

BK 38th Lender LLC v Project Erasmus LLC
2021 NY Slip Op 31318(U)
April 13, 2021
Supreme Court, Kings County
Docket Number: 506652/20
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 13th day of April, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
BK 38TH LENDER LLC,

Plaintiff,

- against -

Index No. 506652/20

PROJECT ERASMUS LLC, MIRIAM SCHWARTZ,
JACK SCHWARTZ, RENT A UNIT NY INC.,
MACTECH ROOFING & RESTORATION CORP.,
TRI-STATE LUMBER INC., HS FLOORS INC.
and JOHN DOE #1 THROUGH JOHN DOE #20 (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) _____

25-36, 38-39

Opposing Affidavits (Affirmations) _____

41-42

Reply Affidavits (Affirmations) _____

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Upon the foregoing papers in this action to foreclose mortgages on the commercial property at 153 Erasmus Street in Brooklyn (Property), plaintiff BK 38th Lender LLC (BK) moves (in motion sequence [mot. seq.] one) for an order: (1) pursuant to CPLR 3212,

awarding it summary judgment against defendants Project Erasmus LLC (Project Erasmus or Borrower), Miriam Schwartz and Jack Schwartz (Schwartz Defendants or Guarantors) and Mactech Roofing & Restoration Corp. (Mactech); (2) pursuant to CPLR 3215 (a) and RPAPL 1321, awarding it a default judgment against non-appearing defendants, Rent A Unit NY Inc., Tri-State Lumber Inc. and IIS Floors Inc. (HS Floors); (3) pursuant to RPAPL 1321, appointing a referee to ascertain and compute the amount due under the notes and mortgages and to determine whether the Property should be sold in one or more parcels; and (4) amending the caption to delete the John Doe defendants.

Background

On March 17, 2020, BK commenced this commercial foreclosure action by filing a summons and an unverified complaint. On March 19, 2020, BK filed a notice of pendency against the Property. The complaint alleges that on or about June 5, 2017, the Borrower, Project Erasmus, executed and delivered to S3 RE Funding II LLC (S3): (1) a \$750,000.00 promissory note (Land Note), which was secured by a mortgage on the Property, an Assignment of Leases and Rents and a Security Agreement (Land Mortgage), and (2) a \$3,250,000.00 Building Loan promissory note (Building Loan Note), which was secured by a Building Loan Mortgage in favor of S3 (Building Loan Mortgage) (complaint at ¶¶ 9-10 and 11-12). The complaint alleges that the Guarantors (the Schwartz Defendants) executed two separate guaranties “[t]o induce Plaintiff’s predecessor-in-interest to make the loans . . .” (*id.* at ¶ 17).

The complaint alleges that the original lender, S3, “assigned all of its right, title and interest in and to the Notes and Mortgages to BK . . .” pursuant to two separate assignments of mortgage each dated January 14, 2020 and “also executed and delivered to BK . . . an allonge with respect to each of the Notes” (*id.* at ¶¶ 14-15). The complaint alleges that “BK . . . is the sole, true, and lawful owner and holder of the Notes and the Mortgages . . .” (*id.* at ¶ 16). The complaint annexes copies of the Notes with the corresponding allonges, the Mortgages and the assignments.

The complaint alleges that the Borrower, Project Erasmus, defaulted under the terms of the loan agreements and the Mortgages by failing to make the monthly interest payment due on November 1, 2019 (*id.* at ¶ 20). The complaint further alleges that the Borrower failed to pay all outstanding principal and interest due under the Notes on November, 30, 2019, the maturity date of the loans (*id.* at ¶ 21).

On or about June 10, 2020, Mactech answered the complaint and asserted a counterclaim and crossclaim for a \$16,854.00 mechanic’s lien and a crossclaim against Project Erasmus and the Schwartz Defendants for an accounting. On July 1, 2020, HS Floors filed a notice of appearance and a claim to surplus monies.

On October 22, 2020, Project Erasmus and the Schwartz Defendants collectively answered the complaint and asserted affirmative defenses, including that BK lacks standing. The answer alleges that BK “no longer has the right to enforce the Notes and Mortgages at issue herein” because BK allegedly “granted BQ Four LLC [BQ] a security

interest in the notes and related documents encumbering the Mortgaged Premises . . .” on or about January 28, 2020 (answer at ¶¶ 42-43). The answer further alleges “if the Plaintiff defaults on its Amended and Restated Promissory Note with BQ . . . the Plaintiff’s right to foreclose on, *inter alia*, the Notes and Mortgages at issue in this action is automatically extinguished[.]” “[u]pon information and belief, the Plaintiff has defaulted on its Amended and Restated Promissory Note with BQ . . .” and that “[t]here are pending foreclosure proceedings with respect to *all* of the Collateral Assignment Properties.” (*id.* at ¶¶ 48, 49 and 51).

The other defendants failed to answer or otherwise respond to the complaint.

BK’s Summary Judgment Motion

BK now moves for summary judgment against Project Erasmus, the Schwartz Defendants and Mactech, an order of reference, a default judgment against the non-appearing defendants and other relief. Notably, BK filed the instant summary judgment motion before any discovery or a preliminary conference.

BK submits an affidavit from Ralph Dweck (Dweck), who attests that “I am authorized to submit this affidavit on behalf of the Plaintiff BK . . .” and that “[t]he facts and matters set forth in this affidavit are based upon my personal knowledge and/or my review of BK 38th Lender LLC’s business records [and] the business records of BK 38th 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

BK . . . in its loan portfolio” which “includes all of the loan documents purchased from its predecessors-in-interest and all file documents that were formally in the possession of said predecessors-in-interest.”

Dweek attests that BK seeks to foreclose the mortgages against the Property under which \$3,688,321.00 in principal is due and owing. Dweek describes the January 14, 2020 assignments of the Notes and Mortgages from S3 to BK. Dweek attests that “S3 . . . also executed and delivered to BK . . . an allonge with respect to each of the Notes [which] are annexed to the Complaint . . .” and “BK . . . is the sole, true, and lawful owner and holder of the Notes and the Mortgages . . .” Dweek asserts that the guaranties were also assigned to BK. Dweek reiterates the events of default alleged in the complaint.

Dweek also submits a supplemental affidavit with a copy of the “Payment History” maintained by BK “showing a lack of payment from Borrower which were due to be made on November 1, 2019 and November 30, 2019, respectively.” Notably, the “Payment History” appears to be an Excel spreadsheet, which does not identify which mortgage note it relates to, does not identify the Borrower and seemingly indicates that there was no balance due on January 30, 2020.

Copies of the loan documents, including the Notes, the allonges, the Mortgages and the guaranties, are all submitted with BK’s summary judgment motion.

Project Erasmus and the Schwartz Defendants' Opposition

Project Erasmus and the Schwartz Defendants, in opposition, assert that “Plaintiff’s pre-discovery motion for summary judgment must be denied in its entirety.” Defendants argue that BK “has not established that it is the holder of the note nor has Plaintiff offered admissible documentary evidence of the default at issue.” Defendants contend that there are material issue of fact regarding BK’s standing “which cannot be resolved without discovery.”

Specifically, defendants argue that BK has failed to establish its standing to foreclose. Defense counsel asserts that while BK attaches two allonges as exhibits to the Dweck Affidavit, “**there is no evidence that the ‘Allonges’ were ever firmly affixed to their respective notes[,]**” as required under Uniform Commercial Code (UCC) § 3-202. Defense counsel further notes that the Dweck Affidavit does not “address affixation of the Allonges to the Notes, the last page of the respective Notes could have accommodated indorsements, and the identifying footers of the Notes and Allonges do not match.” Defendants argue that “[w]ithout a proper indorsement, ‘mere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing[,]’” citing *U.S. Bank N.A. v Moulton*, (179 A1D3d 734, 737 [2020]).

In addition, defendants submit copies of BK’s January 28, 2020 Collateral Assignments of the Mortgages from BK to BQ, which were recorded on February 6, 2020. Defense counsel argues that these assignments specified that BK “retains **conditional**

ownership rights” over the notes and mortgages, and can only foreclose if BK is not in default under the Collateral Assignments. The Collateral Assignments thus provide:

“The foregoing assignment is made as collateral for that certain Amended and Restated Promissory Note executed and delivered by Assignor to and for the benefit of Assignee in the amount of \$20,483,031.45 dated as of the date hereof. *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, provided that no Event of Default has occurred under the terms of the aforementioned Secured Promissory Note or under any of the loan documents executed in connection therewith*” (emphasis added).

Defense counsel notes that defendants’ answer alleged, upon information and belief, that BK has no right to foreclose because BK defaulted under the Collateral Assignments. Defense counsel asserts that “[t]his affirmative defense clearly depends on information in the hands of Plaintiff: namely, whether or not Plaintiff defaulted on the Secured Promissory Note . . .”

Finally, defendants argue that BK failed to establish its prima facie right to summary judgment because it failed to offer admissible evidence of Project Erasmus’ default. Defense counsel asserts that “[t]he ‘Payment History’ offered by the Plaintiff via the Supplemental Dweck Affidavit of March 8, 2021, which seems to be nothing more than a printout of an Excel spreadsheet, falls short of this basic requirement.” Defense counsel notes that “the alleged Payment History also seems to indicate that, as of January 30, 2020, **no balance was due**” and provides no “explanation of whether the ‘Payment History’

reflects both Notes for \$750,000 and \$3.25 Million, respectively.” Defendants argue that BK’s “Payment History” “raises more questions than answers . . .”

BK’s Reply

BK, in reply, argues that its moving papers conclusively established defendants’ execution and delivery of the notes, the mortgages and the guaranties and “said parties’ default under same” and that the burden has shifted to the defendants to establish the existence of material issues of fact for trial. BK’s counsel asserts that **“it is beyond dispute that the subject loans have been in default since November 1, 2019, when the Borrower failed to make its monthly payment of interest due under the Notes.”** BK’s counsel further asserts “[w]hile their counsel takes issue with the format of the payment history, the Borrower-Defendants have not presented any evidence that they made the payment due for November 2019 or that they ever repaid the loans upon maturity.”

Regarding BK’s standing to foreclose, BK’s counsel asserts that the Assignments of Mortgage from S3 to BK “not only assigned the subject Mortgages, but it also unequivocally assigned the subject Notes.” BK’s counsel asserts that “the Borrower-Defendants’ reliance upon the allonges in an attempt to create an issue of fact with respect to Plaintiff’s standing is entirely misplaced, as the allonges are not needed for Plaintiff to establish its standing.”

BK’s counsel further argues that BK’s collateral assignment of the Mortgages “does not limit Plaintiff’s ability to enforce the Notes and Mortgages.” BK argues that

defendants' mere allegations made "upon information and belief" that BK is in default under the Collateral Assignment does not raise a triable issue of fact to preclude summary judgment. BK asserts that "[t]heir opposition . . . does not cite to **any evidence – nonetheless evidence in admissible form** – showing such a purported default . . ."

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]).

Although BK submitted copies of the Notes, Mortgages and the guaranties, 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 Project Erasmus' payment 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]).

Here, however, BK's submission of the Supplemental Dweck Affidavit along with an ambiguous "Payment History" consisting of a 1 ½ page Excel spreadsheet that does not identify the Mortgages or the Borrower, is insufficient evidence of Project Erasmus' payment default. While BK claims that the "Payment History" evidences Project Erasmus'

November 2019 payment default, the “Payment History” seemingly reflects that there was no balance due on the Mortgages on January 30, 2020. Consequently, BK’s motion for summary judgment, an order of reference and a default judgment is denied with leave to renew based upon business records which adequately evidence Project Erasmus’ alleged default. Accordingly, it is hereby

ORDERED that BK’s motion (in mot. seq. one) 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.



LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE