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. 850269/2022

MOTION DATE

MOTION SEQ. NO. 001

WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BENEFIT OF THE HOLDERS OF LCCM 2017-LC26 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-LC26,

Plaintiff,

- v -

1867-1871 AMSTERDAM AVENUE LLC, JAVIER MARTINEZ, 1861 AMSTERDAM AVENUE LLC,NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, JOHN DOE

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

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

The court *sua sponte* vacates its judgment of foreclosure and sale and decision and order on motion dated April 2, 2024, and substitutes the following in its place and stead:

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

In this action, Plaintiff seeks to foreclose on an amended, restated and consolidated, mortgage encumbering commercial real property located at 1867-1871 Amsterdam Avenue, New York, New York. The mortgage, dated June 1, 2017, was given by Defendant 1867-1871 Amsterdam Avenue LLC ("Amsterdam") to non-party Ladder Capital Finance LLC, ("Ladder") and secures a loan with an original principal amount of $4,100,000.00 which is memorialized by an amended, restated and consolidated note of the same date. Further, the parties also executed a loan agreement of the same date. The note, mortgage and loan agreement were executed by Defendant Javier Martinez ("Martinez") as Managing Member of non-party The Upper Group Equities, LLC, the managing member of Amsterdam. Concomitantly with these documents, Martinez, in his individual capacity, executed a guaranty of recourse obligations with respect to the indebtedness.

Plaintiff commenced this action and pled that Defendants defaulted in repayment of the indebtedness secured by the mortgage. Defendants Amsterdam, Martinez and Amsterdam Avenue LLC

answered jointly and pled 22 affirmative defenses, including lack of standing and failure to serve contractual pre-foreclosure notices, as well as four counterclaims. Plaintiff served a reply to the counterclaims. Now, Plaintiff moves for summary judgment against the appearing Defendants, a default judgment against the non-appearing parties, an order of reference and to amend the caption. Defendants Amsterdam and Martinez oppose the motion.

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]). 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]). 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]). In support of a motion for summary judgment on 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 Matthew Furay ("Furay"), a Servicing Officer of K-Star Asset Management LLC, ("K-Star"), the alleged special servicer to Plaintiff. Furay claims that the affidavit was made based upon "personal knowledge and personal review of the books and records of Plaintiff and Special Servicer". However, Furay does not indicate what portion of the affidavit is based solely upon personal knowledge, a review of documents or both (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019]["a witness may always testify as to matters which are within his or her personal knowledge through personal observation"]). To the extent the affiant's knowledge is based upon a review records, Furay demonstrated familiarity with the record keeping practices of K-Star and established a proper foundation for admission of its documents into evidence was business records under CPLR §4518 (*see eg Bank of N.Y. Mellon v Gordon*, supra at 204). The records of a prior servicer, Midland Loan Services, a Division of PNC Bank, National Association ("Midland") were also admissible since Furay sufficiently established that those records were received from Midland and incorporated into the records K-Star kept and that it routinely relied upon such documents in its business (*see eg Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]; *see also U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). K-Star's authority to act on behalf of Plaintiff was, contrary to Defendants' assertion, properly established with the power of attorney submitted in reply (*see Bank of N.Y. Mellon v Hoshmand*, 158 AD3d 600, 601 [2d Dept 2018]; *see also Deutsche Bank Natl. Trust Co. v Rudman*, 170 AD3d 950, 952 [2d Dept 2019]).

As to the Mortgagor's 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]). Here, Furay's review of the attached account records demonstrated that the Mortgagor defaulted in

repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]). Accordingly, Plaintiff established the material facts underlying the claim for foreclosure, to wit the mortgage, note, and evidence of mortgagor's default (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

As relevant to the circumstances in this action, standing can be demonstrated by a written assignment of the underlying note (*see Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *U.S. Bank N.A. v Carnivale*, 138 AD3d 1220, 1221 [2d Dept 2016]). Although a written assignment of a mortgage is often a nullity in this context (*see eg U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]), the assignment herein provides for transfer of the "Mortgages listed on Schedule A, attached hereto and by this reference made a part hereof, securing payment of note(s) of even date therewith, in the original principal amount of $4,100,000.00". The assignments also provide the mortgages were transferred "[t]ogether with any and all other liens, privileges, security interests, rights, entitlements, equities, claims and demands". This language sufficiently established conveyance of the notes (*see Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1st Dept 2023]; *US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1st Dept 2018]; *see also Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307 [3d Dept 2012]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2d Dept 2012]).

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 alleging lack of personal jurisdiction was waived when Defendants failed to move to dismiss pursuant to CPLR §3211[a][8] within sixty [60] days of pleading this affirmative defense (*see* CPLR §3211[e]).

The second affirmative defense based upon RPAPL §1302, 1303, 1304 and 1306 fails. RPAPL §1302 does not apply as the mortgage herein is commercial, not "residential". Reliance on RPAPL §1303 fails as Defendants do not plead the premises was occupied by residential tenants when the action was commenced. RPAPL §1304 is inapplicable to this action as the encumbrance is not a residential mortgage, to wit the borrower was not a "natural person" and debt was not incurred by the borrower primarily for "personal, family, or household purposes" (*see* RPAPL §1304[6][a][1][i] and [ii]; *Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]; *Independence Bank v Valentine*, 113 AD3d 62 [2d Dept 2013]). Since RPAPL §1304 is inapplicable, compliance with RPAPL §1306 was not required (*see* RPAPL §1306[1]).

The third affirmative defense alleging contractual pre-foreclosure notice was not given, fails as no provision in the note, mortgage or loan agreement requires service of such a notice upon default. Indeed, section 7.1 consolidated mortgage expressly provides that upon default, "Lender may take such

action, without notice or demand (subject to any notice and cure periods set forth in the Loan Agreement, if any)".

The fourth, fifth to the extent it claims lack of capacity, seventh, eighth, ninth, tenth, thirteenth, fourteenth, eighteenth, twentieth and twenty-second affirmative defenses claiming, *inter alia*, unclean hands, estoppel, laches, contractual breach, champerty, failure to join necessary parties, and non-compliance with unidentified statutes 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]).

The sixth affirmative defense alleging the action is barred by the statute of limitations, is conclusory and meritless. Defendants failed to offer any facts, or simply allegations, to support that the indebtedness under the note was accelerated more than six-years before this action was commenced (*cf. U.S. Bank N.A. v Salvodon*, 189 AD3d 925 [2d Dept 2020]; *21st Mtge. Corp. v Balliraj*, 177 AD3d 687 [2d Dept 2019]).

The eleventh affirmative defense fails as "documentary evidence is not by itself an affirmative defense, but merely one way in which a defense may be raised or proven" (*see Sotomayor v Princeton Ski Outlet Corp.*, 199 AD2d 197 [1st Dept 1993]).

The twelfth affirmative defense is unnecessary as it relates to the amount due and owing under the mortgage (*see 1855 E. Tremont Corp. v Collado Holdings LLC*, 102 AD3d 567, 568 [1st Dept 2013]). Even a mortgagor that has defaulted in appearing in a foreclosure action can appear and contest the amount due and owing under the mortgage (*see Wilmington Sav. Fund Socy., FSB v Moriarty-Gentile*, 190 AD3d 890, 892-893 [2d Dept 2021]). Parenthetically the Court notes the credit agreement provides that "Borrower waives any right it may have to require Lender to pursue any third Person for any of the Obligations".

The fifteenth, sixteenth, nineteenth and twenty-first affirmative defenses based upon alleged violations of the Truth in Lending Act (15 USC §1601), Regulation Z, 12 C.F.R. 226.23, CPLR § 306, CPLR § 3215(c) "HAMP guidelines", and the federal Single Family Loan Insurance Program, 12 U.S.C. 1709 are all inapplicable and inadequately pled.

To the extent the seventeenth affirmative defense is based on Banking Law §§6-l and 6-m, it is without merit as the loan here does not constitute a "home loan" as defined in either statute. The borrowers here are limited liability companies, the debt was commercial in nature and the borrowers do not reside at the premises.

With respect to the counterclaims, Defendants validly waived the right to assert same in section 11.19 of the loan agreement (*see Petra CRE CDO 2007-1, Ltd. v 160 Jamaica Owners, LLC*, 73 AD3d 883 [2d Dept 2010]). Further, since Plaintiff failed to proffer any argument to support dismissal of these claims they were 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 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 branch of Plaintiff's motion for summary judgment against the appearing Defendants, for a default judgment against the non-appearing parties, other than the guarantors, as well as the other relief is granted; and it is further

ORDERED that **Clark Whitsett, Esq. 66-05 Woodhaven Blvd., Rego Park, New York 11374 – 718-850-0003** 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 defendants John Doe #1 through John Doe #100 are hereby stricken and discontinued, without costs to any party as against the other, all without prejudice to the proceedings heretofore had herein; and it further

ORDERED, that the name of Plaintiff is hereby amended to reflect the correct date of the PSA to June 1, 2017, pursuant to CPLR §2001; and it is further

ORDERED, that the caption of this action is hereby amended to read as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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Wilmington Trust, National Association, As Trustee For The Benefit Of The Holders Of LCCM 2017-LC26 Mortgage Trust Commercial Mortgage Pass-Through Certificates, Series 2017-LC26, acting by and through Midland Loan Services, a PNC Real Estate Business, as Special Servicer under the Pooling and Servicing Agreement dated as of June 1, 2017,

Plaintiff,

-against-

1867-1871 AMSTERDAM AVENUE LLC, JAVIER MARTINEZ, 1861 AMSTERDAM AVENUE LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE and NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS,

Defendants.

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and it is

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 22, 2024, at 11:40 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.

4/26/2024
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	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			X	FIDUCIARY APPOINTMENT		REFERENCE