

L&L Capital Partners LLC v 194 Orchard Group, LLC
2024 NY Slip Op 31203(U)
April 2, 2024
Supreme Court, New York County
Docket Number: Index No. 850124/2022
Judge: Francis A. Kahn III
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**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. 850124/2022

L&L CAITAL PARTNERS LLC, AS ASSIGNEE OF
PREFERRED BANK,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

194 ORCHARD GROUP, LLC, ORCHARD CSMG
LLC, HESKY HAIM, MORRIS MEHRABAN, ISAAC
SAIDMEHR, ECON AIR SUPPLY INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 93, 94, 95, 97

were read on this motion to/for

REARGUMENT/RECONSIDERATION

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

The within action is to foreclose on three mortgages encumbering a parcel of commercial real property located at 168 East 80th Street, New York, New York. The other facts underlying this matter are recounted in this Court's order dated May 19, 2023, which denied Plaintiff's motion for, *inter alia*, summary judgment and an order of reference. Now, Plaintiff moves for reargument and renewal of that decision, or in the alternative, for summary judgment against Defendants 194 Orchard Group LLC ("Group"), Orchard CSMG LLC ("CSMG"), Hesky Haim ("Haim"), Isaac Saidmehr ("Saidmehr") and Morris Mehraban ("Mehraban"). Plaintiff also seeks a default judgment against Defendant Econair Supply Inc. ("Econair") and to appoint a referee to compute.

The branch of Plaintiff's motion to reargue the issue of Plaintiff's standing is granted. The Plaintiff when the action was commenced, which is when standing is assessed (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]), was Preferred Bank ("Preferred"), the lender which was given amended and restated mortgage note. This entity was in direct privity with the mortgagors and, therefore, had standing to bring the action (*see eg Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-92 [2d Dept 2021]; *Valley Natl. Bank v 152 Sherman Holding LP*, ___ Misc3d ___, 2023 NY Slip Op 33811[U][Sup Ct NY Cty 2023]). After commencement, any transfer is governed by CPLR §1018 which provides that either the transferee or transferor is authorized to continue prosecution of the action with or without substitution (*see CPLR §1018; Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574 [2d Dept 2020]; *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1st Dept 2017]). As such, in the underlying motion, Plaintiff demonstrated its standing.

The branch of the motion to reargue the Court's determination that a *prima facie* case on the foreclosure claim was not made is granted. "[A]s a general matter, a court should not examine the admissibility of evidence submitted in support of a motion for summary judgment unless the nonmoving

party has specifically raised that issue in its opposition to the motion” (see *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 291 [2d Dept 2019]). In opposition to the underlying motion, since Defendants failed to raise the issue of admissibility, in any respect, as to any of the loan documents or the forbearance agreement, the Court should not have raised the issue *sua sponte* (see *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 54-55 [2d Dept 2014]). Accordingly, Plaintiff’s submissions on the underlying motion demonstrated the note, mortgage, and, based on the forbearance agreement, Defendants’ default in repayment as well as waiver of any pre-foreclosure notice (see generally *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]).

Even were reargument denied, Plaintiff motion also included a successive request for summary judgment which the Court could entertain as such a motion would have clearly enhanced judicial efficiency in this case (see *MTGLQ Invs. v Collado*, 183 AD3d 414 [1st Dept 2020]). Notably, while many issues were raised in the first summary judgment motion, the denial was contingent on a single factor, the alleged inadmissibility of the salient documentation (cf *Wells Fargo Bank, NA v Gittens*, 217 AD3d 901 [2d Dept 2023]). Were the newly proffered affidavits and documents considered, these would have cured any previously noted defects in Plaintiff’s *prima facie* showing.

In opposition, Defendants failed to raise a *bona fide* issue of fact. The standing and contractual notice arguments are unavailing based upon the evidentiary findings made supra. The claim of excessive default interest also fails to raise an issue of fact, since that claim concerns the amount due which is not a defense to summary judgment in a foreclosure action (see *Orchard Hotel, LLC v DAB Group, LLC*, 106 AD3d 628, 630 [1st Dept 2013]).

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]). Further, to the extent that specific legal arguments were not proffered in support of any particular affirmative defense, those defenses were abandoned (see *U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafigliore*, 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 Econair is granted without opposition (see CPLR §3215; *SRMOF II 2012-1 Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

Accordingly, it is

ORDERED that the branch of Plaintiff’s motion for reargument is granted and that portion of this Court’s order dated May 19, 2023, which denied summary judgment against the appearing Defendants is vacated, and it is

ORDERED that upon reargument, Plaintiff’s motion summary judgment against the appearing Defendants, for a default judgment against the non-appearing parties, and the appointment of a referee is granted; and it is further

ORDERED that the branch of the motion for declaratory relief is denied as that relief may not be sought via a motion; and it is further

ORDERED that **Mark McKew, Esq., 1725 York Ave, Ste 29A, New York, New York, 212-876-6783** 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 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 10:40 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

CHECK ONE:

CASE DISPOSED

X

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

X

NO FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

X

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

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

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