

U.S. Bank N.A. v RIY Realty LLC

2021 NY Slip Op 32711(U)

December 14, 2021

Supreme Court, Kings County

Docket Number: Index No. 518629/20

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of December, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice,
-----X

U.S. BANK NATIONAL ASSOCIATION, as Trustee for
VELOCITY COMMERCIAL CAPITAL LOAN TRUST 2016-2,

Plaintiff,

-against-

RIY REALTY LLC;
RITA YAKHNIS;
AVRAHAM AMOUYAL a/k/a AVI AMOUYAL;
BOARD OF MANAGERS OF THE 1559 EAST 13TH STREET
CONDOMINIUM; and
JOHN DOE (said name being fictitious to represent
unknown tenants/occupants of the subject property and
any other party or entity of any kind, if any, having or
claiming an interest or lien upon the mortgaged property),

Defendants.
-----X

DECISION AND ORDER

Index No. 518629/20

Mot. Seq. No. 1-2

The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion/Cross Motion, Affirmation, and
Exhibits Annexed _____

14-20; 24-29

Reply Affirmations _____

30; 32

In this action to foreclose a mortgage on commercial real property owned by defendant RIY Realty LLC (the "borrower defendant"), as well as to collect on the loan guarantee executed by the corporate defendant's managing member, defendant Rita Yakhnis (the "guarantor defendant"), plaintiff U.S. Bank National Association, as trustee for Velocity Commercial Capital Loan Trust 2016-2 (the "plaintiff"), moves in Seq. No. 1

for an order: (1) pursuant to CPLR 3212, granting it summary judgment and striking the defenses/counterclaims of the borrower and guarantor defendants; (2) pursuant to RPAPL 1311 (1), substituting Occupational Therapy Services, PC (an alleged tenant in possession of the underlying property) in place of the “John Doe” defendants; (3) pursuant to CPLR 3215, entering a default judgment against non-answering defendants Avraham Amouyal, also known as Avi Amouyal, and the Board of Managers of the 1559 East 13th Street Condominium (collectively, the “non-answering defendants”); (4) pursuant to RPAPL 1321 (1), appointing a referee to compute the amount due to plaintiff; and (5) pursuant to RPAPL 1325, appointing a receiver. The borrower and guarantor defendants jointly cross-move in Seq. No. 2 for an order, pursuant to CPLR 3212, as well as pursuant to CPLR 3211 (a) (1), (2), (7), and (8), dismissing the action as against each of them.

Background

In July 2016, the borrower defendant executed and delivered a promissory note in the principal amount of \$420,000 in favor of Velocity Commercial Capital, LLC (“Velocity”), which was secured by a mortgage on a commercial condominium unit known as C1 in the building located at 1559 East 13th Street in Brooklyn, New York (the “underlying property”). The guarantor defendant personally guaranteed the loan by executing and delivering to Velocity an Unlimited Guaranty (the “guaranty”). The note, mortgage, and guaranty were later assigned by Velocity to the plaintiff. In October 2020, the plaintiff commenced this action to foreclose the mortgage against (among others) the borrower defendant, as well as to collect on the guaranty against the guarantor defendant.

In their joint answer, the borrower and guarantor defendants (collectively, the “answering defendants”) asserted 16 affirmative defenses, including that the plaintiff lacked standing to commence the action. Thereafter, the plaintiff moved for, among other relief, summary judgment on the complaint as against the answering defendants. The latter opposed the motion and cross-moved, pursuant to CPLR 3212 and 3211, to dismiss the complaint insofar as asserted against each of them. In their cross motion, the answering defendants contended, among other things, that the complaint as against the guarantor defendant should be dismissed because of the plaintiff’s failure to serve her with process in accordance with the guaranty.

Discussion

“In moving for summary judgment in an action to foreclose a mortgage, a plaintiff generally establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default” (*Central Mtge. Co. v Resheff*, ___ AD3d ___, 2021 NY Slip Op 06670, *3 [2d Dept 2021]). “[W]here, as here, a plaintiff’s standing to commence a foreclosure action is placed in issue by a defendant, the plaintiff must also prove its standing as part of its prima facie showing” (*HSBC Bank USA, N.A. v Oscar*, 161 AD3d 1055, 1056 [2d Dept 2018]). A plaintiff has standing to commence a foreclosure action where, among other things, “the note underlying an action was assigned to the plaintiff prior to the date of commencement of the action” (*Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 91 [2d Dept 2021]).

The Borrower Defendant

Here, the plaintiff has established standing, *as against the borrower defendant*, based on the assignment of the mortgage by Velocity to the plaintiff on January 31, 2017, inasmuch as the same assignment also assigned the note to the plaintiff¹ (*see Cenlar FSB v Glauber*, 188 AD3d 1141, 1143 [2d Dept 2020]). The plaintiff also has established its prima facie entitlement to judgment as a matter of law, *as against the borrower defendant*, by submitting copies of the mortgage, unpaid note, and evidence of the loan default (*see Deutsche Bank Natl. Tr. Co. v Finger*, 195 AD3d 789, 791 [2d Dept 2021]).

In opposition to the plaintiff's prima facie showing, the borrower defendant has failed to raise a triable issue of fact. The borrower defendant's contention that the plaintiff's summary judgment motion was premature is without merit. "A party who seeks a finding that a summary judgment motion is premature is required to put forth some evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Vikram Const., Inc. v Everest Nat. Ins. Co.*, 139 AD3d 720, 721 [2d Dept 2016]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Wells Fargo Bank, N.A. v Gonzalez*, 174 AD3d 555, 558 [2d Dept 2019] [internal quotation marks omitted]). Here,

¹ See Assignment of Commercial Mortgage, Security Agreement and Assignment of Leases and Rents ("Together with the note[s] and obligations therein described or referred to, the money due and to become due thereon, with interest, and all rights accrued or to accrue under said document referenced above") (emphasis added). A copy of the assignment is annexed to the complaint as Exhibit E (NYSCEF Doc No. 1).

the borrower defendant has failed to satisfy its burden (*see e.g. Ocwen Loan Serv., LLC v Fitzgerald*, 168 AD3d 964, 966 [2d Dept 2019]).

Lastly, the plaintiff is entitled to the appointment of a receiver pursuant to section 4.2 (f) of the mortgage and the implementing provision of RPAPL 1325 (1) (“Where the action is for the foreclosure of a mortgage providing that a receiver may be appointed without notice, notice of a motion for such appointment shall not be required.”). Pursuant to CPLR 6403, the receiver “shall give an undertaking in an amount to be fixed by the court making the appointment, that he [or she] will faithfully discharge his [or her] duties.”

The Guarantor Defendant

The guaranty provides, in relevant part, that:

“Guarantor [*i.e.*, the guaranty defendant] irrevocably submits to the nonexclusive jurisdiction of any Federal or state court sitting in New York, over any suit, action or proceeding arising out of or relating to this Guaranty. Guarantor irrevocably waives, to the fullest extent it may effectively do so under applicable law, any objection it may now or hereafter have to the laying of the venue of any such suit, action or proceeding brought in any such court and any claim that the same has been brought in an inconvenient forum. Guarantor hereby consents to any and all process which may be served in any such suit, action or proceeding, (i) *by mailing a copy thereof by registered and certified mail, postage prepaid, return receipt requested*, to the Guarantor’s address shown below . . . and (ii) by serving the same upon the Guarantor in any other manner otherwise permitted by law, and agrees that such service shall in every respect be deemed effective service upon the Guarantor.”

(Guaranty at 3-4 [emphasis added]).

Although the guaranty defendant contractually consented to personal jurisdiction, she is still entitled to be served with process in accordance with the italicized terms of the

guaranty (*see Brooklyn Fed. Sav. Bank v 140 W. Assoc., LLC*, 29 Misc 3d 1237[A], 2010 NY Slip Op 52186[U], *6 [Sup Ct, Kings County 2010, Demarest, J.] [collecting authorities]). Here, the affidavits of service establish that the guaranty defendant was served with process by personal service in accordance with CPLR 308 (1), as well as by first-class mail (NYSCEF Doc No. 7-8). No service of process by registered/certified mail as required by the guaranty was effectuated on the guaranty defendant. In light of the plaintiff's failure to comply with the aforementioned contractual requirement, the Court lacks personal jurisdiction over the guaranty defendant.

Conclusion

Accordingly, it is

ORDERED that the plaintiff's motion in Seq. No. 1 is *granted to the extent* that: (1) pursuant to CPLR 3212, the plaintiff is granted summary judgment *as against RIY Realty LLC only*, and the affirmative defenses/counterclaims of RIY Realty LLC are stricken; (2) pursuant to RPAPL 1311 (1), Occupational Therapy Services, PC is substituted in place of the "John Doe" defendants; (3) pursuant to CPLR 3215, a default judgment is entered against non-answering defendants Avraham Amouyal, also known as Avi Amouyal, and the Board of Managers of the 1559 East 13th Street Condominium; (4) pursuant to RPAPL 1321 (1), a referee is appointed, as more fully set forth below, to compute the amount due to plaintiff; and (5) pursuant to RPAPL 1325, a receiver is appointed, as more fully set forth below, to collect rents generated by the underlying property; and the remainder of the plaintiff's motion *as against Rita Yakhnis only* is denied; and it is further

ORDERED that the answering defendants' cross motion in Seq. No. 2 is *granted to the extent* that the complaint *as against Rita Yakhnis only* is dismissed, pursuant to CPLR 3211 (a) (8), for lack of personal jurisdiction; and the remainder of their cross motion is denied; and it is further

ORDERED that an order shall be submitted on notice for the appointment of a receiver; and it is further

ORDERED that an order shall be submitted on notice for the appointment of a referee to compute; and it is further

ORDERED that Occupational Therapy Services, PC is substituted as a party defendant in place of the "John Doe" defendants; and it is further

ORDERED that the caption is amended to read in its entirety as follows:

-----X
U.S. BANK NATIONAL ASSOCIATION, as Trustee for
VELOCITY COMMERCIAL CAPITAL LOAN TRUST 2016-2,

Plaintiff,

-against-


Index No. 518629/20

RIY REALTY LLC;
AVRAHAM AMOUYAL a/k/a AVI AMOUYAL;
BOARD OF MANAGERS OF THE 1559 EAST 13TH STREET
CONDOMINIUM; and
OCCUPATIONAL THERAPY SERVICES, PC,

Defendants.
-----X

The plaintiff's counsel is directed to electronically serve a copy of this decision and order with notice of entry and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER

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