

Shelwol LLC v Binyan Koidesh LLC
2021 NY Slip Op 30797(U)
March 12, 2021
Supreme Court, Kings County
Docket Number: 511524/20
Judge: Lawrence S. Knipel
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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 12th day of March, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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SHELWOL LLC,

Plaintiff,

- against -

Index No. 511524/20

BINYAN KOIDESH LLC; 1452 53 LLC; ABRAHAM WEIDER; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD AND JOHN DOE #1 through JOHN DOE #99,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____

40-51

Opposing Affidavits (Affirmations) _____

53-59

Reply Affidavits (Affirmations) _____

61-62

Upon the foregoing papers in this action to foreclose a commercial mortgage on the properties at 1324 52nd Street (52nd Property) and 1452 53rd Street (53rd Property) in Brooklyn (collectively, the Properties), plaintiff Shelwol LLC (Shelwol or plaintiff) moves (in motion sequence [mot. seq.] three) for an order: (1) granting it summary judgment against defendants Binyan Koidesh LLC (Binyan) and 1452 53 LLC (1452) (collectively, Borrowers) and Abraham Weider (Weider or Guarantor), pursuant to CPLR

3212; (2) granting it a default judgment against the non-answering defendant, pursuant to CPLR 3215; (3) appointing a referee to compute the amount due under the note and mortgage and to report whether the Properties may be sold; and (4) amending the caption to delete the John Doe defendants.

Background

On July 7, 2020, Shelwol commenced this commercial foreclosure action by filing a summons, a verified complaint and a notice of pendency against the Properties. The complaint alleges that on July 3, 2018, Nexus Capital Investments LLC (Nexus) loaned Binyan \$1,968,750.00, which was secured by a note and mortgage recorded against the 52nd Property (Note #1 and Mortgage #1, respectively) (*see* complaint at ¶¶ 9-10). Nexus allegedly assigned Note #1 and Mortgage #1 to PS Funding Inc. (PS Funding) (*id.* at ¶ 11). The complaint alleges that “[b]y assignment of mortgage dated October 10, 2019 and recorded on October 24, 2019, and delivery of the original loan documents, PS Fund[ing] Inc. assigned all its rights title and interest in Note #1 [and] Mortgage #1 to [Shelwol]” (*id.* at ¶ 12).

The complaint also alleges that on July 15, 2019, Madison Park Investors (Madison) loaned Borrowers 499,999.00, which was secured by a note and mortgage recorded against the Properties (Note #2 and Mortgage #2, respectively) (*id.* at ¶ 13). The complaint alleges that “[b]y assignment of mortgage dated October 10, 2019 and recorded on October 24, 2019, and delivery of the original loan documents, Madison . . . assigned all its rights title and interest in Note #2 [and] Mortgage #2 to [Shelwol]” (*id.* at ¶ 14).

The complaint further alleges that on October 10, 2019, Shelwol loaned Binyan

\$531,251.00, which was secured by a note and mortgage (Note #3 and Mortgage #3, respectively) recorded against the 52nd Property (*id.* at ¶ 15).

On October 10, 2019, Borrowers allegedly executed a consolidated note in favor of Shelwol in the principal amount of \$3,000,000.00 (Consolidated Note), consolidating the obligations set forth in Note #1, Note #2 and Note #3, which was secured by a consolidation, extension and modification agreement (CEMA) encumbering the Properties (*id.* at ¶¶ 17-18). The complaint alleges that the Guarantor (Weider) executed a personal guaranty of payment on October 10, 2019 (*id.* at ¶ 20). The complaint annexes copies of the Consolidated Note, the CEMA and the guaranty.

The complaint alleges that the Borrowers defaulted under the terms of the loan documents “by failing to timely pay the amounts due for December 1, 2019 and thereafter” (*id.* at ¶ 24).

On December 2, 2020, defendants Binyan, 1452 and Weider collectively answered the complaint and asserted several affirmative defenses, including lack of personal jurisdiction and lack of standing. Defendant City of New York Environmental Control Board (ECB) failed to answer or otherwise appear in this action.

Shelwol's Summary Judgment Motion

Shelwol now moves for summary judgment against the Borrowers, Binyan and 1452, and the Guarantor, Weider, an order of reference, a default judgment against non-

appearing defendant ECB and other relief.

Shelwol submits an affirmation from Herbert Wolowitz (Wolowitz), the “managing member and authorized signatory” of Shelwol, who affirms that “I make this affirmation based upon my personal knowledge and the books and records maintained by Plaintiff in my possession.” Notably, Wolowitz does not affirm that such books and records are maintained by Shelwol in the normal course of its business, nor does he affirm that he is familiar with Shelwol’s record-keeping process. Wolowitz’s affirmation does not annex any of the business records upon which his affirmation is based.

Wolowitz’s affirmation describes (nearly verbatim from the complaint) Note and Mortgage #1, Note and Mortgage #2, Note and Mortgage #3 and the October 1, 2019 CEMA and Consolidated Note executed by Borrowers in favor of Shelwol. Wolowitz affirms that Shelwol seeks to foreclose the CEMA against the Properties under which \$3,000,000.00 in principal is due and owing. Wolowitz reiterates the event of default alleged in the complaint. Copies of the loan documents, including the Consolidated Note, the CEMA and the guaranty are submitted with Shelwol’s summary judgment motion.

Defendants’ Opposition

Defendants, in opposition, argue that “there are numerous genuine issues of disputed material facts that, essentially, defeat plaintiff’s current motion for summary judgment.” Specifically, defense counsel asserts that “plaintiff’s summary judgment [motion] should not be granted at this stage due to four key reasons: defective service of summons and complaint, Governor[] Cuomo[’s] Executive Order (s), issues related to

forbearance and ongoing negotiations between plaintiff and defendants.”

Defense counsel explains that it now seeks to dispute that there was proper service upon Weider, the Guarantor, despite the fact that he “conceded to the proper service” in a prior court submission. Weider submits an affidavit attesting that “I was never served properly in the current action.” Weider submits documentary evidence that he resides at 1358 53rd Street, Apt. 2B in Brooklyn, and attests that “I have no connection to the address to which plaintiff served [the] summons and complaint . . .”

Shelwol’s Reply

Shelwol, in reply, submits an attorney affirmation asserting that “[t]his action involves the foreclosure of a commercial mortgage in relation to two vacant properties [and] does not involve a ‘home loan’ because, the Borrower is a corporation and the property is vacant.” Shelwol further asserts that service of process upon Weider was proper. Even if personal service upon Weider was improper, Shelwol asserts that Weider waived the jurisdictional defense by submitting an affirmation in support of defendants’ cross motion (in mot. seq. two) expressly conceding that defendants were properly served. Shelwol also argues that Weider also waived the jurisdictional defense, pursuant to CPLR 3211 (e), by failing to move for dismissal on that ground within 60 days after answering the complaint.

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 Prospect 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 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 Shelwol submitted copies of the Consolidated Note, CEMA and guaranty, it 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]). Wolowitz's affirmation regarding the Borrowers' default based on his review of unidentified business records is inadmissible because Shelwol failed to produce the business records upon which Wolowitz's knowledge is based. In addition, Wolowitz failed to affirm that his affirmation was based on a review of business records that were produced during the normal course of Shelwol's business. Consequently, Shelwol's motion for summary judgment, an order of reference and a default judgment are denied with leave to renew based on papers that provide a proper evidentiary foundation. Accordingly, it is hereby

ORDERED that Shelwol's motion (in mot. seq. three) 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.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE