W Fin. Reit, Ltd. v 150-152 E. 79 LLC
2022 NY Slip Op 31428(U)
April 26, 2022
Supreme Court, New York County
Docket Number: Index No. 850128/2021
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS KAHN, III — Justice — PART 32

INDEX NO. 850128/2021
MOTION DATE
MOTION SEQ. NO. 001

W FINANCIAL REIT, LTD,

Plaintiff,

- v -

150-152 EAST 79 LLC,ZIEL FELDMAN, LANGAN ENGINEERING, ENVIRONMENTAL, SURVEYING, LANDSCAPE ARCHITECTURE & GEOLOGY, D.P.C.,TETRA ENGINEERS ARCHITECTS & LANDSCAPE ARCHITECTS, P.C.,NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, JOHN DOE NO. 1 TO JOHN DOE NO. 30, INCLUSIVE, THE LAST THIRTY NAMES BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF, THE PERSONS OR PARTIES INTENDED BEING THE TENANTS, OCCUPANTS, PERSONS OR CORPORATIONS,

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is determined as follows:

This is an action to foreclose on a mortgage encumbering five parcels of commercial real property located at 150 East 79th Street, 152 East 79th Street, 154 East 79th Street, 1131 Lexington Avenue and 1135 Lexington Avenue. The mortgage was given to secure a loan made by Plaintiff to Defendant 150-152 East 79th LLC ("150-152 East") in the original amount of $43,600,000.00 and is memorialized by a consolidated, amended and restated mortgage note, dated February 28, 2020. The note is executed on behalf of 150-152 East by Defendant Ziel Feldman ("Feldman"). Concomitantly with the note and mortgage, Feldman executed an unconditional personal guaranty of the loan.

Plaintiff commenced this action and pled four causes of action, including to foreclose on the subject mortgage. Defendant Langan Engineering, Environmental, Surveying, Landscape Architecture & Geology, D.P.C. ("Langan"), a holder of a mechanic's lien on certain of the mortgaged premises, answered and pled four affirmative defenses, including lien superiority, as well as a counterclaim and three crossclaims. Defendants 150-152 East and Feldman answered both the complaint and crossclaims and pled twenty-one affirmative defenses, including lack of standing.

Now, Plaintiff moves for summary judgment against Defendants 150-152 East, Feldman, and

Langan, to appoint a Referee to compute, to amend the caption, to dismiss Defendant Langan's counterclaim and for severance of Defendant Langan's crossclaims, or in the alternative, severing the counterclaim and crossclaims. Only Defendants 150-152 East and Feldman opposes the motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of West 134 and Feldheim's default in repayment (*see U.S. Bank, N.A., v James,* 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). As Defendants 150-152 East and Feldman raised lack of standing as an affirmative defense in their answer, Plaintiff was required to demonstrate it had standing to prosecute the action when it was commenced (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]).

Plaintiff's motion was supported with an affidavit from David Heiden ("Heiden"), Co-President of Plaintiff. Heiden's affidavit, which was sufficiently supported by admissible business records, established the mortgage, note, and evidence of mortgagor's default (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra). As to standing, Heiden established that Plaintiff was the original lender and, therefore, in direct privity with the Defendants (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]).

In opposition, Defendants150-152 East and Feldman proffered no argument against Plaintiff's *prima facie* case for foreclosure nor posited that an issue of fact exists on the substantive elements of that claim. Instead, Defendants argued that the motion is premature, was not served on a necessary party and that discovery is necessary to oppose the motion.

Defendants' assertion that Plaintiff's failure to join First Republic Bank ("First Republic"), a tenant at one of the mortgaged premises and necessary party under RPAPL §1311, precludes summary judgment as it is without merit. Although First Republic may be a "tenant in fee" and, therefore, a necessary party under RPAPL §1311[1], it is not an indispensable party and failure to join it herein renders its interest unaffected by the judgment (*see Polish Nat. Alliance of Brooklyn, USA v White Eagle Hall Co., Inc.*, 98 AD2d 400, 406 [2d Dept 1983]; *see also 517-525 W. 45 LLC v. Avrahami,* 202 AD3d 611, 612 [1st Dept 2022]). Indeed, even if First Republic is a lease holding party, it may not be dispossessed by a purchaser at a foreclosure sale without further proceedings (*see 6820 Ridge Realty LLC v Goldman*, 263 AD2d 22, 26 [2d Dept 1999]; *1426 46 St., LLC v Klein*, 60 AD3d 740 [2d Dept 2009]). As such, "[s]ummary judgment [is] not precluded by nonjoinder of [First Republic], who [was a] necessary part[y] only in the sense that their subordinate interests could be adversely affected only if they were joined, and not in the sense of being indispensable" (*John Hancock Mut. Life Ins. Co. v 491-499 Seventh Ave. Assocs.*, 220 AD2d 208 [1st Dept 1995]). In any event, Plaintiff filed an affidavit of service which, on its face, demonstrates First Republic was served in the capacity of a John Doe defendant and defaulted in appearing. (*see eg 21st Mtge. Corp. v Raghu*, 197 AD3d 1212, 1217 [2d Dept 2021][A defaulting party is "not entitled to service of additional papers in the action"]).

As to the branch of Plaintiff's motion to dismiss all Defendants' affirmative defenses, CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov,* 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028

[2d Dept 2017]). When evaluating such a motion, a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

The first and nineteenth affirmative defenses, which are directed to the legal sufficiency of Plaintiff's complaint, are unnecessary since dismissal cannot be effectuated without a motion pursuant to CPLR 3211[a][7] (*see Riland v Frederick S. Todman & Co.*, 56 AD2d 350 [1st Dept 1977]). Normally, this defense is nothing more than "'harmless surplusage,' and . . . a motion by the plaintiff to strike the same should be denied" (*Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]). However, where all other affirmative defenses fail as a matter of law, it may be dismissed (*Raine v Allied Artists Productions, Inc.*, 63 AD2d 914, 915 [1st Dept 1978]).

The second, ninth, tenth, eleventh, fifteenth and twenty-first affirmative defenses, alleging documentary evidence, intervening acts by Plaintiff, ratification, economic duress, damages caused by third parties and reserving the right to plead further affirmative defenses are incomprehensible and, therefore, inadequately pled.

The third affirmative defense alleging the action is barred by the statute of limitations is conclusory and meritless. Plaintiff established that it timely commenced this action with proof, via affidavits and corroborating documents, that it accelerated the debt for the first time with the commencement of this action (*see* CPLR §214[6]; *Freedom Mortgage Corp. v Engel*, 37 NY3d 1 [2021]). In opposition, Defendants failed to offer any facts, or simply allegations, to support that the indebtedness under the note was accelerated more than six-years before this action was commenced.

The fifth, sixth, seventh, eighth and fourteenth affirmatives defenses alleging unclean hands and bad faith, mitigation, waiver and estoppel, unjust enrichment as well as force majeure and impossibility are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden,* 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson,* 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]).

Similarly, the twelfth, thirteenth and eighteenth affirmative defenses that, in one form or another, allege breach of contract by Plaintiff, in addition to being conclusory and totally devoid of any supporting facts (*see Countrywide Home Loans Servicing, L.P. v Vorobyov,* supra), fail to allege how any acts by Plaintiff constitute excuses to a default in payment under the mortgage note.

The sixteenth affirmative defense asserting Plaintiff is not entitled to recover attorney's fees is belied by the notes and mortgages at issue which expressly permit reimbursement of same.

The seventeenth affirmative defense claiming breach of the implied covenant of good faith and fair dealing is improperly duplicative of the multiple breach of contract claims (*see City of New York v 611 West 152nd St., Inc.*, 273 AD2d 125 [1st Dept 2000]).

The twentieth affirmative defense alleging Plaintiff's lack of standing is meritless as Plaintiff was the originator of the disputed loans.

Defendants' opposition to dismissal of the affirmative defenses was entirely conclusory and, by failing to raise specific legal arguments in rebuttal, all the affirmative defenses were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

Defendants' assertion the motion must be denied because no discovery has been conducted is unavailing as they have offered nothing to demonstrate Plaintiff is in exclusive possession of facts which would establish a viable defense to their maturity default (*see Island Fed. Credit Union v. I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]). Moreover, as "the affirmative defenses are precluded, no discovery could lead to facts that would warrant denial of plaintiff's summary judgment motion" (*Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]).

The branch of Plaintiff's motion to dismiss Defendant Lanagan's affirmative defenses and counterclaim is granted without opposition.

The branch of the motion to sever Defendant Lanagan's crossclaims against the Defendants is granted without opposition.

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption striking "John Doe #1" through "John Doe #5" as Defendants and to add First Republic Bank as a Defendant is granted (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that the affirmative defenses pled by all the appearing Defendants are dismissed; and it is further

ORDERED that the counterclaim of the defendant, Langan Engineering, Environmental, Surveying, Landscape Architecture & Geology, D.P.C. is dismissed with prejudice; and it is further

ORDERED that the crossclaims of the defendant, Langan Engineering, Environmental, Surveying, Landscape Architecture & Geology, D.P.C. are severed; and it is further

ORDERED that **Hayley Greenberg 521 5th Avenue Suite 1700 New York NY 10175 (212) 593-6111** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the property identified in the notice of pendency can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of $350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

ORDERED that Plaintiff shall forward all necessary documents to the Referee and to Defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if Defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED that failure to submit objections to the referee may be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED, that the caption of this action shall be amended by replacing "John Doe No. 1" with "First Republic Bank" as a defendant; and it is further

ORDERED, that the caption of this action be amended by striking therefrom the defendants sued herein as "John Doe No. 2" to "John Doe No. 30", all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK
--X
W FINANCIAL REIT, LTD,

Plaintiff,

Index No. 850128/2021

-against-

150-152 EAST 79 LLC; ZIEL FELDMAN; LANGAN ENGINEERING, ENVIRONMENTAL, SURVEYING, LANDSCAPE ARCHITECTURE & GEOLOGY, D.P.C.;

TETRA ENGINEERS ARCHITECTS & LANDSCAPE ARCHITECTS, P.C.; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; NEW YORK CITY DEPARTMENT OF FINANCE; FIRST REPUBLIC BANK,

Defendants.

---X

and it is further,

ORDERED that Plaintiff must bring a motion for a judgment of foreclosure and sale within 45 days of receipt of the referee's report; and it is further

ORDERED that if Plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct Plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to Plaintiff's failure to move this litigation forward; and it further

ORDERED that counsel for Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)]; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **August 17, 2022 at 10:00 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

4/26/2022
DATE

FRANCIS KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION
APPLICATION:	X	GRANTED		DENIED		GRANTED IN PART		OTHER
		SETTLE ORDER				SUBMIT ORDER
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			X	FIDUCIARY APPOINTMENT		REFERENCE