

Derby Copeland Capital, LLC v A.V. Grantor Trust
2022 NY Slip Op 31531(U)
May 10, 2022
Supreme Court, New York County
Docket Number: Index No. 850101/2020
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 PART 32

Justice

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INDEX NO. 850101/2020

DERBY COPELAND CAPITAL, LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

A.V. GRANTOR TRUST, ADAM VICTOR,
TRANSNATIONAL MANAGEMENT SYSTEMS II,
LLC, BOARD OF MANAGERS OF MANHATTAN PLACE
CONDOMINIUM, JOHN AND/OR JANE DOE

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32,
33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

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

In this action, Plaintiff seeks to foreclose on a mortgage, dated June 30, 2016, encumbering real
property located at 630 First Avenue, Units 30A and 30G, New York, New York and given by
Defendant A.V. Grantor Trust ("Trust"). The mortgage secures a loan given by Plaintiff to Defendants
Trust and Transnational Management Systems II, LLC ("TMS") in the original principal amount of
\$1,800,000.00 memorialized by a promissory note of the same date as the mortgage. The note and
mortgage were executed by Adam Victor ("Victor") as Member of Defendant TMS and Victor in his
capacity as Trustee of Defendant Trust. Concomitantly with the above documents, the parties entered
into a loan agreement which revealed that the loan proceeds were required to be used for, among other
things, repair of the engines on a Gulfstream IV private jet owned by TMS. The loan was also secured
by a lien on the jet pursuant to Article 9 of the Uniform Commercial Code.

Prior to the issuance of the loan, Defendants were engaged in litigation in California regarding
misuse of the plane which resulted in the needed repairs. Defendants were represented in that action by
non-parties Larry Hutcher, Esq. ("Larry Hutcher") and the law firm at which he was a partner, Davidoff
Hutcher & Citron LLP ("DHC"). Victor was introduced to Plaintiff through a principal thereat, Jesse
Hutcher, Larry Hutcher's son. Larry Hutcher apparently represented Defendants in closing the loan
under a written conflict of interest waiver.

When Defendants defaulted in repaying the loan, which is not disputed, Plaintiff conducted a
sale of the jet via a non-judicial disposition of collateral under UCC §9-610. Thereafter, TMS and
Victor commenced an action in Supreme Court, New York County against Plaintiff, Jesse Hutcher,
DHC and Larry Hutcher (see Transnational Management Systems II, A.V. Grantor Trust, Adam Victor v
Derby Copeland Capital, LLC, et al., Index No. 652190/2020). In the complaint, TMS and Victor pled
causes of action against DHC and Larry Hutcher for violation of Rule 1.7 of the New York Rules of

Professional Conduct, legal malpractice, and disgorgement. TMS and Victor also alleged claims against Plaintiff that the UCC sale was not conducted in a commercially reasonable manner and for reformation of the loan documents that are the subject of this action.

By order dated June 22, 2021, Justice Andrew Borrok granted Defendant's motion pursuant to CPLR §3211[a] and dismissed the complaint in its entirety. With respect to the causes of action against Plaintiff, Justice Borrok held TMS and Victor's claim the UCC sale was commercially unreasonable inapposite as the sale was properly noticed and that the claim was otherwise "vague and insufficient". Justice Borrok also held the reformation cause of action was insufficiently pled as well as the factual claims therein were incredible and "belied by the documentary evidence".

After TMS and Victor commenced their action, Plaintiff filed its summons and complaint herein to foreclose on the condominium units. Defendants Trust, Victor, as Trustee and TMS answered and pled five "complete defense[s]" and five affirmative defenses as well as a counterclaim for damages based upon an alleged violation of Banking Law §6-1. Defendant Board of Managers of Manhattan Place Condominium ("Condominium") also answered.

Now, Plaintiff moves for summary judgment against the appearing Defendants, striking their answers, for a default judgment against the non-appearing Defendants and for an order of reference. Defendants Trust, Victor, as Trustee and TMS oppose 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 Mortgagors' 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]).

Plaintiff's motion was supported with an affidavit of facts from Jesse Hatcher, a Manager/Member of Plaintiff, and annexed documents. The affidavit established *prima facie* entitlement to accelerated judgment with proof the note, mortgage and Defendant's default in repayment thereunder (see *Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

In opposition, Defendants first posit that Plaintiff failed to accelerate the debt because a default notice was not served as required under the terms of the mortgage. Defendants' argument on this point is unavailing as they failed to plead non-compliance with these sections as an affirmative defense. "Absent there being a cognizable affirmative defense alleging non-compliance with statutory or contractual notice requirements, the plaintiff was not required to address those issues as part of its *prima facie* burden in moving for summary judgment" (see *One W. Bank, FSB v Rosenberg*, 189 AD3d 1600, 1602-1603 [2d Dept 2020]; cf. *HSBC Mtge. Corp. (USA) v Gerber*, 100 AD3d 966 [2d Dept 2012])[Defendant's answer "set forth several affirmative defenses including that, as a condition precedent and in order to maintain the action, the plaintiff, pursuant to the mortgage documents, was required to send a notice of default/acceleration prior to the commencement of the action"]).

