufficiently supported by appropriate documentary evidence (see *eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra; see also *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019])["Admissible evidence may include 'affidavits by persons having knowledge of the facts [and] reciting the material facts'"].

This branch of Plaintiff's motion was supported with an affirmation from Henry Yabroudy ("Yabroudy"), the First Vice President of Plaintiff. The affidavit established the mortgage, note, and evidence of mortgagor's default and was sufficiently supported by appropriate evidentiary documents (see *eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra). As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (see *eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). Here, since Plaintiff was lender under when the mortgage and note were given, it was in direct privity with the mortgagors when the action was commenced and, therefore, unquestionably had standing (see generally *Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]).

The affirmative defense alleging contractual pre-foreclosure notice was not given fails as no provision in the note, mortgage or loan agreement requires same. Indeed, section 6 of the note expressly provides that upon default the lender may accelerate the indebtedness, "without any prior notice to Borrower". Section 13 of the note also provides the borrower waives any "notice of acceleration". Section 12.2[1][m] of the mortgage provides, *inter alia*, that no pre-foreclosure notice is required upon a repayment default.

¹ Plaintiff's amended notices of motion (NYSCEF Doc Nos. 132 and 140) are rejected as untimely. The first was filed after the time for Defendants to file opposition and the second was filed while this matter was *sub judice*.

Defendants' opposition, at the outset, is untimely, and the cross-motion is improper. This Court's orders (NYSCEF Doc No 124 and 127) directed that that "opposition" be filed by November 24, 2023. In contravention of that order, Defendants' papers were filed three-days late and included a cross-motion despite being limited to filing "opposition". No justifiable excuse for this delay was proffered and, given Defendants' prior default, smacks of a pattern of default in this matter (*see generally GMAC Mtge., LLC v Guccione*, 127 AD3d 1136 [2d Dept 2015]). Even were the Court to consider the opposition on its merits, it fails to raise an issue of fact.

In opposition to the branch of the motion for summary judgment, Defendant Corp. proffered an affidavit from its principal, Defendant Israel. His assertion that the default claimed by Plaintiff is a failure to pay a single interest installment is belied by the complaint which states Borrower failed to make the monthly installment payments due on October 1, 2022, *and for each and every month thereafter* [emphasis added]. Yabroudy's affidavit is in accord with this claim. In any event, "[t]he law is clear that when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene" (*Home Sav. of Am. v Isaacson*, 240 AD2d 633 [2d Dept 1997], *citing New York Guardian Mortgage Corp. v Olexa*, 176 AD2d 399, 401 [3d Dept 1991]). With respect to the other issues in Plaintiff's *prima facie* case for foreclosure, since none of the salient facts related thereto were contradicted by Israel, they are "deemed to be admitted" (*Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1st Dept 2017]).

With respect to the Guarantor Defendants, Plaintiff's moving papers, including the memorandum of law, are silent as to a basis for accelerated judgment against these Defendants based upon the guaranty. Further, the notice of motion does not expressly seek either a default judgment or summary judgment against the Guarantors. "[A] court does not have a mandatory, ministerial duty to grant a motion for leave to enter a default judgment, and retains the discretionary obligation to determine whether the movant has met the burden of stating a viable cause of action" (*see Newrez, LLC v City of Middletown*, 216 AD3d 655, 657 [2d Dept 2023][internal citations and quotation marks omitted]). Further, a movant seeking summary judgment must explain how the evidence proffered entitles it to same (*see Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 496 [1st Dept 2010]).

As to the branch of the motion to dismiss Defendants' affirmative defenses and counterclaim, CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

As pled, all the affirmative defenses and the counterclaim are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]). Defendants' opposition to

dismissal of the affirmative defenses was, again, entirely conclusory and, by failing to raise specific legal arguments in rebuttal, those affirmative defenses found insufficient were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties, other than the guarantors, is granted without opposition (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment against the appearing Defendants, for a default judgment against the non-appearing parties, other than the guarantors, as well as the other relief is granted; and it is further

ORDERED that **Clark Whitsett, Esq. 66-05 Woodhaven Blvd., Rego Park, New York 11374 – 718-850-0003** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the property identified in the notice of pendency can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

ORDERED that Plaintiff shall forward all necessary documents to the Referee and to Defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if Defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED that failure to submit objections to the referee may be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that Plaintiff must bring a motion for a judgment of foreclosure and sale within 45 days of receipt of the referee's report; and it is further

ORDERED that if Plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct Plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to Plaintiff's failure to move this litigation forward; and it further

ORDERED that the caption of this action and all papers previously filed herein shall be amended by striking defendants "John Doe #1" through "John Doe #10" all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that the caption shall be amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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NEW YORK COMMUNITY BANK,

Plaintiff,

-against-

176 W. 86 ST. CORP., DARIUSH (DAVID) ISRAELI,
JOSEPH NOORMAND, YAFFA SEDAGHAT KAMAL,
DAVID SEDAGHAT KAMAL, AHAMED SAJJAD,
WEST SIDE MBV 204, LLC, BOARD OF MANAGERS
OF THE PACKARD CONDOMINIUM, NEW YORK,
STATE DEPARTMENT OF TAXATION AND
FINANCE, NEW YORK CITY DEPARTMENT OF
FINANCE, U.S. SMALL BUSINESS
ADMINISTRATION,

Defendants.

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and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County*

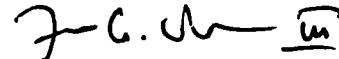
Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **August 7, 2024, at 10:20 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

4/2/2024

DATE



FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER J.S.C.

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE