SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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SSA NE ASSETS LLC,

Plaintiff,

- v -

BURSTYN LLC,LAUREN BURSTYN GORDON, JOHN DOE NO. I THROUGH JOHN DOE NO. XXX

Defendant.

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INDEX NO. 850423/2023

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 51, 52, 53

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is determined as follows:

The within action is to foreclose on a consolidated and modified mortgage encumbering a parcel of real property located 455 West 20th Street, Unit Mew B, New York, New York. The mortgage, dated August 31, 2022, was given by Defendant Burstyn LLC ("Burstyn") to Plaintiff. The mortgage secures a loan with an original principal amount of $5,062,500.00 which is evidenced by a note of the same date as the mortgage. Defendant Lauren Burstyn Gordon ("Gordon") executed the note and mortgage as the sole member of Burstyn. Concomitantly with these documents, Gordon also executed a commercial guaranty of the indebtedness. Plaintiff commenced this action and alleged that Defendants Burstyn and Gordon defaulted in repayment of the indebtedness. Burstyn and Gordon answered jointly and pled seventeen [17] affirmative defenses, including lack of standing and failure to abide by a contractual condition precedent to foreclosure. Now, Plaintiff moves for summary judgment against Defendants Burstyn and Gordon, striking their answer and affirmative defenses, a default judgment against all non-appearing parties, to appoint a Referee to compute and to amend the caption.

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 Defendants' 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]). In support of such a cause of action for foreclosure, a plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported by an affidavit from Joseph Cavagnaro ("Cavagnaro"), "an authorized agent" of Plaintiff. Cavagnaro avers that in his "employment, I am responsible for managing and administering the subject mortgage loan, which is more particularly described below and in the Complaint in Foreclosure filed in this action." Further, he states the affidavit was made based upon "my own personal knowledge of the administration of the mortgage loan" as well as Plaintiff's records. Plaintiff posits that this language is sufficient to support its motion for summary judgment. In opposition, Defendants assert that the affidavit and moving papers are defective as Plaintiff failed to demonstrate Cavagnaro's authority to act on behalf of Plaintiff.

Contrary to Plaintiff's assertion, and despite the distinguishable authority relied upon by Defendants[1], the principle that an affidavit supporting a motion for summary judgment in a foreclosure action must be from an affiant with "authority to act" is well recognized (*see Citibank, N.A. v Herman,* 215 AD3d 629, 630 [2d Dept 2023]; *U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066, 1068 [2d Dept 2022]; *see also Wilmington Sav. Fund Socy., FSB v Diehl*, 219 AD3d 781, 783 [2d Dept 2023]). The rationale underlying these decisions, although not expressly stated therein, is clearly founded in the requirements of CPLR §3212[b], noted supra. When such a motion is supported by an affidavit, that document must "by nature and definition, contain information from a person with direct knowledge of the subject matter discussed within the four corners of the document" (Mark C. Dillon, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:21). "Personal knowledge is not presumed from a mere positive averment of the facts. A court should be shown how the deponent knew or could have known such facts and if there is no evidence from which the inference of personal knowledge can be drawn than it is presumed that such does not exist" (*Bova v Vinciguerra*, 139 AD2d 797, 798 [3d Dept 1988][internal citations omitted]). In other words, an assertion of facts from which the affiant's personal knowledge may be inferred is an essential and ancient principle (*see Castro v N.Y. Univ.*, 5 AD3d 135, 136 [1st Dept 2004]; *see also Jock v Landmark Healthcare Facilities, LLC*, 62 AD3d 1070, 1072 [3d Dept 2009]; *Martin v Aluminum Compound Plate Co.*, 44 AD 412, 413 [1st Dept 1899]["the mere averment of facts as upon personal knowledge is not sufficient, unless the circumstances are such that it can fairly be inferred that the affiant had personal knowledge of the facts so positively stated"]; *Wallace v Baring*, 21 AD 477 [1st Dept 1897]; *Hoormann v Climax Cycle Co.*, 9 AD 579 [1st Dept 1896]).

In application of these principles, one with a relation to the parties (eg. an employee), to the cause of action or an eyewitness to events, related to the action or otherwise, often constitutes, in and of itself, satisfactory proof of an affiant's knowledge (*see Wallace v Baring*, supra at 478; *see also Klein v Trout Lake Preserve Homeowners' Assn.*, 179 AD2d 967, 968 [3d Dept 1992]). Contrarily, an affiant, even an agent of a party or an employee thereof, who fails to demonstrate personal knowledge is incompetent to proffer an affidavit in support of a motion for accelerated judgment (*see eg Barraillier v City of New York*, 12 AD3d 168 [1st Dept 2004]; *Israelson v Rubin*, 20 AD2d 668 [2d Dept 1964]). In the present case, Cavagnaro blithely refers to himself as Plaintiff's "agent" without elaboration. No claim is made that he is or was Plaintiff's employee and no indication of the nature of his agency, direct or through an intermediary, is stated. In the next

[1] Defendants' reliance on *HSBC Bank USA, N.A. v Betts,* 67 AD3d 735 [2d Dept 2009] and similar cases where a plaintiff sought a default judgment under CPLR §3215 is misplaced. CPLR §3215[f] requires that "the applicant" shall provide "proof of the facts constituting the claim . . . by affidavit *made by the party*" and, therefore, proof of an affiant's authority to act on behalf of a plaintiff is required (*see eg HSBC Bank USA NA v Cooper*, 157 AD3d 775, 776 [2d Dept 2018]). No similar restriction is contained in CPLR §3212[b] which only requires support by "affidavit, by a copy of the pleadings and by other available proof". All the other cases cited by Defendants concerned the sufficiency of proof offered to demonstrate a foreclosing party's standing to prosecute the action, to wit either the action was commenced by the servicer in its representative capacity, or the note was in possession of the servicer on the Plaintiff's behalf when the action was commenced. In those cases, proof was necessary that the servicing agent was authorized to act when the action was commenced (*see eg CWCapital Asset Mgt. v Charney-FPG 114 41st St., LLC*, 84 AD3d 506 [1st Dept 2011]) or the note was in the possession of its agent (*see eg Tajram v Tajram,* 183 AD3d 777 [2d Dept 2020]).

sentence, Cavagnaro avers that his knowledge was gained from his "employment", which raises the implication of the existence of another, unnamed, entity which he may serve. Under the circumstances, Cavagnaro's affidavit is insufficient to sustain Plaintiff's *prima face* case for summary judgment on its foreclosure claim.

To the extent Cavagnaro's knowledge is founded in a review of Plaintiff's documents, his affidavit similarly fails. Where the affiant's knowledge is derived, in whole or in part, from records, the documents themselves are the salient evidence and must be in evidentiary form for the affiant's statements based thereon to be admissible (*see eg Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206-207 [2d Dept 2019]). To be admissible as business record, a "qualified" witness must lay an appropriate foundation under CPLR §4518 (*see Montes v. New York City Tr. Auth.*, 46 AD3d 121, 122 [1st Dept 2007]). CPLR §4518[a] is silent as to who must provide such a foundation (*see People v Kennedy*, 68 NY2d 569, 577 [1986]). Neither a custodian of the records nor an employee of a maker of same is required (*see Bank of N.Y. Mellon v Gordon*, supra at 208; *Vermont Comm'r of Banking & Ins. v Welbilt Corp.*, 133 AD2d 396 [2d Dept 1987]). Rather, it is necessary that the affiant provide the court with "sufficient indicia of reliability" (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 521 [1st Dept 2016]; *One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1, 11 [1st Dept 2011]). Here, the Court is not persuaded based upon the vague and conclusory statements concerning Cavagnaro's association with Plaintiff that the obligatory proof of reliability has been met (*see Doros v City of New York*, 216 AD2d 196 [1st Dept 1995]; *Sabatino v Turf House, Inc.*, 76 AD2d 945 [3d Dept 1980]; *Dan Med., P.C. v. New York Cent. Mut. Fire Ins. Co.*, 14 Misc3d 44 [App Term 2d Dept 2006]).

Accordingly, since none of the documentary evidence proffered is in admissible form, Movant failed to establish any of the *prima facie* elements of the cause of action for foreclosure (*see generally Federal Natl. Mtge. Assn. v Allanah*, 200 AD3d 947 [2d Dept 2021]).

As to the branch of the motion to dismiss Defendants' affirmative defenses, 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 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]). To the extent Defendants failed to posit specific legal arguments in support of any particular affirmative defense, those are also deemed 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 counterclaim for an award of attorney's fees based upon RPL §282 is, at present, viable (*see US Bank v Bajwa*, 208 AD3d 1197 [2d Dept 2022]) and, based upon the reasoning supra, Plaintiff failed to demonstrate *prima facie* entitlement to dismissal of the second counterclaim.

The branch of Plaintiff's motion to amend the caption is granted without opposition (*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 branches of Plaintiff's motion for summary judgment on its causes of action for foreclosure and the appointment of a referee are denied, and it is

ORDERED that all the affirmative defenses in Defendants' answer are stricken, and it is

ORDERED, that the caption of this action be amended by striking therefrom the Defendants herein as "John Doe No. 1" through "John Doe No. XXX", 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 STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
SSA NE ASSETS LLC,

Plaintiff,

-against-

BURSTYN LLC and LAUREN BURSTYN GORDON,

Defendants.
----------X
and it is

ORDERED that this matter is set down for a status conference on **May 29, 2024 @ 11:40 am** via Microsoft Teams.

4/2/2024
DATE

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

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE