

Flushing Bank v Phase 2 Dev. LLC
2022 NY Slip Op 30428(U)
February 2, 2022
Supreme Court, Kings County
Docket Number: Index No. 512530/21
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 2nd day of February, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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FLUSHING BANK, SUCCESSOR BY MERGER TO EMPIRE NATIONAL BANK,

Plaintiff,

- against -

Index No. 512530/21

PHASE 2 DEVELOPMENT LLC; PIM EQUITIES INC.; 191 PATCHEN LLC; ISKYO ARONOV; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; WINDOW METAL WORK LLC; "JOHN DOE NO. 1" to "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) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

41-47
51
52-53

Upon the foregoing papers in this action to foreclose a commercial mortgage on the real properties at 191 Patchen Avenue, 992 Hancock Street and 286 Tompkins Avenue in

Brooklyn (Properties), non-parties DOF NPL III LLC (DOF) and Maxim Credit Group, LLC (Maxim), as assignee of plaintiff Flushing Bank, Successor by Merger to Empire National Bank (Flushing), move (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 1018, substituting DOF and Maxim as party plaintiffs in place and stead of Flushing.

Background

On May 25, 2021, Flushing commenced this commercial foreclosure action by filing a summons and an unverified complaint. On May 28, 2021, Flushing filed a notice of pendency against the Properties. The complaint alleges that defendants Phase 2 Development LLC (Phase 2), PIM Equities Inc. (PIM) and 191 Patchen LLC (191 Patchen) (collectively, Borrowers) executed a \$1,700,000.00 mortgage note in favor of Flushing, the successor by merger to Empire National Bank (Empire), which was secured by a consolidation, extension and modification agreement (CEMA) consolidating five separate mortgages on the Properties (complaint at ¶¶ 12-12 and 15). The complaint alleges that Flushing is the “current owner of the Note” (*id.* at ¶ 14). The complaint further alleges that the Borrowers defaulted under the loan documents “by failing to timely pay each and every installment of principal and interest which became due and payable on [February 1, 2021] and continuously thereafter and said amounts remain unpaid and in default . . .” (*id.* at ¶ 19). The complaint also alleges that defendant Iskyo Aronov (Aronov) guaranteed payment by executing a guaranty on July 9, 2014 (*id.* at ¶ 20). The complaint alleges that as of May 24, 2021, principal in the amount of \$1,451,918.45 is due under the loan (*id.* at

¶ 21 [a]). The complaint annexes exhibits, including: (1) a copy of the July 9, 2014 “Consolidated, Modified and Extended Mortgage Note” in the amount of \$1,700,000.00 executed by the Borrowers in favor of Empire, and (2) a copy of the July 9, 2014 CEMA between Empire and the Borrowers. On June 11, 2021, Flushing filed an amended complaint, which is nearly identical to the original complaint (*see* NYCEF Doc No. 8).

On June 29, 2021, Phase 2, PIM and 191 Patchen collectively answered the amended complaint, denied the material allegations therein and asserted affirmative defenses. On September 30, 2021, Phase 2, PIM and 191 Patchen amended their answer to add five counterclaims.

Assignment of Claim to Non-Party DOF

On October 1, 2021, counsel for DOF and Maxim, filed a June 25, 2021 “Assignment of Claim” executed by Walter Krzyminski, Vice President of Flushing (Assignment of Claim), which provides that:

“Plaintiff Flushing Bank, successor by merger to Empire National Bank (the ‘Lender’), hereby assigns, sells and sets over to DOF NPL III LLC (‘Assignee’) all of its right, title and interest in and to the within action

“This assignment is as is, with all faults and without representation, warranty or recourse, express or implied of any type, kind, character or nature except as otherwise expressly provided in the Loan Purchase and Sale Agreement, between the Lender and the Assignee” (*see* NYSCEF Doc No. 33).

On October 5, 2021, DOF, as “Plaintiff by assignment” and Maxim filed a verified reply to the Borrowers’ amended answer with counterclaims, denied the material allegations therein and asserted affirmative defenses.

DOF and Maxim’s Instant Motion

On October 5, 2021, DOF and Maxim filed the instant motion for an order, pursuant to CPLR 1018, substituting them as party plaintiffs in place and instead of Flushing. Movants submit an attorney affirmation from Harry Zubli, Esq. asserting that:

“On June 29, 2021, Flushing Bank, successor by merger to Empire National Bank assigned all of its rights, title and interest in the . . . Note, Mortgage and all loan documents to DOF NPL III LLC. See **Exhibit ‘C’** for Assignment of Mortgage recorded on July 27, 2021 as CRFN 2021000288681. See **Exhibit ‘D’** for Allonge to Note.

“In addition, Flushing Bank, successor by merger to Empire National Bank assigned all of its rights, title and interest in the instant commercial foreclosure action to DOF NPL III LLC. See **Exhibit ‘E’** for Assignment of Claim.

“On June 29, 2021, DOF NPL III LLC granted Maxim Credit Group, LLC a security interest in the Note, Mortgage and loan documents which security interest is evidenced by that certain Memorandum of Collateral Assignment of Note, Mortgage and Other Loan Documents recorded on August 9, 2021 as CRFN 2021000309431. See **Exhibit ‘F’** for recorded Memorandum of Collateral Assignment of Note, Mortgage and Other Loan Documents.

“DOF NPL III LLC is the current owner and holder of the Note, Mortgage and all remaining loan documents subject to the security interest held by Maxim Credit Group, LLC.”

While counsel acknowledges that “CPLR section 1018 allows Movant to maintain the instant action without substituting itself for Flushing Bank, Successor by Merger to Empire National Bank, as party plaintiff . . .” he requests that the caption be amended to replace Flushing with DOF and Maxim as party plaintiffs.

In addition to the original complaint and the notice of pendency, the moving papers also annex the following exhibits referenced in counsel’s affirmation: (1) a June 29, 2021 “Assignment of Mortgage” recorded in the City Register’s office on July 27, 2021 at CRFN 2021000288681, which provides that Flushing as “Assignor” “hereby assigns unto the Assignee [DOF] all of its rights, title and interest in and to [the] mortgages . . . TOGETHER with the bonds or notes or obligations described in the Mortgages . . .”; (2) a one-page “Allonge to Consolidated, Modified and Extended Mortgage Note” providing that **“Pay to the order of DOF NPL HI LLC (‘Assignee’), as is, where is, with all faults without recourse and without representation or warranty of any kind, express or implied except as expressly set forth in the Loan Purchase and Sale Agreement Effective June 28, 2021”**; (3) the June 25, 2021 Assignment of Claim from Flushing to DOF; and (4) a June 29, 2021 “Memorandum of Collateral Assignment of Note, Mortgage and Other Loan Documents” between DOF, as borrower, and Maxim, as lender (Memorandum), recorded in the City Register’s office on August 9, 2021 at CRFN 2021000309431, pursuant to which DOF granted Maximum a security interest in the note and mortgage (*see* NYSCEF Doc Nos. 44-47). Notably, the Memorandum, which is executed by Eric Sodkin on behalf

of Maxim and by Steve Hackel on behalf of DOF, reflects that Hackel's signature is notarized by movant's counsel, Harry Zubli (*see* NYSCEF Doc. No. 47).

Defendants' Opposition

Defendants 191 Patchen, Aronov and Phase II, in opposition, submit an attorney affirmation arguing that *Maxim's*¹ motion should be denied because "[it] has submitted no admissible evidence that the Note and Mortgage have been assigned to *Maxim*" (emphasis added). Defense counsel notes that Maxim does not submit a fact affidavit and relies on an attorney affirmation, which is inadmissible hearsay "as he is unable to authenticate the business records of Maxim." Essentially, defense counsel argues that counsel's moving affirmation is insufficient to support an order substituting DOF and Maxim for Flushing.

DOF and Maxim's Reply

DOF and Maxim, in reply, submit another attorney affirmation from Harry Zubli, Esq. (Attorney Zubli) asserting that defendants' opposition should be rejected as untimely. In addition, Attorney Zubli affirms that his moving and reply affirmations are admissible because they are based on personal knowledge since, he represented DOF in connection with Flushing's transfer of the loan to DOF and DOF's execution of the Memorandum, pursuant to which DOF granted Maxim a security interest in the subject loan. Attorney Zubli thus explains:

"Affiant Harry Zubli Esq. (hereinafter 'Affiant') has firsthand personal knowledge of all of the matters surrounding the

¹ Although defense counsel's affirmation is submitted in opposition to both BOF and Maxim's motion, defense counsel repeatedly refers to the motion as "Maxim's motion."

assignment of the mortgage between Flushing Bank as Assignor and DOF . . . as Assignee since *Affiant represented DOF in the acquisition and closing of the subject loan from Flushing Bank*

“In addition, Affiant has firsthand personal knowledge of all of the matters surrounding the Memorandum of Collateral Assignment of Note, Mortgage and Other Loan Documents (hereinafter the ‘Memorandum’) between DOF and Maxim . . . since *Affiant represented DOF in connection with granting Maxim the collateral mortgage and in connection with DOF entering into the Memorandum*, which is further evidenced by the fact that Affiant acknowledged Steve Hackel’s signature on the Memorandum (who executed the Memorandum on behalf of DOF).

“The foregoing Assignment of Mortgage and Memorandum (among other documents) were all made and maintained by Affiant in Affiant’s regular course of its business as counsel to DOF and it remains Affiant[’]s regular course business to have maintained such Assignment of Mortgage and Memorandum at the time of the transaction. Furthermore, Affiant caused the foregoing documents to be recorded by sending same to the title company for recording.”

In addition to his personal knowledge, Attorney Zubli asserts that the signatures on the June 29, 2021 Assignment of the loan documents from Flushing to DOF and on the Memorandum pursuant to which DOF granted Maxim a security interest in the loan were properly acknowledged and are, therefore, prima facie evidence that those documents were executed by the person(s) who purported to do so. Attorney Zubli also certifies that those documents “have been reviewed and compared by Affiant to the originals and hereby confirm that the copies annexed to the Motion are true and complete copies of the foregoing document.”

Attorney Zubli also argues that both the Assignment of the loan and the Memorandum were recorded on the Automated City Register Information System (ACRIS), and thus, the court may take judicial notice of such recorded instruments that are a matter of public record.” Finally, Attorney Zubli affirms that “Affiant is in possession of the original Consolidated, Modified and Extended Mortgage Note which original Note is held on behalf of DOF and Maxim.”

Discussion

Substitution of DOF and Maxim is proper under CPLR 1018, which provides that “[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action.” The movants, DOF and Maxim, have established that substitution is warranted because Flushing assigned the mortgage and note and its claims against the Borrowers thereunder to DOF, and that DOF, in turn, granted Maxim a security interest in the subject loan.

While typically an attorney affirmation constitutes inadmissible hearsay (*see, e.g., Citimortgage, Inc. v Bredehorn*, 160 AD3d 803, 804 [2018] [holding that trial court improvidently exercised its discretion in granting plaintiff’s motion to substitute FNMA as plaintiff based on an attorney affirmation, which was inadmissible hearsay]), that is not the case with Attorney Zubli’s moving and reply affirmation submitted in support of DOF and Maxim’s motion. Attorney Zubli affirms that he was the transactional attorney who was personally involved in the assignment of the loan from Flushing to DOF and the security

interest that DOF granted to Maxim, and that the documents attached to his moving affirmation, including Flushing’s Assignment of the mortgage and note and the Memorandum granting Maxim a security interest therein, are kept by him in the normal course of his law practice. Under these circumstances, Attorney Zubli’s affirmation does not constitute inadmissible hearsay, and the exhibits annexed thereto are admissible as business records. In addition, this court takes judicial notice of the June 29, 2021 Assignment of the loan documents from Flushing to DOF and the Memorandum, since those documents were publicly recorded on ACRIS (see *Des Fosses v Rastelli*, 283 AD 1069, 1070 [1954] [court took judicial notice of the recorded referee’s deed in foreclosure action]). Accordingly, it is hereby

ORDERED that DOF and Maxim’s motion (mot. seq. one) is granted, “DOF NPL III” and “Maxim Credit Group, LLC” are hereby substituted in place and instead of “Flushing Bank, Successor by merger to Empire National Bank” as plaintiff, pursuant to CPLR 1018, and the caption is amended to reflect that substitution; and it is further

ORDERED that the caption shall hereinafter read:

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DOF NPL III LLC and MAXIM CREDIT GROUP, LLC,

Plaintiffs,

- against -

PHASE 2 DEVELOPMENT LLC; PIM EQUITIES INC.;
191 PATCHEN LLC; ISKYO ARONOV; NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE;
NEW YORK CITY DEPARTMENT OF FINANCE, NEW

YORK CITY ENVIRONMENTAL CONTROL BOARD;
WINDOW METAL WORK LLC; "JOHN DOE NO. 1"
to "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 lien upon the premises
described in the complaint,

Defendants.

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This constitutes the decision and order of the court.

E N T E R,

J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**