

Lakeland Bank v Sixth St. Community Ctr., Inc.

2022 NY Slip Op 32225(U)

July 7, 2022

Supreme Court, New York County

Docket Number: Index No. 850041/2021

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS KAHN, III PART 32

Justice

-----X INDEX NO. 850041/2021

LAKELAND BANK,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

SIXTH STREET COMMUNITY CENTER, INC., NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
JOHN DOE, JANE DOE, DOE ASSOCIATES, AND DOE
CORP.

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 51, 58, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion and cross-motion are determined as follows:

In this action, Plaintiff seeks to foreclose on a commercial consolidated and extended mortgage, dated October 15, 2015, encumbering a parcel of improved real property located at 638 East Sixth Street, New York, New York. The mortgage was given to present Plaintiff Lakeland Bank by Sixth Street Community Center ("Sixth Street") to secure a consolidated, amended and restated note which memorializes loans with an original principal amount of \$1,300,000.00.

Plaintiff commenced this action wherein it is alleged Defendant Sixth Street defaulted in repayment of the note. Defendant Sixth Street answered and raised nine affirmative defenses, including standing, as well as one counterclaim. The City of New York ("City") also answered on behalf of Defendant ECB and pled four affirmative defenses, including a claim of lien priority, as well as a counterclaim and crossclaim.

Now, Plaintiff moves for summary judgment against Defendant Sixth Street, dismissing its affirmative defenses and counterclaim, for a default judgment against the non-appearing Defendants, for an order of reference and to amend the caption to substitute JY Tangerous L.P. as the Plaintiff. Defendant Sixth Street opposes the motion and cross-moves to deny Plaintiff's motion and to dismiss the complaint pursuant to CPLR §3211. Plaintiff opposes the cross-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]). As

Defendants raised lack of standing in their answer, Plaintiff was required to demonstrate same (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). Likewise, Plaintiff was required to show that it substantially complied with the notice requirement under the mortgage (*id.* at 850).

Plaintiff's motion was supported with an affidavit of facts from Jeffrey Fleischmann ("Fleischmann"), a limited partner and authorized signatory of JY Tangerous L.P. ("Tangerous"), the assignee of Lakeland. Fleischmann's affidavit established the mortgage, note, and evidence of mortgagor's default and was sufficiently supported by admissible business records (*see eg Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*). Standing to bring a foreclosure action is measured when the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 360 [2015]). Here, it is undisputed that the Plaintiff which commenced that action was Lakeland. As the original lender, Lakeland was in direct privity with the Defendant Sixth Street when the action was commenced and, therefore, unquestionably had standing (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]).

Pursuant to CPLR §1018, Tangerous is authorized to continue prosecution of the action in Lakeland's name without substitution (*see CPLR §1018; Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574 [2d Dept 2020]; *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1st Dept 2017]). In any event, Tangerous produced, in admissible form, an allonge which transferred the note to it after commencement of the action (*see U.S. Bank, N.A. v Duran*, 174 AD3d 768, 769 [2d Dept 2019]; *Central Fed. Sav., F.S.B v. 405 West 45th St., Inc.*, 242 AD2d 512 [1st Dept 1997]).

As to the branch of the motion to dismiss Defendants' affirmative defenses, 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]).

As pled all the affirmative defenses 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 counterclaim to the effect that the mortgage is a cloud on title as Plaintiff failed "to show that they have paid value for the note with actual money or funds as recited in the terms of the mortgage and note" is incomprehensible and fails to state any cognizable claim under New York law.

In opposition, Defendant Sixth Street failed to raise any issue of fact. Based upon the Court's findings *supra*, its argument concerning Plaintiff's standing is unavailing. The claim that it was entitled to receive a default notice and cure period is not supported by the terms of the gap note and consolidated mortgage. Those documents expressly provide that notice and an opportunity to cure is applicable only

in the case of a non-monetary default, which it not applicable here. As to its affirmative defenses, since Defendant Sixth Street failed to raise specific legal arguments in rebuttal, all the affirmative defenses were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafigliore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

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 **James Scott Yoh, 135-11 40th Road, 5th Floor, Flushing, NY 11354, 917-719-5388-ext 101** 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 the caption of this action be amended by striking therefrom the remaining Defendants sued herein as "John Doe #1" to "John Doe #99" and it is further

ORDERED that the caption of this action be amended to replace JY in place of Lakeland Bank and it is further

ORDERED, that the caption of this action as amended shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
JY TANGEROUS L.P.,

Index No. 850041/2021

Plaintiff,

-against-

SIXTH STREET COMMUNITY CENTER, INC.
and NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE,

Defendants
-----X

and it is 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 13, 2022, at 10:40 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.

7/7/2022

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, J.S.C.

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