

Humboldt Indus. LLC v Zen Restoration, Inc.

2021 NY Slip Op 32212(U)

October 13, 2021

Supreme Court, Kings County

Docket Number: Index No. 513343/19

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

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 October, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

HUMBOLDT INDUSTRIAL LLC,

Plaintiff,

- against -

Index No. 513343/19

ZEN RESTORATION, INC., BERNARD SOBUS,
UNITED STATES OF AMERICA, KRZYSZTOF
ROSTEK, NEW YORK STATE DEPARTMENT OF
LABOR, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE and TWE MARBLE
STONE INC.,

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 _____

167-184

Opposition Affidavits (Affirmations) Annexed _____

185-190

Upon the foregoing papers in this action to foreclose a commercial mortgage on the real property at 818-824 Humboldt Street a/k/a 824/828 Humboldt Street in Brooklyn (Block 2605, Lot 13) (Property), defendants Zen Restoration, Inc. (Zen or borrower), Bernard Sobus (Sobus or guarantor) and TWE Marble Stone Inc. (TWE) move (in motion sequence [mot. seq.] four) for an order vacating the May 6, 2021 judgment of foreclosure and sale and to schedule a hearing before the Referee regarding the amount due and owing.

Background

On or about August 30, 2017, Zen executed a \$340,000.00 mortgage note in favor of Signature Bank secured by a mortgage encumbering the Property, which was recorded on September 6, 2017 under CRFN 2017000331417. As further security for the loan, Sobus executed a continuing guaranty and a continuing general security agreement. On or about August 1, 2018, Zen executed a certain note modification allonge (August 2018 Allonge) in favor of Signature Bank, which amended and supplemented the \$340,000.00 mortgage note. On or about July 1, 2019, Signature Bank assigned the \$340,000.00 mortgage to plaintiff Humboldt Industrial LLC (Humboldt) by an Assignment of Mortgage, which was recorded on July 30, 2019 under CRFN 2019000239708. By a July 1, 2019 allonge, Signature Bank endorsed the \$340,000.00 promissory note to Humboldt.

Meanwhile, on June 17, 2019, Signature Bank commenced this action to foreclose the \$340,000.00 mortgage encumbering the Property by filing a summons, a verified complaint and a notice of pendency against the Property. On July 8, 2019, Signature Bank filed an amended complaint.

Defendants United States of America and Krzysztof Rostek each filed a notice of appearance. The remaining defendants, including Zen, the borrower, and Sobus, the guarantor, failed to answer or otherwise appear in the action.

On or about August 1, 2019, Humboldt moved for an order substituting it as plaintiff in place of Signature Bank. By an October 17, 2019 order, the court (Vaughan, J.) granted Humboldt's motion and Humboldt was substituted as the plaintiff.

On or about November 19, 2019, Humboldt moved for an order of reference, a default judgment against the non-answering defendants, including Zen and Sobus, and other relief. By a July 31, 2020 order, this court granted Humboldt's motion for an order of reference on default, granted Humboldt a default judgment against the non-answering defendants, amended the caption and appointed a referee to compute the amount due under the loan documents and to determine if the Property should be sold in one parcel.

On January 15, 2021, the referee issued her oath and the Referee Report and determined the amount due and owing by considering the loan documents and plaintiff's sworn testimony. According to the referee's Statement of Amount Due and Owing, the total amount due and owing under the subject mortgage note is \$386,388.41, which figure is comprised of: (1) \$300,898.35 for the unpaid principal; (2) \$127,581.60 for default interest (18.00% per annum from May 4, 2018 through August 28, 2020); (3) late charges of \$1,213.43; and (4) a credit of \$43,304.98. The Referee Report also concluded that the Property should be sold as one parcel.

The Judgment of Foreclosure and Sale

On February 18, 2021, Humboldt moved (in mot. seq. three) for an order confirming the Referee Report and granting it a judgment of foreclosure and sale regarding the \$340,000.00 mortgage. TWE, the tenant at the Property, opposed Humboldt's motion to confirm the Referee Report and for a judgment of foreclosure and sale on the ground that Humboldt failed to provide it with notice of entry and thereby deprived it an opportunity to appear at a hearing regarding the amount due.

By a May 6, 2021 decision and order, this court granted Humboldt's motion, confirmed the Referee Report, granted Humboldt a \$386,388.41 judgment of foreclosure and sale, plus interest thereon from August 28, 2020, \$10,883.65 for reasonable attorneys' fees actually incurred through February 1, 2021 and \$3,748.15 for costs and disbursements, and held that such amounts "shall be distributed from the sale proceeds . . ."

Defendants' Instant Motion

On August 31, 2021, prior to a foreclosure sale, defendants Zen, Sobus and TWE collectively moved for an order vacating the May 6, 2021 judgment of foreclosure and sale and scheduling a hearing before the Referee regarding the amount due and owing.

Sobus submits an affidavit attesting that he is the President of Zen, the owner of the Property by virtue of a July 11, 2013 deed. Sobus attests that he recently retained new defense counsel who advised him that "even though [the August 2018] Allonge lists the unpaid principal balance as \$290,880.53, the Plaintiff advised the Referee that the unpaid principal balance was \$300,898.36" which "error would cause the interest calculation and the alleged total amount due to be incorrect." In addition to the incorrect principal balance, Sobus alleges that "[c]ounsel has advised me that there are other errors in the Referee's Report, such as the calculation of interest, and the stated amount that the Plaintiff allegedly paid for the real estate taxes."

Although defendants' notice of motion only seeks an order vacating the judgment of foreclosure and sale and scheduling a hearing to determine the amount due and owing, defense counsel asserts that an order should be issued "dismissing the action as the Plaintiff

lacked standing to commence the action and this is a non-waivable defense . . .” Defense counsel also argues that the judgment of foreclosure and sale should be vacated because: (1) a hearing was not held before the Referee, in accordance with CPLR 4313; (2) Humboldt lacks standing; (3) there was an insufficient and inadequate affirmation to support the award of legal fees; and (4) this court should exercise its inherent discretionary powers to vacate the judgment of foreclosure and sale “in the interest of substantial justice.”

Regarding Humboldt’s standing to foreclose, defense counsel asserts that “[t]here is an allonge to Plaintiff, which does not appear on the last page of the note but appears as a wholly separate piece of paper” and “the allonge refers to the original note, but makes no reference to the note mortgage allonge.” Defense counsel also argues that “[t]he assignment of mortgage [from Signature Bank to Humboldt] may not have been recorded as no recording information was provided by Plaintiff.” Although defense counsel acknowledges that the moving defendants have never answered the complaint, he asserts that defendants did not waive the standing defense under RPAPL 1302-a, which provides that:

“Notwithstanding the provisions of subdivision (e) of rule thirty-two hundred eleven of the civil practice law and rules, any objection or defense based on the plaintiff’s lack of standing in a foreclosure proceeding *related to a home loan*, as defined in paragraph (a) of subdivision six of section thirteen hundred four of this article, shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss. A defendant may not raise an objection or defense of lack of standing following a foreclosure sale, however, unless the judgment of foreclosure

and sale was issued upon defendant's default" (emphasis added).

Humboldt's Opposition

Humboldt, in opposition, submits an attorney affirmation arguing that Zen, the borrower, and Sobus, the guarantor, "completely failed to vacate their defaults in answering or appearing [and] failed to interpose an answer to the Verified Complaint." For this reason, plaintiff's counsel asserts that defendants' motion is "procedurally improper" and should be denied.

Plaintiff's counsel also asserts that defendants' standing argument fails because this action was commenced by Signature Bank, the original lender. Plaintiff's counsel explains that defendants' standing challenges are rebutted by indisputable documentary evidence annexed to the July 8, 2019 amended complaint, including: (1) the July 1, 2019 mortgage assignment, which was duly recorded on July 30, 2019 at CRFN 2019000239708, and (2) the note with an allonge from Signature Bank indorsing the note to Humboldt. In any event, plaintiff's counsel argues that defendants have waived their standing defense by failing to assert it in an answer to the complaint or a pre-answer dismissal motion. Plaintiff's counsel explains that RPAPL 1302-a, by its express terms, is inapplicable to this case because it is limited to a "foreclosure proceeding related to a *home loan*" (emphasis added).

Humboldt also submits an affidavit from its manager, Thomas Hooker (Hooker), who attests that:

“First, Defendants claim that the unpaid principal balance of the Loan is \$290,880.53 (and not the \$300,898.36 determined by the Referee and confirmed by this Court) on the grounds that Borrower previously agreed in that certain Note Modification Allonge dated as of August 1, 2018 that the principal sum of \$290,880.53 remained outstanding. However . . . this acknowledgment did not effectuate a waiver of any prior defaults and Plaintiffs remedies thereunder. Specifically, Section 7 (e) of the Note provides that, ‘No failure or delay by the Bank in exercising any right, power or privilege hereunder shall operate as a waiver thereof’, and Section 14 of the modification explicitly provides that this provision has not been changed: ‘Except as otherwise specifically provided in this Allonge, the Note and the Mortgage will remain unchanged and fully enforceable according to the original terms and conditions.’

“Borrower defaulted on May 4, 2018, a date prior to the modification, by virtue of incurring a federal tax lien in the face amount of \$433,633.30. As evidenced by the payment history of Plaintiffs predecessor, whose records have been incorporated into Plaintiffs records in the regular course of business, the unpaid principal balance due in May of 2018 was \$300,898.36. Plaintiff notes that this tax lien default was recited in Paragraph 17 of the Amended Complaint without dispute. Accordingly, the Referee and this Court correctly calculated the unpaid principal balance and interest accrual thereon. A copy of Plaintiffs predecessor payment history evidencing the payment history in May of 2018 is annexed hereto as Exhibit ‘A’.”

Hooker further avers that Humboldt and its predecessor, Signature Bank, advanced \$12,489.32 and \$2,765.67, respectively, in taxes for the Property.

Discussion

Defendants’ motion to vacate the May 6, 2021 decision and order by which this court granted Humboldt’s motion to confirm the Referee Report and for a judgment of

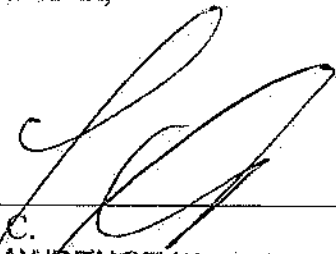
foreclosure and sale is denied. By a July 31, 2020 order, this court granted Humboldt an order of reference *on default*. Defendants Zen and Sobus, the borrower and guarantor under the subject loan, never moved for an order vacating their appearance default in this action. Having failed to do so, defendants are absolutely precluded from seeking any relief.

As this court previously held, a hearing was not required under the circumstances here because there were no disputed facts to settle, since the borrower and guarantor failed to appear or interpose an answer disputing that they owe Humboldt the principal and interest due under the \$340,000.00 mortgage (*Blueberry Investors Co. v Ilana Realty, Inc.*, 184 AD2d 906, 908 [1992]). Accordingly, it is hereby

ORDERED that defendants' motion (mot. seq. four) is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



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