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| <b>Victoria Capital Trust v MHS Beach 48 LLC</b>                                                                                                                                                                               |
| 2021 NY Slip Op 31720(U)                                                                                                                                                                                                       |
| May 20, 2021                                                                                                                                                                                                                   |
| Supreme Court, Kings County                                                                                                                                                                                                    |
| Docket Number: 507426/19                                                                                                                                                                                                       |
| 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 20<sup>th</sup> day of May, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X  
VICTORIA CAPITAL TRUST, BY AND THROUGH ITS TRUSTEE,  
WILMINGTON SAVINGS FUND SOCIETY, FSB,

Plaintiff,

- against -

Index No. 507426/19

MHS BEACH 48 LLC; CHAIM STREICHER; THE SEA GATE ASSOCIATION; JOHN DOE NO. 1 THROUGH JOHN DOE NO. XXX, inclusive, the last thirty names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

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) Annexed\_\_\_\_\_

29-35

Opposition Affidavits (Affirmations) Annexed\_\_\_\_\_

37-38

Upon the foregoing papers in this action to foreclose a commercial mortgage against the real property at 4823 Beach 48th Street in Brooklyn (Property), plaintiff Victoria Capital Trust, by and through its trustee, Wilmington Savings Fund Society, FSB (WSF) moves, (in motion [mot.] sequence [seq.] two) for an order: (I) granting it summary judgment against defendants MHS Beach 48 LLC (MHS or borrower), Chaim

Streicher (Streicher or guarantor), The Sea Gate Association (Sea Gate), and John Doe No. I through John Doe No. XXX (collectively defendants), pursuant to CPLR 3212; (2) striking defendants' answer and counterclaims; (3) amending the caption; and (4) for an order of reference.

### *Background*

On April 3, 2019, WSF commenced this commercial foreclosure action by filing of a summons, an unverified complaint and notice of pendency against the Property. The complaint alleges that defendants defaulted by failing to pay a mortgage owed to plaintiff by November 30, 2018, the maturity date of the loan. WSF alleges that it notified MHS of the default, that MHS has failed to cure its default and that MHS remains in default. The complaint alleges that WSF has the authority to recover the debt pursuant to section 2.1 of a July 21, 2017 Amended and Restated Trust Agreement, which identifies WSF as Certificate Trustee, Delaware Trustee and Collateral Trustee.

The complaint alleges that WSF is the owner and holder of the May 10, 2017 promissory note in the principal amount of \$1,440,000.00, which was executed by MHS in favor of Sharestates Investments, LLC Series BC2017-001045 (Sharestates), the original lender, secured by a mortgage on MHS's Property, which was recorded on May 24, 2017 under CRFN 2017000195094. The complaint alleges that defendant Streicher executed a May 10, 2017 guaranty of the loan. The complaint alleges that prior to the commencement of this action, Sharestates assigned the note and mortgage to WSF and Sharestates executed an allonge to the note and delivered the loan documents to WSF. The complaint alleges that WSF currently holds and owns the loan documents.

On or about August 20, 2019, WSF moved (in mot. seq. one) for a default judgment against defendants, an order amending the caption and for an order of reference. On or about November 19, 2019, defendants MHS and Streicher collectively filed papers in opposition to WSF's motion for a default. This court was advised that WSF intends to withdraw its motion for a default judgment.

On December 26, 2019, defendants MHS and Streicher collectively answered the complaint, asserted affirmative defenses, including lack of standing, lack of personal jurisdiction and failure to serve defendants with a notice of default in accordance with the terms of the mortgage. Defendants also asserted two counterclaims for: (1) breach of the duty to exercise good faith and fair dealing, and (2) rescission of the loan on the ground that "Plaintiff is in violation of the law for allowing defendants to enter into a loan agreement which was wholly unsuitable for them." On or about January 27, 2020, WSF filed an answer to defendants' counterclaims.

***WSF's Summary Judgment Motion***

WSF now moves for summary judgment, an order striking defendants' answer and counterclaims, an order of reference and other relief. WSF contends it is entitled to summary judgment because there are no triable issues of fact and it has produced copies of the note, the mortgage and evidence of its standing and of defendants' payment default. WSF argues that the defenses and counterclaims in defendants' answer lack factual support and merit.

WSF submits the affidavit of Darren Weaver (Weaver) who attests that Victoria by

and through its trustee, WDF (f/k/a Toorak Repo Seller I Trust) “is the holder and owner of that certain Promissory Note, dated as of May 10, 2017, in the original principal amount of \$1,440,000.00 the maker of which is MHS . . .” and “is also the holder and owner of that certain Mortgage, Assignment of Leases and Rents and Security Agreement dated as of May 10, 2017 . . .” Weaver also attests that WSF “is the holder and owner” of the guaranty executed by defendant Streicher. Weaver attests that WSF is the owner and holder of the note, mortgage and guaranty by virtue of: (1) a May 18, 2017 assignment of mortgage, which was recorded on October 11, 2018 under CRFN 201800037211, and (2) a May 17, 2017 allonge affixed to the note. Weaver further attests that “[i]n connection with the assignment of the Loan to [WSF], the original Note, the original Mortgage, and the other original Loan Documents were delivered to [WSF]” and “[WSF] is in possession of the original Note.”

Notably, Weaver does not identify his employer or his affiliation, if any, with WSF or Victoria. In addition, Weaver does not state the basis for his knowledge of the “facts” he asserts in his affidavit.

Weaver also attests that MHS “failed to pay the indebtedness owed under the Note upon its maturity date, and is in default under the Loan Documents . . .” Weaver further attests that “[a] default letter . . . dated February 26, 2019, was sent to Defendants notifying Defendants of the Maturity Default.” Weaver’s affidavit, however, fails to annex any of WSF’s business records evidencing MHS’s payment default, a copy of the February 26, 2019 default letter, an affidavit of service for the default letter or any

information at all regarding WSF's mailing practices.

Weaver also attests that WSF "has the authority to proceed as plaintiff in this action pursuant to 2.1 of the Amended and Restated Trust Agreement, dated as of July 21, 2017 . . ." which identifies WSF as Certificate Trustee, Delaware Trustee and Collateral Trustee. Weaver attests that "[p]ursuant to Section 2.1 of the Trust Agreement, WSF has the power to conduct business of the Trust and to sue and to be sued on behalf of Toorak Repo Seller I Trust (n/k/a Victoria Capital Trust)."

WSF also submits affidavits of service reflecting that it served the summons and complaint on: (1) Streicher by leave and mail service on April 18, 2019, and (2) MHS and Sea Gate, respectively, by service upon the Secretary of State on April 23, 2019. WSF contends that defendants failed to move pursuant to CPLR § 3211 (e) to timely preserve Streicher's defense of improper service.

### ***Defendants' Opposition***

Defendants, in opposition, contend that the court lacks personal jurisdiction over defendant Streicher because he was not properly served. Defendants contend that Streicher's sworn denial of receipt of the summons and complaint rebuts Victoria's affidavit of service and that, at a minimum, a traverse hearing is warranted.

Defendants also argue that Victoria lacks standing to sue because the loan was endorsed to "Toorak Repo Seller Trust," and not to WSF or Victoria. Defendants also assert that the trust agreement relied upon by WSF does not give it any powers to foreclose, execute any documents or the authority to commence this foreclosure action.

Defendants contend that the trust documents do not indicate that WSF is affiliated with any of the parties herein, or to the Property secured by the mortgage. According to defendants, paragraph 2.b of the trust agreement, which allows the trustee “to sue and to be sued all as explicitly set forth herein,” does not provide WSF standing to sue.

Defendants also argue that the Weaver affidavit is inadequate because it does not state who Weaver works for or how he has personal knowledge of anything he alleges. Defendants asserts that the Weaver affidavit does not state how Weaver knows that WSF was in possession of the note and defendants argue that reviewing another party’s records is insufficient to claim personal knowledge. Even if Weaver’s affidavit is admissible, defendants note that Weaver does not allege that WSF was in possession of the note before this action was commenced.

Defendants also argue that WSF cannot sue Streicher to enforce the guaranty because the guaranty was only executed for the benefit of Sharestates, the original lender, its successors and assigns and the guaranty was never specifically assigned to WSF. Defendants argue that the mortgage and note appear to have been assigned from Sharestates, the original lender, to “Toorak Repo Seller Trust,” but the guaranty was never assigned, and therefore, WSF lacks standing to sue to enforce the guarantee.

Defendants also assert that WSF is not entitled to summary judgment and an order of reference because it failed to comply with conditions precedent in the mortgage. Section 2.01(b) of the mortgage requires that lender give defendants notice of default and allows defendants ten days from such notice to cure their default. Defendants claim that

WSF failed to send them a default notice and has not produced an affidavit from someone with personal knowledge to establish that such notice was sent.

### *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, WSF contends it is entitled to summary judgment and an order of reference because there are no triable issues of fact and there is proof in the record of the note, mortgage, guarantee and defendants' payment default. However, WSF failed to provide admissible evidence from someone with firsthand knowledge of the note, mortgage, assignment and defendants' alleged payment default, which is required to establish a prima facie entitlement to summary judgment.

The Weaver affidavit upon which WSF's summary judgment motion is based does not provide a foundation upon which to admit the documents proffered by WSF. As the defense correctly argues, the Weaver affidavit is insufficient because it fails to provide the basis for Weaver's knowledge, his title, employer or relationship to WSF. The Weaver affidavit does not provide a foundation establishing who Weaver is, who he works for, and how he has firsthand knowledge of the factual assertions he makes.

In addition, WSF has not established its prima facie entitlement to summary judgment and an order of reference because it has failed to submit admissible proof of MHS's 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]).

Furthermore, there are facts in dispute regarding whether WSF complied with the terms of the mortgage by sending defendants a default notice as a precondition to foreclosure and whether WSF has standing to enforce the note, mortgage and guaranty. WSF has failed to establish its standing to foreclose, since the note and mortgage were assigned to “Toorak Repo Seller Trust” and WSF fails to explain how it is affiliated with that entity. In addition, there is no evidence that Sharestates, the original lender, assigned the guarantee. Consequently, for the foregoing reasons, denial of WSF’s summary judgment motion is warranted. Accordingly, it is

**ORDERED** that Victoria’s motion (mot. seq. two) is only granted to the extent that the caption is amended to delete the “John Doe” defendants; and Victoria’s motion is otherwise denied.

This constitutes the decision and order of the court.

ENTER  
  
J. S. C.  
HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE