

<b>U.S. Bank N.A. v 2123 Spencer Place Prop. Mgt., LLC</b>
2022 NY Slip Op 31928(U)
June 6, 2022
Supreme Court, Kings County
Docket Number: Index No. 528358/21
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 6<sup>th</sup> day of June, 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 2019-1,

Plaintiff,

- against -

Index No. 528358/21

2123 SPENCER PLACE PROPERTY MANAGEMENT,  
LLC; TYESHA FREEMAN; NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD; NEW YORK  
STATE DEPARTMENT OF TAXATION AND FINANCE;  
"JOHN DOES #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.

-----X  
The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) \_\_\_\_\_

40-41

Opposing Affidavits (Affirmations) \_\_\_\_\_

49-53

Upon the foregoing papers in this action to foreclose a commercial mortgage encumbering the property, an apartment building at 21-23 Spencer Place in Brooklyn (Block 2000, Lot 3) (Property), defendants 2123 Spencer Place Property Management,

LLC (2123 Spencer Place or borrower) and Tyesha Freeman (Freeman or guarantor) move (in motion sequence [mot. seq.] one) for an order dismissing the complaint pursuant to CPLR 3211 (a) (3), (a) (7) and/or (a) (10), and awarding them \$5,000.00 in attorneys' fees, costs and disbursements pursuant to Real Property Law § 282.

### Background

On November 5, 2021, plaintiff U.S. Bank National Association, as Trustee for Velocity Commercial Capital Loan Trust 2019-1 (US Bank), commenced this commercial foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (*see* NYSCEF Doc Nos. 1 and 2). The complaint alleges that "plaintiff was at all times hereinafter mentioned and now is a federally chartered bank with its principal place of business in the State of Illinois and is the owner and holder of the subject mortgage lien on the Property" (NYSCEF Doc No. 1, complaint at ¶ 1).

The complaint (together with the exhibits annexed thereto) alleges that on October 31, 2018, defendant 2123 Spencer Place, by its principal, defendant Freeman, executed and delivered a note to US Bank's predecessor, Atlantic Commercial Capital, Inc. (Atlantic), in the principal amount of \$2,350,000.00, which was secured by a mortgage encumbering the Property. More specifically, the complaint alleges that:

"the defendant(s), whose names appear in the copy of the instrument set forth in Schedule 'C' of this complaint (which is a true and exact copy thereof), duly executed and acknowledged the bond, note, guaranty, extension agreement, modification agreement, consolidation agreement, assumption agreement, security agreement, term loan and security agreement, deed or other instrument set forth in Schedule 'C'

of this complaint for the purpose of securing payment of \$2,350,000.00 to plaintiff's predecessor in interest wherein and whereby said defendant(s) covenanted to pay said sum of money to plaintiff's predecessor in interest with interest thereon, all as more fully appears, together with the terms of payment of said sum and the rights of plaintiff in Schedule 'C'.

"That as security for the payment of said indebtedness, 2123 Spencer Place . . . by Tyesha Freeman Managing Member executed, acknowledged and delivered to plaintiff's predecessor in interest the Mortgage attached hereto as Schedule 'D' of this complaint and the Loan Agreement attached hereto as Schedule 'E' (*id.* at ¶¶ 5-6).

The five-page "Semi-Annual Adjustable Term Note," which is annexed to the complaint as Schedule C, includes two allonges: (1) an allonge that states, "[t]his instrument is an Allonge that shall be attached to and made a part of a certain Promissory Note, dated October 31, 2018, executed by 2123 SPENCER PLACE . . . in favor of ATLANTIC . . . (the 'Lender')" and was executed by either "Edward Stock, President or John DeBlasio, Vice President" of Atlantic in favor of Velocity Commercial Capital, LLC (Velocity), and (2) an allonge containing the same exact language and endorsed in blank on Velocity's behalf (*see* NYSCEF Doc No. 1 at 20-21, complaint Schedule C).