Defendants also argue that the commercial reasonableness of the underlying UCC sale of the private jet raises an issue of fact. Defendants assert that the insufficient sale price for the jet renders a greater portion of the collateral herein subject to appropriation. However, Defendants raised the identical issue based upon identical facts and circumstances in its action against Plaintiff. After a full

and fair opportunity to support the viability of that claim, it was held deficient as a matter of law. As such, Defendants are barred by collateral estoppel from asserting that claim here (*see eg Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282 [1st Dept 2005]; *Lamberti v Plaza Equities, LLC*, 161 AD3d 841 [2d Dept 2018]). Even such a defense was viable, a dispute as to the amount owed is not a defense to a motion for summary judgment, but a matter for resolution on a reference (*see eg Heywood Condominium v Rozencraft*, 148 AD3d 38 [1st Dept 2017])

As to the affirmative defenses¹, 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 “complete defense” based upon 27-2109.1 of the New York City Administrative Code fails to state a claim. The code specifically states that the “failure to notify shall not be deemed to affect in any way any pending legal proceeding related to such residential real property” (*see NYCAC §27-2109.1[b]*). The remedy for a violation thereof is a civil monetary penalty that is enforced by HPD (*id.*).

The second “complete defense” fails as the affidavits of service submitted by plaintiff showed notices in the appropriate form were served in accordance with the requisites of RPAPL §1303, (*see eg US Bank v Nathan*, 173 AD3d 1112 [2nd Dept 2019]).

As to the third and fourth “complete defense[s]”, Plaintiff also demonstrated RPAPL §1304 is inapplicable to this action. Compliance with this section is limited to “home loans” where, *inter alia*, the “debt is incurred by the borrower primarily for personal, family, or household purposes” and “[t]he loan is secured by a mortgage [on] . . . a one to four family dwelling . . . which is or will be occupied by the borrower as the borrower’s principal dwelling” (*see RPAPL § 1304[6][a][1][ii] and [iii]*). The undisputed facts of this case demonstrate that the debt in this case was for strictly for Victor’s businesses, not for personal, family or household purposes (*see Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]; *Independence Bank v Valentine*, 113 AD3d 62 [2d Dept 2013]). As RPAPL §1304 is inapplicable, Plaintiff demonstrated compliance with RPAPL §1306 was also not necessary (*see RPAPL §1306[1]*).

Similarly, the fifth “complete defense[s]” based on CPLR §3012-b fails as this section is only applicable to “a residential foreclosure action involving a home loan” as defined in RPAPL §1304.

The first affirmative defense of unconscionability fails as a matter of law. “In general, an unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party” (*King v Fox*, 7 NY3d 181, 191 [2006]). Based on the facts presented, Victor was fully informed of the nature of the transaction and the relationships between the players therein such that the loan transaction was neither substantively nor

¹ The so-called “complete defense[s]” are ordinarily pled as affirmative defenses in foreclosure actions. As such, the Court will assume these were intended as affirmative defenses.

procedurally unconscionable (*see Weiss v Phillips*, 157 AD3d 1 [1st Dept 2017]; *Emigrant Mtge. Co., Inc. v Fitzpatrick*, 95 AD3d 1169 [2d Dept 2012]; *see also PHH Mtge. Corp. v Davis*, 111 AD3d 1110 [3d Dept 2013]).

The second, third and fourth affirmative defenses alleging unclean hands and unjust enrichment 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]).

The fifth affirmative defense based upon UCC §9-610 and the commercial reasonability of the sale of the jet fails based upon the determination of the Court *supra*.

Defendants' counterclaim is founded in Plaintiff's alleged violation of Banking Law §6-1. The version of Banking Law §6-1 in effect when the note was executed applied only to "high-cost home loans". A "home loan" was defined as one "in which . . . [t]he principal amount of the loan does not exceed the lesser of: (A) conforming loan size limit for a comparable dwelling as established from time to time by the federal national mortgage association; or (B) three hundred thousand dollars" (*see Lewis v Wells Fargo Bank, N.A.*, 134 AD3d 777, 779 [2d Dept 2015]). Here, since the principal amount of the note was \$1,800,000.00, this statute is inapplicable, and the counterclaim fails (*id.*).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (*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 is granted without opposition (*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 and other relief is granted; and it is further

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

ORDERED that **Jeffery R. Miller, Esq., 32 Broadway, 13th Floor, New York, New York 10004, 212-227-4200** 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 the caption is amended as follows:
SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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DERBY COPELAND CAPITAL, LLC,

Plaintiff,

Index No. 850101/2020

-against-

A.V. GRANTOR TRUST, ADAM VICTOR AS
TRUSTEE OF THE A.V. GRANTOR TRUST,
TRANSNATIONAL MANAGEMENT SYSTEMS II,
LLC, BOARD OF MANAGERS OF MANHATTAN
PLACE CONDOMINIUM, ADAM VICTOR,
individually, to the extent he has any possessory interest in
the Mortgaged Premises,

Defendants.

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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 September 7, 2022 at 10:20 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.

5/10/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

Francis A. Kahn III

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

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