

Normandy Capital Trust v 2606 Clarendon Rd. LLC

2022 NY Slip Op 30333(U)

January 24, 2022

Supreme Court, Kings County

Docket Number: Index No. 511272/21

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 24th day of January, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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NORMANDY CAPITAL TRUST, by and through its Trustee, WILMINGTON SAVINGS FUND SOCIETY, FSB,

Plaintiff,

- against -

Index No. 511272/21

2606 CLARENDON ROAD LLC; BENZION L. EISENBERG; THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; 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.

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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) _____

16-22, 24

Opposing Affidavits (Affirmations) _____

28-32

Reply Affidavits (Affirmations) _____

33-34

Upon the foregoing papers in this action to foreclose a commercial mortgage on the real property at 301 East 26th Street in Brooklyn (Block 5192, Lot 1) (Property), plaintiff Normandy Capital Trust (Normandy Trust), by and through its trustee, Wilmington Savings Fund Society, FSB (WSF) moves (in motion sequence [mot. seq.] one) for an

order: (1) granting the Normandy Trust summary judgment against defendants 2606 Clarendon Road LLC (2606 Clarendon or borrower) and Benzion L. Eisenberg (Eisenberg or guarantor), pursuant to CPLR 3212; (2) awarding the Normandy Trust a default judgment against non-appearing defendant The City of New York Environmental Control Board (NYCECB), pursuant to CPLR 3215; (3) striking 2606 Clarendon and Eisenberg's answers; (4) amending the caption to remove the John Doe defendants; and (5) appointing a referee, pursuant to RPAPL 1321.

Background

On May 12, 2021, WSF commenced this commercial foreclosure action on behalf of the Normandy Trust by filing a summons, a verified complaint and a notice of pendency against the Property. The complaint alleges that on July 31, 2019, the borrower, 2606 Clarendon, executed an Amended, Restated and Consolidated Commercial Promissory Note in the principal amount of \$2,135,000.00 (Consolidated Note) in favor of Ice Lender Holdings LLC (Ice), which was secured by a Consolidation and Modification of Mortgage Security Agreement (Consolidated Mortgage) and an Assignment of Rents and Fixtures (complaint at ¶¶ 8-10). The mortgage allegedly “consolidated three prior mortgages, all of which were assigned to Original Lender [Ice], to form a single lien (*id.* at ¶ 10). The complaint is verified by Colin McLinden, an “Associate” and “Head of Special Servicing” for Toorak Capital Partners, LLC (Toorak), the Administrator of the Normandy Trust.

The complaint alleges that “[p]laintiff is the owner and holder . . .” of the Consolidated Mortgage and a certain guaranty of the Consolidated Note. The complaint

alleges that “[p]rior to the commencement of this action, Original Lender [Ice] assigned the Note and Mortgage to Plaintiff[,]” copies of which are annexed to the complaint (*id.* at ¶ 14). The complaint also alleges that “[t]he original Loan Documents, including the Note, were delivered to Plaintiff, and, thus, Plaintiff is the current holder and owner of the Loan Documents” (*id.* at ¶ 15). The Consolidated Note (annexed as Exhibit B to the complaint) contains an August 7, 2019, Allonge with an endorsement executed by Ice in favor of the Normandy Trust. An August 7, 2019 Assignment of Mortgage (annexed as Exhibit E to the complaint) provides that the Consolidated Mortgage “**TOGETHER** with the bonds, notes or other obligations described in said mortgages . . .” are assigned from Ice to the Normandy Trust. The complaint alleges that Toorak, the Trust Administrator, and WSF, the Trustee, have authority to sue on the Normandy Trust’s behalf, pursuant to 2.1 of the July 21, 2017 Amended and Restated Trust Agreement (Trust Agreement), select excerpts of which are annexed to the complaint as Exhibit G.¹

The complaint alleges that “[b]orrower defaulted under the Loan Documents by failing to pay the full amount owing under the Note upon maturity” (*id.* at ¶ 18). The complaint alleges that by a March 22, 2021 default letter “Plaintiff notified Borrower of its default under the Loan Documents, that the debt had matured, and that, as a result, the full

¹ Exhibit G to the complaint is the cover page, page 13 and the signature pages from the Trust Agreement. The Normandy Trust only annexed Section 2.1 of the Trust Agreement, which provides that the Administrator and the Trustee “shall have power and authority, and is hereby authorized and empowered, to conduct the business of the Trust . . . *and to sue and to be sued all as explicitly set forth herein*” (emphasis added). However, the complaint does not annex the remainder of the Trust Agreement, which apparently contain other provisions regarding Toorak and WSF’s authority to act on the Normandy Trust’s behalf.

amount owed under the Note was due and payable (*id.* at ¶ 18). Notably, the March 22, 2021 Notice of Default allegedly sent to the borrower is annexed to the complaint as Exhibit F and, in contrast to the allegations in the complaint, identifies Toorak as the “Lender” and the “owner and holder of that certain Commercial Promissory Note dated July 31, 2019, in the original principal amount of \$2,135,000.00 . . .” (*see* NYSCEF Doc No. 7). The Notice of Default signed by Normandy Trust’s counsel (on behalf of Toorak as “Lender”), states that “Lender has previously notified Borrower that Borrower is in default under the Note and other Loan Documents as a result of Borrower’s failure to timely make payments due and owing thereunder and as a result that the matured indebtedness owed under the Note is now due and payable.”

Notably, the Consolidated Mortgage annexed to the complaint explicitly provides that: (1) the Borrower and Lender agree that “VI. Borrower *waives* presentment and demand for payment, notice of dishonor, protest and notice of protest of the Note”; (2) “[m]ortgagor shall pay all monthly installments of interest as provided for in the Note and shall repay the Debt on or before the Maturity Date, as such term is defined in the Note² . . . at the time and in the manner provided in the Note and in this Mortgage”; and (3) that “[t]he Debt shall become immediately due and payable at the option of the Mortgagee . . . if any portion of the Debt is not paid when due, including the failure to repay the Debt on or before the Maturity Date . . .” and “if Mortgagor fails to cure a default under *any other*

² The Consolidated Note provides “[i]f not sooner paid, the entire principal amount of this Note, together [with] accrued interest and with all other sums due hereunder, shall be due and payable in full on **August 01, 2020** (the ‘Maturity Date’)” (*see* NYSCEF Doc No. 3).

term, covenant or provision of this Mortgage within thirty (30) days after Mortgagor first receives notice of any such default . . .” (see NYSCEF Doc No. 4 [emphasis added]).

Section 23 of the Consolidated Mortgage also provides that:

“Upon the occurrence of any Event of Default or if Mortgagor fails to make any payment or to do any act as herein provided, Mortgagee may, but without any obligation to do so and *without notice to or demand on Mortgagor* and without releasing Mortgagor from any obligation hereunder, make or do the same in such manner and to such extent as Mortgagee may deem necessary to protect the security hereof. Mortgagee is authorized to enter upon the Mortgaged Property for such purposes or appear in, defend, or *bring any action or proceeding to protect its interest in the Mortgaged Property or to foreclose this Mortgage or collect the Debt . . .*” (*id.* [emphasis added]).

Thus, there is no provision in the Consolidated Mortgage that required the mortgagee to send the borrower a notice of default as a precondition to commencing a foreclosure action.

On July 16, 2021, defendants 2606 Clarendon and Eisenberg separately answered the complaint and asserted affirmative defenses, including: (1) that plaintiff failed to serve it “properly,” pursuant to CPLR 308, and thus, the court lacks personal jurisdiction; (2) plaintiff failed to send a notice of default, which is a condition precedent to foreclosure; and (3) lack of standing (see NYSCEF Doc Nos. 13 and 14).

Defendant NYCECB failed to answer or otherwise respond to the complaint.

The Normandy Trust’s Summary Judgment Motion

On September 14, 2021 (60 days after defendants answered), the Normandy Trust moved for summary judgment against 2606 Clarendon and Eisenberg, an order of reference, a default judgment against NYCECB and other relief.

The Normandy Trust submits a four-page affidavit from Stephen J. Tyde, Jr. (Tyde), “a Principal” and “Head of Special Servicing” for Toorak,³ the Administrator of the Normandy Trust, in which he more generally reiterates the allegations in the complaint. Tyde attests that plaintiff is the “holder and owner of the Loan,” the “owner and holder” of the Consolidated Mortgage encumbering the Property and the “holder” of the guarantee. Regarding plaintiff’s standing to foreclose, Tyde attests that:

“Original Lender assigned the Note and the Mortgage to Plaintiff recorded on August 30, 2019 in the Office of the City Register of the City of New York as CRFN 2019000279517 (the ‘Assignment’).

“Plaintiff is the holder and owner of the Note, the Mortgage, the Guaranty, and all other documents further evidencing, securing, or executed in connection with the debt owed under the Note, all of which are collectively referred to as the ‘Loan Documents’.

“In connection with the Assignment, the original Loan Documents were delivered to Plaintiff.”

Tyde’s only mention of payments under the Consolidated Mortgage is in the following paragraphs:

“Under the terms of the Loan Documents, Borrower was obligated to make monthly payments of principal and interest and other amounts to Plaintiff.

“Further, under the terms of the Loan Documents, in the event of a default by Borrower, the entire unpaid principal, accrued interest, and all other amounts payable under the Loan Documents may be accelerated at Plaintiff’s option.

³ Notably, Colin McLinden, who verified the Normandy Trust’s complaint, was also identified as the “Head of Special Servicing” for Toorak.

“By way of a default letter dated March 22, 2021, Plaintiff notified Borrower of its default under the Loan Documents, that the debt had matured, and that, as a result, the full amount owed under the Note was due and payable.”

Tyde then attests that “[a]s of August 31, 2021, the following amounts were due and owing to Plaintiff under the Loan Documents . . .”

Notably, Tyde’s affidavit does not annex any documentary evidence or business records from the Normandy Trust, Toorak or WSF regarding the Consolidated Mortgage to support the general statements in his moving affidavit, including business records regarding Normandy Trust’s alleged receipt of the Consolidated Note from Ice, the borrower’s alleged payment default and/or the payment history of the consolidated loan. Additionally, Tyde does not identify or describe his role at Toorak or how he acquired personal knowledge of the purported “facts” in his affidavit, other than a “verification” at the end of his affidavit generally stating that:

“STEPHEN TYDE, being duly sworn, says that he is a Principal for Toorak Capital Partners, LLC, trust administrator for Plaintiff in this action, that *the foregoing affidavit is true to his own knowledge except as to matters therein stated to be alleged on information and belief* and that as to those matters he believes them to be true” (emphasis added).

WSF also submits a three-page attorney affirmation that describes the action and asserts that “[e]ach and every defendant herein was duly served with process within 120 days of the filing of the Summons and Complaint . . .” WSF’s counsel asserts that: (1) 2606 Clarendon was served with process on May 26, 2021 “through serving an agent, as authorized by CPLR § 311-A”; (2) Eisenberg was served with process on July 1, 2021 “by

affixing the same to the door of his dwelling house (usual place of abode) and mailing a copy of the same as authorized by CPLR § 308 (4)”; and (3) NYCECB was served with process on May 20, 2021, “through serving an agent, as authorized by CPLR § 311 (2).” WSF’s counsel annexes the following documents to her affirmation: (1) the pleadings with exhibits, including the Consolidated Note, the Consolidated Mortgage, the Assignment of Mortgage, the guaranty and the March 22, 2021 default letter; (2) WSF’s affidavits of service upon defendants; and (3) copies of 2606 Clarendon and Eisenberg’s answers to the complaint.

WSF submits a memorandum of law arguing that “[s]ummary judgment is appropriate where, as here, the movant makes a prima facie showing of entitlement to judgment and tenders sufficient evidence to demonstrate the absence of any triable issue of fact.” WSF asserts that “[p]laintiff has produced copies of the Note, Mortgage, and the Assignment” and that “[t]hese documents, together with the evidence of Borrower’s defaults, establish Plaintiff’s prima facie entitlement to summary judgment.”

Defendants’ Opposition

On November 3, 2021, defendants 2606 Clarendon and Eisenberg collectively opposed the Normandy Trust’s summary judgment motion. Defendants submit an opposing affirmation from Eisenberg, the sole member of 2606 Clarendon, who affirms that he was not served with process, either in person or by mail, and “[n]o one in my household or work was served or refused to accept service.” Eisenberg further affirms that plaintiff never served a notice of default upon 2606 Clarendon. Finally, Eisenberg affirms

that “Plaintiff was required to provide proof of the alleged default in support of its motion for summary judgment, yet failed to do so, necessitating denial of Plaintiff’s motion.”

Defendants also submit an attorney affirmation, the majority of which challenges personal jurisdiction over defendants. Defense counsel asserts that Eisenberg’s sworn denial “containing a detailed and specific contradiction of the allegations in the process server’s affidavit will defeat the presumption of proper service” and that a traverse hearing is required. Defense counsel argues that Eisenberg was purportedly served by nail-and-mail service, but “[p]laintiff has not done the due diligence that is required to be permitted to attempt service pursuant to CPLR 308 (4).” Defense counsel also asserts that plaintiff’s affidavit of service upon 2606 Clarendon is “defective” because “[p]laintiff’s process server is not a licensed process server in New York City . . .” and the affidavit of service does not contain a process server license number.

Defense counsel further argues that “[p]laintiff has failed to prove it sent the required notice of default *as required by the mortgage*” without identifying any provision in the Consolidated Mortgage that requires the Normandy Trust to send the borrower a default notice as a precondition to foreclosure (emphasis added). Defense counsel nevertheless argues that “nowhere in the Tyde Affidavit does it provide who did the actual mailing of the purported default notice.”

Defense counsel also contends that “[p]laintiff has failed to establish standing to commence this action, as it has not proven it is the holder of the note at the time of commencement and/or there was . . . actual delivery of the note to Plaintiff.” Defense

counsel notes that Tyde's affidavit "does not provide the date that [the Normandy Trust] allegedly came into possession of the note[.]" "nowhere in the Tyde Affidavit does it provide [that he] has personal knowledge of these facts or documents . . ." and "[p]laintiff has not provided any proof that Toorak Capital Partners has any authority to make these statements" because the Trust Agreement annexed as Exhibit G to the complaint is "incomplete and does not evidence any power given to Toorak Capital Partners." Defense counsel notes that Tyde does not even mention the allonge to the Consolidated Note, which "does not contain any pagination or writing to demonstrate its connection to the note or that it was firmly annexed thereto."

Finally, defense counsel argues that the Normandy Trust is not entitled to summary judgment because it failed to demonstrate its prima facie entitlement to a foreclosure judgment by submitting evidence of the borrower's alleged payment default. Defense counsel asserts that the Tyde affidavit is inadmissible hearsay because "because it does not aver personal knowledge, nor does it annex any business record."

The Normandy Trust's Reply

The Normandy Trust, in reply, submits an attorney affirmation, half of which addresses defendants' argument that it did not obtain personal jurisdiction over them. Plaintiff's counsel argues that defendants' defense has no merit because plaintiff properly served both the borrower and the guarantor.

Counsel for the Normandy Trust also argues that "neither the Note nor the Mortgage contain a provision requiring Plaintiff to send a notice of default prior to initiating a

foreclosure action.” Counsel asserts that even assuming there is such a requirement in the loan documents, “[p]laintiff has proved it satisfied this requirement” based on the Tyde affidavit testimony, by producing a copy of the March 22, 2021 default letter and alleging in paragraph 18 of the complaint that the default letter was mailed.

Regarding the Normandy Trust’s standing to foreclose, plaintiff’s counsel asserts that “[w]hile the Tyde Afli[davit] does not reference the allonge, such an omission is not fatal, as Plaintiff has produced the Note and Allonge as Exhibit B to the Complaint . . .”

Finally, plaintiff’s counsel contends that the Tyde affidavit was not made by someone without personal knowledge of the facts because the “Verification Page provides that the foregoing affidavit is true to Stephen Tyde’s own knowledge” and Toorak is the Trust Administrator. Plaintiff’s counsel further argues that the Tyde affidavit “which provides that the loan is in default and itemizes the amounts due and owing . . . constitutes sufficient evidence of default.”

Discussion

(1)

A timely challenge to personal jurisdiction should be remitted for a traverse hearing to determine whether service was proper before a summary judgment motion is determined (*see, e.g., Jenny Oil Corp. v Petro Products Distributors, Inc.*, 121 AD2d 686, 687 [1986]). Here, however, defendants waived their objection to service by failing to seek dismissal within the requisite timeframe set forth in the statute. CPLR 3211 (e) provides, in relevant part, that “an objection that the summons and complaint . . . was not properly served is

waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground *within sixty days after serving the pleading*, unless the court extends the time upon the ground of undue hardship” (3211 [e] [emphasis added]; *see also Wells Fargo Bank, N.A. v Sasson*, 167 AD3d 818, 819 [2018] [holding that defendant “waived the defense of lack of personal jurisdiction by failing to move to dismiss on that ground within 60 days of serving their answer”]).

While defendants both answered the complaint on July 16, 2021, and asserted improper service of process as affirmative defenses, defendants failed to move to dismiss the complaint on that ground within 60 days or by September 14, 2021, and thus, defendants waived the defense of lack of personal jurisdiction.

(2)

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]). Such a motion must be supported “by affidavit, by a copy of the pleadings and by other available proof, such as depositions

and written admissions” (CPLR 3212 [b]). To make a prima facie showing, the moving party must “demonstrate its entitlement to summary judgment by submission of proof in admissible form” (*Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 507 [2015]); *see also Zuckerman*, 49 NY2d at 562). Admissible evidence may include “affidavits by persons having knowledge of the facts [and] reciting the material facts” (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]); *see* CPLR 3212 [b]; *Viviane Etienne Med. Care, P.C.*, 25 NY3d at 508).

“A motion for summary judgment will not be granted if it depends on proof that would be inadmissible at the trial under some exclusionary rule of evidence” (*Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 52 [2014], quoting David D. Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3212:18 at 27 [2005 ed]; *see HSBC Mgt. Servs., Inc. v Royal*, 142 AD3d 952, 954 [2016]; *Aurora Loan Servs., LLC v Mercius*, 138 AD3d 650, 652 [2016]; *US Bank N.A. v Madero*, 125 AD3d 757, 758 [2015]). “Out-of-court statements offered for the truth of the matters they assert are hearsay and may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable” (*Nucci v Proper*, 95 NY2d 597, 602 [2001] [internal quotation marks omitted]; *see Viviane Etienne Med. Care, P.C.*, 25 NY3d at 508).

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] [emphasis added]; see also *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2017]). When the plaintiff's standing has been placed in issue by a defendant, plaintiff is required to prove standing as part of its prima facie case (*Loancare v Firshing*, 130 AD3d 787, 789 [2015]). 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, Normandy Trust has failed to establish its prima facie entitlement to summary judgment and an order of reference because its motion is not supported by a fact affidavit with admissible proof of the material facts alleged in the complaint. Other than an attorney affirmation, which has no evidentiary value, the Normandy Trust's summary judgment motion is supported only by a brief affidavit from Stephen Tyde, a principal of Toorak, Trust Administrator of the Normandy Trust. Tyde's affidavit does not annex a power of attorney or any other documentation establishing Toorak's authority to testify on behalf of the Normandy Trust.

While the complaint alleges that Toorak and WSP have authority to sue on the Normandy Trust's behalf, pursuant to 2.1 of the Trust Agreement, the complaint only annexes the cover page, page 13 of the Trust Agreement and the signature pages. Paragraph 2.1 of the Trust Agreement provides that the Administrator "shall have power and authority, and is hereby authorized and empowered, to conduct the business of the

Trust . . . , *and to sue and to be sued all as explicitly set forth herein*” (emphasis added). Thus, the extent of Toorak’s authority and power to act and speak on behalf of the Normandy Trust is set forth in other provisions of the Trust Agreement, the entirety of which plaintiff failed to produce. Consequently, plaintiff’s motion based entirely on Tyde’s affidavit is denied. (*see HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2009] [affirming denial of plaintiff’s motion for order of reference based on affidavit of plaintiff’s servicer because “the record is barren of any evidence demonstrating that agent’s authority to act on behalf of the plaintiff”]).

In addition, although the Normandy Trust submitted copies of the Consolidated Note, the Consolidated Mortgage and the guaranty, it has not established its prima facie entitlement to summary judgment and an order of reference because it has failed to submit any admissible evidence of the borrower’s alleged payment default. The only testimony in Tyde’s affidavit about payments under the Consolidated Mortgage are in paragraphs 9 and 11 in which he attests that “[u]nder the terms of the Loan Documents, Borrower was obligated to make monthly payments of principal and interest . . .” and “[b]y way of a default letter dated March 22, 2021, Plaintiff notified Borrower of its default under the Loan Documents, that the debt had matured, and that, as a result, the full amount owed under the Note was due and payable.” Thus, Tyde merely attests that the borrower was obligated to make mortgage payments and that a March 22, 2021 default letter advised the borrower that there was a default. Tyde *does not* attest to the borrower’s payment history

under the Consolidated Mortgage or the borrower's alleged failure to pay the full amount of the loan on the August 1, 2020 maturity date.

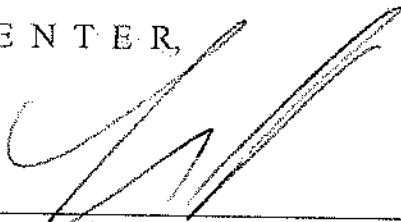
While the boilerplate "verification" on the last page of the Tyde affidavit states that the information contained therein is true to his own knowledge, Tyde does not identify or describe his role at Toorak, his authority and role regarding the subject loan, or how he acquired personal knowledge of the minimal "facts" contained in his moving affidavit. While "generally speaking, a witness may always testify as to matters which are within his or her personal knowledge through personal observation" (*see Bank of New York Mellon v Gordon*, 171 AD3d 197, 206 [2019]), Tyde does not attest to his role or responsibilities at Toorak regarding the subject loan and the general "verification" at the end of his affidavit is inadequate to demonstrate that his affidavit testimony is based on personal observations. In addition, Tyde's affidavit does not annex any documentary evidence or business records from either Toorak or WSF regarding the loan to support his affidavit testimony, including records reflecting the alleged payment default or the payment history of the loan. If Tyde's personal knowledge was actually derived from his review Toorak or WSF business records, the Normandy Trust has failed to submit admissible proof of the borrower's default, as a matter of law (*see Deutsche Bank National Trust Company v Elshiekh*, 179 AD3d 1017, 1021 [2020] [holding 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 are not produced]; *Bank of New York Mellon v Gordon*, 171 AD3d 197, 208-209 [2019] [same]; *JPMorgan Chase Bank National Assoc. v Grennan*, 175 AD3d 1513, 1516-

1517 [2019] [same]). For all of the foregoing reasons, the Normandy Trust's motion for summary judgment, an order of reference and a default judgment are denied with leave to renew based on motion papers that provide factual evidence and a proper evidentiary foundation. Accordingly, it is hereby

ORDERED that Normandy Trust's motion (mot. seq. one) is only granted to the extent that the caption is amended to delete the John Doe defendants and the motion is otherwise denied with leave to renew.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**