

U.S. Bank N.A. v Radyo Panou Inc
2021 NY Slip Op 31296(U)
April 15, 2021
Supreme Court, Kings County
Docket Number: 526818/19
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 15th day of April, 2021

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR VELOCITY COMMERCIAL
CAPITAL LOAN TRUST 2017-1,

Plaintiffs,

- against -

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RADYO PANOU INC, GEFFRARD JOSEPH, NYC
BUREAU OF HIGHWAY OPERATIONS, NEW
YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY PARKING
VIOLATION BUREAU, RADIO PANOU,
ELISNER BRUES and JOHN SMITH,

Defendants.

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The following efiled papers read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	75 _____
Opposing Affidavits (Affirmations) _____	95 _____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) in support _____	77, 85 _____

Upon the foregoing papers, plaintiff U.S. Bank National Association, as trustee for Velocity Commercial Capital Loan Trust 2017-1, moves for an order: (i) pursuant to CPLR 3212, granting summary judgment against defendants Radyo Panou Inc. (Radyo)

and Geffrard Joseph (Joseph); (ii) pursuant to CPLR 3215, granting a default judgment against defendants NYC Bureau of Highway Operations, New York City Environmental Control Board, New York City Parking Violation Bureau, Radio Panou, Elisner Brues and John Smith; and (iii) appointing a referee to compute the amount due.

Plaintiff commenced this action to foreclose a commercial mortgage encumbering the property at 1685 Nostrand Avenue in Brooklyn. The mortgage was executed by Radyo on November 9, 2016 to secure a \$429,000 note in favor of Velocity Commercial Capital Inc. (Velocity). As additional security, Joseph executed a personal guaranty. By assignment dated November 16, 2017 and recorded December 1, 2017, the subject mortgage “[t]ogether with the note(s) and obligations therein described or referred to,” were assigned from Velocity to plaintiff.

According to the verified complaint, filed on December 10, 2019, Radyo defaulted under the terms of the mortgage and note by failing to make the monthly payments due on August 1, 2019 and each month thereafter. In their answer, filed on December 21, 2019, Radyo and Joseph set forth numerous affirmative defenses, including lack of standing.

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 evidence of default (*see U.S. Bank N.A. v Mezrahi*, 169 AD3d 952, 953 [2d Dept 2019]; *Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d 1001, 1002 [2d Dept 2015]). Additionally, where, as here, a defendant places standing in issue, the plaintiff must prove

its standing in order to be entitled to relief (*see U.S. Bank N.A.*, 169 AD3d at 953; *Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 684 [2d Dept 2016]). A plaintiff has standing in a mortgage foreclosure action when it is the holder or assignee of the underlying note at the time the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]; *U.S. Bank N.A.*, 169 AD3d at 953). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident” (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]; *see Aurora Loan Servs., LLC*, 25 NY3d at 361-362; *Wells Fargo Bank, N.A. v Harrison*, 188 AD3d 1298, 1300 [2d Dept 2020]).

Contrary to the contention of Radyo and Joseph, plaintiff has established standing by producing the written assignment instrument, dated November 16, 2017, which assigned the subject mortgage “[t]ogether with” the underlying note (*see Wells Fargo Bank, N.A. v Archibald*, 150 AD3d 937, 938 [2d Dept 2017]; *U.S. Bank N.A. v Akande*, 136 AD3d 887, 890 [2d Dept 2016]). However, while plaintiff has submitted a copy of the mortgage and note, it failed to establish Radyo’s default as a matter of law. “There is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518 (a), and the records themselves actually evince the facts for which they are relied upon” (*Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept

2017]; see *HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822, 826 [2d Dept 2017]). “A default is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form” (*Deutsche Bank Natl. Trust Co. v. McGann*, 183 AD3d 700, 702 [2d Dept 2020]). In support of its motion for summary judgment, plaintiff submits an affidavit from Jeff Taylor, executive vice president of Velocity, the “special servicer” for plaintiff. In his affidavit, Taylor states:

“As part of the regular performance of my job functions, I am personally familiar with the record-keeping practices and procedures, and have access to, the business records relating to the history, administration and collection activities applicable to the Loan (defined hereafter) including all servicing agreements. These records were made at or near the time of the actions or events they reflect by, or from information transmitted from, a person with knowledge of the subject transaction in the regular practice and ordinary course of business. I have personal knowledge of the manner in which the records were created and kept, and I have reviewed and relied upon the records in executing this affidavit. Unless stated otherwise, I make this affidavit based on the records of Velocity, in its capacity as special servicer for U.S. Bank, in my possession or subject to my control.”

Taylor further asserts that Radyo defaulted on its obligations under the terms of the note by failing to make monthly payments due on August 1, 2019 and each month thereafter. However, Taylor does not aver that he has personal knowledge of the default, and to the extent Taylor’s knowledge is based on his review of business records, he does not identify what records he relied on in determining the default and does not attach them.

to his affidavit (*see Flatbush Two, LLC v Morales*, 190 AD3d 826, 828 [2d Dept 2020]; *Deutsche Bank Natl. Trust Co.*, 183 AD3d at 702; *JPMorgan Chase Bank, N.A. v Akanda*, 177 AD3d 718, 719-720 [2d Dept 2019]).¹

As a result, plaintiff's motion is denied in its entirety without prejudice.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE

¹Plaintiff's submission of a notice of default and acceleration is insufficient to establish default as a matter of law (*see BNH Milf, LLC v Milford Street Props.*, — AD3d —, 2021 NY Slip Op 01742, *2 [2d Dept 2021]; *JPMorgan Chase Bank, N.A.*, 177 AD3d at 719).