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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 810098/2010
HUDSON VALLEY BANK, N.A.
vs.
L.G.R.R.A. REALTY LLC
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 9/8/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed Memorandum Decision and Order

Dated: 1/6/12

EMILY JANE GOODMAN 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: PART 17

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WEXA1 HBV LLC, AS ASSIGNEE
OF HUDSON VALLEY BANK,

Plaintiff,

-against-

Index No.: 810098/2010

L.G.R.R.A. REALTY LLC, TRANSUS LLC,
DRAGON'S SURFSIDE REALTY, LLC,
LAWRENCE OMANSKY, MARILYN BROWN,
LEON OMANSKY TRUST, ROBERT OMANSKY,
SALLY OMANSKY, URBAN UNDERGROUND
REALTY, LLC, THE BOARD OF MANAGERS
OF THE DRAGON ESTATES CONDOMINIUM,
and ENVIRONMENTAL CONTROL BOARD OF
THE CITY OF NEW YORK, and "JOHN DOE"
No. 1-5, the true names of said defendants being
unknown to plaintiff, the parties intending to be
those Persons sharing or claiming an interest in
the mortgages premises described in the Complaint
by virtue of being tenants, or occupants, or
judgment-creditors, or lienors of any type or nature
in all or part of said premises,

Defendants.

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EMILY JANE GOODMAN, J.:

Plaintiff, WEXA1 HBV LLC, as assignee of Hudson Valley Bank (WEXA1), seeks to recover on a note that is secured by a Mortgage and Security Agreement (the Mortgage) affecting real property consisting of a commercial condominium unit, Unit 1W, at 51 Warren Street in Manhattan (the Unit), and the guarantees of several of the individual defendants. Plaintiff moves, pursuant to CPLR 3212, for summary judgment in its favor on its complaint, and to dismiss the affirmative defenses of the defendants who have answered in this action, that is, L.G.R.R.A Realty LLC, Transus LLC, Dragon's Surfside Realty LLC, Lawrence Omansky,

Marilyn Brown, Leon Omansky Trust, Robert Omansky and Sally Omansky (the Answering Defendants). WEXA1 also seeks a default judgment against the defendants that have not answered (CPLR 3215), the appointment of a referee to compute the amount due to plaintiff under the note and to determine whether the property should be sold in one parcel, and to amend the caption.

Hudson Valley Bank, N.A. (HVB) commenced this action on or about November 26, 2010. In the verified complaint, plaintiff alleges that it is the owner and holder of a Revolving Line of Credit Promissory Note in the principal amount of $1,700,000.00 plus interest and fees (the Note), and the Mortgage affecting the Unit. The Mortgage was executed by defendant L.G.R.R.A Realty LLC, by Lawrence Omansky, its member, and secures the Note. The Note, executed by Transus LLC and Dragon's Surfside Realty, LLC, states that it is secured by the guarantees of defendants L.G.R.R.A. Realty LLC, Lawrence Omansky, and Marilyn Brown and a first-lien mortgage on the real property referred to here as the Unit. The maturity date stated on the Note is September 1, 2009.[1]

Plaintiff alleges that it has not been paid all outstanding principal and interest due on the Note upon its maturity date, and that it sent a default notice advising the mortgagors and obligors that it would enforce its remedies under the Note and Mortgage if the default were not cured, but to no avail. Plaintiff further contends that it has not been paid certain escrow payments, for taxes and other costs, as provided for in the loan documents, that defendants have not paid these costs,

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[1]Plaintiff states the maturity date as October 16, 2009, but the Note itself states that the entire balance of the instrument, "if not renewed by the Bank, shall become due and payable in full on September 1, 2009 (the 'Maturity Date') (*see* Pl. Mov., Exh. B, [Revolving Line of Credit Promissory Note annexed to Summons and Verified Complaint]). The Answering Defendants do not mention this discrepancy, and there is no indication that it has any effect on the outcome.

and that during the pendency of this action it might be compelled to pay sums due on various things, such as insurance premiums, and water charges on the mortgaged premises. Plaintiff prays that it may recover these amounts, to be repaid from the proceeds of the sale of the mortgaged premises, and seeks contractual attorneys' fees under the Mortgage, as well as costs and disbursements. Plaintiff also seeks to recover any deficiency due under the Note, after the foreclosure sale, from the alleged guarantors on the Note, L.G.R.R.A. Realty LLC, Lawrence Omansky and Marilyn Brown.

The Foreclosure

On a motion for summary judgment in an action to foreclose on a mortgage, a plaintiff establishes its case as a matter of law by submitting the note, the mortgage, evidence of ownership of the note and mortgage and of default (*Witelson v Jamaica Estates Holding Corp. I,* 40 AD3d 284, [1st Dept 2007]; *see Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 856 [2d Dept 2009]). Upon the making of such a showing, it is incumbent upon the party opposing foreclosure to come forward with evidence sufficient to raise a fact issue as to any available defense (*Wells Fargo Bank, N.A.*, 61 AD3d at 856). To meet its burden, WEXA1 provides a copy of the Note and the Mortgage, both of which are dated August 31, 2006, and a March 9, 2010 Notice of Default and Acceleration from HVB (*see* Arnone Aff., Exh. B [Complaint attachments]). WEXA1 also provides a copy of a document assigning the Mortgage and Note from HVB to WEXA1.

In opposition, defendant Lawrence Omansky submits an affidavit in which he avers that he is both a defendant and a principal of defendants L.G.R.R.A. Realty LLC, Transus LLC and Dragon's Surfside Realty LLC. Omansky notes that the caption does not reflect the name

Hudson Valley Bank, N.A., but only Hudson Valley Bank, and argues that only the former had authority to assign the Note. The assignment submitted by plaintiff reflects that Hudson Valley Bank N.A. assigned both the Note and the Mortgage, and consequently Omansky's argument about the caption raises no genuine fact issue for trial (*see* Mov. Aff., Leavitt Aff., Exh. A, at 1 [Assignment of Mortgage with note obligation described therein]).

Omansky relies on *LNV Corp. v Madison Real Estate, LLC* (2010 WL 5126043, 2010 NY Misc LEXIS 5937, 2010 NY Slip Op 33376[U] [Sup Ct, NY County 2010]), to support his contention that summary judgment should be denied, arguing that the WEXA1 has no personal knowledge about transactions with HVB, prior to the December 15, 2010 assignment to WEXA1. *LNV Corp.* stands for the proposition that, in a foreclosure action, a plaintiff must demonstrate that it is the owner of the note and the mortgage when commencing the action in order to have standing to bring it. The record evidence in *LNV Corp.* did not demonstrate that the plaintiff-movant held the note, and the court determined that a foreclosure action may not be commenced by such a party.

Omansky does not dispute that the documentary evidence, attached to the complaint, shows that the Note, secured by the Mortgage, was entered into with HVB, and held by HVB when it brought this action. Therefore, HVB, the note holder, had standing to commence the action. Omansky also does not dispute that soon after commencement of this action, HVB assigned the Note and Mortgage to WEXA1, and that WEXA1's unopposed motion to be substituted as plaintiff in this action was granted by this court's order dated, April 4, 2011 (*see Maspeth Fed. Sav. and Loan Assn. v Simon-Erdan*, 67 AD3d 750, 751 [2d Dept 2009]). Omansky does not demonstrate that WEXA1 does not hold the Note and Mortgage now.

In addition to the documents evidencing the Note, Mortgage and assignment, in moving, WEXA1 has provided the affidavit of its managing member, Alan Leavitt, who avers that he has personal knowledge of WEXA1's books and records as they relate to the instant action, and has thoroughly reviewed them. Leavitt also states that no "robo-signed documents" have been filed in connection with this action (Pl. Mov., Leavitt Aff., ¶ 3). Omansky argues that Leavitt does not have sufficient knowledge to make this averment, because he has no personal knowledge about what occurred while the loan documents were held by HVB.

Although Omansky does not define the term "robo-signed documents," apparently he alludes to instances where a foreclosure plaintiff's employee signs an affidavit averring that a verification of facts and records concerning a foreclosure debt was performed, when the verification either was not done, or was cursory. This action was commenced by the original lender, there is no indication that it submitted affidavits with unverified information, and Omansky does not point to any. Furthermore, there is no indication that these instruments have ever been assigned to any party other than WEXA1, and Omansky does not assert that Leavitt does not have personal knowledge of WEXA1's own records, or dispute the factual assertions made by WEXA1 here.[2] The documents plaintiff submits essentially speak for themselves as to their nature and obligations, and Omansky does not contend that any specific fact asserted by HVB or WEXA1 is incorrect or false.

Omansky also cites to *Aurora Loan Servs., LLC v Thomas* (2010 WL 4314480, 2010 NY Misc LEXIS 5242, 2010 NY Slip Op 33023[U] [Sup Ct, Suffolk County 2010]), in which the

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[2]Any dispute as to the exact amount owed by the mortgagor to the mortgagee does not preclude the granting of summary judgment as to liability (*see Layden v Boccio*, 253 AD2d 540 [2d Dept 1998]), although Omansky does not dispute the amount allegedly owed here.

court found that the movant had not met its burden on summary judgment because it did not submit admissible evidence in support of its burden as movant. This case is not analogous to *Aurora*, in which the court determined that certain affidavits and transcripts were not in admissible form, and that there was no certificate acknowledging conveyance of real property outside of the state.

Omansky argues that plaintiff has not met its burden to demonstrate that the Answering Defendants' affirmative defenses should be dismissed, because the movant lacks personal knowledge, and therefore, does not submit admissible evidence to meet its burden. Plaintiff, however, has met its prima facie burden on the motion, as well as addressed each of the affirmative defenses in moving.

In the first affirmative defense, the Answering Defendants assert that the complaint fails to state a cause of action, but have not cross-moved to dismiss on this ground. The complaint states a cause of action, as plaintiff has met its prima facie burden on the foreclosure. The defense does not change the outcome concerning the foreclosure, but, at worst, is surplusage, "as it may be asserted at any time even if not pleaded" (*Riland v Todman & Co.*, 56 AD2d 350, 352 [1st Dept 1977]), and, therefore, is not dismissed.

The second affirmative defense, based upon lack of proper service of process is dismissed. CPLR § 3211 (e) requires the defendant to move for judgment within sixty days of filing an answer, otherwise this defense is considered waived (*see Wiebusch v Bethany Memorial Reform Church*, 9 AD3d 315 [1st Dept 2004]).

The third and fourth affirmative defenses, that plaintiff has failed to comply with New York State banking law and New York's Real Property Actions and Proceedings Law (RPAPL),

are dismissed. The Answering Defendants do not point to a provision of either RPAPL or the State's Banking Law that has been violated. To the extent that the Answering Defendants may be seeking the protections afforded under Banking Law § 6-l and 6-m or RPAPL § 1304, those protections are afforded to those who obtain what is defined in the statutes as a home loan. The definition of home loan includes only those loans were the borrower is a natural person, and not, as here, a limited liability company.[3]

The Answering Defendants do not dispute the validity of the Note or Mortgage, or the default, the opposition submitted does not give details as to affirmative defenses or specify facts that would require trial, and the Answering Defendants do not submit admissible evidence demonstrating a fact issue for trial, as required to defeat summary judgment. The Answering Defendants' conclusory assertion that discovery is necessary in this case, alone, is not a bar to summary judgment (*see* CPLR 3212 [f]). As the opposition does not raise a genuine issue of fact, in the face of the documentary evidence that a loan was made which has not been repaid, summary judgment is granted against the Answering Defendants, on the foreclosure action, and dismissing the affirmative defenses. Moreover, a referee will be appointed as requested by plaintiff to compute the amount due on the mortgage and to hear and report as to whether the property should be sold in one parcel.

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[3]Omansky cites to *Stern-Obstfeld v Bank of Am.* (30 Misc 3d 901 [Sup Ct, NY County 2001]), which discusses notice requirements for foreclosures on cooperative residential apartments, but the Unit is not a cooperative, with shares, but real property. In addition, the Mortgage specifically states that: "MORTGAGOR ACKNOWLEDGES AND REPRESENTS THAT THE LOAN, AS EVIDENCED BY THE NOTE SECURED BY THE MORTGAGE, IS A COMMERCIAL TRANSACTION, AND THAT THE PROCEEDS OF THE LOAN SHALL NOT BE USED FOR PERSONAL, FAMILY OR HOUSEHOLD PURPOSES" (Pl. Mov., Leavitt Aff., Exh. C, ¶ 51). Finally, the debt in this case is for a revolving line of credit, not a home loan.

Pursuant to paragraph 22 of the Mortgage, plaintiff is entitled to reasonable attorneys' fees, costs and disbursements in the foreclosure action. Plaintiff is, therefore, entitled to a judgment of liability on this issue, with the issue of the amount owed to be referred to a referee.

Plaintiff further contends that it has not been paid escrow payments for certain taxes and other costs, as provided for in the "loan documents," that these costs have not been paid for the Unit. Plaintiff also seeks recovery of funds that it might be compelled to pay on the Unit, for example for insurance premiums and sewer charges. Plaintiff prays that it be awarded these amounts from the foreclosure sale proceeds. While plaintiff is not precluded from later demonstrating that it is entitled to this recovery, relief will not be granted here, as it has not sufficiently addressed the basis for this entitlement, by pointing to a specific supporting document, or law, to demonstrate liability. Plaintiff also has not submitted evidence that the applicable defendants have not paid charges that they should have for the Unit, or about specific funds were due that have not been received in escrow. This determination is made without prejudice to renewal.

Plaintiff has met its burden to demonstrate that its mortgage has priority over mortgages held by Sally Omansky, Robert Omansky and the Leon Omansky Trust. Plaintiff submitted a title report in moving, which reflects that the Mortgage was recorded earlier in time. No opposition to this issue is raised by the Answering Defendants, and plaintiff is entitled to summary judgment on it.

Lawrence Omansky argues that it makes more sense that the Answering Defendants attempt to sell the Unit (rather than having a court directed sale). While this may be true, as they may be quite motivated to obtain the highest price possible for it, the argument does not change

the result here.

The Guaranties

Plaintiff moves for summary judgment on its complaint, which seeks recovery against Marilyn Brown, Lawrence Omansky and L.G.R.R.A Realty LLC on commercial guaranties executed respectively by each. Each guaranty is of all sums due to HVB from Transus LLC and Dragon's Surfside Realty, LLC. Plaintiff does not point to anything in the assignment demonstrating that these guaranties were assigned with the Note and Mortgage.[4] In order to meet its prima facie burden, plaintiff must at least, in its moving papers, adequately address the basis for its entitlement to judgment in order to demonstrate such entitlement. As it has not done so, the motion is denied without prejudice to renewal.

Amending the Caption

Plaintiff's motion to amend the caption to strike the defendants listed as John Doe numbers one through five is granted without opposition.

Default Judgments against the Defendants that have not Answered

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit "proof of service of the summons and the complaint . . . proof of the facts constituting the claim, the default and the amount due by affidavit made by the party" (CPLR 3215 [f]). Default judgments are appropriate against Urban Underground Realty, LLC, the Environmental Control Board of the City of New York, and the Board of Managers of the

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[4]Leavitt states in his affidavit that plaintiff holds the guaranties by virtue of the mortgage assignment (Leavitt Aff., ¶ 5), but the assignment does not state that the guaranties were transferred (*see* Leavitt Aff., Exh. A [second page]). If plaintiff seeks judgment based on the language of the guaranties themselves, it should so state, and explain the basis for its contention, in order to meet its burden.

Dragon Estates Condominium, all of which were named as defendants only insofar as they have, or may have, an interest in the Unit. Plaintiff has demonstrated service on them, and, with its verified complaint, which may be used as the affidavit of the facts constituting the claim (CPLR 3215 [f]), states that any interest possessed by these parties including any lien, judgment or possessory right, is subordinate and/or inferior to the Mortgage lien.

Finally, while plaintiff requests an extensive order/judgment predicated on its complaint, it has not submitted a proposed order, and its lengthy claim for relief in the complaint is not specific to this case. Accordingly, the court will not use that language. Instead, the court directs plaintiff and the Answering Defendants to

Settle Order and Judgment on Notice.

Dated: 1-6-12

ENTER:

J.S.C.

EMILY JANE GOODMAN