

Green Poultry Farming, LLC v Bengal Wholesale Co., Inc.

2022 NY Slip Op 31545(U)

April 22, 2022

Supreme Court, Kings County

Docket Number: Index No. 512070/20

Judge: Lawrence Knipel

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 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 22nd day of April, 2022.

P R E S E N T;

HON. LAWRENCE KNIPEL,

Justice.

-----X

GREEN POULTRY FARMING, LLC as assignee of
WORLD BUSINESS LENDERS, LLC,

Plaintiff,

- against -

Index No. 512070/20

BENGAL WHOLESALE COMPANY, INC.; MOHAMMED HOSSAIN A/K/A MOHAMMED MAHBUB HOSSAIN; MALEKA K. JAHAN; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; CAPITAL ONE BANK (USA), N.A.; ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK; UNITED STATES OF AMERICA; and "JOHN DOE NO. 1" to "JOHN DOE No. 30,"

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) Annexed _____

18-43 47-50

Opposing Affidavits (Affirmations) _____

48-50 51-57

Reply Affidavits (Affirmations) _____

51-57

Upon the foregoing papers in this action to foreclose a mortgage on the residential property at 309 Parkville Avenue in Brooklyn (Block 5425, Lot 100) (Property), plaintiff Green Poultry Farming, LLC (Green Poultry) as assignee of World Business Lenders, LLC (WBL) moves (in motion sequence [mot. seq.] one) for an order: (1) granting it summary

judgment on the first cause of action in the complaint for foreclosure of the Property against defendants Bengal Wholesale Company, Inc. (Bengal or borrower), Mohammed Hossain a/k/a Mohammed Mahbub Hossain (Hossain or guarantor) and Maleka K. Jahan (Jahan) (collectively, the Bengal defendants) and on the fourth cause of action for an award of attorneys' fees, pursuant to CPLR 3212 (a); (2) dismissing the Bengal defendants' affirmative defenses, pursuant to CPLR 3211 (b); (3) granting it a default judgment against non-appearing defendants New York State Department of Taxation and Finance, Capital One Bank (USA), N.A., Environmental Control Board of the City of New York and United States of America, pursuant to CPLR 3215 (a); and (4) appointing a referee to compute the amount due, pursuant to CPLR 4311 and RPAPL § 1321.

The Bengal defendants cross-move (in mot. seq. two) for an order granting them summary judgment dismissing the complaint, pursuant to CPLR 3212.

Background

On July 10, 2020, Green Poultry as "assignee of WBL" commenced this foreclosure action by filing a summons, a complaint verified by a Vice President of WBL "as servicer for Green Poultry . . ." and a notice of pendency against the Property.

The complaint alleges that on or about August 5, 2019, Bengal, the corporate borrower, executed a "Business Promissory Note and Security Agreement" in the principal amount of \$105,000.00 in favor of WBL "governed by the laws of the State of New Jersey" (see NYSCEF Doc No. 1, complaint at ¶ 17). The complaint references the August 6, 2019 note entitled "BUSINESS PROMISSORY NOTE AND SECURITY AGREEMENT"

(Promissory Note), which reflects that Bengal promised to pay WBL, as lender, \$105,000.00 with “0.13695890411% interest per day with daily payments from August 7, 2019 to August 4, 2020 (*see* NYSCEF Doc No. 3). The Promissory Note provides that the borrower grants lender a security interest in “collateral” which is defined as “all personal property now owned or hereinafter acquired[,]” which “will be kept at Borrower’s address . . . or at 309 Parkville Ave Brooklyn, NY 11230[,]” the Property (*id.*).

Paragraph 12 of the Promissory Note provides that “[t]his Loan Agreement shall be governed by the laws of the State of New Jersey without regard to its conflicts of laws rules” yet it provides that “venue shall be in any court of the State/Commonwealth of New York or in the United States District Courts sitting in New York . . .” (*id.*). Notably, the Promissory Note in the record contains no indorsements. The complaint alleges that “Plaintiff is the current owner of the signed Note and *is in possession* of the authoritative copy of the Note *through its commercial loan servicer and authorized representative WBL[,]*” but does not reference or annex a servicing agreement and/or a power of attorney (complaint at ¶ 4 [emphasis added]). The complaint alleges “[i]n order to further secure Bengal’s obligation under the Note, on or about August 5, 2019, defendant Hossain duly executed, acknowledged and delivered the Guaranty” (*id.* at ¶ 18).

Importantly, the complaint also alleges that on or about August 5, 2019, defendants Hossain and Jahan “gave a Mortgage on the Mortgaged Premises as security for the obligations under the Note in the amount of \$105,000.00, along with an Addendum to Mortgage signed by Jahan (the ‘Hypothecation Agreement’)” (complaint at ¶ 19). The

complaint annexes as Exhibit D the August 5, 2019 Hypothecation Agreement entitled “MORTGAGE, ASSIGNMENT OF LEASES AND RENTS AND SECURITY AGREEMENT \$105,000.00,” which states that it was prepared by WBL as “Mortgagee,” identifies Jahan and Hossain as “Mortgagor” and identifies Bengal as “Borrower” (NYSCEF Doc No. 5). The Hypothecation Agreement states that:

“WHEREAS, pursuant to a certain business promissory note and security agreement dated as of the Effective Date . . . by Bengal . . . respectively (‘Borrower’) in favor of Mortgagee, the Mortgagee is making a *secured commercial loan* to Borrower . . .

“WHEREAS, in consideration for the Loan to its affiliate, Borrower, Mortgagor has guaranteed Borrower’s payment of the Obligations.

“NOW, THEREFORE, in consideration of the mutual premises set forth above and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed as follows:

“To secure the payment of all Obligations which may or shall become due under the Loan Agreement and/or under any of the other documents evidencing, securing or executed in connection with the Loan (this Mortgage, the Loan Agreement, and such other documents . . . referred to . . . as the ‘Loan Documents’), including interest and other amounts which would accrue and become due but for the filing of a petition in bankruptcy . . . and the costs and expenses of enforcing any provision of any Loan Document (all such sums, together with the Obligations, being hereinafter collectively referred to as the ‘Debt’), Mortgagor hereby irrevocably mortgages, grants, bargains, sells, conveys, transfers, pledges, sets over and assigns, and grants a security interest, to and in favor of Mortgagee, **WITH POWER OF SALE**, all of Mortgagor’s right, title and interest in . . . the ‘Mortgaged Property’” (*id.*).

Paragraph 22 of the Hypothecation Agreement entitled "Security Agreement" states that "[t]his Mortgage is both a real property Mortgage and a 'security agreement' within the meaning of the UCC" and that:

"Mortgagor shall pay to Mortgagee on demand any and all reasonable expenses, including reasonable attorneys' fees and disbursements, incurred or paid by Mortgagee in protecting its interest in the UCC Collateral and in enforcing the rights hereunder with respect to the UCC Collateral. Any notice of sale, disposition, other Transfer, or other intended action by Mortgagee with respect to the UCC Collateral, sent to Mortgagor in accordance with the provisions hereof at least ten (10) days prior to such action, shall constitute commercially reasonable notice to Mortgagor. The proceeds of any disposition of the UCC Collateral, or any part thereof, may be applied by Mortgagee to the payment of the Debt in such priority and proportions as Mortgagee in its sole discretion shall determine" (*id.* at 17).

Paragraph 33 (a) of the Hypothecation Agreement entitled "Governing Law and Venue" provides that:

"WITH RESPECT TO MATTERS RELATING TO THE CREATION AND PERFECTION OF THE LIENS AND SECURITY INTERESTS CREATED BY THIS MORTGAGE, AND TO PROCEDURES RELATING TO THE FORECLOSURE OF SUCH LIENS AND SECURITY INTERESTS, THIS MORTGAGE SHALL BE GOVERNED BY, AND BE CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE PROPERTY STATE, IT BEING UNDERSTOOD THAT, EXCEPT AS EXPRESSLY SET FORTH ABOVE IN THIS PARAGRAPH AND TO THE FULLEST EXTENT PERMITTED BY THE LAW OF THE PROPERTY STATE, THE LAW OF THE LOAN AGREEMENT STATE APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE, SHALL GOVERN ALL OTHER MATTERS RELATING TO THIS MORTGAGE AND THE OTHER LOAN DOCUMENTS, INCLUDING ALL MATTERS RELATING TO THE DEBT (INCLUDING THE ENFORCEMENT THEREOF) ARISING HEREUNDER OR THEREUNDER. ALL PROVISIONS OF THE LOAN

AGREEMENT AND THE OTHER LOAN DOCUMENTS INCORPORATED HEREIN BY REFERENCE SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE LOAN AGREEMENT STATE, AS SET FORTH IN THE GOVERNING LAW PROVISION OF THE LOAN AGREEMENT (*id.* at 20 [emphasis added]).

Thus, regarding “procedures relating to foreclosure . . .” of the Property, the mortgage explicitly states that it “shall be governed by . . . the laws of the Property State,” which is New York.

An “Addendum” (Exhibit B to the Hypothecation Agreement) provides that:

“This Mortgage is given in the form of hypothecated security in that it is given to secure the debt of another, to wit: the indebtedness evidenced by the Promissory Note dated August 5, 2019 in the amount of \$105,000.00 which is made and delivered by Bengal . . . (hereby referred to as ‘Borrower’) to and for the benefit of Beneficiary, Maleka K. Jahan (hereinafter referred to as ‘Owner’) will derive a material and direct benefit from the loan evidenced by the Note, and in accordance therewith, Owner agrees that such interest and benefit are sufficient consideration to support the Mortgage. In the event of a default by Borrower under the Note, Owner expressly acknowledges, covenants, and agrees that Beneficiary shall have all rights and remedies hereunder as set forth for default just as if Owner had executed the Note” (*id.*).

The complaint alleges that “Bengal and Hossain failed to make payment under the Note and Guaranty beginning on or about November 15, 2019 and continuing each day thereafter . . .” and that the “lender” in a January 24, 2020 writing accelerated the balance due under the Note (complaint at ¶ 21). The complaint further alleges that “[b]y virtue of the Default under the Note, Plaintiff has elected to foreclose on the Mortgaged Premises, in order to recoup all or part of the indebtedness owing under the Note[]” (*id.* at ¶¶ 24-25).

The complaint asserts four causes of action: (1) foreclosure of the Property; (2) to recover against Bengal under the Promissory Note; (3) to recover against Hossain under the guaranty; and (4) an award of attorneys' fees.

The Bengal Defendants' Answer

On August 24, 2020, the Bengal defendants collectively answered the complaint, denied the material allegations therein and asserted affirmative defenses, including: (1) lack of standing; (2) "[t]he Plaintiff has breached the terms of the contract Note/Mortgage by improper acceleration and demand"; (3) "[t]he Plaintiff failed to follow New York State Foreclosure procedure requirements"; and (4) "[t]he Plaintiff failed to comply with New York & the Note/ Mortgage Notice provision (answer at ¶¶ 1-11).

Green Poultry's Summary Judgment Motion

On December 11, 2020, prior to any discovery, Green Poultry moved for summary judgment on its first and fourth causes of action for foreclosure of the Property and an award of attorneys' fees, an order dismissing the Bengal defendants' affirmative defenses, a default judgment against the non-appearing defendants and an order of reference. Green Poultry submits an attorney affirmation asserting that:

"[t]his action is not a residential foreclosure action involving a home loan, as such term is defined in RPAPL § 1304. Instead, this is a commercial foreclosure action because the Business Promissory Note and Security Agreement secured by the mortgage on residential real property (the Mortgaged Premises) . . . is not subject to the requirements of RPAPL §§ 1302 and 1304 and CPLR § 3408" (see NYSCEF Doc No. 19 at ¶ 3).

The remainder of the moving affirmation merely references the following exhibits: (1) the pleadings; (2) the notice of pendency; and (3) affidavits of service of the summons and complaint upon defendants (*see* NYSCEF Doc Nos. 19-31).

Green Poultry also submits an “Affidavit of Merit and Amounts Owed” from John Murphy, a Vice President of WBL “as servicer for Green Poultry . . .” (Murphy Moving Affidavit, NYSCEF Doc No. 32 at ¶1). Notably, the Murphy Moving Affidavit, like the complaint verified by WBL, fails to annex a servicing agreement or a power of attorney demonstrating that WBL is authorized to act and speak on Green Poultry’s behalf.

Murphy attests that Green Poultry maintains a principal place of business in New Jersey and that the “[o]riginal lender WBL, which assigned the loan and mortgage at issue to Plaintiff[,] is a New York limited liability company . . .” (*id.* at ¶ 4). Murphy attests that “Hossain and Jahan are or were husband and wife, and residents of the State of New York, who resided at the Mortgaged Premises . . .” (*id.* at ¶ 6).

Murphy reiterates the allegations in the complaint regarding the August 5, 2019 “Business Promissory Note and Security Agreement” allegedly executed by Bengal in favor of WBL for the \$105,000.00 loan, the guaranty executed by Hossain and the “Mortgage, Assignment of Leases and Rents and Security Agreement in favor of WBL . . . granting WBL a secured interest on the Mortgaged Premises as security for the Loan Agreement” which is also referred to as the Hypothecation Agreement (*id.* at ¶¶ 7-10).

The Murphy Moving Affidavit annexes as Exhibits A through D: (A) a copy of the *unendorsed* \$105,000.00 “Business Promissory Note” executed by Bengal (by Hossain) in

favor of WBL; (B) a two-page “Business Loan Summary” executed by Hossain on August 6, 2019, which was “provided to the Bengal Defendants in connection with the Loan Agreement . . .”; (C) a copy of the guaranty executed by Hossain; and (D) a copy of the Mortgage (the Hypothecation Agreement) (*see* NYSCEF Doc Nos. 33-36). Murphy attests that:

“Subsequent to WBL and Bengal entering the Loan Agreement, *it was assigned* from WBL to Plaintiff through the following series of transactions:

1. Bill of Sale from [WBL] to WBL SPO, LLC, dated August 9, 2019, together with Allonge, dated August 9, 2019, and Assignment, dated August 9, 2019;
2. Bill of Sale from WBL SPO, LLC to [WBL], dated October 4, 2019, together with Allonge, dated October 4, 2019, and Assignment, dated October 4, 2019;
3. Bill of Sale from [WBL] to WBL SPE III, LLC, dated October 4, 2019, together with Allonge, dated October 4, 2019, and Assignment, dated October 4, 2019;
4. Bill of Sale from WBL SPE III, LLC to [WBL], dated March 4, 2020, together with Allonge, dated March 4, 2020, and Assignment, dated March 4, 2020; and
5. Bill of Sale from [WBL] to Green Poultry . . . *dated March 4, 2020, together with Allonge, dated March 4, 2020, and Assignment, dated March 4, 2020*” (Murphy Servicer Affidavit at ¶ 11 [emphasis added]).

Murphy references the documents annexed to Green Poultry’s motion as Exhibits E, F, G, H and I, and attests that “Plaintiff was indisputably *the holder of the Loan Agreement* as of the date of the commencement of this action on July 8, 2020” and “WBL has continued servicing the subject business loan even after its assignment” (*id.* [emphasis added]).

Exhibits E, F, G, H and I are “Bills of Sale” between the foregoing entities all of which state that “Seller” “hereby sells, assigns, transfers, conveys and delivers to . . .” “Purchaser” “all of Seller’s right, title and interest in and to each and every Loan identified in Exhibit A . . .” Exhibit A identifies the \$105,000.00 loan from WBL to Bengal (among others that are not relevant to this action) and includes a series of undated “Allonges” (without the Promissory Note), all of which provide that:

“THIS ENDORSEMENT IS TO BE ATTACHED TO AND MADE A PART OF THAT CERTAIN BUSINESS PROMISSORY NOTE AND SECURITY AGREEMENT dated as of August 5, 2019, made by Bengal . . . the payor, in favor of [WBL], the payee, in the original principal amount of \$105,000.00 (the ‘Note’). Such Note is hereby transferred pursuant to the following endorsement with the same force and effect as if such endorsement were set forth at the end of such Note without recourse or representation or warranty of any kind (*see* NYSCEF Doc Nos. 37-40 [emphasis added]).

Notably, the Allonges all state at the bottom that “[t]his Allonge *shall be firmly attached to the Note* described above and is hereby made a part thereof[,]” suggesting that they were not firmly attached to the Promissory Note at the time the Allonges were executed (*id.* [emphasis added]). In addition to the undated Allonges, the Exhibits also include general “Assignments” of the “Loans” (without any indication that the Promissory Note was specifically assigned) (*id.*).

Regarding Bengal’s alleged payment default, Murphy attests that “Bengal missed numerous payments under the Loan Agreement, beginning on August 16, 2019” and “[a]s a result, on January 24, 2020, WBL, *on behalf of the WBL SPE III, LLC* declared a default and accelerated the balance due under the Loan Agreement and sent a demand letter

specifying the outstanding amount *owed to Plaintiff* as of that date” (Murphy Servicer Affidavit at ¶¶ 12 and 13 [emphasis added]). Murphy references (as Exhibit J) a January 24, 2020 “Demand Letter” from WBL on behalf of an unidentified “lender” which indicates that it was sent “VIA UPS & Mail” but *does not include any proof of mailing*.

Murphy attests that “[t]he current balances due under the Loan Agreement as of November 23, 2020” are \$98,230.74 in principal, \$59,626.41 in interest and a prepayment premium of \$24,360.69 based on a “Borrower Statement,” which Murphy identifies as an “admissible business record of WBL . . .”:

“[a]s evidence of the default and debt, Plaintiff provides an updated borrower statement, dated November 23, 3030 (the ‘Borrower Statement’), which shows the loan terms and balances and loan activity from the inception of the account through the default. A true and correct copy of the Borrower Statement is annexed hereto as Exhibit K. Additionally, the Borrower Statements shows the total principal, interest, prepayment premium and NSF fees due.

“[t]he Borrower Statement is an admissible business record of WBL, which has continued servicing the Loan Agreement after its assignment. I am familiar with the record-making practices of WBL, my employer, and can verify that the individual records of loan payments, interest accruals, fees and other items in the Borrower Statement were made in the regular course of WBL’s business, it was the regular course of WBL to make and retain such records, and the records were made at or about the time of the event being recorded” (*id.* at ¶¶ 15-17).

Green Poultry also submits a moving memorandum of law, *which correctly references New York law* regarding the summary judgment standard, the evidentiary showing necessary to obtain summary judgment on a cause of action to foreclose a mortgage and the law regarding standing to foreclose (*see* NYSCEF Doc No. 44 at 8-10).

Essentially, Green Poultry (or rather, WBL) argues that Green Poultry is entitled to summary judgment on its first cause of action to foreclose the Property because it established its prima facie case by producing copies of the Promissory Note, the Mortgage/Hypothecation Agreement and evidence of default “[a]s demonstrated in the Borrower Statement, an authenticated business record of WBL, servicer of the account . . .” (*id.* at 8). Regarding standing, Green Poultry simply argues that “Plaintiff submits documentary evidence that conclusively demonstrates that the Loan Agreement (and thereby the Mortgage) was assigned to and held by Plaintiff at the commencement of this action on July 8, 2020” (*id.* at 10).

The Bengal Defendants’ Opposition and Cross Motion

The Bengal defendants oppose Green Poultry’s summary judgment motion and cross-move for summary judgment dismissing the complaint based only on an attorney affirmation. Defense counsel asserts that Green Poultry failed to establish its prima facie entitlement to summary judgment and that there are issues of fact to be determined (NYSCEF Doc No. 48 at ¶ 2). Defense counsel notes that “Plaintiff has failed to show who [wa]s the holder of the note at the time the action was commenced” (*id.* at ¶ 7). Defense counsel further argues that “at the time the assignment [was] executed, the entity Green Poultry Farming LLC did not exist[,]” and thus, “[t]he rights consequent with the assignment by law, cannot pass to an entity that did not exist on the date of the assignment” (*id.* at ¶ 8). Defense counsel explains that “[a] search of Delaware Department of State, Division of Corporations . . . for the entity Green Poultry . . . show that the said entity was

formed on March 5, 2020[.]” and thus, WBL could not possibly have assigned the Promissory Note to Green Poultry on March 4, 2020 (*id.* at ¶¶ 8-9). Defense counsel submits a computer printout from the Department of State Division of Corporations reflecting that Green Poultry was incorporated on “3/5/2020” (*see* NYSCEF Doc No. 49).

Defense counsel contends that Green Poultry “failed to demonstrate the admissibility of the records relied upon by its affiant [Murphy of WBL] under the business records exception to the hearsay rule” because “[t]here is no documentary authority to show that Green Poultry . . . retained the service of W[BL]” as its servicer of the mortgage (NYSCEF Doc No. 48 at ¶¶ 12-13).

Green Poultry’s Reply and Opposition to the Cross Motion

Green Poultry, in reply and in opposition to the Bengal defendants’ summary judgment cross motion, submits a reply affidavit from Murphy of WBL, who now attests, *for the first time on reply*, that: (1) WBL organized and formed Green Poultry on March 4, 2020; (2) WBL executed an Operating Agreement on March 5, 2020, pursuant to which WBL became an “agent” of Green Poultry and “[i]n accordance with its authority under the Operating Agreement, WBL *acts as servicer* for any loans held by G[reen Poultry], including the Loan Agreement . . .”;¹ and (3) “[o]n March 12, 2020 . . . WBL’s finance department actually effectuated the transfer of the Loan Agreement by booking the loan

¹ Murphy quotes from Section III (E) of Green Poultry’s March 5, 2020 Operating Agreement, which states that WBL “is an agent of the Company for the purpose of its business” and does not discuss or mention WBL *servicing* Green Poultry’s mortgage loans (*see* NYSCEF Doc No. 55).

with Plaintiff, and not with WBL” (NYSCEF Doc No. 51, Murphy Reply Affidavit at ¶¶ 5-9 [emphasis added]).

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 seeking an order of reference to determine the amount that is due on an encumbered property, a plaintiff must show its entitlement to a judgment [which] may be shown . . . by the plaintiff showing entitlement to summary judgment . . .” (*U.S. Bank N.A. v Miller*, 49 Misc 3d 1205 (A), * 5 [Sup Ct, Kings County 2015] [citing RPAPL § 1321; 1-2 Bruce J. Bergman, *Bergman on New York Mortgage Foreclosures* § 2.01 (4) (k) (note: online edition)]).

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, although Green Poultry’s moving papers submitted copies of the \$105,000.00 Promissory Note executed by Bengal (the corporate defendant) and the Mortgage/Hypothecation Agreement executed by Hossain (the individual defendant), Green Poultry did not establish its prima facie entitlement to summary judgment on its first cause of action to foreclose the Property. The Second Department has held that an affidavit of merit executed by plaintiff’s purported servicing agent, like the Murphy Moving Affidavit submitted by Green Poultry here, is insufficient when “the record is barren of any evidence

demonstrating that agent's authority to act on behalf of the plaintiff" (*HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2009]; *see also U.S. Bank, N.A. v Stiene*, ___ AD3d ___, 2022 WL 791366, at *2 [App. Div. Mar. 16, 2022] [holding that court should have denied plaintiff's motion for default judgment and order of reference because "plaintiff submitted an affidavit executed by a contract management coordinator for the plaintiff's purported loan servicer" and "there is no evidence in the record demonstrating that the affiant had the authority to act on behalf of the plaintiff"]).

Green Poultry's belated submission of the Murphy Reply Affidavit and Green Poultry's March 5, 2020 Operating Agreement, which vaguely provides that WBL "is an agent of the Company for the purpose of its business" yet does not specifically authorize WBL to service any mortgages, including the Mortgage/Hypothecation Agreement regarding Mohammed and Jahan's residential Property, is insufficient. Moreover, such "evidence" will not be considered in support of Green Poultry's motion for summary judgment and an order of reference because Green Poultry (or rather WBL) submitted it for the first time on reply. The Second Department has held that "a party moving for summary judgement cannot meet its prima facie burden by submitting evidence for the first time in reply" and "generally, evidence submitted for the first time in reply papers should be disregarded by the court" (*see Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2015]; *see also Nationstar Mortg., LLC v Tamargo*, 177 AD3d 750, 753-754 [2019])[holding that "evidence submitted by Aurora for the first time in its reply to the

defendants' opposition to its motion was not sufficient to establish Aurora's prima facie compliance with the mortgage's default notice requirements").

Even if Murphy's reply Affidavit were considered, Murphy does not explain why his affidavit testimony on reply regarding WBL's transfer of the Promissory Note to Green Poultry on March 12, 2020 is inconsistent with his moving testimony that the Promissory Note was transferred from WBL to Green Poultry by a Bill of Sale and Allonge dated March 4, 2020, *the day before* Green Poultry was incorporated on March 5, 2020 (*compare* Murphy Moving Affidavit at ¶ 11 and Murphy Reply Affidavit at ¶ 9). Instead, Green Poultry submits a reply memorandum of law in which it argues, without any admissible, documentary or testimonial evidence, that Green Poultry "*ratified the [March 4, 2020] transfer and accepted the benefits referable therein on March 12, 2020*" (*see* NYSCEF Doc No. 58 at 5 [emphasis added]). This inconsistent testimony from a purported "agent" of Green Poultry, even if considered, raises several issues of fact regarding Green Poultry's standing to foreclose, including whether, when and how the Promissory Note was transferred to and then ratified by Green Poultry.

In addition, Green Poultry's moving papers fail to conclusively establish Green Poultry's standing to foreclose and raise triable issues of fact because the "Allonges" in the record indicate that they were not firmly affixed to the Promissory Note, as required under the Uniform Commercial Code (UCC). Indeed, the Allonges, which are produced separate and apart from the Promissory Note, explicitly state that "**THIS ENDORSEMENT IS TO BE ATTACHED TO AND MADE A PART OF THAT CERTAIN BUSINESS**

PROMISSORY NOTE . . .” and that “[t]his Allonge *shall be firmly attached to the Note* described above[.]” which suggests, using the future tense, that the Allonges were not firmly affixed to the Promissory Note at the time that they were executed (*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”]).

For the foregoing reasons, Green Poultry has failed to demonstrate its prima facie right to summary judgment on its first or fourth causes of action in the complaint, and consequently, Green Poultry’s motion for summary judgment, an order of reference and other relief is denied.

The Bengal defendants’ summary judgment cross motion is also denied since it is based entirely on an attorney affirmation (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980] [holding that bare affirmation of attorney who demonstrated no personal knowledge of the action “is without evidentiary value”]). In any event, defense counsel did not conclusively establish Green Poultry’s lack of standing to foreclose to warrant dismissal of the complaint, and there are triable issues of fact that warrant discovery. Accordingly, it is hereby

ORDERED that Green Poultry’s motion (mot. seq. one) for summary judgment on its first and fourth causes of action in the complaint, an order of reference, an order dismissing the Bengal defendants’ affirmative defenses and a default judgment against the

non-appearing defendants is denied without prejudice and with leave to renew at the conclusion of discovery; and it is further

ORDERED that the Bengal defendants' summary judgment cross motion (mot. seq. two) is denied without prejudice and with leave to renew at the conclusion of discovery.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.



**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**