

Newbank v 43 Mott Realty Owner LLC

2024 NY Slip Op 31617(U)

May 3, 2024

Supreme Court, New York County

Docket Number: Index No. 850034/2022

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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NEWBANK, INDEX NO. 850034/2022
Plaintiff, MOTION DATE _____
MOTION SEQ. NO. 003

- v -

43 MOTT REALTY OWNER LLC, TAI CHEUNG REALTY,
INC., SEOUL GARDEN BOWERY INC., PETER PARK,
JONG MEE PARK, KEVIN YE, BISTRO MARKETPLACE 17
INC., 52 JP PARK CORP., NEW YORK STATE
DEPARTMENT OF TAXATION & FINANCE, CITY OF NEW
YORK DEPARTMENT OF FINANCE, JOHN DOE

**DECISION + ORDER ON
MOTION**

Defendant:

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 117, 118, 119, 120,
121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141,
142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 158, 159, 160, 161, 162

were read on this motion to/for

JUDGMENT - SUMMARY

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

The within action is to foreclose on a mortgage encumbering a parcel of commercial real property located at 43 Mott Street, New York, New York given by Defendants 43 Mott Realty Owner LLC (“Owner”) and Tai Cheung Realty, Inc. (“Realty”). The mortgage secures a loan made by Plaintiff, apparently in conjunction with the US Small Business Administration, to Defendant Seoul Garden Bowery Inc. (“Seoul”). The loan is memorialized by a note, dated June 1, 2017, with an original principal amount of \$1,200,000.00. The note was given to Plaintiff and was executed by Defendant Peter Park (“Peter”) as President of Seoul. The mortgage, also dated June 1, 2017, was executed by Defendants Kevin Ye (“Ye”), as Managing Member of Owner, and Ping Cheung (“Cheung”), as President of Realty. Concomitantly with these documents, Defendants Peter, Ye, Jong Mee Pary (“Jong”), Bistro Marketplace 17 Inc. (“Bistro”) and 52 JP Park Corp. (“52 JP”) each executed a document titled “Unconditional Guaranty” securing the indebtedness. Defendants Owner and Cheung executed documents titled “Unconditional Limited Guaranty”.

Plaintiff commenced this action alleging Defendants defaulted in repayment under the note and guarantees. All Defendants initially defaulted in appearing and by order of this Court dated June 22, 2022, Plaintiff was granted a default judgment and an order of reference was issued. By stipulation, so ordered on October 6, 2022, Plaintiff and Defendants Owner, Realty and Ye agreed to vacate the default against these Defendants only. Further, Plaintiff assented to accept these Defendants’ joint answer which, after amendment, contains eight [8] affirmative defenses. Also included in the amended answer was a section titled “VERIFIED THIRD-PARTY COMPLAINT” against existing Defendants Peter, Jong, Bistro and 52 JP. No third-party complaint was filed. By order of this Court dated May 5, 2023,

Plaintiff's motion for summary judgment was denied on the basis that *prima facie* proof of the note, mortgage, as well as the defaults by Mortgagors and Guarantor in repayment was not established. Now, Plaintiff again moves for summary judgment against Owner, Realty and Ye, striking the affirmative defenses, appointing a referee to compute and to amend the caption. Defendants Owner, Realty and Ye 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 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 Sang Min Ahn ("Ahn"), Senior Vice President and Head of Loan Portfolio Management for Plaintiff. Ahn claims the affidavit was made based upon his "own personal knowledge or upon my review of NewBank's books and records". Although Ahn does not indicate what information is based on personal observation or derived from records (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019]), to the extent Ahn's knowledge is based upon a review of the books and records, he laid a proper foundation for the admission of Plaintiff's records into evidence under CPLR §4518 (*see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]; *see also Bank of N.Y. Mellon v Gordon*, supra at 204). The records of other entities were also admissible since Ahn sufficiently established that those records were received from the makers and incorporated into the records Plaintiff kept and that it routinely relied upon such documents in its business (*see U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). The records referenced by Ahn were annexed to the moving papers as required (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). 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, Ahn's review of the attached account records demonstrated that Defendants 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, Ahn's affidavit established the mortgage, note, and Mortgagor's default (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

As to the guarantors' liability, unlike the prior motion, the guarantees are presently in admissible form. "On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). In support of the branch of the motion against Defendant Ye and Owner Plaintiff demonstrated that they executed an unconditional guaranty of the indebtedness and that and have not performed thereunder. Concerning Owner, the limitation in that guarantee was not conditioned on the occurrence of certain events (*cf. Nexbank, SSB v Soffer*, 129 AD3d 485 [1st Dept 2015]), rather Owner's liability is

limited to the collateral pledged therein. As such a *prima facie* case for summary judgment against these Defendants individually was made.

In opposition, Defendants assertion that they are entitled to have the Court reconsider its stricken affirmative defenses is misplaced. A party may not seek reconsideration of a determined issue by naked request in opposition papers. CPLR §2221[e] mandates that such relief may only be obtained via motion to renew or reargue that “shall be identified specifically as such” (*see Barasch v Williams Real Estate Co., Inc.*, 104 AD3d 490 [1st Dept 2013]). In any event, an unconditional guarantor cannot raise any defenses personal to the principal on the guaranteed obligation (*see I Bldg, Inc. v Hong Mei Cheung*, 137 AD3d 478, 478 [1st Dept 2016]) except a defense of failure of consideration for the principal contract (*see Moon 170 Mercer, Inc. v Vella*, 169 AD3d 537 [1st Dept 2019]; *see also Walcutt v Clevite Corp.*, 13 NY2d 48, 56 [1963]). Here, Defendants failed to demonstrate in their stricken affirmative defense, as well as in opposition to both this and the prior motion, an issue of fact as to how the underlying loan transaction was entirely lacking in consideration.

As to the remaining portion of the fourth affirmative defense, with the grant of summary judgment the only issue outstanding is the amount due and owing which is not a defense to summary judgment (*see eg 1855 E. Tremont Corp. v Collado Holdings LLC*, 102 AD3d 567 [1st Dept 2013]). Moreover, since the liability under the guarantees exists to explicitly secure the amount due and owing under the loan documents, it is incidental to the foreclosure action (*LibertyPointe Bank v 7 Waterfront Prop., LLC*, 94 AD3d 1061 [2^d Dept 2012]) and likewise not a defense to summary judgment.

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, as well as the other relief is granted; and it is further

ORDERED that fourth affirmative defense in Defendants’ answer is stricken, and it is

ORDERED that **Christy M. Demelfi, Esq., 2280 Grand Avenue, Suite 202 Baldwin New York 11510, (516) 887-1975** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and examine whether the tax parcel 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 the caption of this action and all papers previously filed herein shall be amended by striking defendants “John Doe #1” through “John Doe #50” all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that the caption shall be amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
NEWBANK,

Plaintiff,

-against-

43 MOTT REALTY OWNER LLC, TAI CHEUNG REALTY,
INC., SEOUL GARDEN BOWERY INC., PETER PARK, JONG
MEE PARK, KEVIN YE, BISTRO MARKETPLACE 17 INC., 52
JP PARK CORP., NEW YORK STATE DEPARTMENT OF
TAXATION & FINANCE, CITY OF NEW YORK
DEPARTMENT OF FINANCE,

Defendants.

-----X
and it is 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/suptctmanh)); 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 **September 19, 2024, at 2:10 p.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.

5/3/2024
DATE

CHECK ONE:

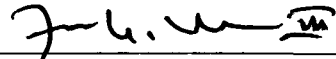
CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE


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