

**938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest  
Hous. Dev. Fund Corp.**

2024 NY Slip Op 31511(U)

April 19, 2024

Supreme Court, New York County

Docket Number: Index No. 850233/2018

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. 850233/2018

938 ST. NICHOLAS AVENUE LENDER LLC,

MOTION DATE \_\_\_\_\_

Plaintiff,

MOTION SEQ. NO. 008

- v -

936-938 CLIFFCREST HOUSING DEVELOPMENT  
FUND CORPORATION, NEW YORK CITY  
DEPARTMENT OF HOUSING PRESERVATION AND  
DEVELOPMENT, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW YORK  
STATE DEPARTMENT OF TAXATION AND FINANCE,  
NEW YORK CITY DEPARTMENT OF FINANCE, HESS  
CORPORATION, CHAMPION COMBUSTION CORP.,  
S.J. FUEL CO., MICHELLE R. FINCHER, NYC  
COMMISSIONER OF SOCIAL SERVICES, DIANA  
MORGAN, CITIMORTGAGE, INC., CARLTON  
BURROUGHS, HOPE PRUITT and SYDNEY PRUITT,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 410, 411

were read on this motion to/for

JUDGMENT - SUMMARY

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

Plaintiff 938 St. Nicholas Avenue Lender, LLC ("938 LLC") commenced this action to foreclose<sup>1</sup> on a mortgage encumbering real property located at 938 St. Nicholas Avenue, New York, New York. Defendant 936-938 Cliffcrest Housing Development Fund Corporation ("Cliffcrest") is the mortgagor which obtained a loan of \$1,650,000.00 from non-party Community Capital Bank. The loan was memorialized by a mortgage note dated September 28, 2006, and is secured by a document of the same date titled Mortgage, Assignment of Leases and Rents and Security Agreement. The other factual and procedural underpinnings of this action were extensively recounted in this Court's decision dated January 27, 2022 (NYSCEF Doc No 157) and will only be recounted here to the extent necessary.

<sup>1</sup> A prior action to foreclose this mortgage was "marked disposed" (*Peny & Co. v 936-938 Cliffcrest Housing*, NY Cty Index No 850011/2013).

Cliffcrest's pre-answer motion to dismiss pursuant to CPLR §3211 was denied by order of Justice Arlene Bluth May 31, 2019 (NYSCEF Doc No 61). Cliffcrest answered, pled fifteen affirmative defenses and included a third-party action therein. Cliffcrest later filed a third-party summons and complaint against Third-Party Defendant Maverick Real Estate Partners LLC ("Maverick") containing a single cause of action based in champerty. Plaintiff and Maverick collectively replied to Cliffcrest's answer and answered the third-party complaint, which contained six affirmative defenses. Defendants, Michelle R. Fincher, Diana Morgan, Carlton Burroughs, Hope Pruitt and Sydney Pruitt ("Board Defendants"), shareholders and former officers on the Board of Directors of Cliffcrest, also answered and raised four affirmative defenses and five counterclaims.

By this Court's January 27, 2022, order, *supra*, the branch of Plaintiff's motion for summary judgment against Cliffcrest was denied based upon, *inter alia*, failure to submit sufficient evidentiary proof supporting the elements of a claim for foreclosure and its standing to prosecute same. However, the branches of the motion for a default judgment against Shareholder Defendants and for summary judgment dismissing the third-party complaint against Maverick were granted. Defendant Cliffcrest's cross-motion for summary judgment dismissing the complaint was denied as a *prima facie* case was not presented. This decision was affirmed in its entirety by decision of the Appellate Division, First Department (*see 938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 218 AD3d 417 [1<sup>st</sup> Dept 2023]).

Now, Defendant Cliffcrest again moves for summary judgment dismissing Plaintiff's complaint arguing Plaintiff does not possess all documents necessary to foreclose as well as that it can neither demonstrate Cliffcrest's default nor Plaintiff's standing. Plaintiff opposes the motion and cross-moves for summary judgment against Cliffcrest and to appoint a referee to compute.

A defendant moving to dismiss a viably pled cause of action for foreclosure must affirmatively demonstrate one of the essential elements is lacking or the merits of a defense (*see Deutsche Bank Natl. Trust Co. v Homar*, 163 AD3d 522, 524 [2d Dept 2018]; *Vumbico v Estate of Wiltse*, 156 AD3d 939 [2d Dept 2017]). Similarly, "[o]n a . . . motion for summary judgment dismissing the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, *prima facie*, the plaintiff's lack of standing as a matter of law" (*Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 22. [2d Dept 2019]; *see also Wilmington Sav. Fund Socy., FSB v Hack*, 209 AD3d 798 [2d Dept 2022]).

Here, Cliffcrest's motion is founded, to one degree or another, in the supposition that Plaintiff does not "have" and is unable to produce all the "loan documents" defined by the note and mortgage. Defendant fundamentally misapprehends what is required to be proved by a plaintiff in a mortgage foreclosure action. As the Court expressed in its earlier decision, a *prima facie* case for foreclosure is made by producing the mortgage, the unpaid note, and evidence of the mortgagor's default in repayment (*see eg U.S. Bank N.A. v Beymer*, 190 AD3d 445, 446 [1<sup>st</sup> Dept 2021]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 655 [2d Dept 2013]). This means that only the "relevant documents" need be produced in evidentiary form, not every scrap of paper related to a mortgage loan transaction (*see Banque Nationale de Paris v 1567 Broadway Ownership Assocs.*, 214 AD2d 359, 360 [1<sup>st</sup> Dept 1995]). The definition of "loan documents" in section 1.1 of the mortgage and its inclusion of "other instruments or agreements evidencing, securing or otherwise" in that term does not alter this conclusion. In any event, Defendant fails to specify what other documents are necessary to this action. Similarly, Cliffcrest's reliance on section 4.8 for the proposition that all documents executed and delivered in connection with the loan transaction are necessary to foreclose the mortgage is nonsensical. When that

section is read in its entirety, it is a standard “merger clause” which “merely furnishes another reason for applying the parol evidence rule” (*see eg Sabo v Delman*, 3 NY2d 155, 161 [1957]).

Defendant also argues that Plaintiff “cannot produce admissible evidence of Cliffcrest’s default or admissible evidence that the notice of default requirements pursuant to the Mortgage were complied with”. This theory is premised on Cliffcrest’s assertion that Plaintiff is unable to show “it incorporated its predecessors’ records into its own records and Plaintiff has no knowledge of any of its predecessors’ record keeping practices”. In support of these arguments, Plaintiff proffered two deposition transcripts of Thomas Hooker (“Hooker”), vice president of investments for Maverick, who was produced for deposition as Plaintiff’s corporate designee. Plaintiff’s claim that these transcripts are inadmissible is without merit. The absence of a signed reporter’s certificate was properly cured in Defendant’s opposition to the cross-motion (*see Gallway v Muintir, LLC*, 142 AD3d 948 [2d Dept 2016]). Defendant’s failure to comply with the service/execution requirements of CPLR §3116[a] is also not fatal because its use was sought as proof of an admission. “An unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion” (*Morchik v Trinity Sch.*, 257 AD2d 534, 536 [1<sup>st</sup> Dept 1995]). Similarly, the transcripts were admissible as Plaintiff failed to challenge the accuracy of same (*see eg Willis v Galileo Cortlandt, LLC*, 106 AD3d 730, 731 [2d Dept 2013]; *see also Luna v CEC Entertainment, Inc.*, 159 AD3d 445, 446 [1<sup>st</sup> Dept 2018]).

Concerning the substance of Hooker’s testimony, Defendant is correct that he professed no knowledge of the record keeping practices of prior assignors of the note and mortgage to Peny & Co. (“Peny”), The State of New York Mortgage Agency (“NYMA”) or 936 Coogans Bluff LLC (“Coogans”). Likewise, Hooker denied having similar knowledge regarding New York City Department of Housing Preservation and Development (“HPD”). Hooker also acknowledged that no one at Plaintiff has “personal knowledge” regarding the making of the note. However, this testimony does not demonstrate that Plaintiff is incapable of producing *anyone* at trial with the requisite knowledge, such as representatives of CCB, Peny, NYMA, and/or Coogans. At best, this argument constitutes pointing to “gaps in the plaintiff’s case” which is an insufficient basis for summary judgment (*Deutsche Bank Natl. Trust Co. v Dennis*, 181 AD3d 864, 870 [2d Dept 2020]). Defendant’s argument that “Plaintiff cannot demonstrate that it incorporated its predecessors’ records into its own records” is not supported by the relevant testimony. Hooker averred on this issue as follows:

Q. I appreciate that. Let me rephrase the question slightly. As you sit here today, do you have any independent recollection or do you have any knowledge that a payment history record such as the one you referenced that Maverick maintains was produced to Cliffcrest in this matter?

A. I don't know. Also, when I say our payment history, 938's payment history, I include the fact that prior business records incorporated our business records or predecessor business records are incorporated in ours.

Q. When you say the prior business records of predecessors are incorporated into yours, can you explain that process for me?

A. Yeah. So we receive payment histories, business records from predecessors from whom we buy loans, and we rely upon those histories in the regular course of business, yeah.

(Hooker Transcript, Pgs 64, Lines 18-25; 65, Lines 1-10).

Defendant's claim that "Plaintiff does not know what forms the basis for the amount it states is outstanding of \$1,629,044.61" is not supported by the testimony. Hooker stated that the payment history is memorialized in payment records attached to an affidavit from Helene Rudolph ("Rudolph")<sup>2</sup>.

Defendant's assertion that Plaintiff is unable to demonstrate a contractual pre-foreclosure notice was sent is immaterial. Defendant's eighth affirmative defense is entirely conclusory and "insufficient to raise the issue of the plaintiff's compliance with either statutory or contractual notice requirements" (*One W. Bank, FSB v Rosenberg*, 189 AD3d 1600, 1602 [2d Dept 2020]). As such, Plaintiff has no burden to establish compliance with any contractual notice requirements as part of its *prima facie* case for foreclosure (*id.*). In any event, sections 3.1[a] and [c] of the mortgage exclude payment defaults, which Cliffcrest admits occurred, from the contractual pre-foreclosure notice requirement.

As to standing, when a viable affirmative defense challenging same is pled, it is ordinarily a plaintiff's obligation to prove same to be entitled to foreclose (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2<sup>nd</sup> Dept 2020]). Nevertheless, as Defendant is a movant seeking summary judgment on this issue, it is its obligation to demonstrate *prima facie* that Plaintiff lacked standing as a matter of law (*see Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79 [2d Dept 2021]; *DLJ Mtge. Capital v Mahadeo*, 166 AD3d 512 [1<sup>st</sup> Dept 2018]). Ergo, Movant was obligated to demonstrate *prima facie* "that the plaintiff was not in direct privity with them, was not in physical possession of the note indorsed to it or in blank at the time of the commencement of the action, and that the assignment of the note . . . to the plaintiff was invalid" (*Wilmington Sav. Fund Socy., FSB v Matamoro*, supra). "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law" (*Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 60 [2d Dept 2015]).

Defendant failed to establish, as a matter of law, that Plaintiff's lacks standing. The argument concerning Plaintiff's purported lack of possession of all the "loan documents" is defective for the reasons noted supra. Indeed, in a mortgage foreclosure action the note is the operative document, and the mortgage follows incidentally (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015] *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]). Further, all other rights the assignor has also pass to the assignor which ostensibly includes all other documents associated with a transaction (*see UCC §3-201[a]; Marchai Props., L.P. v Fu*, 171 AD3d 722, 724 [2d Dept 2019]). The assertion that, based on Hooker's testimony, Plaintiff cannot establish an evidentiary foundation for the relevant documents is unavailing based upon the reasoning above. Parenthetically, the Court notes that Cliffcrest's objections regarding proof of Plaintiff's possession of the note are not necessarily fatal. It appears three of the four mortgage assignments contain express language assigning the note as well as the mortgage (*see eg Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1<sup>st</sup> Dept 2023]; *US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1<sup>st</sup> Dept 2018]; *see also Deutsche Bank Natl. Trust Co. v Romano*, 147 AD3d 1021 [2d Dept 2017]).

Accordingly, Defendant's motion for summary judgment dismissing Plaintiff's complaint is denied.

<sup>2</sup> Dated March 4, 2020. The Court noted in its January 27, 2022, order, that Rudolph was a Vice President of Vice President and Deputy General Counsel of The Community Preservation Corporation ("CPC"), servicer for PENY and NYMA.

Turning to the cross-motion, Plaintiff failed to sufficiently address why a successive motion for summary judgment should be entertained under the circumstances (*see eg Wells Fargo Bank, NA v Carpenter*, 189 AD3d 1124 [2d Dept 2020]). No showing was made that this motion fits under the “narrow exception” to the proscription against filing successive motion summary judgment. This exemption only applies when it is proven the motion is “substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts” (*Aurora Loan Servs., LLC v Yogev*, 194 AD3d 996, 997 [2d Dept 2021]; *Public Serv. Mut. Ins. Co. v Windsor Place Corp.*, 238 AD2d 142 [1<sup>st</sup> Dept 1997]). Here, denial of Plaintiff’s first motion was “not merely technical but substantive” (*Foo-Lu Co. v Rojas*, 160 AD3d 932, 934 [2d Dept 2018]). Further, “entertaining a second summary judgment motion involve[s] review of multiple disputed issues . . . [which] rather than eliminating a burden on the Supreme Court, . . . actually impose[s] an additional burden on the court” (*see Wells Fargo Bank v Gittens*, 217 AD3d 901, 903 [2d Dept 2023]; *Wells Fargo Bank v Osias*, 205 AD3d 979, 982 [2d Dept 2022]).

Accordingly, it is

ORDERED that Defendant’s motion and Plaintiff’s cross-motion are denied in their entirety, and it is

ORDERED that Plaintiff is directed to file a note of issue *forthwith*.

4/19/2024

DATE

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

CHECK ONE:

  
  
  


CASE DISPOSED  
 GRANTED  
 SETTLE ORDER  
 INCLUDES TRANSFER/REASSIGN

DENIED

  
  
  


NONFINAL DISPOSITION  
 GRANTED IN PART  
 SUBMIT ORDER  
 FIDUCIARY APPOINTMENT

  
  


OTHER  
 REFERENCE

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