

<b>Flushing Savs. Bank, FSB v PJ Bricks, LLC</b>
2012 NY Slip Op 30056(U)
January 11, 2012
Supreme Court, New York County
Docket Number: 810087/11
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

Index Number : 810087/2011

FLUSHING SAVINGS BANK

vs

P.J. BRICKS, LLC

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 1/11/12

HON. JUDITH J. GISCHE *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS 10

-----X  
Flushing Savings Bank, FSB,

Plaintiff,

**Decision/Order**

-against-

Index #: 810087/11

Mot. Seq. #: 002

PJ Bricks, LLC,  
New York State Department of Taxation and Finance,  
New York City Department of Finance,  
Paul Urban, Board of Managers of the New York  
Industrial Condominium, Baron Upholsterers, Inc.,  
"John Does No. 1 to John Doe No. xxx" inclusive,  
the last thirty names being fictitious and unknown to  
plaintiff, the persons or parties intended being the  
tenants, occupants, persons or corporations, if any,  
having an interest in or lien upon the premises  
described in the complaint.

Presiding:

Hon. Judith J. Gische, JSC

J.S.C.

Defendants.

-----X  
Hon. Judith J. Gische:

Pursuant to CPLR 2219(a) the following numbered papers were considered by the court on this motion.

PAPERS	NUMBERED
N/M, KS affirm., JB affd., exhibits.....	1
PBVU affd. In opp., exhibits.....	2
KS reply affirm., JB reply affd., exhibits.....	3
MLK sur-reply affirm., exhibits.....	4
KS Sur-reply affirm., exhibits.....	5

*Upon the foregoing papers the decision and order of the court is as follows:*

This is a mortgage foreclosure action. Plaintiff, Flushing Savings Bank, FSB ("FSB") now moves for summary judgment, the appointment of a referee and the amendment of the caption. Defendants, Paul Urban ("Urban"), Baron Upholsterers, Inc. ("Baron Upholsters") and PJ Bricks LLC ("PJ Bricks") (collectively "Baron defendants")

jointly oppose the motion. Issue has been joined by the Baron defendants and no note of issue has been filed. The motion is, therefore, properly before the court for consideration on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

The underlying action seeks to foreclose a commercial mortgage, secured by the premises known as unit 3 located at 545 West 45<sup>th</sup> Street, New York, New York ("premises"). In their verified answer, the Baron defendants have denied the material allegations in the complaint and interposed six affirmative defenses ("AD"), claiming respectively: failure to state a cause of action (1<sup>st</sup> AD), waiver, estoppel, laches and unclean hands (2<sup>nd</sup> AD), ratification and equitable estoppel (3<sup>rd</sup> AD), failure to give notice (4<sup>th</sup> AD), failure to mitigate (5<sup>th</sup> AD) and reservation of the right to assert additional ADs (6<sup>th</sup> AD).

#### Discussion

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact, also through admissible evidence Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 (1<sup>st</sup> Dept 2003). On a motion for summary judgment, it is for the court to decide any issues of law that are raised. Hindes v. Weisz, 303 A.D.2d 459 (2<sup>nd</sup> Dept 2003).

[\*4]

## 1. Affirmative Defenses

Preliminarily, the court addresses that part of the motion which seeks to dismiss the affirmative defenses. The affirmative defenses asserted by the Baron defendants are boilerplate. FSB has made a *prima facie* showing that each and every one of the affirmative defenses fails, as a matter of law. The Baron defendants do not oppose that part of the motion seeking dismissal of the affirmative defenses. Therefore, the motion for summary judgment dismissing the affirmative defenses is granted.

## 2. Mortgage Foreclosure

In order to establish a *prima facie* case in a mortgage foreclosure action, the proponent must produce the mortgage, the note and evidence of a default. EMC Mtge Corp. v. Riverdale Associates, 291 AD2d 370 (2<sup>nd</sup> dept, 2002); New York State Mortgage Loan Enforcement and Administration Corporation v. North Town Phase II Houses, Inc., 191 AD2d 151 (1<sup>st</sup> Dept. 1993). The Baron defendants argue that the motion should be denied because FSB has failed to prove its *prima facie* case.

The motion is supported by the sworn affidavit of Joseph Baldasare, a vice president with FSB. His affidavit is based upon the books and records of FSB. The Baron defendants claim that he is not competent to submit an affidavit in this case. This contention is rejected. An employee affidavit, based upon documentary evidence maintained by a bank, is sufficient to support a motion for summary judgment in a mortgage foreclosure action. EMC Mtge Corp. v. Riverdale Associates, supra; (prima facie case of mortgage default supported by documents and employee affidavit); Barclays Bank of New York NA v. Smitty's Ranch, Inc., 122 AD2d 323 (3<sup>rd</sup> dept. 1986).

In his affidavit, Baldasare claims that PJ Bricks obtained a mortgage from

[\* 5]

European American Bank ("EAB"), in November 1999, in the amount of \$741,000. PJ Bricks then obtained another mortgage from Citibank NA ("Citibank"), in June, 2004, in the amount of \$531,469.71. Baldasare asserts that these two mortgages were consolidated and extended to form a single lien, in the amount of \$1,200,000, and that the consolidated mortgage was then assigned to FSB, on October 17, 2008. Baldasare also states that FSB gave PJ Bricks a further mortgage, in October 2008, in the amount of \$2,514,608.96. Baldsare claims that the first two assigned consolidated mortgages and the new mortgage were then further consolidated and extended, in October 2008, to form a single lien in the amount of \$3,500,000. Baldasare claims that Urban and Baron Upholsterers guaranteed the consolidated and extended \$3,500,000 mortgage. All of these mortgages, Baldasare claims, are secured by the premises.

Baldasare asserts that, beginning December 1, 2010, and for each and every month thereafter, defendants have failed to pay the monthly amount due on the mortgage and that they are in default.

The documents originally provided in support of the motion were collectively attached to the summons and complaint. Some of the documents were simply exhibits to other documents. In reply, however, the documents were separated and clarified. The documents supporting the motion consist of the following:

- [1] An executed 1999 mortgage note by PJ Bricks in favor EAB for \$741,000;
- [2] An executed 1999 mortgage and security agreement from PJ Bricks to EAB;
- [3] An executed 2004 note by PJ Bricks in favor of Citibank in the amount of \$531,469.71;
- [4] An executed 2004 mortgage, consolidation and extension agreement from PJ

Bricks in favor of Citibank NA in the amount of \$1,200,000 representing the consolidation of the EAB mortgage and the new Citibank loan into a single lien;

[5] An executed 2008 assignment of the Citibank mortgages to FSB;

[6] A 2008 executed "Gap Note" by PJ Bricks in favor of FSB in the amount of \$2,514,608.96;

[7] A 2008 executed mortgage and security agreement from PJ Bricks in favor of FSB in the amount of \$2,514,608.96;

[8] A 2008 executed Consolidation, Modification and Extension Agreement between FSB and PJ Bricks in the amount of \$3,500,000 representing the consolidation of the assigned Citibank mortgages with the new FSB mortgage;

[9] A 2008 executed amended, consolidated and Restated Mortgage note made by PJ Bricks in favor of FSB in the amount of \$3,500,000 and

[10] An October 23, 2008 affidavit made by Paul Urban in his capacity as a member of PJ Bricks pursuant to Article 11 §255 of the Tax law, and

[11] A 2008 executed guaranty by urban and Baron Upholsterers in favor of FSB<sup>1</sup>.

The Baron defendants claim that these documents are deficient in two ways. First they argue that the chain of documentation fails to show that the EAB mortgage was assigned to Citibank. While they originally claimed that there was no proof that Citibank had assigned the mortgages to FSB, the executed assignment was, thereafter, provided in reply (Sheehan reply affirmation, exhibit E). Although the actual assignment of the EAB mortgage to Citibank is not part of the documents provided on this motion,

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<sup>1</sup> This document is only found as part of the conglomerate exhibit to the summons and complaint.

[\* 7]

there is still overwhelming documentary proof that such an assignment occurred. In the 2004 Mortgage, Consolidation and Extension Agreement, signed by Urban on behalf of PJ Bricks, it is acknowledged that Citibank owned the EAB mortgage at that time. In addition, in 2008 Urban, acting on behalf of PJ Bricks, signed an affidavit acknowledging that Citibank validly assigned the EAB 1999 mortgage to FSB. The purpose of the affidavit was to have the New York State Tax Department declare the October 23, 2008 agreements a non-taxable event, which would not have been the case had the EAB mortgage not been validly assigned.

The second problem that the Baron defendants point out with the documents is that FSB has not produced an executed copy of the 2008 Mortgage, Security Agreement and Assignment of Leases and Rents ("2008 Restated Mortgage"). In fact, there is no executed copy of the 2008 Restated Mortgage provided on this motion either in the motion in chief or reply.

The 2008 Restated Mortgage is an exhibit to the October 23, 2008 Consolidation, Modification and Extension Agreement ("CMEA"), which is executed by PJ Bricks. FSB argues that because the CMEA incorporates the 2008 Restated Mortgage by reference, it is as if the document was actually executed. The Baron defendants claim that the CMEA does not incorporate the 2008 restated Mortgage by reference and that, in any event, GOL §5-703 requires that the 2008 Restated Mortgage actually be executed, in order to be enforceable.

GOL § 5-703, otherwise known as the statute of frauds, provides that contracts concerning real estate are required to be in writing. It applies to mortgages. Tri-land Properties, Inc. v. 115 West 28<sup>th</sup> Street Corp., 238 AD2d 214 (1<sup>st</sup> dept. 1997); Hallaway

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v. Properties, Inc. v. Bank of New York, 155 AD2d 897 (1<sup>st</sup> dept. 1989). Unsigned instruments or writings, however, may be integrated with other writings so as to satisfy the statute of frauds. Meyer v. Nelson, 83 AD2d 422 (1<sup>st</sup> dept 1981). As recently stated in the case of Taylor Diversified Corporate Services, Inc. v. AMBAC Assur. Corp., 81 AD3d 810 (2<sup>nd</sup> dept. 2011):

“...[T]he statute [of frauds] does not require that an agreement be contained in one signed document, however. Rather, it may be satisfied by multiple writings, signed and unsigned, provided that all of the terms must be set out in the various writings presented to the court, and at least one writing, the one establishing the contractual relationship between the parties, must bear the signature of the party to be charged, while the unsigned document must on its face refer to the same transaction as that set forth in the one that was signed.”

Here, the CMEA was executed by Urban, the party to be charged, on October 23, 2008. Whether the CMEA expressly incorporates by reference the 2008 Restated Mortgage is not as important as whether the documents, presented at the same time, are referable to one another and when taken together, form the whole of the parties' agreement. This is clearly the case. In fact, other documents executed by Urban at the same time on October 23, 2008 further prove this point. The October 23, 2008, Amended, Consolidated and Restated Mortgage Note refers to the mortgage simultaneously made. So too, Urban's own affidavit, made to persuade the New York State Tax Department that no taxes are due on the October 23, 2008 transactions. The affidavit refers to PJ Brick having committed itself to the 2008 Restated Mortgage. Consequently, the documents, when viewed together, satisfy the statute of frauds.<sup>2</sup>

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<sup>2</sup> No argument is made about partial performance which likely would have been a separate basis to defeat the bar of the statute of frauds. See: Pinkava v. Yurkiw, 64

[\* 9]

The court holds that FSB, therefore, has proven the existence of an enforceable note and mortgage.

The court also finds that Baldasare's statement, that the Baron defendants have failed to make the monthly installment payments due under the mortgage and note, is sufficient to prove, *prima facie*, that there was a default. EMC Mtge Corp. v. Riverdale Associates, supra. The Baron defendant's argument, that FSB has not provided a breakdown of the amounts due, does not bar summary judgment on this matter. The issue of what amounts are actually owed may be resolved after a reference to a Special Referee. Crest/Good Mfg. Co. v. Baumann, 160 AD2d 831 (2<sup>nd</sup> dept. 1990).

The court, therefore, finds that FSB has proven a *prima facie* case entitling it to summary judgment on its cause of action to foreclose a mortgage.

The court also rejects the Baron defendants' argument, that the existence of another action, between the same parties, pending in the New York State Supreme Court in Nassau County, bars this action (Flushing Savings Bank, FSB v. Baron Upholsterers, Inc., Index # 003821/11) ("Nassau County action"). The Nassau county action involves a default in the repayment of a line of credit, not foreclosure of a mortgage. While FSB claimed in that action that the default was, in part, based upon a default in the payment of the mortgage, Justice Driscoll has already held that the action before him and this action seek distinct relief.

Because FSB has proven a *prima facie* case on its claim to foreclose the mortgage, and the Baron defendants have raised no triable issue of fact, the motion

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AD3d 690 (2<sup>nd</sup> dept. 2009).

10] granting FSB summary judgment is granted.

3. Appointment of a Referee

FSB seeks the appointment of a referee to compute the amounts it is owed. In view of the fact that the motion for summary judgment has been granted, the motion to appoint a referee is, likewise, granted. The court appoints **Francis L. Valente, Jr. c/o Townsend & Valente, LLP, 1212 Avenue of the Americas, 18<sup>th</sup> Floor, New York, New York 10036 ([212] 687 4385)**. The reference is made under CPLR Article 40, however, and not RPAPL §1321. See Mortgage Elec. Registration Sys., Inc. v. Maki, 9 Misc.3d 983 (NY Sup. 2005, Sen Co.).

4. Amendment of Caption

In reply, Attorney Sheen withdraws that part of the motion seeking to substitute PJ Brick and Baron for the John Does. The Baron defendants do not oppose amendment to eliminate the unidentified defendants listed in the caption as the John Does. The motion is granted to the extent of eliminating the John Does from the caption.

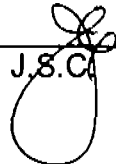
**Conclusion**

The plaintiff's motion is granted to the extent set forth herein. This constitutes the court's decision. Plaintiff is directed to settle an order consistent with this decision, on notice to all appearing parties.

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York  
January 11, 2011

So Ordered:

  
\_\_\_\_\_  
J.G. J.S.C.