

**Wilmington Trust, N.A. v Eklecco Newco LLC**

2024 NY Slip Op 31509(U)

April 12, 2024

Supreme Court, New York County

Docket Number: Index No. 850051/2023

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*

INDEX NO. 850051/2023

MOTION DATE

MOTION SEQ. NO. 001

-----X  
WILMINGTON TRUST, NATIONAL ASSOCIATION, AS  
TRUSTEE FOR THE BENEFIT OF HOLDERS OF  
PALISADES CENTER TRUST 2016-PLSD, COMMERCIAL  
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES  
2016-PLSD,

Plaintiff,

- v -

EKLECCO NEWCO LLC, QUEENS COMIC'S NEWCO  
LLC, RIESLING ASSOCIATES, THREE J'S FAMILY TRUST,  
CS HUDSON INC., NEW YORK STATE DEPARTMENT OF  
TAXATION AND FINANCE, JOHN DOES 1-100,

Defendant.  
-----X

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 50, 51, 52, 53, 54, 55

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

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

The within action is to foreclose on a consolidated, extended and modified mortgage ("CEMA") encumbering three parcels of commercial real property described as the Palisades Center Mall located in Clarkstown, New York<sup>1</sup>. The mortgage was given by Defendant Eklecco Newco LLC ("Eklecco") to non-parties JPMorgan Chase Bank, NA ("JPMorgan") and Barclays Bank PLC ("Barclays") to secure a loan with an original principal amount of \$418,500,000.00 which is memorialized by a consolidated, amended and restated promissory note. That note consolidated nine individual notes, all dated April 7, 2016, that were given by Eklecco to JPMorgan and Barclays. The note and CEMA, both dated April 7, 2016, were executed by non-party Michael A. Mammolito ("Mammolito") as Vice President of Eklecco and are subject to a loan agreement executed by Eklecco, JPMorgan and Barclays of the same date. Also part of the transaction under the loan agreement, was a collateral mortgage given by Defendant Queens Comic's Newco LLC ("Queens") which encumbered as follows:

"among other property, Borrower's right, title and interest in and to, among other things, its leasehold estate in the Premises created by that certain lease agreement described on Exhibit B attached hereto (the "Ground Lease") between Mortgagor, as landlord, and Borrower, as tenant. The Fee and Leasehold Mortgage secures all of Borrower's indebtedness and other obligations under the Note and the other Loan Documents".

<sup>1</sup> Despite the property being located in Rockland County, the parties contracted to venue in this Court.

Concomitantly with these documents, Defendants Riesling Associates (“Riesling”) and Three J’s Family Trust (“Trust”) executed a document titled “Guaranty Agreement” which provided these entities would be “irrevocably and unconditionally” for the defined “Obligations” upon the occurrence of certain events specified in the loan agreement.

On June 19, 2020, and February 26, 2021, Defendants Eklecco, Riesling and Trust entered “standstill” agreements with Plaintiff wherein, *inter alia*, Plaintiff agreed to a “moratorium” on certain installment payments under the loan documents. In the latter agreement, Defendant acknowledged Plaintiff is “the current owner and holder of the Loan and Loan Documents”, the indebtedness, and that “of the date hereof, no Obligor has any claims, defenses, set-offs, rights of recoupment, counterclaims, demands, causes of action or rights of any kind or nature”. On October 9, 2022, the same parties executed a forbearance agreement which contained an admission of the existence of the loan documents, an acknowledgement of the indebtedness, reaffirmance of the promise to repay, Eklecco’s default in repayment, as well as the assignment of the loan documents to Plaintiff.

Plaintiff commenced this action alleging, *inter alia*, Defendants defaulted in repayment under the above documents and pled, among other things, causes of action to: [1] foreclose the CEMA mortgage, [2] foreclose its “security interest” in the collateral mortgage and [3] possession of Eklecco’s personal property. Defendants Eklecco, Queens, Riesling and Trust answered jointly and pled five affirmative defenses, including lack of standing. Now, Plaintiff moves for *inter alia* summary judgment against Eklecco and Queens on its first three causes of action, for a default judgment against the non-appearing parties, striking the appearing Defendants’ affirmative defenses, appointing a referee to compute and to amend the caption. Defendants Eklecco, Queens, Riesling and Trust oppose the motion.

In moving for summary judgment on its first cause of action to foreclose the mortgage on real property, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law through proof of the mortgage, the note, and evidence of Defendants’ default in repayment (*see eg U.S. Bank, N.A. v James*, 180 AD3d 594 [1<sup>st</sup> Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1<sup>st</sup> Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1<sup>st</sup> Dept 2010]). Based upon Defendants’ affirmative defense, Plaintiff was also required to demonstrate it had standing when this action was commenced (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2<sup>nd</sup> 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 [1<sup>st</sup> Dept 2019]). 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 Roger Briggs (“Briggs”), a Managing Director of Special Servicing in the Commercial Mortgage Servicing division of Wells Fargo Bank, National Association (“Wells Fargo”), which is allegedly the special servicer of the subject loan for Plaintiff. As the action was not commenced by Wells Fargo as servicer for Plaintiff nor is it presently being prosecuted as same (*cf. CWC Capital Asset Mgt. v Charney-FPG 114 41st St., LLC*, 84 AD3d 506, 507 [1<sup>st</sup> Dept 2011]), Plaintiff was required to demonstrate Wells Fargo’s authority to act on its behalf for Briggs’s affidavit to be valid (*see eg 21st Mtge. Corp. v Adames*, 153 AD3d 474, 476-477 [2d Dept

2017]). This is customarily established through a power of attorney, pooling and servicing agreements or a combination of both (*see U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *US Bank N.A. v Louis*, 148 AD3d 758 [2d Dept 2017]). Where a servicer acts pursuant to a power of attorney which is “restricted and conditioned” on a discrete document, the referenced material must also be produced for the affidavit submitted by the servicer to be sufficient (*see U.S. Bank N.A. v Tesoriero*, supra at 1068)<sup>2</sup>.

Here, Plaintiff failed to proffer any corroborating documentation of Wells Fargo’s authority to act for Plaintiff in support of its motion, or, as it was entitled, upon reply (*see GMAC Mtge., LLC v Coombs*, 191 AD3d 37, 50-51 [2d Dept 2020]; *Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2d Dept 2015]). Contrary to Defendants’ assertion, absent this defect, Briggs’ status as an employee of Wells Fargo “does not necessarily mean that [he] is incompetent to lay a foundation for the admission of business records that were created by another entity” (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 209 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]).

As to the branch of Plaintiff’s 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]).

The first affirmative defense of impossibility and frustration of purpose based upon the economic sequelae of the COVID-19 pandemic is unavailing as the Appellate Division, First Department has “squarely” and repeatedly “rejected” same (*see eg Pentagon Fed. Credit Union v Popovic*, 217 AD3d 480 [1<sup>st</sup> Dept 2023]).

The second affirmative defense of standing fails based upon Defendants’ express admissions in the February 26, 2021, “standstill” agreement wherein it states Plaintiff is “the current owner and holder of the Loan and Loan Documents”.

The third affirmative defense is incomprehensible and defeated by the express terms of the loan documentation (*see Real Property Law §254[10]*; *SKW Hillside Bleeker Lender LLC v 145 Bleeker LLC*, 217 AD3d 536 [1<sup>st</sup> Dept 2023]; *CSFB 2004-C3 Bronx Apts LLC v Sinckler, Inc.*, 96 AD3d 680 [1<sup>st</sup> Dept 2012]).

The fourth affirmative defense that Plaintiff failed to join an indispensable party, is insufficient on its face. CPLR §1001[a] defines a necessary party as “[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made Plaintiffs or Defendants.” In this context, Article 13 of the Real Property Actions and Proceedings Law defines necessary, representative, and permissive

<sup>2</sup> This latter requirement is ostensibly founded in a combination of the common law doctrine of incorporation of documents by reference and the best evidence rule (*see 21st Mtge. Corp. v Adames*, supra at 752, citing *Amica Mut. Ins. Co. v Kingston Oil Supply Corp.*, 134 AD3d 750 [2d Dept 2015]).

defendants to a foreclosure action (RPAPL §§1311, 1312, 1313). “In making the determination whether an absentee need be joined as an indispensable party, it must be decided if the proposed party has such an interest in the litigation that the court cannot settle the controversy without necessarily considering the interests of the proposed party” (*see Joanne S. v Carey*, 115 AD2d 4, 7 [1<sup>st</sup> Dept 1986]). “Moreover, dismissal for nonjoinder is a last resort . . . [and] the factors mentioned in CPLR 1001 (b) [must] tip overwhelmingly in favor of dismissal” (*JPMorgan Chase Bank, Natl. Assn. v Salvage*, 171 AD3d 438, 439 [1<sup>st</sup> Dept 2019]). In the absence of such a party, the preferred remedy is joinder of the missing party (*see NRZ Pass-Through Trust IV v Tarantola*, 192 AD3d 819 [2d Dept 2021]). Here, Defendants have not pled which parties are absent and why they are indispensable.

The fifth affirmative defense, which is directed to the legal sufficiency of Plaintiff’s complaint, is unnecessary as a general matter since dismissal cannot be effectuated without a motion pursuant to CPLR 3211[a][7] (*see Riland v Frederick S. Todman & Co.*, 56 AD2d 350 [1<sup>st</sup> Dept 1977]). Normally, this defense is nothing more than “‘harmless surplusage,’ and . . . a motion by the plaintiff to strike the same should be denied” (*Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]). However, where all other affirmative defenses fail as a matter of law, it may be dismissed (*Raine v Allied Artists Productions, Inc.*, 63 AD2d 914, 915 [1<sup>st</sup> Dept 1978]).

The attempt to reserve the right to assert further affirmative defenses during this action is incomprehensible and inadequately pled. Any rights in this regard are contained in the applicable sections of the Civil Practice Law and Rules (*see eg* CPLR §3025[b]).

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

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 names of “John Doe #1” through “John Doe #100” be stricken from the action, said parties not being necessary party defendants 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  
Wilmington Trust, National Association, as  
Trustee for the benefit of Holders of Palisades  
Center Trust 2016-PLSD, Commercial Mortgage  
Pass-Through Certificates, Series 2016-PLSD,

Plaintiff,

-against-

EklecCo NewCo LLC, Queens Comic's NewCo LLC, Riesling Associates and Three J's Family Trust, New York State Department of Taxation and Finance,

Defendants.

-----X

and it is

ORDERED that the branch of the motion pursuant to CPLR 603, severing the claims against Riesling and Trust is denied without prejudice to any further motion for summary judgment, and it is

ORDERED that this matter is set down for a status conference on **June 13, 2024 @ 12:00 pm** via Microsoft Teams.

4/12/2024

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

*Francis A. Kahn III*

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

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