YSRE ResiRep II LLC v 533 Quincy Realty LLC
2021 NY Slip Op 31674(U)
May 13, 2021
Supreme Court, Kings County
Docket Number: 517425/19
Judge: Lawrence S. Knipel

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 May, 2021.

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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YSRE RESIREP II LLC,

Plaintiff,

- against -

Index No. 517425/19

533 QUINCY REALTY LLC, 229 WEST 136TH STREET LLC, THEODORE FELDHEIM, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD 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.

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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)	79-90
Opposing Affidavits (Affirmations)	93-98
Reply Affidavits (Affirmations)	101-102

Upon the foregoing papers in this action to foreclose a mortgage on the commercial properties at 533A and 533 Quincy Street in Brooklyn (Block 1624, Lots 73 and 74), a building that has approximately ten apartment units (Property), plaintiff YSRE

ResiRep II LLC (YSRE) moves (in mot. seq. four) for an order: (1) granting it summary judgment against defendants 533 Quincy Realty LLC (533 Quincy or borrower) and Theodore Feldheim (Feldheim or guarantor) (collectively, defendants) for all relief requested in the complaint, including judgment of foreclosure and sale, and dismissing defendants' counterclaims, pursuant to CPLR 3212; (2) awarding it a default judgment against the non-answering defendants, 229 West 136th Street LLC (229 or borrower), the New York City Department of Finance (NYCDOF), the New York State Department of Taxation and Finance (NYSDOTF) and the New York City Environmental Control Board (NYCECB), pursuant to CPLR 3215 (a) and RPAPL 1321; (3) appointing a referee to ascertain and compute the amount due upon the note and mortgage 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 August 8, 2019, YSRE commenced this commercial foreclosure action by filing a summons, a complaint and a notice of pendency against the Property. The complaint alleges that on or about October 15, 2018, borrower (533 Quincy and 229) executed a $3,500,000.00 note in favor of YSRE, which was secured by a consolidated mortgage on the Property (complaint at ¶¶ 9-10). The complaint alleges that Feldheim executed a guaranty of the loan (*id.* at ¶ 13). The complaint alleges that borrower defaulted under the terms of the note and mortgage by failing to make the monthly

interest payment due on July 1, 2019, and any applicable cure period has expired (*id.* at ¶ 16). Regarding standing, the complaint alleges that YSRE "is in physical possession of the original Note and is the sole, true, and lawful owner and holder of the Note and Mortgage" (*id.* at ¶ 12).

On January 25, 2021, 533 Quincy answered the complaint, asserted affirmative defenses, including lack of standing, lack of privity of contract, statute of frauds, statute of limitations, fraud in the inducement and failure to send a proper notice of default. 533 Quincy also asserted three counterclaims against YSRE for: (1) breach of contract by "failing fully to fund the loan (specifically, the construction portion of the loan) and by wrongfully declaring a default by 533 Quincy and demanding an immediate and full repayment of the loan, including the portion of the loan that YSRE never actually funded (533 Quincy answer at ¶ 58); (2) breach of the implied covenant of good faith and fair dealing by "fail[ing] to deliver the $650,000.00 portion of the loan earmarked for construction costs knowing that 533 Quincy required the loan to complete construction . . ." (*id.* at ¶ 64); and (3) breach of fiduciary duties by failing to use the Interest Reserve to satisfy 533 Quincy's monthly interest payment, wrongfully declaring a default and failure to finance the loan so that 533 Quincy could complete construction at the Property (*id.* at ¶ 75).

On February 1, 2021, Feldheim filed his answer to the complaint with counterclaims, which was nearly identical to 533 Quincy's answer with counterclaims.

YSRE's Summary Judgment Motion

YSRE now moves for summary judgment, an order of reference, a default judgment against the non-appearing defendants and other relief. YSRE submits an affidavit from Christopher Nutt (Nutt), the Director of Restructuring of YieldStreet Management, LLC, the manager of YSRE, who attests that his knowledge is based on his review of YSRE's business records. Nutt attests that YSRE seeks to foreclose on the $3.5 million commercial mortgage against the Property, which secures payment under an October 15, 2018 consolidated note executed by borrower in favor of YSRE. Nutt also attests that Feldheim guaranteed the loan. Nutt attests that YSRE, the original lender, is "in physical possession of the original Note and is the sole, true, and lawful owner and holder of the Note and the Mortgage."

Nutt further attests that on October 15, 2018, the borrower and YSRE entered into an "Interest/Capital Improvement Reserve Agreement" (Reserve Agreement), "pursuant to which $200,000.00 was deposited for interest reserve . . . and $650,000.00 was deposited for capital improvements[,]" which could only be released if borrower submits certain documentation, including lien waivers and certifications from borrower's architect or engineer certifying the completion of any construction work at the Property. Nutt attests that "[a]t no time since the inception of the Loan did the Borrower submit to Plaintiff any of the documentation set forth in the [Reserve Agreement]." Essentially, YSRE argues that it had no contractual obligations to release the $650,000.00 in capital

improvement funds because 533 Quincy and Feldheim, its principal, failed to provide YSRE with any lien waivers or architectural/engineering certifications indicating that any construction work had been done at the Property, as required under the Reserve Agreement. For that reason, YSRE seeks summary judgment dismissing 533 Quincy and Feldheim's first counterclaims for breach of the Reserve Agreement and the second counterclaims (for breach of the implied covenant of good faith and fair dealing) as duplicative of the first counterclaims. YSRE argues that defendants' third counterclaims for breach of fiduciary duty are also subject to dismissal because the legal relationship between a borrower and a bank is contractual and does not create a fiduciary relationship.

Nutt further attests that YSRE "drew from the funds in the Interest Deposit to make the monthly payments of interest from the inception of the Loan until May 31, 2019 when there were no longer sufficient funds in said account." Nutt's affidavit references annexed copies of YSRE's business records regarding those payments. Nutt specifies that YSRE used $196,808.33 of the $200K to make seven monthly interest payments of $26,125.00. Nutt attests that "[o]nce the Interest Deposit was depleted, the Borrower was required to make the monthly interest payments of $26,125.00 . . . due under the Note beginning on July 1, 2019, but it failed to do so (and any applicable cure period has expired)." Nutt attests that YSRE sent the borrower and the guarantor a July 29, 2019 default letter demanding the immediate payment of all amounts due under the note.

YSRE submits copies of the loan documents, the Reserve Agreement, the guaranty

and the business records upon which Nutt's affidavit testimony is based.

Defendants' Opposition

Defendants, in opposition, submit an affirmation from Feldheim, a member of 533 Quincy, who affirms that YSRE's summary judgment motion is "premature" because there has been no discovery and is "defective." First, Feldheim asserts that YSRE is not entitled to a default judgment against defendant 229 because it "timely interposed an answer to the complaint" at NYSCEF Doc. No. 72. Feldheim further asserts that YSRE "fails to refute" the counterclaims asserted by 533 Quincy and Feldheim in their answers "with specificity." Feldheim affirms that "[t]hese defenses amount to allegations stating, among other things, that it was Plaintiff's own actions that caused the breach it now complains is a default of the mortgage agreements between the parties" and that "[t]his is a complete defense to Plaintiff's foreclosure action."

Feldheim claims that YSRE failed to release any of the $650,000.00 that was earmarked for rehabilitation/construction costs at the Property, despite the fact that YSRE's representative, Chiya Hoffman, "informed me that the payment was coming." Feldheim further claims that "Plaintiff ceased returning or answering my calls" and that "this avoidance came from the fact that Plaintiff was unable to secure the $650,000.00." Feldheim affirms that "[t]he failure to release these funds meant that 533 Quincy was unable to perform the anticipated construction work at the Property, which was the very purpose of the loan[,]" which constituted "a breach of both Plaintiff's obligations under

the mortgage and note, and of its obligations under the Reserve Agreement." Essentially, Feldheim argues that "[i]t is neither equitable nor conscionable for Plaintiff to now benefit from a purported default that it in fact engineered" and "Plaintiff's declaration of a default by 533 Quincy is nothing more than a means to cover its own wrongdoing." Feldheim claims that "[i]t is common practice in the construction industry not to request or even to require a lien waiver before funds are released, even in contracts that purportedly require one." Feldheim also claims that YSRE reached out to Mike Hidri of LH1 Construction Corp. (LH1) to obtain a lien waiver, and that Mike Hidri provided a lien waiver.

Defendants also submit an affidavit from Mike Hidri, who attests that:

> "We began with demolition work and requested payment of $80,000.00 for that work. The owner and the lender came by to inspect our work. The representative of the lender was Chiya Hoffman ('Hoffman'). I was told by the owner and the lender that we should continue our work – in particular, work on what are known as C-joints – and that payment for the demolition work would be made.
>
> "We continued our work, which was inspected by Hoffman and two (2) other people whose names I do not recall. I requested payment again and was told by Hoffman that I had to sign a lien waiver before payment would be delivered. This is standard in the construction industry – the signing of a lien waiver before receiving payment when one is requested. I did, in fact, sign the lien waiver and delivered it to Hoffman but we were not paid. Unfortunately, I do not have a copy of the lien waiver that I signed.
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> "I attempted to obtain payment multiple times, but was told by Hoffman that they could not make payment because they

were having problems with money."

Notably, Feldheim specifically admits that "Plaintiff, having already defaulted and demonstrated no ability to pay [the $650,000.00], made it futile for me to continue interest payments on a loan that was not fully funded." Feldheim, however, contends that "Plaintiff seeks immediate relief from this Court knowing full well that its default and that Defendants' allegations with the Answer[s] will be established at the close of discovery." Feldheim asserts that "[b]ecause discovery has only just begun in this action, Defendants have been unable to challenge Plaintiff's statements through documentary evidence nor examinations before trial."

YSRE's Reply

YSRE, in reply, submits an affidavit from Nutt, who attests that "Chiya Hoffman is not a member, employee, or authorized representative of Plaintiff or any of its affiliated entities." Nutt explains "[t]o the best of my knowledge, he is the broker, affiliated with Opal Realty NY, LLC, who introduced the Borrower to Plaintiff." Nutt also attests that "Plaintiff is unaware of any communications between Mr. Feldheim and any of its employees, officers or authorized representatives requesting the release of the capital improvement funds." Nutt notes that "Mr. Feldheim does not identify the date and time of any such communications and with whom he purportedly had such communications." Nutt reiterates that Feldheim "failed to provide the lien waivers and certifications which would be required to release the funds." Nutt also refutes defendants' assertion that

YSRE was unable to fund the loan, and asserts that "Plaintiff was, at all times relevant to this action, able to provide the capital improvement funds had the Borrower-Defendants complied with the Reserve Agreement." Nutt also attests that "Plaintiff is unaware of Mike Hidri or LH1 Construction Corp. and has not received any documents from this individual or corporation."

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 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]). When 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, YSRE satisfied its prima facie burden by submitting copies of the note, mortgage, the guaranty and evidence of 533 Quincy and 229's default by failing to make monthly interest payments of $26,125.00 beginning on July 1, 2019, after the $200,000.00 interest reserve was depleted. YSRE also demonstrated its standing to foreclose on the Property as the original lender. The burden thus shifted to defendants to raise a triable issue of fact to preclude summary judgment.

Defendant Feldheim expressly admits that "Plaintiff, having already defaulted and demonstrated no ability to pay [the $650,000.00], made it futile for me to continue

interest payments on a loan that was not fully funded." Thus, defendants admit that they failed to make the monthly interest payments, yet contend that YSRE previously breached the loan agreements, including the Reserve Agreement, by improperly failing to fund the $650,000.00 that was earmarked for construction at the Property. Defendants present both the Feldheim's affirmation and the affidavit of Mike Hidri, the contractor at the Property, to substantiate defendants' counterclaim for breach of the Reserve Agreement. YSRE's alleged breach of the Reserve Agreement by failing to fund the $650,000.00 may constitute a complete defense to this foreclosure action. Defendants are thus entitled to discovery regarding their asserted defenses and counterclaims, pursuant to CPLR 3212 (f), and YSRE's motion for summary judgment, a default judgment and an order of reference is denied with leave to renew after the conclusion of discovery. Accordingly, it is hereby

ORDERED that YSRE's motion (mot. seq. four) is only granted to the extent that the caption is amended to delete the John Doe defendants; YSRE's motion is otherwise denied with leave to renew at the conclusion of discovery.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE