

Ponce Bank v Bushwick &.Jefferson Realty LLC
2021 NY Slip Op 31473(U)
April 28, 2021
Supreme Court, Kings County
Docket Number: 526914/19
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 28th day of April, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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PONCE BANK,

Plaintiff,

- against -

Index No. 526914/19

BUSHWICK & JEFFERSON REALTY LLC, JOSE RODRIGUEZ, NYC BUREAU OF HIGHWAY OPERATIONS, FIRST IC BANK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, GCAP HOLDINGS LLC, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, 21ST MORTGAGE CORP., COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK, SHERESE ANNETTE LEWIS, HFH CAPITAL FUNDING, BARBARA PIASCIK, NEW YORK CITY DEPARTMENT OF FINANCE, THE UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE DEPARTMENT OF THE TREASURY, NEW YORK CITY PARKING VIOLATIONS BUREAU PAYMENT AND ADJUDICATION CENTER, NEW YORK CITY TRANSIT ADJUDICATION BUREAU and "JOHN DOE" #1-10, "MARY DOE" #1-10, and "JANE DOE" #1-10, the names being fictitious, their true names being unknown to the plaintiff, persons intended being persons in possession of portions of the premises herein described,

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) Annexed_____	<u>14-27</u>	<u>30-32, 34</u>
Opposing Affidavits (Affirmations)_____	<u>31-32</u>	<u>38-41</u>
Reply Affidavits (Affirmations)_____	<u>38-41</u>	<u>42</u>

Upon the foregoing papers in this action to foreclose a consolidated mortgage on the commercial property at 1195 Bushwick Avenue in Brooklyn (Property), plaintiff Ponce Bank (Ponce) moves (in motion sequence [mot. seq.] one) for an order: (1) appointing a referee to compute the total sums due and owing, pursuant to RPAPL 1321, and (2) amending the caption to substitute Kev & J Grocery Inc., Jose Cruz, Juan Zapata and Sophia Sanchez for the “John Doe” and “Jane Doe” defendants and striking the “John Doe,” “Mary Doe” and “Jane Doe” defendants from the caption.

Defendant First IC Bank (First IC) cross-moves (in mot. seq. two) for an order granting it leave to file a late answer to the complaint.

Background

On December 11, 2019, Ponce commenced this foreclosure action by filing a summons, a verified complaint and a notice of pendency against the Property. The complaint alleges that on or about January 25, 2017, defendant Bushwick & Jefferson Realty LLC (B&J) executed and delivered a mortgage note in the principal amount of \$750,000.00 in favor of 1195 Bushwick Ave. Funding LLC c/o Hirshmark Capital LLC, secured by a mortgage encumbering the Property, which was recorded on March 1, 2017

under CRFN 2017000081999 (complaint at ¶ 2). The complaint alleges that on or about March 28, 2018, B&J executed and delivered a Gap Note in the principal amount of \$300,000.00 to Ponce providing “for repayment of outstanding principal plus all accrued and unpaid interest payable on demand[,]” secured by a gap mortgage (second mortgage) encumbering the Property, which was recorded on April 10, 2018 under CRFN 2018000119517 (*id.* at ¶ 3). On or about March 28, 2018, B&J allegedly executed and delivered a consolidated note in the principal amount of \$1,050,000.00 in favor of Ponce, which provided for monthly installments commencing on May 1, 2018 (*id.* at ¶ 4). The complaint alleges that the first and second mortgages were consolidated into a \$1,050,000.00 mortgage encumbering the Property, which was recorded on April 10, 2018 under CRFN 2018000119518 (*id.* at ¶ 5). The complaint alleges that “[a]s collateral security for payment of this indebtedness, Defendant[] Jose Rodriguez personally guaranteed performance and payment to PONCE BANK, its successors and/or any subsequent holder of the note by Guaranty dated March 28, 2018” (*id.*).

The complaint alleges that “prior to filing the Complaint, Plaintiff, or Plaintiff’s Agent was in possession and control of the original note with a proper endorsement and/or allonge and was therefore, the holder of both the note and mortgage, which passes as incident to the note” and “Plaintiff is still the owner and holder of said note and mortgage. . . .” (*id.* at ¶¶ 6 and 14).

The complaint alleges that defendant B&J “has failed to comply with the terms

and provisions of said note and mortgage by failing to make the monthly payments of interest and principal due on September 1, 2019, and each successive month thereafter” (*id.* at ¶ 12). The complaint alleges that “there is now due and owing . . . the principal sum of ONE MILLION TWENTY NINE THOUSAND SEVEN HUNDRED TWENTY DOLLARS AND 48/100 (\$1,029,720.48) plus interest from August 1, 2019, together with accrued late charges, and related expenses incurred in protecting the plaintiff’s security” (*id.* at ¶ 14).

The complaint alleges that “[t]he defendants herein ha[ve], or claims to have, some interest in or lien upon said mortgaged premises or some part thereof, which interest or lien, if any, accrued subsequent to the lien of the plaintiff’s mortgage and is subject and subordinate thereto” (*id.* at ¶ 19). Regarding defendant First IC, the complaint alleges that it was “made a party defendant herein solely by reason of a subordinate mortgage which might affect the premises . . .” (*id.* at ¶ 19 [c]).

On December 19, 2019, defendant First IC filed a notice of appearance. Although other defendants also filed notices of appearance, none of the named defendants answered the complaint.

Ponce’s Motion for an Order of Reference

Ponce now moves for an order appointing a referee to compute the amount due and owing and to amend the caption. Ponce submits an affidavit from James C. Visioli (Visioli), Ponce’s Vice President, who describes the \$750,000.00 note that B&J executed

and delivered to 1195 Bushwick Ave. Funding LLC c/o Hirshmark Capital LLC on or about January 25, 2017. Visioli attests that:

“The Plaintiff (or the Plaintiff’s agent on behalf of the plaintiff) has possession of the original note that is the subject matter of this cause of action, having taken physical possession of the original note and mortgage on MARCH 28, 2018, and therefore has an enforceable interest that allows the plaintiff (or the plaintiff’s agent on behalf of the plaintiff) the right to foreclose. PONCE Bank was in possession of the Note at the time of commencement of this action.”

Visioli attests that the note provided for repayment of monthly installments commencing March 1, 2017 and continuing thereafter, with a final payment due on February 1, 2018. Visioli attests that the \$750,000.00 note was secured by a mortgage on the Property, which 1195 Bushwick Ave. Funding LLC c/o Hirshmark Capital LLC assigned to Ponce by a March 28, 2018 mortgage assignment, which was recorded on April 10, 2018 under CRFN 2018000119516.

Visioli also describes the \$300,000.00 gap note that B&J executed and delivered to Ponce on or about March 28, 2018, which “provided for repayment of outstanding principal plus all accrued and unpaid interest payable on demand” and the \$1,050,000.00 consolidated note that B&J executed and delivered to Ponce on or about March 28, 2018. Visioli described the March 28, 2018 gap mortgage in the amount of \$300,000.00, which was consolidated with the January 25, 2017 mortgage in the amount of \$750,000.00 to form the consolidated mortgage in the amount of \$1,050,000.00, which was recorded on April 10, 2018. Visioli’s affidavit annexed copies of the notes, mortgages and the

mortgage assignments.

Visioli attests that “Defendant(s) breached said obligation by failing to tender the installment which became due and payable on SEPTEMBER 1, 2019 and by failing to tender subsequent installments” and that \$1,105,512.83 is presently due and owing.

First IC’s Opposition and Cross Motion

First IC submits an attorney affirmation in opposition to Ponce’s motion for an order of reference, in which defense counsel affirms that:

“The only allegation in the Complaint relating to FIRST IC BANK, paragraph 19c, alleges: ‘The following is made a party defendant herein solely by reason of a subordinate mortgage which might affect the premises described in Schedule A: FIRST IC BANK.’

“While FIRST IC BANK’S mortgage is subordinate to the ‘first mortgage’ of PONCE BANK, FIRST IC BANK’S mortgage is not subordinate to PONCE BANK’S ‘second mortgage,’ as FIRST IC BANK’S mortgage was executed [on March 26, 2018] before . . . the execution of the ‘second mortgage’ [on March 28, 2018] and recorded [on April 2, 2018] before the recording of the ‘second mortgage’ [on April 10, 2018].

“The Complaint, as filed, did not specifically allege that PONCE BANK’S ‘second mortgage’ was superior to FIRST IC BANK’S mortgage.

* * *

“In his Affidavit of Merit and Amount Due, Mr. Visioli stated that amount due was the total amounts of the first and second PONCE BANK mortgages, effectively subordinating FIRST IC BANK’S mortgage to the second mortgage, despite the second mortgage’s junior position. Mr. Visioli’s affidavit

failed to disclose in any respect that FIRST IC BANK's mortgagek was always superior to PONCE BANK's second Mortgage."

First IC cross-moves for an order granting it leave to file a late answer to the complaint to assert that First IC's mortgage is superior to Ponce's second mortgage. Defense counsel asserts that "[t]o the extent I erred in not filing an Answer instead of a Notice of Appearance, it was the product of 'excusable neglect' which I seek to have rectified by filing this opposition and cross-motion, and submitting a proposed Answer out-of-time."

Ponce's Opposition to the Cross Motion

Ponce, in opposition to the cross motion, asserts that defendant First IC was served with process on December 16, 2019, pursuant to CPLR 308 (3), and filed a notice of appearance on December 18, 2019. Ponce argues that "[t]o allow this defendant to interpose an[] answer at this point to oppose Plaintiff's lien priority would severely prejudice the Plaintiff, which apparently is a victim of misrepresentation and fraudulent acts of the defendant, [B&J]." Ponce argues that First IC has failed to satisfy the requirements to file a late answer.

Discussion

"When seeking an order of reference to determine the amount that is due on an encumbered property, a plaintiff must show its entitlement to a judgment. That entitlement may be shown . . . by the plaintiff showing entitlement to summary judgment

...” (*U.S. Bank N.A. v Miller*, 49 Misc 3d 1205 (A), * 5 [Sup Ct, Kings County 2015] [citing RPAPL § 1321; 1-2 Bruce J. Bergman, *Bergman on New York Mortgage Foreclosures* § 2.01 (4) (k) (note: online edition)]).

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 evidence of 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 as a matter of law, 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]).

Ponce, in support of its motion for an order of reference, has demonstrated its prima facie entitlement to judgment as a matter of law by submitting: (1) the mortgages, the notes, and an affidavit attesting to the B&J’s default under the terms of the mortgages; (2) proof of service of a copy of the summons and complaint; and (3) proof of the facts constituting a cause of action for foreclosure (*see Bank of New York Mellon v Genova*, 159 AD3d 1009, 1010 [2018]).

While First IC raises an issue regarding the priority of its mortgage against the Property, it admittedly failed to answer the complaint to assert that defense, and defense

counsel specifically elected to file a notice of appearance instead. First IC’s assertion that its mortgage has priority over Ponce’s second mortgage does not preclude the appointment of a referee to ascertain the amounts owed under Ponce’s consolidated mortgage.

First IC’s cross motion for leave to file a late answer is granted absent any discernible prejudice to Ponce, which will have an ample opportunity to challenge First IC’s priority when it moves for summary judgment. Accordingly, it is hereby

ORDERED that Ponce’s motion (mot. seq. one) for an order of reference to compute the amount due to plaintiff, pursuant to RPAPL 1321, is granted, and an order of reference shall be settled on notice; and it is further

ORDERED that the branch of Ponce’s motion seeking to amend the caption to substitute Key & J Grocery Inc., Jose Cruz, Juan Zapata and Sophia Sanchez for the “John Doe” and “Jane Doe” defendants and strike the “John Doe,” “Mary Doe” and “Jane Doe” defendants from the caption is granted and the caption shall hereinafter read:

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PONCE BANK,

Plaintiff,

- against -

BUSHWICK & JEFFERSON REALTY LLC, JOSE RODRIGUEZ, NYC BUREAU OF HIGHWAY OPERATIONS, FIRST IC BANK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, GCAP HOLDINGS LLC, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK STATE DEPARTMENT

OF TAXATION AND FINANCE, 21ST MORTGAGE CORP., COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK, SHERESE ANNETTE LEWIS, HFH CAPITAL FUNDING, BARBARA PIASCIK, NEW YORK CITY DEPARTMENT OF FINANCE, THE UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE DEPARTMENT OF THE TREASURY, NEW YORK CITY PARKING VIOLATIONS BUREAU PAYMENT AND ADJUDICATION CENTER, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, KEV & J GROCERY INC., JOSE CRUZ, JUAN ZAPATA and SOPHIA SANCHEZ,

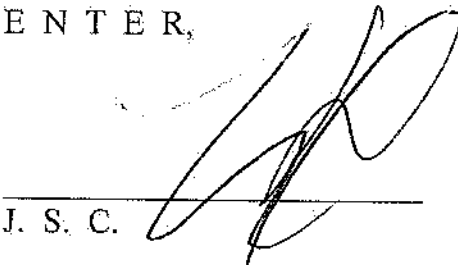
Defendants.

-----X; and it is further

ORDERED that First IC's cross motion (mot. seq. two) for leave to file a late answer to the complaint is granted, and First IC shall file its answer to the complaint within 30 days after service of this order with notice of entry thereof.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE