SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

- v -

EAST RIVER PLAZA LLC,RAFAEL E. BAEZ, STATE OF NEW YORK DEPARTMENT OF TAXATION & FINANCE, CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION PARKING VIOLATIONS BUREAU, CITY OF NEW YORK ENVIORNMENTAL CONTROL BOARD, JOHN DOE

Defendant.

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INDEX NO. 850279/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 103, 104, 105, 106, 107, 108, 109, 110, 111

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

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

This is an action to foreclose on consolidated, modified and extended mortgage ("CEMA") encumbering commercial real property located at 462 East 115th Street, New York, New York. The mortgage was given to Plaintiff by Defendant East River Plaza LLC ("East") to secure a note which memorialized an indebtedness in the original amount of $1,450,000.00. The note and mortgage, both dated November 21, 2014, were executed by Defendant Raphael Baez ("Baez") as a member of East. Concomitantly with the note and mortgage, Baez executed an unconditional guaranty of the indebtedness. Plaintiff commenced this action and pled that Defendant East defaulted in repayment of the loan beginning on June 1, 2019, and by "failing to obtain a Certificate of Occupancy for the Property as required under the . . . Provisions of the Loan Documents". Defendants East and Baez answered and pled two affirmative defenses.

Plaintiff's motion for, *inter alia*, summary judgment (Mot Seq No 1) and an order of reference was granted without opposition by order of this Court dated October 3, 2022. By order dated May 19, 2023, this Court vacated East and Baez's default, re-calendared Motion Seq No 1 and set a briefing schedule. East and Baez filed opposition to Plaintiff's motion.

In moving for summary judgment on its cause of action to foreclose the mortgage, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law via proof of the mortgage, the note, and evidence of Defendants' default thereunder (*see eg 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]). 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]). 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 L. Jeffrey Washington ("Washington"), an authorized officer, Special Credits Lead, for Plaintiff. Washington avers his affidavit is based on his "personal knowledge and . . . review of [Plaintiff's] business records". However, Washington does not distinguish which information is based upon personal knowledge or a review of documents (*cf. Malayan Banking Berhad v Park Place Dev. Primary LLC*, ___AD3d___, 2024 NY Slip Op 01873 [1st Dept 2024]). Washington laid a proper foundation for the admission of Plaintiff's records into evidence under CPLR §4518 by demonstrating he was familiar with the record keeping practices of Plaintiff and sufficiently showed that the records "reflect[ed] a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record [was] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record [was] made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). As to the note and mortgage, these documents were referenced by Washington and annexed to his affidavit (*cf. 938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 218 AD3d 417 [1st Dept 2023]). As such, proof of the loan documents was established in the first instance.

As to Defendants' default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). In this case, Plaintiff pled the existence of two alleged defaults, to wit the mortgagor's failure to obtain a certificate of occupancy for the premises, and the failure to remit an installment payment. Regarding the certificate of occupancy, Plaintiff's affidavits, and memorandum of law in support of this argument are completely conclusory. Washington blithely cites sections of the note, mortgage, CEMA, account security agreement and guaranty he claims obligate Defendant to obtain a certificate of occupancy without any exposition. The memorandum of law is similarly indistinct. Simply citing records without explaining how they establish entitlement to summary judgment is insufficient (*see Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 496 [1st Dept 2010]). Moreover, to the extent Plaintiff attempted to cure this defect in it reply papers, it is inappropriate (*see eg Henry v Peguero*, 72 AD3d 600 [1st Dept 2010]). Washington's allegations regarding Defendants' payment default were deficient as he does not indicate whether his knowledge on this point is personal or founded in records. To the extent that it was based upon the latter, the records evidencing the default (ie. an account ledger or similar), were not proffered (*see eg US Bank v Rowe*, 194 AD3d 978 [2d Dept 2021]). The annexed default notices are insufficient to establish a default in repayment (*see Bank of N.Y. Mellon v Mannino*, 209 AD3d 707 [2d Dept 2022]).

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, 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 [1st 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 [1st Dept 1978]).

The second affirmative defense that Defendant has complied with its mortgage obligations is not required. Non-compliance with the terms of the mortgage is part of Plaintiff's cause of action to foreclose and Defendant placed that matter in issue with its denials in the answer (CPLR §3018[a]).

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 [1st 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
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JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

EAST RIVER PLAZA LLC; RAFAEL E. BAEZ; STATE OF NEW YORK DEPARTMENT OF TAXATION & FINANCE; CITY OF NEW

YORK DEPARTMENT OF TRANSPORTATION PARKING VIOLATIONS BUREAU; and CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD,

Defendants.

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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 20, 2024 @ 12:20 pm** via Microsoft Teams.

4/19/2024
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