The recorded commercial mortgage, security agreement and assignment of leases and rents is annexed to the complaint as Schedule D and the parties' loan agreement is annexed to the complaint as Schedule E (*see* NYSCEF Doc No. 1 at 23 and 40, complaint Schedules D and E). Importantly, the complaint annexes as Schedule F: (1) an October 31, 2018 assignment by which Atlantic, the original lender, assigned and transferred the mortgage "[t]ogether with the notes therein described or referred to . . ." to "Velocity . . .

and its successors and assigns . . .” and (2) a November 20, 2019 assignment by which Velocity granted, sold, assigned, transferred and conveyed the commercial mortgage “[i]together with the note(s) and obligations therein described or referred to . . .” to US Bank (NYSCEF Doc No. 1 at 50-56, complaint Schedule F).

The complaint alleges that 2123 Spencer Place “failed and neglected to comply with the terms and conditions of the debt instrument and mortgage . . . by failing and omitting to pay the items of principal, interest, taxes, assessments, water rents, insurance premiums, escrow and/or other charges, or by failing to perform covenant contained in the aforesaid documents, all as more fully set forth in Schedule ‘G’ . . .” (complaint at ¶ 9). Schedule G identifies Freeman as the guarantor, the “due date” as July 1, 2020 and the “current principal balance” as \$2,303,433.87 (see NYSCEF Doc No. 1 at 58, complaint Exhibit G).

Regarding US Bank’s standing, paragraph 15 of the complaint alleges that:

“plaintiff is now the sole, true and lawful owner and holder of the debt instrument, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note set forth in Schedule ‘C’ and the lien securing the same and all sums presently due thereunder. The note was physically delivered to, and is in plaintiff’s possession, according to the plaintiff’s records of delivery, such records having been made in the regular course of the plaintiff’s business, it being the regular course of the plaintiff’s business to make such records, at the time of delivery or within a reasonable time thereafter (see complaint at ¶ 15).

The complaint asserts two causes of action: (1) to foreclose on the Property, and (2) breach of the personal guaranty of the loan, which was executed by Freeman.

US Bank's affidavits of service upon the moving defendants reflect that: (1) on November 16, 2021, defendant 2123 Spencer Place was served with process by delivery of two copies of the pleadings to the New York Secretary of State, and (2) on November 27, 2021 and December 8, 2021, defendant Freeman was served by leave and mail service, and the affidavit of service upon Freeman was subsequently filed on December 10, 2021 (NYSCEF Doc Nos. 6 and 9).

***Defendants' Pre-Answer Dismissal Motion***

On December 20, 2021, defendants 2123 Spencer Place and Freeman collectively filed a pre-answer motion to dismiss the complaint in lieu of an answer. Defendants' dismissal motion is based on a brief affirmation from defense counsel, who merely references the electronically recorded complaint.<sup>1</sup> Defense counsel generally argues that dismissal is warranted "based on the undeniable fact Plaintiff's complaint is defective, fails to state a cause of action and failed to obtain jurisdiction over Defendant Freeman."

First, defense counsel argues, without citing any legal authority, that the complaint must be dismissed because it does not allege that plaintiff US Bank was licensed to do business in New York.

Second, defense counsel argues that "Plaintiff further failed to establish it also has the capacity to sue because it failed to state when the subject Note was delivered to Plaintiff" and that paragraph 15 "is insufficient to establish" US Bank's standing because

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<sup>1</sup> Defense counsel's moving affirmation references the electronically filed complaint, pursuant to CPLR 2214 (c).

it merely alleges that the note was physically delivered to plaintiff and is in plaintiff's possession. Defense counsel contends that the "complaint is also devoid of any language that states the allonge was firmly affixed to the Note."

Third, defense counsel argues that the complaint must be dismissed for failure to include a necessary party because "*as of [ ] December 7, 2021*, Plaintiff never properly served Defendant Freeman with process as purported guarantor of the subject loan" (emphasis added). Defense counsel asserts that "[i]n the absence of proper service of Defendant Freeman, as the guarantor, this Court must dismiss Plaintiff's complaint against Defendant Freeman for lack of jurisdiction over the Defendant to render judgment herein and/or for failing to serve a necessary party . . ."

Finally, defense counsel contends that the complaint is "materially and patently defective" and fails to state a cause of action because it "fails to state a date of Defendants' purported default and Plaintiff never alleged it made any lawful demands from Defendant."

### ***US Bank's Opposition***

On January 26, 2022, US Bank, in opposition, submitted an attorney affirmation addressing and countering each of defense counsel's grounds for dismissal.

First, regarding defendants' argument that US Bank cannot maintain this action because it is not licensed to do business in New York, US Bank's counsel responds that:

"Banking Law § 200 provides that foreign banks that do not maintain an office in the state of New York, as is the case with US Bank . . . trustee that brought the action on behalf of the underlying trust that owns the mortgage, is not prohibited from commencing foreclosure actions to enforce mortgages in the

state of New York. See *First Wisconsin Tr. Co. v. Hakimian*, 237 A.D.2d 249, 250 (2nd Dept. 1997).”

Plaintiff’s counsel further asserts that “Defendants fail to provide any statutory authority or case-law providing that a trust cannot own a mortgage and enforce said mortgage in the state of New York without “being licensed . . . .”

Second, regarding US Bank’s capacity to sue, plaintiff’s counsel recites the prevailing legal standard that “[a] plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced” and that a plaintiff may demonstrate that “it is the holder or assignee of the underlying note by showing *either a written assignment of the underlying note* or the physical delivery of the note” (emphasis added). US Bank’s counsel references Schedule F to the complaint (also annexed to counsel’s opposing affirmation as Exhibit A), which demonstrates that the mortgage together with the note were collectively assigned from Atlantic to Velocity by an October 31, 2018 assignment, and from Velocity to US Bank by a November 20, 2019 assignment, both of which preceded US Bank’s commencement of this action on November 5, 2021. US Bank’s counsel asserts that “[t]he presence, absence, or affixation of an allonge has no effect on standing in light of the express, written assignment of the note.”

Third, US Bank asserts that this action was commenced by the filing of the summons and complaint on November 5, 2021, and that “[p]ursuant to CPLR § 306-b, service of the

summons and complaint shall be made within 120 days of commencement of the action.” US Bank’s counsel asserts that US Bank’s “time to serve defendants would expire on March 5, 2022, over a month after the February 2, 2022 return date for this motion.” US Bank’s counsel explains that defendants’ argument regarding lack of service upon defendant Freeman is “without merit and premature in light of the subsequently completed service [upon defendant Freeman on December 8, 2021].”

Finally, US Bank’s counsel contends that defendants have failed to provide any documentary evidence or any legal argument demonstrating that the complaint fails to state a legally cognizable cause of action to warrant dismissal pursuant to CPLR 3211 (a) (7). US Bank’s counsel disputes that the complaint fails to allege that defendants defaulted under the mortgage and asserts that “[i]f the Defendants’ attorney had reviewed the Complaint, he would have found that Schedule ‘G’ attached to the Complaint plainly provides the due date as July 1, 2020.”

#### Discussion

“Where a CPLR 3211 (a) (3) motion is based upon an alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff’s lack of standing as a matter of law” and “[t]o defeat a defendant’s motion to dismiss, the plaintiff has no burden of establishing its standing as a matter of law, but must merely raise a question of fact as to the issue” (*Wilmington Sav. Fund Soc’y, FSB v Matamoro*, 200 AD3d 79, 89-90 [2021]).

To have standing to commence a foreclosure action, a plaintiff must have been the holder or assignee of the note at the time the action was 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” (*21st Mortg. Corp. v Rudman*, 201 AD3d 618, 620 [2022] [internal quotation marks omitted] [emphasis added]). The Second Department has clarified that standing may be established in one of three ways: (1) plaintiff is the original lender in privity with defendant borrower; (2) “plaintiff is a holder in physical possession of the note prior to the commencement of the action, with an allonge or indorsement in blank . . .”; or (3) “when the note underlying an action was assigned to the plaintiff prior to the date of commencement of the action . . .” (*id.* at 90-91).

Here, defendants have failed to satisfy their burden of proving that dismissal is warranted on the ground that US Bank lacks standing and/or capacity to foreclose. Although US Bank is a foreign bank which is not licensed in New York State, that is not grounds for dismissal because “Banking Law § 200 authorizes foreign banks to loan money secured by mortgages on property in this State and to commence actions to enforce obligations under those mortgages” (*see First Wisconsin Tr. Co. v Hakimian*, 237 AD2d 249, 250 [1997]).

Similarly unavailing is defense counsel’s argument that the complaint is subject to dismissal based on US Bank’s lack of standing because the pleadings prove otherwise. The

October 31, 2018 and November 20, 2019 assignments, which are collectively annexed to the complaint as Schedule F, demonstrate that the mortgage *together with the subject note* were explicitly assigned from Atlantic, the original lender, to Velocity on October 31, 2018, and from Velocity to US Bank on November 20, 2019, prior to US Bank's commencement of this action on November 5, 2021 (*see* NYSCEF Doc No. 1 at 50-56, complaint Schedule F). Defense counsel's assertion that the complaint is "insufficient" to establish standing is rejected since the Second Department has explicitly held that "there is no requirement that a plaintiff allege standing in the complaint" because "[s]tanding is instead in the nature of an affirmative defense to be pleaded and proved" (*Wilmington Sav. Fund Soc'y, FSB v Matamoro*, 200 AD3d at 89; *see also U.S. Bank Nat'l Assoc. v Herman*, 174 AD3d 831, 832 [2019] [holding that "'(s)tanding is not an essential element' of a cause of action to foreclose a mortgage, but is instead an affirmative defense to be pleaded in an answer"]). For the foregoing reasons, defendants' motion to dismiss the complaint, pursuant to CPLR 3211 (a) (3), is denied.

Defendants' motion to dismiss the complaint, pursuant to CPLR 3211 (a) (10), based on US Bank's failure to include Freeman, the guarantor, as a defendant is denied. Defense counsel seemingly prepared his moving affirmation on December 7, 2021, *before* US Bank's leave and mail service upon Freeman was accomplished on December 8, 2021 and *before* US Bank's affidavit reflecting such service upon Freeman was electronically filed with the court on December 10, 2021 (*see* NYSCEF Doc No. 9). Thus, the branch of defendants' dismissal motion based on lack of service of the summons and complaint upon

defendant Freeman, a necessary party, is denied as moot.

In considering a motion to dismiss, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action “the pleadings must be liberally construed” and “[t]he sole criterion is whether from [the complaint’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Gershon v Goldberg*, 30 AD3d 372, 373 [2006], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “The facts as alleged in the complaint are accepted as true, with the plaintiff accorded the benefit of every favorable inference (*Ginsburg Development Companies, LLC v Carbone*, 85 AD3d 1110, 1111 [2011]; see also *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2010]).

Defense counsel’s contention that the complaint is subject to dismissal, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action is denied. While defense counsel argues that the complaint is insufficient because it “fails to state a date of Defendants’ purported default[,]” Schedule G to the complaint specifically identifies the “due date” as July 1, 2020 (see NYSCEF Doc No. 1 at 58, complaint Exhibit G). Defense counsel’s contention that the complaint is also deficient because US Bank fails to allege that “it made any lawful demands from Defendant” is unavailing since defendants’ dismissal motion fails to identify any provision in the subject mortgage and/or loan that required US Bank to serve defendants with a default notice and/or a demand for payment. Furthermore, paragraph 5.2 of the parties’ loan agreement entitled “Acceleration[,]” which is annexed to the complaint as Schedule E, provides that “[i]f an Event of Default shall occur, at the

election of the Lender, all Obligations shall become immediately due and payable *without notice or demand . . .*” (see NYSCEF Doc No. 1 at 47, complaint Schedule E at 7, ¶ 5.2 [emphasis added]). Thus, contrary to defense counsel’s contention, US Bank seemingly had no obligation to provide defendants with a default notice under the terms of the loan. Accordingly, it is hereby

**ORDERED** that defendants’ dismissal motion (mot. seq. one) is denied in its entirety; and it is further

**ORDERED**, that defendants shall file an answer to the complaint within 30 days of service of this decision and order with notice of entry thereof.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.



**HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE**