

GHA Holdings, LLC v 823 Greenwich LLC
2022 NY Slip Op 32101(U)
June 28, 2022
Supreme Court, New York County
Docket Number: Index No. 850262/2021
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 PART 32

Justice

INDEX NO. 850262/2021

GHA HOLDINGS, LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

823 GREENWICH LLC, BIANCA BELLULOVICH, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, JOHN DOE

**DECISION + ORDER ON
MOTION**

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 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 real property located at 66 Horatio Street, New York, New York. The mortgage is a second consolidated and modified mortgage dated June 6, 2019, which secures a second consolidated mortgage note of the same date with a principal amount of \$2,375,000.00. The note and mortgage were given by Defendant 823 Greenwich LLC ("Greenwich") and were executed by Defendant Blanca Bellulovich ("Bellulovich") as Manager of Greenwich. Concomitantly with these documents, Bellulovich executed an unconditional personal guaranty of the obligations under the note. Defendants Greenwich and Bellulovich answered Plaintiff's complaint and raised twelve affirmative defenses, including lack of standing.

Now, Plaintiff moves for summary judgment against Greenwich and Bellulovich, a default judgment against the non-appearing parties, the appointment of a referee to compute and to amend the caption. Defendants Greenwich and Bellulovich 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 Padilhas' 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]). A plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in

admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). In a foreclosure action, a plaintiff is not required to rely on any particular set of business records, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported with an affidavit of facts from Gary Spindler ("Spindler"), a Manager of Plaintiff. Although Spindler's knowledge was not based upon his personal knowledge, it was sufficiently founded by the business records of Plaintiff, his employer (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]; *Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). Spindler laid a proper foundation for the admission of his employer's own records by demonstrating the requisites of CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of prior servicers were also admissible since Spindler attested those records were received from prior entities, incorporated into the records his employer kept and were routinely relied on by Plaintiff in its business (*see Bank of Am., N.A. v Brannon*, 156 AD3d 1, 10 [1st Dept 2017]; *see also U.S. Bank Trust, N.A. v Bank of Am., N.A.*, 201 AD3d 769, 772 [2d Dept 2022]). The affidavit established the mortgage, note, and evidence of mortgagor's default and was sufficiently supported by appropriate documentary evidence (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

In opposition, Defendants proffer only an affirmation from their counsel which is insufficient to raise an issue of fact on any of the substantive issues herein (*see generally Rue v Stokes*, 191 AD2d 245, 246 [1st Dept 1993]). Defendants' claim that Spindler's affidavit does not lay a proper foundation to admit the subject documents as business records is without merit. Contrary to Defendants' assertion, Plaintiff was not required to prove its standing as no such affirmative defense is contained in the answer (*see Wells Fargo Bank Minn. v Mastropaolo*, 42 AD3d 239, 242 [2d Dept 2007]). In any event, the consolidated note and mortgage sought to be foreclosed was given by Defendants to Plaintiff. As such, the parties are in direct privity (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]). As to their other affirmative defenses, Defendants failed to raise an issue of fact and by failing to address same in their opposition they were abandoned (*see One W. Bank, FSB v Rosenberg*, 189 AD3d 1600 [2d Dept 2020]).

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 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]).

Accordingly, the branches of Plaintiff's motion for summary judgment, striking Defendant Greenwich and Bellulovich and the appointment of a referee to compute are granted.

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 the branch of Plaintiff's motion for summary judgment against the appearing Defendants, for a default judgment against the non-appearing parties as well as the other relief is granted; and it is further

ORDERED that **Tom Kleinberger, Esq., 411 5th Avenue, New York, New York 10016 (917) 326-5523** 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 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 **October 12, 2022, at 11:20 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.

6/28/2022
DATE



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

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

HON. FRANCIS A. KAHN III
J.S.C.
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: