

PS Funding, Inc. v 863 E. 12th Holdings LLC

2022 NY Slip Op 30559(U)

February 9, 2022

Supreme Court, Kings County

Docket Number: Index No. 516768/20

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 9th day of February, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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PS FUNDING, INC.,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 516768/20

863 EAST 12TH HOLDINGS LLC;
ABRAHAM WIEDER;
SANTANDER BANK, N.A.;
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE;
and "JOHN DOE #1" through "JANE DOE #10" and
"ABC CORP. #1 through #10," said names being
fictitious and unknown to the Plaintiff, the persons or parties
intended being the occupants, tenants, persons or entities,
if any, having or claiming an interest in or lien upon
the mortgaged premises described in the verified complaint,

Mot. Seq. No. 1

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion, Affirmation/Affidavit,
Memorandum of Law, and Exhibits Annexed _____
Affirmation in Opposition and Exhibits Annexed _____
Reply Affirmation _____

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In this action to foreclose a mortgage on commercial real property owned by defendant 863 East 12th Holdings LLC (the "borrower defendant"), as well as to collect on the loan guarantee executed by the borrower defendant's sole member, defendant Abraham Wieder (the "guarantor defendant"), plaintiff PS Funding, Inc. (the "plaintiff") moves in Seq. No. 1 for an order: (1) pursuant to CPLR 3212, granting it summary

judgment and striking the joint answer of the borrower and guarantor defendants, dated October 29, 2020 (the “answer”); (2) pursuant to RPAPL 1321 (1), appointing a referee to compute the amount due to the plaintiff; and (3) pursuant to RPAPL 1311 (1), substituting Ofer Koher, Sr., Smadar Danini, David “Doe,” Haim Dorani, and Jacob Srulowitz in place of the “John Doe” defendants, further substituting Lluvia Valdex and Chaya Jacob in place of the “Jane Doe” defendants, and striking the remaining unnamed defendants from the caption.

Background

The borrower defendant executed and delivered a Consolidated, Amended and Restated Project Loan Promissory Note, dated as of March 29, 2019 (the “note”), in the principal amount of \$975,000 in favor of Nexus Capital Investments, LLC (“Nexus”) (NYSCEF Doc No. 12). Concurrently, the borrower defendant executed and delivered the Consolidated, Amended and Restated Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing, likewise dated as of March 29, 2019 (the “mortgage”), to secure the note (NYSCEF Doc No. 13). The mortgage was recorded as a first lien against the borrower defendant’s fee ownership in the two-family residential rental property located at 863 East 12th Street in Brooklyn, New York, in the Office of the City Register of the City of New York on April 12, 2019.

Concurrently with the execution and delivery of the note and mortgage by the borrower defendant, the guarantor defendant guaranteed the loan by executing and delivering to Nexus a Guaranty, dated as of March 29, 2019 (the “guaranty”) (NYSCEF Doc No. 15). On the same date (*i.e.*, March 29, 2019), the note, mortgage, and guaranty

were assigned by Nexus to the plaintiff (NYSCEF Doc No. 14). By letter, dated November 6, 2019, the plaintiff (by counsel) notified each defendant that they had been in payment default since August 1, 2019 (NYSCEF Doc No. 16). By the same letter, the plaintiff accelerated and demanded an immediate payment of the entire indebtedness. Approximately ten months later, on September 9, 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 “defendants”) asserted a total of 23 affirmative defenses, including that the plaintiff lacked standing to commence the action. By notice of motion, dated October 25, 2021, the plaintiff requested the instant relief. The defendants, by way of their counsel’s affirmation, dated December 1, 2021, objected (NYSCEF Doc No. 29). On December 8, 2021, the Court reserved decision. On December 20, 2021, the borrower defendant filed a “Commercial *Tenant’s* Declaration of Hardship During the COVID-19 Pandemic” (the “hardship declaration”) (NYSCEF Doc No. 38) (emphasis added). The hardship declaration, though not applicable by its express terms to a commercial *landlord* such as the borrower defendant herein, de facto stayed this action until the expiration of the statutory moratorium on January 15, 2022. Commencing on January 16, 2022, this action (among other foreclosure actions) has returned to active status in accordance with Administrative Order No. 35/22.

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*, 200 AD3d 640, 643 [2d Dept 2021]). “Where, as here, the plaintiff’s standing has been placed in issue by the defendant’s answer, the plaintiff must prove its standing as part of its prima facie showing on a motion for summary judgment” (*Deutsche Bank Natl. Tr. Co. v Crosby*, ___ AD3d ___, 2022 NY Slip Op 00402 [2d Dept 2022]). A plaintiff establishes its standing to commence a foreclosure action by demonstrating that it is either the holder or assignee of the underlying note at the time the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). “Either a written assignment of the underlying note or the 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” (*Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2d Dept 2017] [internal quotation marks omitted]). Thus, 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 [foreclosure] action” (*Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 91 [2d Dept 2021]).

Here, the plaintiff has established its prima facie entitlement to judgment as a matter of law 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]). Further, the plaintiff has established standing based on the written assignment of the mortgage and note to the plaintiff on March 29, 2019, inasmuch as the same assignment encompassed

the note¹ (*see Cenlar FSB v Glauber*, 188 AD3d 1141, 1143 [2d Dept 2020]). The concurrent assignment of the mortgage and note excludes from consideration the defendants' hypothesis (propounded at length in ¶¶ 28-33 of their counsel's opposition) that the allonge accompanying the note might not have been firmly attached to it.

In opposition to the plaintiff's prima facie showing, the defendants have failed to raise a triable issue of fact. The defendants' concern with the alleged prematurity of the plaintiff's motion is meritless. "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, the defendants have failed to satisfy their burden (*see e.g. Ocwen Loan Serv., LLC v Fitzgerald*, 168 AD3d 964, 966 [2d Dept 2019]).

Contrary to the defendants' contention (in ¶ 19 of their counsel's affirmation), the mortgage was not "executed on" March 29, 2019. Rather, the mortgage was "dated as of" March 29, 2019, with the actual execution date of March 28, 2019 (as reflected in the

¹ See Assignment of Mortgage ("Together with the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under the foregoing Security Instrument") (emphasis added; capitalization omitted). A copy of the assignment is annexed to the complaint as Exhibit D (NYSCEF Doc No. 1).

certificates of acknowledgement), meaning that both sides executed the mortgage one day before the loan closing. The defendants' remaining contentions (including those regarding the purported crossed/checked off "serial numbers") have been considered and found to be unavailing.

Conclusion

Accordingly, it is

ORDERED that the plaintiff's motion in Seq. No. 1 is *granted in its entirety*, the plaintiff is granted summary judgment as against both defendants, and their joint answer, dated October 29, 2020, is stricken; and it is further

ORDERED that the plaintiff's counsel shall submit, on notice, a proposed order for the appointment of a referee to compute; and it is further

ORDERED that Ofer Koher, Sr., Smadar Danini, David "Doe," Haim Dorani, and Jacob Srulowitz are substituted in place of the "John Doe" defendants; that Lluvia Valdex and Chaya Jacob are substituted in place of the "Jane Doe" defendants; and that the remaining unnamed defendants are stricken from the caption, with the amended caption to read as follows:

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PS FUNDING, INC.,	Plaintiff,	
-against-		Index No. 516768/20
863 EAST 12 TH HOLDINGS LLC;		
ABRAHAM WIEDER;		
SANTANDER BANK, N.A.;		
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE;		
OFER KOHER, SR.; SMADAR DANINI; DAVID "DOE";		
HAIM DORANI; JACOB SRULOWITZ; LLUVIA VALDEX; and		
CHAYA JACOB,	Defendants.	

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The plaintiff's counsel is directed to serve a copy of this decision and order with notice of entry on the defendants' counsel electronically, and on the other named defendants by first-class mail, and is further directed to file an affidavit of service thereof with the Kings County Clerk electronically.

This constitutes the decision and order of the Court.

ENTER,

A handwritten signature in black ink, appearing to be 'J.S.C.', written over the printed text 'J.S.C.'.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**