

U.S. Bank N.A. v 351 Troy LLC
2022 NY Slip Op 31033(U)
March 18, 2022
Supreme Court, Kings County
Docket Number: Index No. 521990/21
Judge: Lawrence 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 18th day of March, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR VELOCITY COMMERCIAL CAPITAL LOAN TRUST
2018-2,

Plaintiff,

- against -

Index No. 521990/21

351 TROY LLC; VICTOR BROWN; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; "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.

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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) _____

38-48

Opposing Affidavits (Affirmations) _____

51-52

Reply Affidavits (Affirmations) _____

53

Upon the foregoing papers in this action to foreclose a commercial mortgage on the property at 351 Troy Avenue in Brooklyn (Block 1413, Lot 12) (Property), plaintiff U.S. Bank National Association, as Trustee for Velocity Commercial Capital Loan Trust 2018-

2 (US Bank) moves (in motion sequence [mot. seq.] one) for an order: (1) striking the answer and affirmative defenses asserted by defendants 351 Troy LLC (351 Troy or borrower) and Victor Brown (Brown or guarantor); (2) dismissing 351 Troy and Brown's counterclaim; (3) granting it summary judgment against defendants 351 Troy and Brown, pursuant to CPLR 3212; (4) granting it a default judgment against the non-answering and non-appearing defendants; (5) amending the caption to substitute "Jane Doe #1 (name refused)," "John Doe #1 (name refused)," "John Doe #2 (name refused)," "John Doe #3 (name refused)," "John Doe #4 (name refused)" and "John Doe #5 (name refused) in their capacities as tenants or occupants of the Property in place of "John Doe #1-#50" and "Mary Roe #1-#50"; and (6) appointing a referee to compute the amount due and owing to US Bank under the mortgage.

Background

On August 26, 2021, 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 defendant Brown, on behalf of defendant 351 Troy, executed a \$650,000.00 promissory note in favor of "plaintiff's predecessor," which was secured by a commercial mortgage encumbering the Property (complaint at ¶¶ 4-5). The complaint alleges that US Bank "is the sole, true, and lawful owner and/or holder of Note and Mortgage" (*id.* at ¶ 8). The complaint further alleges that 351 Troy "failed and neglected to comply with the terms and conditions of the Mortgage Loan by failing to pay the principal, interest, taxes, assessments, water rents, insurance premiums, escrow, and/or

other charges, or by failing to perform a covenant contained in the Mortgage Loan, as more fully described in **Schedule F** of this complaint” and “plaintiff elects to call due the entire amount secured by the Mortgage Loan” (*id.* at ¶¶ 9 and 10). Schedule F reflects that the loan matured on April 1, 2021 (*see* NYSCEF Doc No. 9). The complaint also alleges that defendant Brown guaranteed payment by executing a guaranty (*id.* at ¶ 20). 0

The complaint annexes exhibits, including: (1) a copy of the five-page, April 12, 2018 “Semi-Annual Adjustable Rate Note” in the amount of \$650,000.00 executed by 351 Troy in favor of Velocity Commercial Capital, LLC (Velocity), which has an “Allonge to Promissory Note” on a separate, unnumbered page stating that “[t]his instrument is an Allonge that shall be attached to and made a part of a certain Promissory Note, dated April 12, 2018, executed by 351 TROY LLC in favor of Velocity . . .” with a blank indorsement executed by Ryan Wise, Senior Associate at Velocity (*see* NYSCEF Doc No. 6); (2) a copy of the “Commercial Mortgage, Security Agreement and Assignment of Leases and Rents” between 351 Troy, as mortgagor, and Velocity, as lender (*see* NYSCEF Doc No. 7); (3) an August 10, 2021 “Assignment of Commercial Mortgage, Security Agreement and Assignment of Leases and Rents” “[t]ogether with the note(s) and obligations therein described . . .” from Velocity to US Bank, which was executed by Mickie Byron of Velocity (*see* NYCEF Doc No. 8); and (4) a copy of the guaranty executed by Brown (*see* NYSCEF Doc No. 10).

On October 9, 2021, 351 Troy and Brown collectively answered the complaint, denied the material allegations therein and asserted affirmative defenses, including that US

Bank lacks standing to foreclose. 351 Troy and Brown also asserted a counterclaim for recovery of “reasonable attorneys[’] fees and costs under the Access to Justice in Lending Act of 2010” (see NYSCEF Doc No. 32).

None of the other defendants answered or otherwise responded to the complaint.

On October 15, 2021, US Bank replied to defendants’ counterclaim.

US Bank’s Instant Summary Judgment Motion

On November 16, 2021, US Bank filed the instant motion for an order granting summary judgment, a reference, a default judgment against the non-appearing and non-answering defendants, striking and dismissing defendants’ answer, affirmative defenses and counterclaim and amending the caption.

US Bank submits a fact affidavit from Sandie Lawrence (Lawrence), a Department Manager at Velocity, “the duly authorized servicer and attorney in fact . . .”¹ for US Bank, who attests that “I submit this affidavit as verification of the allegations in the complaint and the plaintiff’s reply to the counterclaim.” Lawrence’s affidavit, which annexes copies of the pleadings (and all exhibits thereto, including the note, mortgage and mortgage assignment), reiterates the allegations in the complaint, including the allegation regarding 351 Troy’s execution of the mortgage and note and its alleged failed to make monthly payments under the mortgage. Lawrence alleges that US Bank was the “holder” of the

¹ Exhibit A to Lawrence’s affidavit is a Limited Power of Attorney, pursuant to which US Bank appointed Velocity, the servicer of the loans in the Trust, as Attorney-In-Fact (see NYSCEF Doc No. 45).

note on August 26, 2021, when this action was commenced and that US Bank “is the owner of the subject mortgage, which passed to the plaintiff as an inseparable incident of the note, and is also the mortgagee of record, as evidenced by the true and accurate copies of the mortgage and assignments of mortgage . . .” Lawrence further attests that “351 Troy . . . defaulted under the commercial note by failing to make the payments due on April 1, 2021, and thereafter, which was an event of default on the mortgage” and that “[e]xhibit ‘C’ is the business record I consulted that demonstrates the default.” Exhibit C appears to be a payment history prepared by “Mr. Cooper” from May 2, 2018 through October 7, 2021 (*see* NYSCEF Doc No. 47). Lawrence avers that her affidavit is based on her review of Velocity’s business records and the business of records of US Bank’s sub-servicer, “Mr. Cooper” which “were reviewed for accuracy and incorporated into Velocity’s business record keeping process.”

US Bank also submits an attorney affirmation, which annexes copies of the notice of pendency and the affidavits of service upon defendants and asserts that “[t]hrough the accompanying affidavit of Sandie Lawrence, the plaintiff proved the existence of the note and mortgage, and defendants’ default.” US Bank’s counsel argues that “[p]laintiff is entitled to summary judgment against the answering defendants because no genuine issues of material fact exist that would require a trial.” US Bank’s counsel also argues that dismissal of defendants’ counterclaim for attorneys’ fees under Real Property Law (RPL) § 282 is warranted because this case involves a mortgage executed by a corporate defendant “exclusively for commercial purposes,” and thus, RPL 282 is inapplicable.

Defendants' Opposition

Defendants 351 Troy and Brown, in opposition, submit a terse opposing affidavit from Brown, who merely attests that “as more fully developed in the affirmation of my attorney, Plaintiff [] has not produced evidence in admissible form to prove standing, the default, and other aspects of its prima facie case for foreclosure” and “Plaintiff has not shown the absence of issues of material facts, which precludes the granting of summary judgment at this juncture.”

Defense counsel submits an affirmation arguing that US Bank’s moving papers fail to set forth sufficient facts regarding US Bank’s possession of the note. Defense counsel claims that Lawrence’s moving affidavit is inadmissible hearsay because Lawrence relies on a payment history that reflects that it was prepared by “Mr. Cooper,” the sub-servicer. Defense counsel asserts that while Lawrence attests that Mr. Cooper’s records were “incorporated” into Velocity’s business records, “it is strange that the records of V[elocity] carry the markings of Mr. Cooper, and a reasonable inference could be made that the records presented are in fact the records of Mr. Cooper and not V[elocity].” Defense counsel notes that “[t]his is a reasonable inference that Defendants as the opponent on a motion for summary judgment is entitled to and all evidence must be viewed in the light most favorable to the Defendants.” Essentially, defense counsel argues that “it appears Lawrence is attempting to testify to the records of a third-party Mr. Cooper, and not the

records of V[elocity], which would be inadmissible hearsay” and that “[t]here now appear to be questions as to the credibility of the testimony and records in Plaintiff’s submissions.”

US Bank’s Reply

US Bank, in reply, submits an attorney affirmation arguing that it satisfied its burden of proof for summary judgment “by producing the relevant loan documents and a sworn affidavit from Sandie Lawrence, in which she sufficiently established proof of the note, mortgage, and the corporate borrower’s default, through admissible business records.” US Bank’s counsel notes that defendants “do not dispute the existence of the loan nor their default thereunder” and “they submit no actual evidence in opposition to the motion, or in support of any of their 11 boilerplate affirmative defenses and counterclaim.”

US Bank’s counsel further contends that its evidence of 351 Troy’s payment default is sufficient because Lawrence asserted that Velocity’s business records “include documents generated and received from the Velocity Trust, and plaintiff’s sub-servicer, Mr. Cooper, in connection with the subject mortgage loan, which records were reviewed for accuracy and incorporated into Velocity’s business record keeping process.”

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]). When a plaintiff establishes prima facie entitlement to summary 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 has produced the indorsed note, the mortgage, the guaranty and sufficient evidence that 351 Troy breached the terms of the mortgage by failing to make the required mortgage payments. Contrary to defense counsel's contention, Lawrence's affidavit was sufficient to establish 351 Troy's payment default based on her review of Mr. Cooper's payment history, which Lawrence attests was incorporated into Velocity's business records and relied upon by Velocity in the normal course of its business (*see U.S. Bank v Kropp-Somoza*, 191 AD3d 918, 921 [2021] [holding that "the affidavit from an employee of the plaintiff's loan servicer was sufficient to lay a foundation for the admission of certain business records which were created by the prior loan servicer . . ." based on testimony that such records from the prior servicer were incorporated into the servicer's records and routinely relied upon by the servicer]).

Furthermore, US Bank has established its standing to foreclose based on the August 10, 2021 assignment of the mortgage together with the underlying note, which pre-dated the commencement of this foreclosure action on August 26, 2021, and US Bank's production of the note indorsed in blank (*Deutsche Bank Tr. Co. Americas v Vitellas*, 131 AD3d 52, 59 [2015] [holding that "a plaintiff's standing may generally be demonstrated by showing *either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action*"] [internal quotations and citations omitted] [emphasis added]).

Defendants, in opposition, have failed to raise a triable issue of material fact to preclude summary judgment. Defendants have also failed to oppose that branch of US

Bank's motion seeking dismissal of their counterclaim for an award of attorneys' fees.

Accordingly, it is hereby

ORDERED that US Bank's motion (mot. seq. one) is granted to the extent that: (1) summary judgment is granted in US Bank's favor on the first cause of action against 351 Troy to foreclose on the Property and on the second cause of action against Brown under the guaranty; (2) US Bank is entitled to an order of reference, which shall be settled on notice within 30 days of service of this decision and order with notice of entry thereof; (3) US Bank is entitled to a default judgment against the non-answering and non-appearing defendants; (4) defendants' counterclaim is hereby dismissed; and (5) the caption is hereby amended to substitute "Jane Doe #1 (name refused)," "John Doe #1 (name refused)," "John Doe #2 (name refused)," "John Doe #3 (name refused)," "John Doe #4 (name refused)" and "John Doe #5 (name refused)" in their capacities as tenants or occupants of the Property in place of the John Doe and Mary Roe defendants; and it is further

ORDERED that the caption shall hereinafter read:

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR VELOCITY COMMERCIAL CAPITAL LOAN TRUST
2018-2,

Plaintiff,

- against -

351 TROY LLC; VICTOR BROWN; NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE;
NEW YORK CITY DEPARTMENT OF FINANCE, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD;
"JANE DOE #1" (NAME REFUSED); "JOHN DOE #2
(NAME REFUSED); "JOHN DOE #3 (NAME REFUSED);
"JOHN DOE #4 (NAME REFUSED) and "JOHN DOE
#5" (NAME REFUSED) in their capacities as tenants
or occupants of the Property,

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**