

**940 First LLC v First Ave. Realty Holdings L.P.**

2020 NY Slip Op 31705(U)

April 17, 2020

Supreme Court, New York County

Docket Number: 850255/2017

Judge: Debra A. James

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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. DEBRA A. JAMES PART IAS MOTION 59EFM**

*Justice*

-----X

940 FIRST LLC,

Plaintiff,

- v -

FIRST AVENUE REALTY HOLDINGS L.P., CHASKIEL  
STRULOVITCH, NITANEL DEITCHER, and JOHN DOE #1  
THROUGH JOHN DOE #100,

Defendants.

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INDEX NO.	850255/2017
MOTION DATE	11/08/2018
MOTION SEQ. NO.	001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 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, 157, 158, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 212, 213, 214, 215, 216, 217, 218, 219

were read on this motion to/for JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff's motion for summary judgment is

DENIED; and it is further

ORDERED that counsel are directed to appear for a  
compliance conference in IAS Part 59, Room 331, 60 Centre  
Street, on July 14, 2020, at 10:00 AM.

DECISION

In this foreclosure action concerning a building with commercial and residential space, plaintiff moves for summary judgment and/or default judgment against the named defendants on the grounds of certain alleged defaults. The named defendants oppose the motion and two tenants sued herein as "John Doe" also oppose the motion to the extent it seeks relief which affects their rent regulated status.

Plaintiff in its memorandum of law in support asserts that it is entitled to summary judgment on its foreclosure complaint based upon "four distinct events of default under the Loan Documents: (1) Strulovitch's gross misrepresentations as to his net worth at the time of origination of the Loan; (2) Borrower's failure to timely pay the Water Bill; (3) Borrower's failure to replenish the Interest and Real Estate Tax Reserve Account; and (4) Borrower's failure to make payments due on September 10, 2017 and October 10, 2017."

Defendants oppose the motion on the grounds that the affidavit submitted in support of plaintiff's application is insufficient because David Aviram, a principal of the plaintiff, did not have personal knowledge of the defaults asserted because those alleged defaults occurred prior to the assignment of the mortgage to plaintiff.

The assignment of the subject mortgage from BankUnited to plaintiff took effect on October 25, 2017. The defaults alleged by the plaintiff in the supporting Aviram affidavit were alleged to have occurred (1) in March 2015 (to the extent those defaults were based on alleged misrepresentations of defendants' ownership interest, the time the mortgage was made (2) on May 2, 2017 (failure to pay the water bill), (3) prior to October 25, 2017 (failure to replenish the reserve account), and (4) on September 10 and October 10, 2017 (failure to pay installments due).

"A plaintiff seeking summary judgment in a mortgage foreclosure action establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default, by proof in admissible form . . . . [A] plaintiff [meets] that burden by producing the relevant documents and the complaint verified by one of its officers based upon that officer's personal knowledge of [its] records."

Woori Am. Bank v Glob. Universal Group Ltd., 134 AD3d 699, 700 (2d Dept 2015).

Thus, to the extent that the plaintiff in seeking summary judgment relies upon the business records of its assignor, BankUnited, as evidence of default, the Aviram affidavit is insufficient to establish a proper foundation under the business records exception of the hearsay rule because Aviram did not attest that he was personally familiar with the record keeping practices of the assignor. See Aurora Loan Services, LLC v Mercius, 138 AD3d 650, 652 (2d Dept 2016). As such, the

plaintiff fails to establish prima facie entitlement to summary judgment as a matter of law. Id.

Plaintiff's attempt to cure this deficiency in its reply affidavit is unavailing. "[T]he function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion. . . . If a movant, in preparation of a motion for summary judgment, cannot assemble sufficient proof to dispel all questions of material fact, the motion should simply not be submitted." Ritt by Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 (1<sup>st</sup> Dept 1992).

The court notes that in its reply, plaintiff concedes the accuracy of the limited opposition of defendant tenants, to wit, that the law is well settled that the rights of rent stabilized tenants are unaffected by the foreclosure, which their regulated leases survive, and the new owner upon any foreclosure sale assumes all of the rights and obligations of the prior owner as landlord under the regulated tenancy. See Pisani v Cominger, 36 AD2d 593 (1<sup>st</sup> Dept 1971) and Combined Ventures LLC v Fiske House Apartment Corp, 74 AD3d 1119 (2d Dept 2010). Thus, plaintiff has not sought and is not entitled to any relief against such defendants.

As plaintiff has failed to meet its burden by submitting evidence in admissible form establishing a prima facie

entitlement to judgment as a matter of law, expedited judgment must be denied.

04/17/2020  
DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE