106E101 Holdings LLC v 106 E. 101 St. I LLC
2026 NY Slip Op 31145(U)
March 20, 2026
Supreme Court, New York County
Docket Number: Index No. 850197/2019
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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106E101 HOLDINGS LLC,

Plaintiff,

- v -

106 EAST 101 ST. I LLC, ESTHER SIROL, CARLOS HEINTZ, TRUSTEE OF THE ESTHER SIROL IRREVOCABLE TRUST, MANZELLE ORANGE, ROBERT GRANDOTTO,

Defendant.

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INDEX NO. 850197/2019

MOTION DATE

MOTION SEQ. NO. 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444

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

Upon the foregoing documents, Plaintiff's motion is decided as follows:

The present matter is an action to foreclose on a mortgage encumbering a parcel of real property located at 106 East 101st Street, New York, New York. The mortgage secures a loan in the original principal amount of $1,100,000.00, given by Defendant 106 East 101 St. I LLC ("Mortgagor") to Plaintiff, 106E101 Holdings LLC ("106E101 Holdings") which is memorialized by a mortgage note. The mortgage and note, both dated May 3, 2019, were executed by Defendant, Esther Sirol, as the sole member of 106 East 101 St. I LLC. The maturity date in the note was April 30, 2020, and required monthly interest payments on the first day of each month proceeding the maturity date. Concomitantly with the loan documents, Defendant Esther Sirol executed a guaranty of payment of the indebtedness. The subject mortgage satisfied a prior CEMA, which had consolidated four prior mortgages as to the subject property.

Plaintiff commenced this action, and pled in the complaint, *inter alia*, that Mortgagor defaulted by transferring the subject premises to Defendant Carlos Heintz ("Heintz") Trustee of the Esther Sirol Irrevocable Trust, on May 21, 2019, and for failing to repay the amounts due under the mortgage and note. By Order dated February 26, 2020, default judgment was granted against all Defendants. By Order dated September 20, 2021, default was vacated as against Mortgagor, Esther Sirol and the Esther Sirol Irrevocable Trust ("the Trust") only[1]. Answers were then filed. Sonia Sirol (Esther Sirol's daughter) and Alejandro James (Esther Sirol's nephew), as Trustees of the Trust, answered and pled 15 affirmative

[1] Defendants Heintz, Mazelle Orange and Robert Grandotto remain in default for their failure to appear.

defenses, including personal jurisdiction, Esther Sirol's lack of mental capacity, fraud, unconscionability, unclean hands, criminal usury, predatory lending, TILA, and violations of RPAPL §§282, 1306, 1304, and 1303, 12 C.F.R. § 1024.41 as well as Banking Law 6-l. As appointed guardian, Emily Ann Klotz, Esq. answered on behalf of Esther Sirol in her individual capacity and as the sole member of the Mortgagor and pled similar affirmative defenses.

Now, Plaintiff moves for summary judgment against Mortgagor, Esther Sirol and the Trust, to strike the answering Defendants' affirmative defenses and to appoint a referee to compute the amount due, or in the alternative, to convert the pleadings to grant Plaintiff an equitable mortgage and appoint a referee. Sonia Sirol, as trustee of the Trust, opposes 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]). Also, based on the affirmative defenses pled, Plaintiff was required to demonstrate its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]). 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 specific business records must be proffered, provided 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]).

On the branches of the motion for summary judgment and appointment of a referee, Plaintiff established the mortgage, note, and evidence of Mortgagor's default in repayment via the affirmation of Adam Steiner ("Steiner"), a Manager of 106E101 Holdings, which was sufficiently supported by admissible business records annexed thereto (*see eg Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Contrary to Defendant Trust's opposition, Steiner's authority on behalf of 106E101 Holdings and his personal knowledge was sufficiently established (*see U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *US Bank N.A. v Louis*, 148 AD3d 758 [2d Dept 2017]). On the issue of default, Holdings demonstrated Mortgagor defaulted by failing to pay the amounts due under the note and mortgage as of July 1, 2019. In opposition, as Defendant Trust did not offer any opposition on this issue the monetary default was "deemed to be admitted" (*Bank of Am. v* Brannon, 156 AD3d, 1, 6 [1st Dept 2017])[2].

Concerning standing, in a foreclosure action it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to

[2] The dispute over whether a default occurred because the subject property was impermissibly transferred to Defendant Heintz, as Trustee of the Trust, is rendered moot.

commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). Since 106E101 Holdings was the lender when the mortgage and note were given, it was in direct privity with the mortgagor when the action was commenced, and, therefore, unquestionably had standing (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]).

Accordingly, Plaintiff established its *prima facie* entitlement to summary judgment with proof of the mortgage, note, and evidence of mortgagor's default in repayment and its standing. This shifted the burden to Defendants to raise a bona fide issue of fact as to one of their affirmative defenses to foreclosure (*see Bernstein v Dubrovsky*, 169 AD3d 692 [1st Dept 2019]).

In opposition, Defendant Trust proffers arguments in support of its affirmative defenses of lack of mental capacity; undue influence; fraud; unconscionability and criminal usury. Although not pled as an affirmative defense, in opposition to the motion Defendant Trust posits that the mortgage is civilly usurious and void under General Obligations Law §5-501[1] and Banking Law § 14–a[1]. No opposition to the motion was submitted on behalf of Esther Sirol, either in her personal capacity or as the sole member of the Mortgagor, 106 East 101 St. I LLC.

With respect to the affirmative defense of lack of mental capacity, undue influence and fraud, Defendant Trust argues that Esther Sirol was fraudulently induced by 106E101 Holdings into signing the deed, mortgage and guaranty, rendering same void. Defendant relies upon Esther Sirol's May 22, 2020, affidavit, records showing hospitalization for psychiatric observation in January 2019, records from her June 28, 2019, and August 6, 2020, psychiatric evaluations as well as the March 8, 2021, Order following an Article 81 hearing, appointing a Guardian for Esther Sirol.

Although there may be evidence that indicates that Esther Sirol's mental competency began deteriorating as of January 2019, prior to the execution of the subject mortgage, Defendant Trust has not raised an issue of fact that Esther Sirol was incompetent when the transactions occurred. "A party's competence to enter into a contract is presumed, and the party asserting incapacity bears the burden of proof (*see Er-Loom Realty, LLC v Prelosh Realty, LLC*, 77 AD3d 546, 548 [1st Dept 2010]). Nor has Defendant Trust shown that 106E101 Holdings knew, or should have known, of Esther Sirol's alleged incapacity. (*see Weisberg v DeMeo*, 254 AD2d 351, 351 [1st Dept 1998]). Moreover, although "[a] mortgagor may be relieved from his default under a mortgage upon a showing of waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct by the mortgagee", here Defendant Trust's arguments concern allegations as to Defendant Heintz's alleged improper conduct. (*EBC Amro Asset Mgmt. Ltd. v Kaiser*, 256 AD2d 161, 162, [1st Dept 1998]). Defendant Trust has not shown any improper conduct on the part of 106E101 Holdings.

"To successfully raise the defense of usury, a debtor must allege and prove by clear and convincing evidence that a loan or forbearance of money, requiring interest in violation of a usury statute, was charged by the holder or payee with the intent to take interest in excess of the legal rate" (*Blue Wolf Capital Fund II, L.P. v American Stevedoring Inc.*, 105 AD3d 178, 183 [1st Dept 2013]). Criminally usury is defined under Penal Law §§ 190.40 and 190.42 as well as General Obligations Law §5-521[3]. A loan is criminally usurious when it imposes interest at "a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period." (Penal Law §190.40; *see also* 1 Bergman on New York Mortgage Foreclosures § 6.03[7] [2026]). Per GOL §5–501[1], [2] and Banking Law §14–a[1], a loan is civilly usurious if its interest rate exceeds 16% per annum.

A defense of criminal usury is available to both individual and corporate borrowers (*see Adar Bays, LLC v GeneSYS ID, Inc.*, 37 NY3d 320, 330 [2021]). However, civil usury is ordinarily not available to a corporation or a guarantor of such an entity's debt (*see* GOL §5-521; *Bankers Trust Co. v Braten*, 184 AD2d 239 [1st Dept 1992]). Although a corporation, or individual guarantor of a corporate obligation, may not ordinarily assert a defense of civil usury, "where the loan was in fact, although not in form, made to an individual guarantor to discharge his personal obligations, and not in furtherance of a corporate or personal enterprise, the individual guarantor may interpose the defense of usury" (*Schneider v Phelps*, 41 NY2d 238, 242 [1977]). "To determine whether a transaction is usurious, courts look not to its form but to its substance or real character" (*Blue Wolf Cap. Fund II, L.P. v. Am. Stevedoring Inc.*, 105 AD3d 178, 183 [1st Dept 2013]).

Initially, Defendant Trust's failure to specifically plead an affirmative defense of civil usury does not preclude its assertion in opposition to this motion (*see Rogoff v San Juan Racing Ass'n*, 54 NY2d 883, 885 [1981]). Defendant Trust pled affirmative defenses of criminal usury and unconscionability, "Plaintiff does not contend that it was surprised, and it had a full opportunity to address the arguments in its reply papers in its original summary judgment motion" (*NY 2015 Boat LLC v Shapiro*, 234 AD3d 554, 557 [1st Dept 2025]).

Defendant Trust's opposition raised a question of fact as to the applicability of a civil usury defense despite the Mortgagor being a limited liability company. The Court of Appeals has "made it clear that in cases like the present one the availability of the defense of usury turns on the resolution of the ultimate question of fact -- was the corporate form used to conceal a usurious loan to an individual guarantor?" (*Schneider v Phelps*, supra at 241-242). Here there is sufficient evidence that 106 East 101 St. I LLC may have been used to secure a loan to satisfy and discharge a personal debt and obligation of Esther Sirol (*see NY 2015 Boat LLC v Shapiro*, supra; *542 A Realty, LLC v A. Davis, LLC*, 189 AD3d 950 [2d Dept 2020]; *Shapiro v Weissman*, 7 AD2d 752 [2d Dept 1958]). Per Esther Sirol's affidavit (submitted in connection with a prior motion in this matter), dated May 22, 2020, as well as the 1994 deed, Esther Sirol acquired the subject premises on or about August 8, 1994, and resided at the property thereafter. The prior CEMA, satisfied by the subject mortgage, was entered into by Esther Sirol personally and the corporate entity, 106 East 101 St. I LLC, was created less than a month prior to the subject closing.

Defendant Trust has also raised a question of fact as to whether the effective or "true" interest rate for the subject mortgage was usurious (*see Band Realty Co. v North Brewster, Inc.*, 37 NY2d 460 [1975]). An instrument requiring interest in excess of the legal limit could render it usurious and unenforceable as *void ab initio* (*see* GOL §5–501[2] and §5-511; *see also Feivel Funding Associates v Bender*, 156 AD3d 416, 417 [1st Dept 2017]). "Expressed verbally, the formula to be used in arriving at the effective rate of interest is as follows: Take the annual interest borne by the note, plus the total of all prepaid finance charges (these include points and other charges properly includable as interest, but not to include prepaid interest, and are referred to in Band Realty as the "discount"), with the latter to be divided by the term of the loan in years. Divide the resulting sum by the difference between the principal amount of the loan and the total prepaid finance charges (i.e., the "discount")" (1 Bergman on New York Mortgage Foreclosures § 6.02[4] [2026][emphasis added]; *see also Band Realty Co. v. North Brewster, Inc.*, supra at 462).

Here, Mortgagor borrowed $1,100,000 from Plaintiff and at the 12% rate contained in the note, the total annual interest is $132,000. Defendant Trust, relying upon the closing statement, asserts that there were $54,633.14 in prepaid finance charges comprised of $22,000 to Choice Marketing Solutions,

Inc. for "broker fees", $22,000.00 to Orchard Consulting LLC for "organization" fees and $10,633.14 to Plaintiff for "Short Term Interest". Thus, the total annual interest would be $186,663.14[3] and the net loan funds received by Mortgagor is $913,336.86 ($1,100,000, the loan principal, *minus* the retained interest $186,663.14). Expressed as a percentage of the net loan funds, the potential effective interest rate is 20.4% which is in excess of the civil usury cap of 16% (GOL § 5–501[1], [2] and Banking Law § 14–a[1]), but not the criminal usury limit of 25% (Penal Law §190.40). Therefore, Defendant Trust has raised an issue of fact with respect to a *bona fide* defense of civil usury and unconscionability that precludes summary judgment (*see B.D. Estate Planning Corp, v Trachtenberg*, 114 AD3d 477 [1st Dept 2014]).

Defendants Trust, Esther Sirol and the Mortgagor did not oppose that portion of 106E101 Holdings' motion which sought to dismiss the affirmative defenses sounding in RPAPL §§282, 1303, 1304 and 1306, 12 C.F.R. §1024.41, Banking Law §6-l; TILA, predatory lending, unclean hands or lack of personal jurisdiction. As no specific legal argument was proffered in support of the remaining affirmative defenses, they are 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]).

That branch of Plaintiff's motion which seeks to amend the complaint to conform to the evidence per CPLR §3025[c], to assert a claim for an equitable mortgage, is denied without prejudice. A motion to pursuant to CPLR §3025[c] is more properly made to the trial judge, upon the proof established at the time of trial. Moreover "... the doctrine of equitable mortgage is inapplicable where a legal written mortgage exists" (*see Auquilla v Villa*, 240 AD3d 48, 61–62 [2d Dept 2025]). Plaintiff has not shown why this Court should consider an equitable mortgage at this time where it maintains there is a valid mortgage.

ORDERED that Plaintiff's motion for summary judgment and an order of reference is denied, and it is further

ORDERED that all the affirmative defenses in the answers of Defendant Esther Sirol Irrevocable Trust's, 106 East 101 St. I LLC and Esther Sirol except the 10th and 14th, as they relate to unconscionability and civil usury, are to be stricken.

3/20/2026
DATE

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

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[3] Since the term of the loan is effectively one year, no adjustment to this amount occurs under the formula.