

**Park Slope Lender LLC v Park Residence Condos,
LLC**

2021 NY Slip Op 30648(U)

February 25, 2021

Supreme Court, Kings County

Docket Number: 517227/19

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of February, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
PARK SLOPE LENDER LLC,

Plaintiff,

- against -

Index No. 517227/19

THE PARK RESIDENCE CONDOS, LLC, THE PARK TOWNHOMES, LLC, PERRY M. FINKELMAN, JILL SIMEONE, KDL CONSTRUCTION & DEVELOPMENT GROUP LLC, ASAP BUILDERS, INC. and JOHN DOE #1 THROUGH JOHN DOE #10 (said John Doe defendants being fictitious, it being intended to name all other parties who may have some interest in or lien upon the premises sought to be foreclosed,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

109, 11-115, 143-153

Opposing Affidavits (Affirmations) _____

132-141, 143-153

Upon the foregoing papers in this action to foreclose mortgages on five commercial parcels of property in Brooklyn (Properties), plaintiff Park Slope Lender LLC (Park Slope) moves (in motion sequence [mot. seq.] four) for an order: (1) granting it summary judgment against defendant/borrowers The Park Residence Condos, LLC and

The Park Townhomes, LLC and defendant Perry M. Finkelman (Finkelman), the guarantor, pursuant to CPLR 3212; (2) awarding it a default judgment against the non-answering defendants Jill Simeone (Simeone), KDL Construction & Development Group LLC (KDL) and ASAP Builders, Inc. (ASAP), pursuant to CPLR 3215 (a) and RPAPL 1321; (3) appointing a referee to ascertain and compute the amount due under the notes and mortgages and to determine whether the Properties should be sold in one or more parcels, pursuant to RPAPL 1321; and (5) amending the caption to delete the John Doe defendants.

Defendants The Park Residence Condos, LLC, The Park Townhomes, LLC and Finkelman (collectively, the Park Defendants) cross-move (in mot. seq. six) for an order, pursuant to CPLR 3212, dismissing the complaint for lack of standing.

Background

On August 6, 2019, Park Slope commenced this commercial foreclosure action by filing a summons and complaint and a notice of pendency against the Property. The complaint alleges that on or about December 3, 2014, the borrowers, The Park Residence Condos, LLC and The Park Townhomes, LLC, executed and delivered to Bank Leumi USA (Bank Leumi): (1) an Acquisition Loan Note in the principal amount of \$1,415,677.00, which was secured by a December 3, 2014 Acquisition Loan Mortgage; (2) a Building Loan Note in the principal amount of \$10,536,278.00, which was secured by a December 3, 2014 Building Loan Mortgage and Security Agreement; and (3) a Project Loan Note in the principal amount of \$3,418,045.00, which was secured by a

December 3, 2014 Project Loan Mortgage and Security Agreement (collectively, the Notes and Mortgages) (*see* complaint at ¶¶ 9-17). The unverified complaint further alleges that:

“Pursuant to the Mortgages, the Borrower[s] pledged and assigned to the mortgagee all of its estate, right, title and interest in and to the following real property, and the improvements and chattel located thereon, in the County of Kings, State of New York: Parcel I: 333 14th Street, Brooklyn, New York (Block 1036, Lot 18); Parcel II: 331 14th Street, Brooklyn, New York (Block 1036, Lot 73); Parcel III: 346 13th Street, Brooklyn, New York (Block 1036, Lot 171); Parcel IV: 346A 13th Street, Brooklyn, New York (Block 1036, Lot 181); and Parcel V: 346B 13th Street, Brooklyn, New York (Block 1036, Lot 182) . . .” (*id.* at ¶ 20).

The complaint alleges that the guarantor (Finkelman) executed a guaranty of payment under the Notes and Mortgages on December 3, 2014, which was subsequently assigned to Park Slope on July 1, 2019 (*id.* at ¶ 27).

The complaint alleges that the original lender, Bank Leumi, “assigned all of its right, title and interest in and to the Notes and Mortgages to 13th Street Lender LLC” (13th Street) pursuant to “three separate Assignments of Mortgage each dated September 17, 2018 . . .” and “also executed and delivered to 13th Street . . . an allonge with respect to each of the Notes” (*id.* at ¶¶ 21-22). The complaint alleges that 13th Street “assigned all of its right, title and interest in and to the Notes and Mortgages to Park Slope . . .” pursuant to “three separate Assignments of Mortgage each dated July 1, 2019 . . .” and “also executed and delivered to Park Slope . . . an allonge with respect to each of the Notes” (*id.* at ¶¶ 23-24). The complaint further alleges that Park Slope “is in physical

possession of the Notes and the allonges” and “is the sole, true, and lawful owner and holder of the Notes and the Mortgages . . .” (*id.* at ¶¶ 25-26).

The complaint annexes copies of the Notes with the corresponding allonges, the Mortgages and the assignments. Notably, each of the three July 1, 2019 allonges to the Notes executed by 13th Street in favor of Park Slope state at the top of the first page that **“THIS ALLONGE IS ATTACHED TO AND MADE A PART OF THE BELOW REFERENCED NOTE”** and at the bottom of the second page that **“THIS ALLONGE SHOULD BE PERMANENTLY AFFIXED TO THE NOTE DESCRIBED ABOVE.”**

The complaint alleges that the Borrowers defaulted under the terms of the loan agreements and the Mortgages by: (1) failing to substantially complete the townhomes and obtain temporary or permanent certificates of occupancy on or before the December 31, 2017 completion date; (2) failing to sell a sufficient number of units on or before April 1, 2018; (3) failing to make the monthly interest payment due on July 1, 2018 and thereafter; and (4) failing to pay all outstanding principal and interest due under the Notes on December 31, 2018, the maturity date (*id.* at ¶¶ 29, 32 and 34).

On or about February 20, 2020, the Park Defendants collectively answered the complaint and asserted affirmative defenses, including lack of standing. Defendants Simeone, KDL and ASAP failed to answer or otherwise respond to the complaint.

Park Slope's Summary Judgment Motion

Park Slope now moves for summary judgment against the Park Defendants (the borrowers and the guarantor), an order of reference, a default judgment against the non-appearing defendants, Simeone, ASAP and KDL, and other relief.

Park Slope submits an affidavit from Ralph Dweck (Dweck), who attests that “I am authorized to submit this affidavit on behalf of Plaintiff Park Slope . . .” and that “[t]he facts and matters set forth in this affidavit are based upon my personal knowledge and/or my review of Park Slope Lender LLC’s business records [and] the business records of Park Slope Lender LLC’s predecessors-in-interest . . .” Dweck further attests that “[i]n the regular performance of my job functions, I am familiar with the business records maintained by Park Slope . . . in its loan portfolio” which “includes all of the loan documents purchased from its predecessors-in-interest.” Notably, Dweck’s affidavit does not annex any of the business records upon which his affidavit testimony is based.

Dweck attests that Park Slope seeks to foreclose the Mortgages against the Properties under which \$10,594,955.14 in principal is due and owing. Dweck describes the chain of title of the Mortgages, including the July 1, 2019 assignments of the Notes and Mortgages from 13th Street to Park Slope. Dweck attests that “13th Street . . . also executed and delivered to Park Slope . . . an allonge with respect to each of the Notes [which] are annexed to the Complaint . . .” and “Park Slope . . . is the sole, true, and lawful owner and holder of the Notes and the Mortgages . . .” Dweck further asserts that the guaranty was also assigned to Park Slope. Dweck reiterates the events of default

alleged in the complaint, including that the Park Defendants failed to repay the balance of the loan by December 31, 2018, the maturity date. Copies of the loan documents, including the Notes with the attached allonges, the Mortgages and the guaranty, are submitted with Park Slope's summary judgment motion.

The Park Defendants' Opposition and Cross Motion

The Park Defendants oppose Park Slope's motion and cross-move for summary judgment dismissing the complaint. The Park Defendants submit an affidavit from Finkelman, the guarantor and principal of the borrower defendants, who asserts, upon information and belief, that "Plaintiff is a special purpose entity with no disclosed members, managers, principals, office, or verifiable business operations" and "[n]one of the papers filed by Plaintiff in the instant action contain any indicia of who the members, managers, or principals of Park Slope Lender may be." Finkelman notes that Dweck's moving affidavit "merely avers that he is 'authorized' to submit an affidavit on behalf of Plaintiff" and does not identify his actual relationship with Park Slope.

Finkelman attests that "[s]ince the middle of 2019, the Park Defendants have actively sought third-party financing in order to pay off the Notes and redeem the Mortgages" however, "all of the lenders whom the Park Defendants have contacted regarding such financing have required basic information about Park Slope . . ." which "is not publicly available and is in the sole possession, custody, and control of Park Slope . . ." Finkelman contends that "[a]s a result of the refusal by Plaintiff to respond to the Park Defendants' basic information requests . . . multiple lenders declined to provide financing

...” Finkelman attests that “[a]s a consequence of Plaintiff’s inequitable misconduct and bad faith, Borrowers have been stymied from obtaining financing to exercise its rights to pay off the Notes and redeem the Mortgages.”

The Park Defendants also submit a memorandum of law arguing that Park Slope’s summary judgment motion should be denied because it failed to submit admissible evidence of the borrower defendants’ default. The Park Defendants contend that Dweck’s affidavit is “conclusory hearsay testimony” and that “Dweck does not attest to having any personal knowledge of the business practices or procedures of Bank Leumi or 13th Street Lender, Plaintiff’s two alleged predecessors-in-interest under the Notes, Mortgages, and Guaranty.” The Park Defendants also argue that Park Slope’s summary judgment motion should be denied as premature, pursuant to CPLR 3212 (f), because there has been no discovery, which is “critical” to oppose the Park Slope’s motion and prosecute their affirmative defenses.

The Park Defendants further argue that their cross motion for summary judgment dismissing the complaint should be granted because Park Slope “collaterally assigned the mortgages upon which it seeks to foreclose to [13th Street] a non-party prior to the time that it instituted the action, obviously depriving it of standing to obtain a judgment of foreclosure.” Defense counsel submits copies of the Collateral Assignments of Mortgage from Park Slope to 13th Street all of which are dated as of July 1, 2019. Notably, however, the Collateral Assignments of Mortgage annexed to the Park Defendants’ cross-moving papers specifically state that “Assignor shall retain all rights of ownership of the

subject Mortgage, and the note secured thereby, including, but not limited to foreclosing said Mortgage for non-payment or for any other default thereunder . . .”

Park Slope’s Reply and Opposition to the Cross Motion

Park Slope, in reply and in opposition to the cross motion, submits a memorandum of law arguing that its moving papers conclusively established its right to summary judgment, and that the burden has shifted to the Park Defendants to produce evidentiary proof of material issues of fact. Park Slope asserts that the Park Defendants’ cross motion for summary judgment dismissing the complaint for lack of standing based entirely on the Collateral Assignments of Mortgage from Park Slope to 13th Street should be denied because the Collateral Assignments of Mortgage “do not limit [its] ability to enforce the Notes and Mortgages” and “expressly provide that [it] is empowered to continue to enforce the Notes and Mortgages through foreclosure.”

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospecvi Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49

NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and admissible evidence of the borrower’s default (*see Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2017]). Where the issue of standing is raised by a defendant, a plaintiff must also establish its standing as part of its prima facie case (*see Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d at 726; *Security Lending, Ltd. v New Realty Corp.*, 142 AD3d 986, 987 [2016]; *LGF Holdings, LLC v Skydel*, 139 AD3d 814, 814 [2016]). Where a plaintiff establishes prima facie entitlement to judgment, the burden then shifts to the defendant to raise a triable issue of fact as to a bona fide defense to the action (*CitiMortgage, Inc. v Guillermo*, 143 AD3d 852, 853 [2016]; *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467 [1997]).

Here, although Park Slope submitted copies of the Notes, Mortgages and guaranty, Park Slope has not established its prima facie entitlement to summary judgment and an order of reference because it has failed to submit admissible proof of the borrowers’

default, as a matter of law. The Second Department has held that affidavit testimony regarding a borrower's default based on a review of business records is inadmissible hearsay and lacks probative value if the business records themselves are not produced (see *Deutsche Bank National Trust Company v Elshiekh*, 179 AD3d 1017, 1021 [2020]; *Bank of New York Mellon v Gordon*, 171 AD3d 197, 208-209 [2019]; *JPMorgan Chase Bank National Assoc. v Grennan*, 175 AD3d 1513, 1516-1517 [2019]). Dweck's affidavit testimony regarding the borrowers' default based on his review of unidentified business records is inadmissible because Park Slope failed to produce the business records upon which Dweck's knowledge is based. In addition, Dweck relies on business records created by Park Slope's predecessors, Bank Leumi and 13th Street, yet Dweck does not allege that he is personally familiar with those entities' record-keeping practices and procedures, or that those entities' records were incorporated into Park Slope's records and routinely relied upon by Park Slope in its business (see *Bank of New York Mellon v Gordon*, 171 AD3d at 209-210). Consequently, Park Slope's motion for summary judgment and order of reference are denied with leave to renew based on papers that provide a proper foundation for the admission of business records reflecting the Park Defendants' alleged defaults.

The Park Defendants cross motion for summary judgment dismissing the complaint for lack of standing based on the July 1, 2019 Collateral Assignments of Mortgages is also denied. Contrary to the Park Defendants' contention, the Collateral Assignments of Mortgages from Park Slope, as assignor, to 13th Street, as assignee, do

not prove that Park Slope lacks standing to prosecute this foreclosure action because they specifically provide that “Assignor shall retain all rights of ownership of the subject Mortgage, and the note secured thereby, including, but not limited to foreclosing said Mortgage for non-payment or for any other default thereunder . . .” Accordingly, it is hereby

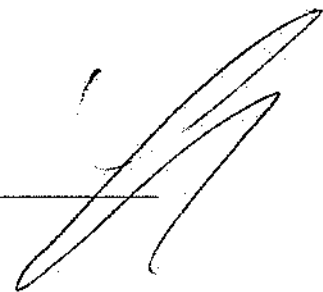
ORDERED that Park Slope’s motion (in mot. seq. four) is only granted to the extent that the caption is amended to delete the John Doe defendants, and the motion is otherwise denied with leave to renew; and it is further

ORDERED that the Park Defendants’ cross motion (in mot. seq. six) for summary judgment dismissing the complaint for lack of standing is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.



**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**