

Rockaway Rutland Lender LLC v Progeny Bldgs. LLC
2022 NY Slip Op 30479(U)
February 23, 2022
Supreme Court, Kings County
Docket Number: Index No. 522464/21
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 23rd day of February, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
ROCKAWAY RUTLAND LENDER LLC,

Plaintiff,

- against -

Index No. 522464/21

PROGENY BUILDINGS LLC, PAMELA GREEN, CAPITAL
ONE BANK (USA) N.A., NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, NEW YORK
CITY DEPARTMENT OF FINANCE, NEW YORK CITY
PARKING VIOLATIONS BUREAU, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD and JOHN DOE #1
THROUGH JOHN DOE #10 (said John Doe defendants
being fictitious, it being intended to name all other
parties who may have some interest in or lien upon
the premises sought to be foreclosed,

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) _____

18-29

Opposing Affidavits (Affirmations) _____

35-37

Reply Affidavits (Affirmations) _____

38

Upon the foregoing papers in this action to foreclose a commercial mortgage encumbering the mixed-use property located at 1029 Rutland Road in Brooklyn (Block 4597, Lot 45) (Property), plaintiff Rockaway Rutland Lender LLC (Rockaway) moves (in

motion sequence [mot. seq.] one) for an order: (1) granting it summary judgment against defendant Progeny Buildings LLC (Progeny or borrower), pursuant to CPLR 3212; (2) awarding it a default judgment against non-appearing defendants Pamela Green (Green or guarantor), Capital One Bank (USA) N.A. (Capital One), New York State Department of Taxation and Finance, New York City Department of Finance, New York City Parking Violations Bureau and the New York City Environmental Control Board, pursuant to CPLR 3215 (a); (3) appointing a referee to ascertain and compute the amount due under the note and mortgage being foreclosed and to determine whether the Property should be sold in one or more parcels, pursuant to RPAPL 1321; and (4) amending the caption to delete the John Doe defendants.

Background

On September 1, 2021, Rockaway commenced this commercial foreclosure action by filing a summons, an *unverified* complaint and a notice of pendency against the Property. The complaint alleges that on or about September 30, 2019, borrower, Progeny, executed and delivered to Prime Commercial Lending LLC (Prime) a \$375,000.00 note, which was secured by a mortgage on the Property (complaint at ¶¶ 7-8). The complaint also alleges that Green executed a guarantee of the loan “to induce” Rockaway’s predecessor, Prime, to make the loan (*id.* at ¶ 15). The complaint alleges that “[t]he Borrower failed to make the monthly payment of principal and interest due under the Note on June 10, 2021, and each month thereafter” and “[b]y a letter dated June 18, 2021, Plaintiff’s predecessor-in-interest advised the Borrower and Guarantor of the foregoing

events of default and demanded the immediate payment in full of all of Borrower's obligations" (*id.* at ¶¶ 18 and 20). Allegedly, "there is now due and owing from the Borrower to Plaintiff, under the Note and the Mortgage, principal in the amount of \$373,530.71, plus interest . . ." (*id.* at ¶ 22).

Regarding Rockaway's standing to foreclose, the complaint alleges that "[p]ursuant to an Assignment of Mortgage *dated September 23, 2019*, Prime . . . assigned all of its right, title and interest in and to the Mortgage to KCMi Capital Inc. ('KCMi') and "Prime . . . also executed and delivered to KCMi an allonge with respect to the Note" (*id.* at ¶¶ 10-11). Importantly, this alleged mortgage assignment was executed *one week before* the mortgage and guaranty were allegedly executed by Progeny and Green, respectively, on September 30, 2019. The complaint alleges that "[p]ursuant to an Assignment of Mortgage dated July 8, 2021, KCMi assigned all of its right, title and interest in and to the Note and the Mortgage to Rockaway . . ." and "KCMi also executed and delivered to Rockaway . . . an allonge with respect to the Note and a Lost Note Affidavit" (*id.* at ¶¶ 12-13).

The complaint annexes collectively as Exhibit 1: (1) a July 8, 2021 "Allonge" that explicitly states that "[t]his Allonge . . . *is attached to and made part of* the following instrument: Promissory Note dated September 30, 2019, made by Progeny . . . in favor of Prime . . . assignor of KCMi . . . ('Lender') in the original principal amount of \$375,000.00, for the purpose of annexing thereto the following endorsement[.]" which was executed by Ken Markizon, KCMi's President, to the order of Rockaway; (2) an acknowledgement of Ken Markizon's signature in Camden, New Jersey, by notary Kenneth Olin that appears

alone *on a separate, unnumbered page*, although there is sufficient room on the page containing the “Allonge”; (3) a July 8, 2021 “Lost Note Affidavit” by Ken Markizon of KCMi attesting that “KCMi is the legal owner and holder of the Note[,]” which “was assigned to KCMi by Allonge dated September 27, 2019 . . .” (*three days before* Progeny took out the loan on September 30, 2019); “KCMi is assigning the Note and Allonge to ROCKAWAY . . .”; “[t]he Note and Allonge have been misplaced, lost and/or destroyed”; “KCMi has conducted a diligent search and inquiry to find the original Note and Allonge and has been unable to do so”; and “[a]ttached hereto are true, complete and correct copies of the original Note and Allonge”; (4) a one-page, unnumbered and undated “Allonge” executed by Jon Cosentino of Prime, which references “Loan Date: September 27, 2019” and “states that “[f]or value received, the undersigned hereby assigns, transfers, and pledges without recourse to KCMi . . . the attached mortgage note *to which this Allonge is and remains physically affixed*” and “[w]itness the due execution of this Allonge on this day of _____”; and (5) a copy of the three-page promissory note executed by Green on September 30, 2019 “as 100% member of” Progeny (*see* NYSCEF Doc No. 2 [emphasis added]). The complaint also annexes the September 30, 2019 mortgage as Exhibit 2.

The complaint annexes collectively as Exhibit 3: (1) an “Assignment of Mortgage” pursuant to which Prime assigned “[a] certain Mortgage, *dated the 27th of September, 2019*, executed between Prime . . . and Progeny[,]” which assignment is executed by Jon Cosentino of Prime on September 27, 2019 (*three days prior* to Progeny’s alleged execution of the note and mortgage), *but is notarized four days earlier* on September 23,

2019; (2) the recording page for the Assignment of Mortgage; (3) a September 30, 2019 “[RPL] Section 275 Affidavit” from Green attesting that “I am a member of Progeny . . . the owner (mortgagor) of the property subject to the mortgage which is being assigned” and “[t]he assignee set forth on the assignment of mortgage to which this affidavit is attached is not acting as a nominee of the owner (mortgagor) of the property, and *the mortgage continues to secure a bona fide obligation*” (see NYSCEF Doc No. 4 [emphasis added]). The complaint also annexes as Exhibit 4 a July 8, 2021 “Assignment of Mortgage” executed by Ken Markizon, KCMI’s President, pursuant to which KCMI assigned *only the mortgage* to Rockaway (see NYSCEF Doc No. 5)..

The complaint annexes as Exhibit 5 a June 18, 2021 default letter addressed to Progeny and Green advising that “Events of Default have occurred under the Loan Documents based on, among other things, the Borrower’s failure to make the required payments when due under the Note on June 10, 2021” and “[b]y reason of the foregoing Events of Default, all sums due under the Note are hereby accelerated, and demand is hereby made to Borrower and Guarantor for immediate payment in full of all obligations of the Borrower due under the Loan Documents” (see NYSCEF Doc No. 6).

On September 20, 2021, Progeny answered the complaint, denied the material allegations therein and asserted affirmative defenses, including: (1) that the notice of default was either not sent in accordance with the express terms of the mortgage or did not contain the language required; (2) lack of standing; (3) statute of limitations; and (4) failure

to join necessary parties. Progeny also asserts a counterclaim for reasonable attorneys' fees.

On September 24, 2021, Rockaway replied to Progeny's counterclaim, denied the allegations therein and asserted affirmative defenses.

Rockaway's Instant Motion

On October 27, 2021, Rockaway filed the instant motion for summary judgment against Progeny, a default judgment against the other non-appearing defendants, an order of reference and to amend the caption.

Rockaway submits a July 8, 2021,¹ "Business Record Affidavit" from Ken Markizon, President of KCMI since October 1, 2015, who attests that:

"Annexed hereto are true, accurate and complete copies of documents evidencing the loan history for Loan Number 000000002634 (the 'Loan History') . . . The unpaid principal balance as of the date hereof is \$373,530.71.

"The documents constituting the Loan History produced herewith were created and/or updated by me personally or by personnel or staff under my control or supervision employed by KCMI, in the regular course of business of KCMI, at the time of the transactions or occurrences recorded therein, or within a reasonable time thereafter and it was the regular course of business of KCMI to make and maintain the Loan History.

"The Loan History consists of records showing the credits and debits against the balance of the loan made to the borrower Progeny . . . The Loan History is based on the loan information including: the principal amount loaned, the date the loan

¹ Apparently, Ken Markizon's July 8, 2021 "Business Record Affidavit" was executed the very same day that Markizon executed the "Lost Note Affidavit" and the "Assignment of Mortgage" from KCMI to Rockaway and all three documents are notarized by Kenneth Olin.

commenced, the amount of the monthly payments the breakdown of principal, interest and escrow, city taxes hazard insurance and the interest rate applied and other relevant documents. During the servicing of the loan, the amounts received and the date the payments were received were also made a part of the Loan History contemporaneously as said payments were received. Also made a part of the Loan History are the dates and amounts of advances or payments made by KCMI on the loan on the borrower's behalf.

"I have personal knowledge of the Loan History of this account as I reviewed it prior to executing this document. I also oversaw the maintenance of such Loan History in KCMI's business records, in my capacity as President of KCMI. I hereby affirm . . . that the forgoing and the Loan History annexed hereto as Exhibit A is a true, complete and accurate copy of the electronic printout and other documents constituting the Loan History maintained by KCMI for this account" (*see* NYSCEF Doc No. 20).

Exhibit A to Markizon's "Business Record Affidavit" is the "Loan History" from "9-30-19" through "6-25/21" containing the "Note number" of 2634-000 and identifying Progeny. The payment history reflects that the interest rate charged and late fees were assessed beginning in June 2021 (*see* NYSCEF Doc No. 21).

Rockaway also submits an affidavit from Ralph Dweck (Dweck), who attests that "I am authorized to submit this affidavit on behalf of Plaintiff Rockaway . . ." and that "[t]he facts and matters set forth in this affidavit are based upon my personal knowledge and/or my review of Rockaway['s] business records, the business records of Rockaway['s] predecessor-in-interest, or the publicly-available documents maintained by the Clerk of the Court." Dweck further alleges that "[i]n the regular performance of my job functions, I am familiar with the business records maintained by Rockaway . . . in its loan portfolio" which

includes documents generated by Rockaway in the ordinary course of its business operations and “all of the loan documents purchased from its predecessors-in-interest and all file documents that were formally in the possession of said predecessors-in-interest.”

Specifically, Dweck attests that:

“KCMII[s] business records concerning the Loan, including transactional documents, default notices and loan/payment histories, were incorporated into Rockaway[s] business records when it acquired the Loan and Rockaway . . . routinely relies upon said records in the conduct of its business and keeps said records in the ordinary course of its business.”

Dweck attests that Rockaway seeks to foreclose the mortgage against the Property, describes the chain of title of the mortgage, including the mortgage assignments. Dweck avers that “KCMII also executed and delivered to Rockaway . . . an allonge with respect to the Note and a Lost Note Affidavit, both of which are annexed to the Complaint” and “Rockaway . . . is the sole, true, and lawful owner and holder of the Note, the Mortgage and the Guaranty . . .” Dweck reiterates the events of default alleged in the complaint, including that Progeny “failed to make the monthly payment of principal and interest due under the Note on June 10, 2021, and each month thereafter.” Dweck’s affidavit annexes the following exhibits: (1) a copy of the complaint with all exhibits; (2) a copy of the guaranty; (3) a copy of KCMII’s Loan History, which was incorporated into Rockaway’s business records; (4) affidavits of service; (5) Progeny’s answer with counterclaim; and (6) Rockaway’s reply to counterclaim.

Rockaway also submits an attorney affirmation arguing that “[p]laintiff has made out a prima facie case for summary judgment against the Borrower and Guarantor by

submitting true and accurate copies of the subject loan documents and conclusively establishing that the Borrower and Guarantor are in default of their obligations under said loan documents.” Rockaway’s counsel further affirms that “the Dweck Affidavit (and the exhibits thereto) conclusively established that Plaintiff had standing to commence (and pursue) this foreclosure action” because “Exhibits A-3 and A-4 . . . contain recorded copies of the assignments of the Mortgage underlying this case to Plaintiff” and “Exhibit A-1 includes allonges endorsing the Note underlying this case to Plaintiff.” Rockaway’s counsel contends that “Borrower cannot raise a triable issue of fact that should preclude this Court from granting summary judgment in favor of Plaintiff . . .”

Progeny’s Opposition

Progeny, in opposition, submits an affidavit from Green, its “managing member,” who attests that “[p]laintiff is unable to establish standing as a review of Plaintiff’s own submissions shows that Plaintiff’s predecessor was somehow allegedly assigned the subject note and mortgage *prior to the execution and existence* of the subject note and mortgage” (emphasis added). Green further attests that “[p]laintiff [] has not produced evidence in admissible form to prove standing, the default, and other aspects of its prima facie case for foreclosure.”

Progeny also submits an attorney affirmation in which defense counsel asserts that there are “inconsistent accounts presented in the affidavits and affirmations which result in questions of fact which require trial for resolution.” Defense counsel argues that “both the Dweck and Markizon affidavits along with the documents they relied upon, have no

evidentiary value as the documents and testimony derived from them constitute hearsay . . .” because they are conclusory. Defense counsel further argues:

“In the Dweck Affidavit at Paragraph 11, Dweck testifies that the subject note and mortgage were executed on September 30, 2019. However, at paragraph 15, Dweck claims the Plaintiff’s predecessor-in-interest (KCMI) was assigned the subject note and mortgage by virtue of an assignment executed and dated September 23, 2019, seven days prior to the existence of the subject note and mortgage.

“The dates testified to by Plaintiff are crucial because if Plaintiff’s testimony is accurate, it must follow that KCMI (later by extension Plaintiff) was assigned a note and mortgage that did not exist at the time of its execution.

“Further, in Plaintiff’s complaint, and as reproduced in Plaintiff’s Exhibit A at page 31, there is the initial assignment where the loan originator Prime . . . by and through President Jon Cosentino, purports to assign the . . . mortgage to KCMI. However this assignment references a mortgage dated September 27, 2019, not as referenced by Plaintiff’s Affirmation, the Dweck Affidavit, and Plaintiff’s complaint at paragraph 8 as the note and mortgage dated September 30, 2019.

“It must follow that either Plaintiff was assigned a different note and mortgage which is fatal to this foreclosure action, or Plaintiff’s records contain factual errors which require examinations of credibility.”

Defense counsel also notes that the September 27, 2019 mortgage assignment states that it was executed by Prime’s President on September 27, 2019, yet his signature was previously notarized on September 23, 2019. Defense counsel contends that “[t]he factual implausibility or clear errors in record keeping utterly refute any inference of reliability of this document” and “[w]ithout those hallmarks of reliability, they cannot qualify as

business records and would therefore be inadmissible hearsay.” Defense counsel further asserts that the inconsistencies in Rockaway’s records and testimony “draws into question the totality of Plaintiff’s submissions . . .” and “[p]laintiff’s prima facie case regarding standing, evidence of the default, notice requirements, and compliance with any other contractual provisions is in doubt.”

Rockaway’s Reply

Rockaway, in reply, submits an attorney affirmation asserting that Rockaway’s “moving papers conclusively established the Borrower’s execution and delivery of the Note and the Mortgage and Borrower’s default under same” and “[b]ased on this showing by Plaintiff, the burden has shifted to the Borrower . . .” to raise material issues of fact.

Regarding standing, Rockaway’s counsel argues that:

“Plaintiff’s Complaint and its moving papers include as an Exhibit a written assignment (i.e., an allonge) of the subject Note from the original lender Prime . . . to KCMI . . . and a subsequent allonge from KCMI . . . to Plaintiff. . . . Borrower’s opposition does not contest the validity of these allonges.

“This written assignment of the Note to Plaintiff, which predates the commencement of this action by more than two months, in and of itself, establishes Plaintiff’s standing to pursue this action.”

Rockaway’s counsel also asserts that the assignments of mortgage are not the “dispositive documents” and that “the assignment of mortgage includes as an attachment an affidavit of Borrower’s principal Pamela Green attesting as to the validity of the assignment!”

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 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]). 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 the issue of standing is raised by a defendant, a plaintiff must also establish its standing as part of its prima facie case (*see Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d at

726; *Security Lending, Ltd. v New Realty Corp.*, 142 AD3d 986, 987 [2016]; *LGF Holdings, LLC v Skydel*, 139 AD3d 814, 814 [2016]).

“A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced . . .” and may do so “by showing either a written assignment of the underlying note or the physical delivery of the note” (*U.S. Bank N.A. v Guy*, 125 AD3d at 846-847). It is well-established that “either a written assignment of the underlying note or physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident” (*U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752, 754 [2009]; *see also Deutsche Bank Nat’l Tr. Co. v Horowitz*, 163 AD3d 764, 765 [2018]).

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, Rockaway has failed to establish its standing to foreclose and Rockaway’s own pleading and moving submissions raise several triable issues of fact regarding Rockaway and its predecessor’s ownership and possession of the underlying note that preclude the relief Rockaway now seeks. For example, Ken Markizon’s July 8, 2021 “Lost Note Affidavit” (annexed as part of Exhibit I to the complaint), in which Markizon attests

that “KCMI is the legal owner and holder of the Note” because the note “was assigned to KCMI by Allonge dated September 27, 2019 . . .” raises serious questions regarding Rockaway’s standing to foreclose because the promissory note could not possibly have been transferred to Rockaway’s predecessor, KCMI, *three days before* Progeny executed the promissory note on September 30, 2019. The September 27, 2019 “Allonge” referenced in Markizon’s “Lost Note Affidavit” (annexed to the complaint as Exhibit I) reflects that *it has a blank space where the date was not filled in* and it erroneously references “Loan Date: September 27, 2019” (*see* NYSCEF Doc Nos. 2 and 23).

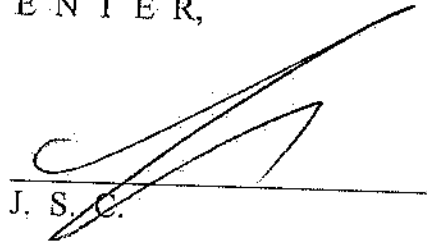
Furthermore, the allonges annexed to Rockaway’s moving papers do not appear to be firmly affixed to the promissory note, as required under the Uniform Commercial Code (UCC), and appear on separate, unnumbered pages, raising triable issues of fact (*see Bayview Loan Servicing, LLC v Kelly*, 166 AD3d 843, 846 [2018] [holding that “there is a triable issue of fact as to whether the note was properly endorsed in blank by an allonge ‘so firmly affixed thereto as to become a part thereof’ when it came into the possession of Wells Fargo, which later endorsed the note to the plaintiff”]).

Finally, Rockaway’s contention that Green’s September 30, 2019 affidavit (*see* NYSCEF Doc No. 4) “attest[ed] to the validity of the [mortgage] assignment” is rejected since a mortgage is merely security for a debt evidenced by a promissory note and a transfer of the mortgage without the underlying promissory note is a nullity, and *no interest is acquired by it* (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 280 [2011] [emphasis added]). Accordingly, it is hereby

ORDERED that Rockaway's motion (mot. seq. one) is only granted to the extent that the caption is amended to delete the John Doe defendants; the motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE