

<b>BK 38th Lender LLC v Bushwick 1010, LLC</b>
2022 NY Slip Op 32356(U)
July 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 506242/2020
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 7<sup>th</sup> day of July, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X  
BK 38<sup>TH</sup> LENDER LLC,

Plaintiff,

- against -

Index No. 506242/20

BUSHWICK 1010, LLC, IGOR AKOPOV, DURANTE RENTALS, LLC, P.C.I. CONTRACTING, INC., LEVERAGE BUILDERS GROUP INC., Z ARCHITECTURE PLLC, TITAN FORMWORK SYSTEMS, LLC, MEEVER USA, INC., IKG & MC LLC, LAGE INDUSTRIES CORP., HKS CONSTRUCTION CORP., HD SUPPLY CONSTRUCTION SUPPLY, LTD. and NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,

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) \_\_\_\_\_

129-147 152-154, 160-161

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

149-150

Upon the foregoing papers in this action to foreclose mortgages on the commercial property at 1010 Bushwick Avenue in Brooklyn (Property), plaintiff BK 38th Lender LLC (BK) moves (in motion sequence [mot. seq.] five) for an order: (1) awarding it a default judgment against non-appearing defendants Igor Akopov (Akopov or Guarantor), Durante Rentals, LLC, P.C.I. Contracting, Inc. (PCI), Leverage Builders Group Inc., Z Architecture

PLLC, Meever USA, Inc., IKG & MC LLC, Lage Industries Corp., HKS Construction Corp. and the New York City Environmental Control Board, pursuant to CPLR 3215 (a) and RPAPL 1321; (2) granting it summary judgment against defendants Bushwick 1010, LLC (Bushwick or Borrower), Titan Formwork Systems, LLC (Titan) and HD Supply Construction Supply, Ltd. (HD Supply), pursuant to CPLR 3212; and (3) appointing a referee to compute the amount due under the notes and mortgages and to determine whether the Property should be sold in parcels, pursuant to RPAPL 1321.

BK moves (in mot. seq. six) for an order, pursuant to the COVID-19 Emergency Protect Our Small Businesses Act of 2021 (as amended on September 1, 2021), determining that defendant Bushwick's hardship declaration is invalid.

#### Background

On March 12, 2020, at the beginning of the Covid-19 pandemic, BK commenced this commercial foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property. The complaint alleges that on or about May 30, 2017, Bushwick executed and delivered to S3 RE Funding II LLC (S3): (1) a Consolidated, Restated and Extended Promissory Note in the principal amount of \$1,800,000.00, which was secured by a Mortgage Consolidation, Modification and Extension Agreement and an Assignment of Leases and Rents, which were recorded on June 15, 2017; and (2) a Building Loan Note in the principal amount of \$3,700,000.00, which was secured by a Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement, which was

recorded on June 15, 2017. The complaint alleges that defendant Akopov executed a guaranty of payment under the Notes and Mortgages on May 30, 2017.

The complaint further alleges that the Borrower defaulted under the terms of the loan agreements and the mortgages by failing to make the monthly interest payment due on July 1, 2019. In addition, the complaint alleges that:

“[o]n or about August 1, 2019, the Borrower and Plaintiff’s predecessor-in-interest entered into a Forbearance Agreement (the ‘Forbearance Agreement’) pursuant to which the Borrower acknowledged the foregoing event of default and the mortgagee agreed to forbear from exercising its rights and remedies so long as the Borrower, *inter alia*, continued to make monthly interest payments due under the Notes and repaid the Loan in full by December 31, 2019” (complaint at ¶ 28).

The complaint also alleges that the Borrower “failed to make the monthly interest payment due under the Notes on October 1, 2019” (*id.* at ¶ 29). The complaint adds that the borrower’s failure to discharge a series of mechanic’s liens is an additional event of default (*id.* at ¶ 30).

On June 24, 2020, HD Supply answered the complaint, admitted that it filed a \$122,392.00 mechanic’s lien against the Property but denies that its mechanic’s lien is subject and subordinate to BK’s mortgages without providing the date that it filed its lien. On June 24, 2020, Titan answered the complaint, asserted affirmative defenses, a cross claim and a counterclaim to foreclose a \$58,808.58 mechanic’s lien, which was allegedly recorded on September 25, 2019 (subsequent to the recording of the subject Building Loan and Consolidated Mortgages that BK seeks to foreclose here). On or about August 5, 2020, PCI filed a notice of appearance and a limited waiver.

Bushwick subsequently answered the complaint,<sup>1</sup> denied the complaint's material allegations and asserted affirmative defenses, including "[t]hat payments made by defendant have been improperly calculated, allocated and/or applied to the subject loan[,]” “any alleged default had been cured by defendant prior and/or subsequent to plaintiff's alleged acceleration” and lack of standing (*see* NYSCEF Doc No. 108, Bushwick answer at ¶¶ 13 and 17).

On August 4, 2021, Bushwick filed a “Commercial Mortgagor's Declaration of COVID-19-Related Hardship” in which Bushwick declared that its business owns ten or fewer commercial units and “is experiencing financial hardship and is unable to pay the mortgage in full[,]” which was executed on July 26, 2021 (*see* NYSCEF Doc No. 110).

***BK's Summary Judgment Motion***

On August 26, 2021, BK filed the instant renewed motion for summary judgment, an order of reference and a default judgment. BK submits an affidavit from Matan Kurman (Kurman), head of operation for S3, who attested to Bushwick's execution of the loan documents, the Forbearance Agreement and Bushwick's failure to make monthly payments due under the Notes and Forbearance Agreement on October 1, 2019 (*see* NYSCEF Doc No. 131). Kurman submits a report of amount due upon acceleration and a payment history (*see* NYSCEF Doc Nos. 134 and 135) evidencing Bushwick's default. BK also submitted

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<sup>1</sup> By an August 19, 2021 stipulation (NYSCEF Doc Nos. 125-126), Bushwick's answer was deemed served and accepted by BK.

an affidavit from Ralph Dweck (Dweck), who reiterates the allegations in the complaint and submits copies of the loan documents, including the Notes with the attached allonges, the Consolidated and Building Loan Mortgages, the Guaranty and the Forbearance Agreement. Dweck attests to Bushwick's payment default and that "[a]dditional events of default have occurred as a result of the Borrower's failure to discharge a series of mechanic's liens, the first of which was filed on or about May 10, 2019" and annexes "a schedule from a title report prepared for [BK] by Riverside Abstract evidencing the mechanic's liens" (*see* NYSCEF Doc No. 140). Notably, Exhibit D to Dweck's affidavit reflects that both Titan and HD Supply's mechanic's liens were filed in 2019, well after the subject Mortgages were recorded.

PCI opposed BK's motion only to the extent it seeks a default judgment against PCI, which filed a notice of appearance and seeks surplus funds. No other opposition was filed.

***BK's Motion Regarding Bushwick's Hardship Declaration***

On September 22, 2021, BK moved for an order invalidating Bushwick's hardship declaration based on its claim that the Property "is a vacant and abandoned construction site that is a danger to the community" and the loans have been in default since October 1, 2019 and thus "the Borrower's inability to repay the loans was not caused by the COVID-19 pandemic." BK's counsel asserts that the Property is an abandoned construction site and there are zero units currently occupied by tenants or available for rent, and thus, BK does not have a hardship requiring a stay of this action.

Bushwick did not oppose BK's motion regarding its hardship declaration.

### Discussion

As a preliminary matter, by a December 13, 2021 decision and order (*see* NYSCEF Doc No. 165), this court held BK's instant motions for summary judgment, an order of reference and a default judgment (mot. seq. five) and to invalidate Bushwick's hardship declaration (mot. seq. six) in abeyance pending the outcome of a hardship hearing. BK's motion regarding Bushwick's hardship declaration is now academic, since the moratorium regarding commercial foreclosures based on the Covid-19 pandemic has been lifted. Accordingly, BK's motion to invalidate Bushwick's July 26, 2021 hardship declaration is denied as moot, and the court may now determine the merits of BK's pending motion for summary judgment and other relief.

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 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, BK has established its prima facie case through the production of Kurman’s fact affidavit, copies of the notes, mortgages and evidence of Bushwick’s payment default (*see Central Mtge. Co. v Resheff*, 200 AD3d 640, 643 [2d Dept 2021]), which defendants do not oppose. BK is also entitled to summary judgment against alleged junior lienors HD Supply and Titan, both of which failed to oppose BK’s summary judgment motion. Notably, Titan’s answer to the complaint confirms its junior lienor status, since its mechanic’s lien was allegedly recorded on September 25, 2019 (*see* NYSCEF Doc No. 26 at page 9, ¶ 7), well after the subject Building Loan and Consolidated Mortgages were recorded on June 15, 2017 (*see* NYSCEF Doc Nos. 3 and 5). In addition, BK is entitled to a default judgment against the non-appearing and non-answering defendants, pursuant to

CPLR 3215, having submitted proof of service upon those parties. Accordingly, it is hereby

**ORDERED** that BK's motion (in mot. seq. five) is granted to the extent that BK is granted summary judgment against Bushwick, Titan and HD Supply; BK is entitled to an order of reference, which BK shall settle on notice within 30 days of service of this decision and order with notice of entry thereof upon all parties (including defendant Bushwick 1010, LLC); and BK is granted a default judgment against the non-appearing defendants, Akopov, the Guarantor, Durante Rentals, LLC, Leverage Builders Group Inc., Z Architecture PLLC, Meever USA, Inc., IKG & MC LLC, Lage Industries Corp., HKS Construction Corp. and the New York City Environmental Control Board; and it is further

**ORDERED** that that BK's motion (mot. seq. six) is denied as moot.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE