

U.S. Bank N.A. v Prinsecita Esther Corp.

2021 NY Slip Op 32713(U)

December 14, 2021

Supreme Court, Kings County

Docket Number: Index No. 5223J8/18

Judge: Lawrence S. 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 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
2018-1,

Plaintiff,

- against -

Index No. 522318/18

PRINSECITA ESTHER CORP.; BERNARDO RODRIGUEZ;
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE; NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD; NEW YORK CITY DEPARTMENT
OF FINANCE PARKING VIOLATIONS BUREAU;
"JOHN DOE #1-#50" and "Mary ROE #1-#50".
The last two names being fictitious, it being
intended to name all other parties who may have
some 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) _____

39-53, 55

Opposing Affidavits (Affirmations) _____

57-65

Upon the foregoing papers in this action to foreclose a mortgage on the commercial property at 18 Shepherd Avenue in Brooklyn (Block 3911, Lot 32), plaintiff U.S. Bank National Association, as Trustee for Velocity Commercial Capital Loan Trust 2018-1 (US

Bank) moves (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 3212, granting it summary judgment for “the relief sought in its Complaint . . .”¹

Background

On November 7, 2018, US Bank commenced this commercial foreclosure action by filing a summons, an *unverified* complaint and a notice of pendency against the Property. The complaint alleges that the borrower, corporate defendant Prinsecita Esther Corp. (Prinsecita or Borrower), duly executed a \$490,000.00 note in favor of US Bank’s unidentified “predecessor,” which was secured by a mortgage on the Property that was executed by Prinsecita’s President, Bernardo Rodriguez (Rodriguez) (complaint at ¶¶ 5-6). The complaint also alleges that Rodriguez executed a guarantee of the loan (*id.* at ¶ 21). The complaint alleges that Prinsecita “failed and neglected to comply with the terms and conditions of the debt instrument and mortgage . . . by failing and omitting to pay the items of principal, interest, taxes, assessments, water rents, insurance premiums, escrow and/or other charges, or by failing to perform a covenant contained in the aforesaid documents . . .” (*id.* at ¶ 9).

Regarding US Bank’s standing to foreclose, the complaint annexes a copy of the February 1, 2018 note signed by Rodriguez on behalf of Prinsecita in favor of PHMS, LLC (PHMS) with an “Allongé To Promissory Note” on a separate page executed by Jeff Taylor of Velocity Commercial Capital, LLC (Velocity) in favor of US Bank. The complaint

¹ See NYSCEF Doc No. 39.

alleges that “the mortgage has been assigned to plaintiff by Assignment, included herein . . .” (*id.* at ¶ 8). The complaint further alleges:

“That the plaintiff is now the sole, true and lawful owner and holder of the debt instrument . . . and the lien securing the same and all sums presently due thereunder. The note was physically delivered to, and is in plaintiff’s possession, according to the plaintiff’s records of delivery . . .” (*id.* at ¶ 15).

The complaint asserts three causes of action: (1) against Prinsecita to foreclose the Property; (2) against Rodriguez to collect on the guaranty; and (3) to correct a scrivener’s error in the mortgage regarding the legal description of the Property.²

On November 26, 2018, defendants Princesita and Rodriquez collectively filed an answer verified by defense counsel, which denied the material allegations in the complaint and asserted two affirmative defenses for unclean hands and contributory negligence. The answer also asserted a counterclaim for a judgment declaring that the note, mortgage, loan agreement and guaranty are “void” and directing the Kings County Clerk to expunge the mortgage as a lien on the Property (answer at ¶¶ 5-15). The counterclaim alleges that Rodriguez “was the sole officer and shareholder of Princesita” and “[p]rior to February 1, 2018, an individual pretending to be Rodriguez, applied for a loan with Plaintiff’s assignor in the approximate sum of \$490,000” (*id.* at ¶¶ 7-8). The counterclaim further alleges that:

“[a]ll of the aforesaid documents were forgeries executed by the Rodriguez Imposter who, upon information and belief, submitted phony and false documentation and photo identification to induce Plaintiff and/or its assignor and others

² Specifically, the complaint alleges that the second paragraph of the mortgage erroneously reads “439 feet southerly” when it should read “439 feet northerly,” as set forth in Prinsecita’s April 22, 2016 deed to the Property (*see* complaint at Exhibit I).

into believing that the Rodriguez Imposter was, in fact, Bernardo Rodriguez.

“Rodriguez was unaware at the time, that any of the aforesaid documents were executed or that a mortgage was filed against the subject premises and neither knew the Rodriguez Imposter nor authorized him to act on his behalf” (*id.* at ¶¶ 11-12).

On September 9, 2019, US Bank replied to defendants’ counterclaim, denied the allegations therein and asserted affirmative defenses to defendants’ counterclaim, including that defendants’ counterclaim fails to comply with CPLR 3013, 3014, 3015 and 3016, equitable lien/ mortgage and equitable subrogation. The remaining defendants failed to answer or otherwise appear in this action.

After issue was joined, discovery ensued. On March 5, 2021, US Bank filed a note of issue and certificate of readiness indicating that this action is ready for trial.

US Bank’s Instant Summary Judgment Motion

On August 5, 2021, US Bank filed the instant summary judgment motion based on an affidavit from Sandie Lawrence (Lawrence), who attests that she is “the Special Servicing Department Manager for Velocity Commercial Capital, the Original Lender whose interest in the at-issue Velocity Mortgage was later assigned to Plaintiff U.S. Bank . . .” (NYSCEF Doc No. 52 at ¶ 1). Lawrence attests that she is “fully familiar with the facts and circumstances set forth herein” without describing the source of her knowledge.

Lawrence explains that “as of February 1, 2018, the day when the Velocity loan proceeds were used to pay off the PHMS Loan, there was a total of \$406,220.44 . . . due

and owing on the PHMS Loan[.]” and references a PHMS payoff letter annexed to US Bank’s counsel’s moving affirmation as Exhibit G. Lawrence hypothetically reasons that:

“Had the PHMS Loan not been paid off with the Velocity loan proceeds, the PHMS mortgage would still be extant, and, assuming non-payment through December 31, 2021, based upon the terms of the PHMS Loan documents, there would be \$621,206.10 of princip[al], interest and late fees due and owing” (emphasis added).

Lawrence asserts that “plaintiff is entitled to judgment of \$750,099.86 . . .,” which includes the \$621,206.10 *that would have been due under the PHMS Loan if it had not been paid off* by Velocity, more than \$100,000.00 in attorneys’ fees owed to the Herrick Feinstein law firm, “which is representing Velocity in connection with Prinsecita’s claim that Velocity’s mortgage should be invalidated and its lien expunged[.]” more than \$10,000.00 to another law firm representing Velocity in this foreclosure action and more than \$15,000.00 in property taxes and insurance that Velocity has paid (*see* NYSCEF Doc No. 52 [emphasis added]). The only exhibit to Lawrence’s affidavit purportedly “shows the monthly calculations of interest and late fees from March 1, 2018 through December 21, 2021 applying the 15% default rate and late fees set forth in the PHMS Loan documents” without any indication of who prepared the document (*see* NYSCEF Doc No. 53).

Thus, US Bank seemingly seeks to foreclose on the Property under the PHMS mortgage, despite the fact that on February 1, 2018, Prinsecita allegedly refinanced the Property and the Velocity loan paid off the PHMS loan. Lawrence’s affidavit also indicates that US Bank seeks over \$100,000.00 in attorneys’ fees charged by the Herrick Feinstein law firm, despite Lawrence’s testimony that such legal fees were actually incurred by US

Bank's alleged predecessor, Velocity. Notably missing from Lawrence's affidavit is any mention of Prinsecita's execution of either the PHMS note and mortgage, the Velocity note and mortgage or Prinsecita's alleged defaults under any of the loan documents.

US Bank also submits a three-page attorney affirmation from Arthur J. Jakoby (Jakoby), an attorney with the Herrick Feinstein law firm, who affirms that "in connection with Herrick, Feinstein LLP's representation of the *Plaintiff* [it] has billed and collected legal fees and costs in the amount of \$102,413.40" and will be seeking additional fees (emphasis added). Without laying any foundation for the admission of the document, Jacoby annexes the April 22, 2016 "Loan Agreement" between PHMS, as lender, and Prinsecita, as borrower, and asserts that it "provides for the payment of the legal fees incurred to enforce the rights of the Lender." While Jakoby admits that "our fees are being paid by a title company[.]" he asserts that "the title company has a right of subrogation and thus stands in the shoes of its insured, here the Plaintiff." Jakoby's affirmation also annexes, without any evidentiary foundation: (1) a copy of the guaranty; (2) a purported "true and correct copy of the PHMS Customer Account Activity Statement"; (3) purported "true and correct" copies of the 2016 and 2017 delinquent and default notices purportedly sent to Prinsecita by "Planet Home"; (4) a PHMS payoff letter; (5) the purported settlement statement from Prinsecita's February 1, 2018 refinance of the Property; and (6) the pleadings.

US Bank's summary judgment motion is also supported by an unverified "Statement of Undisputed Material Facts" (NYSCEF Doc No. 55), which (without any evidentiary

proof) describes defendants' execution of the April 22, 2016 PHMS loan, mortgage and guaranty, defendants' alleged payment default under the PHMS loan in December 2016 and implies that defendants defaulted under the Velocity loan. Notably, US Bank's Statement of Undisputed Facts asserts that "[t]he validity of the PHMS Loan is not in dispute" because "Rodríguez acknowledged the validity of the PHMS Mortgage and the validity of his own signature on the PHMS Loan in his deposition." However, there are no deposition transcripts annexed to US Bank's moving papers.

Defendants' Opposition

Defendants, in opposition, submit an attorney affirmation arguing that US Bank's summary judgment motion must be denied "due to the clear demonstration that an individual pretending to be Mr. Rodríguez . . . applied for, attended the closing of, and obtained the subject loan ('Velocity Loan') with Plaintiff's assignor . . ." Defense counsel further argues that US Bank "fails to meet its *prima facie* burden of establishing entitlement to judgment as a matter of law by failing to demonstrate the validity of the Velocity Loan nor the validity of the purported April 22, 2016 PHMS Loan . . . by admissible nonhearsay evidence." Rodríguez also submits an affidavit attesting that "[t]he Velocity Loan mortgage currently encumbering my property is the result of identity theft and fraud" and references a copy of the fraudster's identification that was produced at the closing.

US Bank's Reply

US Bank, in reply, submits a memorandum of law arguing that it established its right to summary judgment under the theory of equitable subrogation based on its Statement of Undisputed Facts.

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 Kirchhoff*, 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, US Bank did not establish its prima facie entitlement to summary judgment on any of its three causes of action in the complaint because it failed to submit *any* admissible evidence in support of its *unverified* complaint, which only alleges causes of action for foreclosure, to collect on the guaranty and to correct a scrivener's error in the mortgage regarding the description of the Property.

Although US Bank submitted copies of the notes, mortgages and the guaranty, it has not established its prima facie entitlement to summary judgment because it failed to submit any admissible evidence that Rodriguez executed the PHMS or Velocity mortgages and notes on behalf of Prinsecita and that Prinsecita defaulted under either of the mortgages. US Bank's counsel's affirmation regarding the execution of the loans and defendants' alleged payment default constitute inadmissible hearsay (*see Ingber v Martinez*, 191 AD3d 959, 961-962 [2021]); and counsel fails to lay any foundation for the loan documents and mortgage records annexed to his affirmation. Additionally, US Bank's Statement of Undisputed Facts is unverified and is based on Rodriguez's deposition testimony, the transcript of which is not included in the record for this court's

consideration. Finally, US Bank's assertion, for the first time in reply, that it is entitled to summary judgment for equitable subrogation is rejected, since US Bank's complaint does not allege a cause of action for equitable subrogation, US Bank never amended its complaint to add an equitable subrogation cause of action and US Bank only asserted equitable subrogation as an affirmative defense in reply to defendants' counterclaim. Accordingly, it is hereby

ORDERED that US Bank's summary judgment motion (mot. seq. one) is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.



HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE