

U.S. Bank N.A. v Shouela
2022 NY Slip Op 31814(U)
May 26, 2022
Supreme Court, Kings County
Docket Number: Index No 525840/2020
Judge: Lawrence Knipel
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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 26th day of May, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X
U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR
VELOCITY COMMERCIAL CAPITAL LOAN TRUST 2018-1;

Plaintiff,

-against-

ISAAC SHOUELA,
Z. Co. LLC,
HSBC BANK USA NATIONAL ASSOCIATION,
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,
JOHN DOE # "1" to JANE DOE # "10," inclusive, the last
ten names being fictitious and unknown to plaintiff,
the persons or parties intended being the tenants, occupants,
persons or corporations, if any, having or claiming an interest
in or lien upon the premises described in the complaint,

Defendants.
-----X

DECISION AND ORDER

Index No. 525840/20

Mot. Seq. No. 2

The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion, Affirmation/Affidavit, and Exhibits Annexed _____	<u>24-45, 47</u>
Affirmation in Opposition _____	<u>50</u>
Reply Memorandum of Law _____	<u>52</u>

In this action to foreclose a mortgage on commercial real property located 4012-4014 13th Avenue in Brooklyn, New York (Block 5589, Lot 44) (the "property"),¹

¹ The correct property lot is "44" (rather than "40" as stated in the proposed order of reference) because, as plaintiff's supporting papers reflect, the underlying mortgage and its subsequent (footnote continued)

plaintiff U.S. Bank National Association, as Trustee for Velocity Commercial Capital Loan Trust 2018-1 (“plaintiff”), moves in Seq. No. 2 for an order: (1) granting plaintiff summary judgment pursuant to CPLR 3212 as against each of defendants Isaac Shouela (“Shouela”) and Z. Co. LLC (“Z-Co”); (2) granting plaintiff a default judgment, pursuant to CPLR 3215, as against each of defendants HSBC Bank USA National Association, New York City Environmental Control Board, New York State Department of Taxation and Finance, Zeko Menswear Inc. sued herein as “John Doe No. 1,” and Mehudar Meats & More L.P. sued herein as “John Doe No. 2” (collectively, the “non-answering defendants”); (3) amending the caption of this action to delete the “John Doe” defendants and substitute in their place Zeko and Mehudar which are sued herein as “John Doe #1” and “John Doe #2,” respectively; and (4) appointing a referee to compute the amount due to plaintiff under the underlying note and mortgage. Defendants Shouela and Z-Co (collectively, “defendants”) object by way of their joint counsel’s affirmation in opposition.

Background

Defendant Shouela executed and delivered to plaintiff’s assignor, Velocity Commercial Capital, LLC (“Velocity”), a Semi-Annual Adjustable Term Note, dated as of November 30, 2017, in the principal amount of \$999,900 (the “note”), together with the Loan Agreement of the same date (the “loan agreement”) (NYSCEF Doc No. 29 and 31, respectively). Concurrently, Shouela executed and delivered to Velocity a Commercial Mortgage, Security Agreement and Assignment of Leases and Rents, likewise dated as of

assignment to plaintiff were both recorded under Lot 44 (see NYSCEF Doc. No. 30 and 32 [Mortgage and Assignment of Mortgage, respectively]).

November 30, 2017, to secure his obligations under the note and loan agreement (the “mortgage”) (NYSCEF Doc No. 30). The mortgage was recorded as a consolidated first lien against Shouela’s ownership interest in the property² in the Office of the City Register of the City of New York on December 12, 2017 under CRFN 2017000454032 (NYSCEF Doc No. 30).³

Approximately one year later, Velocity assigned the mortgage, together with the underlying note, to plaintiff by Assignment of Commercial Mortgage, Security Agreement and Assignment of Leases and Rents, effective as of October 11, 2018 and recorded on November 7, 2018 under CRFN 2018000368742 (NYSCEF Doc. No. 32). Post-assignment, plaintiff has retained Velocity as a special servicer (NYSCEF Doc. No. 33 and 34 [Mortgage Loan Purchase Agreement; Pooling and Servicing Agreement, respectively]).

From and after August 1, 2020, Shouela has been in payment default under the note and mortgage (*see* Affidavit of Rick Favela, director of special assets at Velocity, dated May 11, 2021, ¶ 11 [NYSCEF Doc No. 27]; “Payment History” [NYSCEF Doc No. 34]).

On December 23, 2020, plaintiff commenced this action to foreclose the mortgage against defendants (among others) and filed a notice of pendency against the property. On

² “The . . . property consists of a one-story-over-partial-basement retail building erected circa 1930 which contains five . . . stores. The structure contains a total of 6,500± square feet of gross building area. There is no on-site parking.” (NYSCEF Doc. No. 38 [Relevant Excerpts of Appraisals]).

³ Contemporaneously with Velocity’s loan to Shouela, defendant Z-Co which, at the time had owned the property, conveyed it to Shouela by deed, dated November 30, 2017 and recorded on December 12, 2017 under CRFN 2017000454031. As soon as the deed from Z-Co to Shouela was recorded, Velocity recorded the aforementioned mortgage under CRFN 2017000454032.

January 7, 2021, Shouela filed a Mortgagor's Declaration of COVID-19-Related Hardship (the "hardship declaration") (NYSCEF Doc. No. 8). By verified answer, dated March 18, 2021 and e-filed on March 19, 2021, defendants joined issue (NYSCEF Doc. No. 21). In their answer (verified by Shouela), defendants asserted a total of nine affirmative defenses, including (as their second affirmative defense) that plaintiff lacked standing to commence the action.

By notice of motion, dated June 2, 2021, plaintiff requested the instant relief. As noted, defendants have objected, contending (by counsel) that this action was commenced in violation of the Governor's Executive Orders (NYSCEF Doc. No. 50).

Thereafter, by order to show cause, dated December 14, 2021, plaintiff moved in Seq. No. 3 to strike Shouela's hardship declaration. After oral argument on plaintiff's order to show cause, the Court, by order, dated January 5, 2022, struck Shouela's hardship declaration and vacated all related stays on the basis that Shouela, as an owner of more than ten commercial units, was not entitled to any pandemic-related relief (NYSCEF Doc. No. 71).

On February 2, 2022, the instant motion was fully submitted, with the Court reserving decision.

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*, 201 AD3d 878, 881 [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, 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 payment default (see *Deutsche Bank Natl. Tr. Co. v Finger*, 195 AD3d 789, 791 [2d Dept 2021]). Further, plaintiff has established standing based on (among other documents) the written assignment of the mortgage and note from Velocity to plaintiff effective as of October 11, 2018 (*i.e.*, approximately two years before the inception of this action), which assignment explicitly encompassed the note (see *Cenlar FSB v Glauber*, 188 AD3d 1141, 1143 [2d Dept 2020]).

In opposition to plaintiff's prima facie showing, defendants have failed to raise a triable issue of fact. Defendants' principal (if not sole) contention that this action is void because it was commenced in violation of the pandemic-related Executive Orders is unavailing for two reasons. First, Executive Order 202.28 and its successors prohibited commencement of commercial foreclosure actions against those owners-mortgagors who, as individuals, were "eligible for unemployment insurance or benefits under state or federal law or [who were] otherwise facing financial hardship due to the COVID-19 pandemic," as more fully explained in the margin.⁴ Second, and more fundamentally, neither Executive Order 202.28 nor its successors contain a provision mandating dismissal of a commercial foreclosure action commenced during the pause period (*see U.S. Bank Nat. Assn. v Middle Dam St. Inc.*, 2021 NY Slip Op 30686[U], *7 [Sup Ct, Kings County 2021, Knipel, J.] ["Importantly, the aforementioned Executive Orders do not authorize the dismissal of commercial foreclosure actions commenced during the COVID-19 pause

⁴ The starting point is Executive Order 202.28 which, issued on May 7, 2020, declared, in relevant part, that "[t]here shall be no initiation of . . . a foreclosure of any . . . commercial mortgage, for nonpayment of such mortgage, owned . . . by someone that is *eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic* for a period of sixty days beginning on June 20, 2020" (emphasis added). This moratorium continued unabated until March 24, 2021 by way of a series of extensions issued under each of Executive Orders 202.28, 202.48, 202.57, 202.64, 202.70, 202.75, 202.94, and 202.95 (collectively, the "subsequent Executive Orders") (*see Ladder Capital Fin. VIII REIT LLC v 1917 ACP Owner LLC*, 2021 WL 924979, *1 [Sup Ct, NY County 2021]). All of the subsequent Executive Orders, insofar as they relate to the commercial foreclosure actions, are rooted in Executive Order 202.28, which, as noted, prohibited the initiation of commercial foreclosure actions against those individual owners-mortgagors – and Shouela is *not* one of them – who were "eligible for unemployment insurance or benefits under state or federal law or [who were] otherwise facing financial hardship due to the COVID-19 pandemic." *See Heracles Acquisition Fund XIV LLC v 527 Myrtle LLC*, 2021 WL 2394212, *2 (Sup Ct, Kings County 2021, Knipel, J.) ("Executive Order 202.28, by its plain terms, only applies to 'someone that is eligible for unemployment insurance or benefits under state or federal law . . .'); *Bridgecity Capital QOB LLC v 1717 E. 8 St. LLC*, 2021 NY Slip Op 30406(U) (Sup Ct, Kings County 2021, Knipel, J.) (same).

period, pursuant to CPLR 3211.”]; *see also Hildun Corp. v Mayo*, 2022 WL 326395, *2 [Sup Court, NY County 2022]; *DCC Vigilant, LLC v Nuvo Ciao-Di LLC*, 2021 WL 5027281, *2 [Sup Court, NY County 2021]; *VNO 100 W. 33rd St. LLC v Exp. Fashion Operations, LLC*, 2021 WL 4724257, *1 [Sup Ct, NY County 2021]).

Defendants’ remaining contentions (as well as their remaining affirmative defenses) have been considered and found to be without merit.

Conclusion

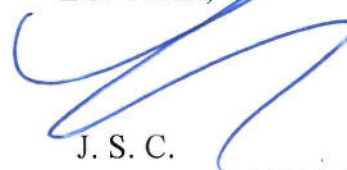
Accordingly, it is

ORDERED that plaintiff’s motion in Seq. No. 2 is *granted in its entirety*, plaintiff is granted summary judgment as against defendants, and their answer, dated March 18, 2021 and e-filed March 19, 2021 (NYSCEF Doc No. 21), is stricken; and it is further

ORDERED that a long-form order appointing a referee and granting a default judgment against the non-answering defendants (as well as for ancillary relief) is being issued contemporaneously herewith.

This constitutes the decision and order of the Court.

ENTER,



J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**