

U.S. Bank N.A. v RJF 110 Realty LLC

2016 NY Slip Op 31273(U)

March 11, 2016

Supreme Court, New York County

Docket Number: 850109/2015

Judge: Shirley Werner Kornreich

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
U.S. BANK NATIONAL ASSOCIATION, TRUSTEE
AS SUCCESSOR IN INTEREST TO BANK OF
AMERICA, NATIONAL ASSOCIATION, AS
SUCCESSOR BY MERGER TO LASALLE BANK
NATIONAL ASSOCIATION, AS TRUSTEE FOR THE
HOLDERS OF BEAR STEARNS COMMERCIAL
MORTGAGE SECURITIES INC., COMMERCIAL
MORTGAGE PASS-THROUGH CERTIFICATES
SERIES 2004-TOP16, acting by and through its special
servicer C-III ASSET MANAGEMENT LLC,

Index No.: 850109/2015

DECISION & ORDER

Plaintiff,

-against-

RJF 110 REALTY LLC, JACK R. FRANCO, THE NEW
YORK STATE DEPARTMENT OF TAXATION &
FINANCE, THE NEW YORK CITY DEPARTMENT OF
FINANCE and "JOHN DOE #1" through "JOHN DOE
#12," the last twelve names being fictitious and unknown
to Plaintiff, the persons or parties intended being the
tenants, occupants, persons or corporations, if any, having
or claiming an interest in or lien upon the premises,
described in the complaint,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

In this commercial foreclosure action, the plaintiff, U.S. Bank National Association (the Bank), moves (1) for partial summary judgment against defendants on its first cause of action for foreclosure on the mortgage; (2) dismissal of the affirmative defenses contained in the answer of defendant RJF 110 Realty LLC (RJF or the Borrower); and (3) for an order appointing a referee to compute the amount due to the Bank. The Borrower and defendant Jack Franco oppose the motion. The Bank's motion is granted for the reasons that follow.

I. *Procedural History & Factual Background*

The material facts are not in dispute. The Borrower does not deny its default on a loan (the Loan) secured by a mortgage (the Mortgage) on commercial real property located at 110-114 West 32nd Street and 113-117 West 31st Street in Manhattan (the Property), which consists of two adjacent retail and office buildings. *See* Dkt. 99 at 24 (legal description of the Property). The Borrower, however, contends that summary judgment must be denied because the Bank failed to submit sufficient evidence to establish its standing to foreclose on the Mortgage.

The history of the Loan is set forth in the complaint and is further explained on this motion by the affidavit of Angela Norris Johnson, an employee of the Loan's current special servicer, C-III Asset Management LLC (C-III). *See* Dkt. 100.¹ Ms. Johnson affirmed she is responsible for the administration of the Loan and has reviewed the Loan file. *See id.* at 2. She further affirmed that the Bank is currently in possession of the original endorsed promissory note, the history of which follows.

On August 18, 2004, non-party Morgan Stanley Mortgage Capital Inc. (Morgan Stanley) loaned \$17.75 million to RJF. The Loan is memorialized by, *inter alia*, a Loan Agreement, an Amended and Restated Promissory Note (the Note), a Mortgage Consolidation and Modification Agreement, an Amended and Restated Mortgage and Security Agreement, and an Assignment of

¹ It should be noted that the complaint, which extensively sets forth the history of the Loan, was also verified by an employee of C-III. *See* Dkt. 2 at 21. That said, after this motion was fully submitted, defendant Jack Franco, not RJF, requested that the court consider a February 8, 2016 letter as a sur-reply; the letter was filed without prior court approval. *See* Dkt. 108. As discussed herein, and as confirmed during a February 16, 2016 telephone conference, defendants are not arguing that the Bank *actually* lacks standing, but only that the record submitted on this motion is insufficient to establish the Bank's standing. The Bank was given the option of submitting a supplemental affidavit from Ms. Johnson to which defendants would be permitted to respond. *See* Dkt. 109. If the Bank declined to do so, which it did, the court would deem defendants' February 8 letter as part of the record. *See id.* That said, as the Bank correctly contends, its original submissions are sufficient to entitle it to summary judgment.

Leases and Rents (collectively, the Loan Documents). *See* Dkt. 99 at 27. On February 9, 2005, Morgan Stanley assigned the Loan and the rights under the Loan Documents to LaSalle Bank, National Association (LaSalle), which, at the time, was the Trustee for the holders of Bear Stearns Commercial Mortgage Securities Inc., Commercial Mortgage Pass-Through Certificates, Series 2004-TOP16 (the CMBS Trust).² *See id.* at 267. On October 17, 2008, LaSalle merged with Bank of America, N.A. (BOA), which succeeded LaSalle as Trustee for the CMBS Trust. On February 11, 2015, BOA assigned the Loan and the Loan Documents to the Bank, the plaintiff in this action. *See id.* at 288.

The Loan matured on September 1, 2014. Shortly before maturity, on August 26, 2014, the Bank, RJF, and Franco – a principal of RJF and a guarantor of the Loan – entered into a Forbearance Agreement. *See* Dkt. 99 at 303. The Recitals in the Forbearance Agreement recount the history of the Loan, which comports with the same history set forth in the complaint and Ms. Johnson’s affidavit. *See id.* Recital D states that “Noteholder [i.e., the Bank, as Trustee for the CMBS Trust] is the current owner and holder of the Loan and the Loan Documents, pursuant to certain assignments and endorsements executed and delivered prior to the date hereof.” *See id.* Recital E then states that “[t]he Loan matured on the Effective Date of this Agreement (the “Maturity Date”), Borrower is in the process of refinancing the Loan with a third-party, and, as a result, the Loan has not been repaid by Borrower on the Maturity Date

² The Loan was, and currently is, part of the CMBS Trust. By virtue of the fact that the Loan and its servicing must adhere to the strict requirements of the governing contracts and applicable CMBS regulations, the Bank has in its possession, and has provided to the court, extensive documentation regarding its rights with respect to the Loan and the Property. This is not a case, like many of the cases cited by defendants, where a bank is attempting to foreclose on a residential property without proof that it actually has rights in the property and the mortgage loan. Rather, the Bank’s right to foreclose on the Mortgage is perfectly clear.

(such failure, the “Maturity Default”).” *See id.* at 304 (underline in original). Finally, Recital F states that:

Borrower and Guarantor [i.e., Franco] have requested [the CMBS Trust] to forbear from exercising [its] rights and remedies under the Loan Documents that arise due to the existence of the Maturity Default, and [the CMBS Trust] has agreed to forbear from proceeding to exercise such rights and remedies until the “Forbearance Termination Date,” as hereafter defined, conditioned upon Borrower’s and Guarantor’s compliance with the terms and provisions of this Agreement.

See id.

The Forbearance Agreement then provides that, in consideration for forbearance, among other things:

Borrower and Guarantor acknowledge and agree that the recitals herein are true and correct, that the indebtedness evidenced by the Note is immediately due and owing to Noteholder without offset, defense or counterclaim, and that the Loan Agreement, the Note, the Guaranty and the other Loan Documents, are valid, binding and fully enforceable according to their terms.

See id.; *see also id.* at 307 (acknowledgment that the Guaranty remains in full force and effect).

After refinancing efforts failed, the Bank commenced this action on March 9, 2015. The Bank’s complaint asserts four causes of action: (1) foreclosure on the Mortgage; (2) entitlement to rents; (3) foreclosure on the security interest under the Loan Documents; and (4) appointment of a receiver. *See* Dkt. 2. After myriad disputes were resolved by the court (including the Bank’s motion to appoint a receiver and a now-discontinued third-party action), RJF filed an answer on September 17, 2015 containing 17 affirmative defenses. *See* Dkt. 92. RJF’s second affirmative defense is lack of standing. *See id.* at 13. The parties attempted to resolve this case, but such efforts failed because Franco was unable to secure refinancing from a new lender.

Consequently, on December 10, 2015, the Bank filed the instant motion for partial summary judgment seeking foreclosure on the Mortgage, the appointment of a referee to compute, and dismissal of all of RJF's affirmative defenses. In opposition, RJF does not contest its default on the Loan or proffer a basis to withstand dismissal of its affirmative defenses, except for standing. Despite expressly acknowledging the Bank's rights under the Loan Documents in the Forbearance Agreement and waiving all applicable affirmative defenses (standing, as discussed below, is a waivable affirmative defense), RJF now contends that the Bank is not entitled to summary judgment because it failed to submit the legally required documentary proof of standing. RJF is wrong.

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to

defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Here, “[i]t is undisputed that [the Bank] established prima facie [its] right to foreclosure with undisputed evidence that defendant failed to pay the outstanding principal due under the parties’ loan agreements.” *ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 (1st Dept 2011), citing *JPMCC 2007-CIBC19 Bronx Apts., LLC v Fordham Fulton LLC*, 84 AD3d 613 (1st Dept 2011); see also *1855 E. Tremont Corp. v Collado Holdings LLC*, 102 AD3d 567 (1st Dept 2013) (same). Indeed, in the Forbearance Agreement, defendants “expressly waived any defense to foreclosure on the mortgage and the note.” *JPMCC*, 84 AD3d at 613.

Standing is an affirmative defense, not an element of plaintiff’s claim. A “defense of standing is not jurisdictional in nature” and is waivable. See *Wells Fargo Bank, N.A. v Muskopf*, 44 Misc3d 1223(A), at *2-3 (Sup Ct, Suffolk County 2014) (Whelan, J.) (collecting cases). Indeed, “[t]he prosecution of a claim by one without standing is not an actionable wrong, as the claimant may prevail even in the absence of standing and such prosecution does not vitiate or otherwise affect the validity of the mortgage.” *Id.* at *3. That said, “[w]here standing is put into issue by a defendant’s answer, a plaintiff must prove its standing if it is to be entitled to relief.” *Wells Fargo Bank Minnesota, Nat’l Ass’n v Mastropaolo*, 42 AD3d 239, 242 (2d Dept 2007); see *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 (2d Dept 2009) (same).

It is well settled that “[i]n a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced.” *OneWest Bank FSB v Carey*, 104 AD3d 444, 445 (1st Dept 2013), quoting *Collymore* 68 AD3d at 753. Under similar circumstances (albeit in a case that was far closer of a call than here), the Court of Appeals recently explained that standing is established where, as here, plaintiff submits evidence showing that “[the Bank], as trustee under the PSA [i.e., the Pooling and Servicing Agreement governing the MBS trust], became the lawful owner of the note.” *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 (2015). Also, as here, an affidavit of an employee of the servicer with personal knowledge of the mortgage file may be used to prove the bank possesses the note. *See id.* at 359-61. Simply put, a plaintiff that establishes it is the current holder of the note (even, in some circumstances, when it did not also have possession of the mortgage when the action was commenced) has established its standing to foreclose on the mortgage. *See id.* at 361-62.

The Bank has done so. Thus, there is no question of fact regarding the Bank’s standing. The extensive documentation submitted by the Bank along with Ms. Johnson’s thorough affidavit prove the Bank is the current holder of the Note. RJF has not submitted any evidence that raises a question of fact as to the veracity of the Banks’ submissions or the truthfulness of Ms. Johnson’s sworn statements. To the contrary, defendants admitted in the Forbearance Agreement that the Bank is the current holder of the Note with the right to enforce it against them. This alone demonstrates that defendants’ standing arguments are nothing more than a thinly veiled attempt to forestall judgment by feigning the existence of a material question of fact. *See Castro v Peguero*, 135 AD3d 584 (1st Dept 2016) (feigned issue of fact insufficient to

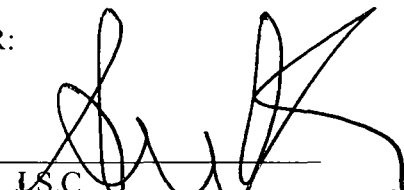
defeat summary judgment), accord *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968). Nevertheless, even if the cases cited by defendants as to the applicable evidentiary standard would otherwise warrant denial of summary judgment (and they most certainly do not),³ defendants are precluded from asserting standing as a defense because they expressly waived the right to do so in the Forbearance Agreement. By acknowledging the Bank's standing and their lack of any offset, defense or counterclaim, they cannot now assert the contrary. The acknowledgements, including the Bank's standing, were the consideration for the Bank's agreement to forebear on RJF's default.

The Bank expressly bargained for the right to foreclose on the Mortgage expeditiously without having to litigate the very sort of meritless affirmative defenses proffered by defendants. Regardless, the record on this motion clearly establishes that the Bank has standing on the Note and that defendants are in default, thereby entitling the Bank to summary judgment and foreclosure. Accordingly, it is

ORDERED that the motion by plaintiff U.S. Bank National Association for partial summary judgment seeking foreclosure against defendant RJF 110 Realty LLC is granted, the affirmative defenses of said defendant are dismissed and the application for the appointment of a referee to compute is granted. A separate order of reference will be issued, in which the court will appoint the referee to compute.

Dated: March 11, 2016

ENTER:



 U.S.C.
SHIRLEY WERNER KORNEICH

³ See Dkt. 107 at 7-15. As discussed on the February 16 call, the Bank has met its burden of production under *Aurora*. To the extent any earlier (i.e., prior to 2015) lower court case cited by defendants purports to require further proof from the Bank, such holdings would have been abrogated by *Aurora*.