

Street Snacks LLC v Bridge Assoc. of Soho, Inc.
2022 NY Slip Op 32813(U)
August 18, 2022
Supreme Court, New York County
Docket Number: Index No. 602374/2009
Judge: Francis 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. 602374/2009

STREET SNACKS LLC,

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 006

BRIDGE ASSOCIATES OF SOHO, INC., ADAM LUCKNER,
MIDWAY HOLDINGS CORP., YORK RESOURCES
LLC, STERLING NATIONAL BANK, NEW YORK STATE
DISTRICT ATTORNEY, STATE OF NEW YORK, CITY OF
NEW YORK, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY DEPARTMENT OF
FINANCE, JOHN DOES, NUMBERED 1 THROUGH 25

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 110, 111, 112, 113, 114

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 consolidated, extended and modified commercial mortgage encumbering three parcels of real property located at 533 Greenwich Street a/k/a 99 Vandam Street, New York, New York, 619 Bridge Street, Woodmere, New York and 62 Clark Street, Long Beach, New York. The mortgage secures an indebtedness in an original amount of \$1,600,000.00 and was given by Defendant Bridge Associates of Soho, Inc. ("Bridge"). Plaintiff commenced this action to foreclose on the subject mortgages. Defendants, Bridge, Adam D. Luckner ("Luckner") and Midway Holdings Corp. ("Midway") answered and pled seven affirmative defenses. On or about March 4, 2020, the property located in New York County was sold pursuant to a judgment of foreclosure and sale issued in an action to foreclose on a tax lien on the premises (*see NYCTL 2013-A Trust v Bridge Associates of Soho*, NY County Index No 154799/2014). Defendants' motion (Motion Seq No 5) pursuant to CPLR §507 for an order changing venue of this action to Nassau County was denied.

Now, Plaintiff moves for summary judgment against the appearing parties, to strike the answer and affirmative defenses of Defendants Bridge, Luckner, and Midway, for a default judgment against Defendant New York City Environmental Control Board; to confirm a stipulation of discontinuance dated August 29, 2017, or, in the alternative, to discontinue the action against certain Defendants, and to appoint a referee to compute. Defendants Bridge, Luckner, and Midway oppose the motion.

On the branches of the motion for summary judgment and a default judgment and appointment of a referee, Plaintiff established the mortgage, note, and evidence of Mortgagor's default via the affidavit of Joseph Pistilli ("Pistilli"), the Chairman of the Board of Directors of First Central Savings

Bank, the original lender, which was sufficiently supported by admissible business records annexed thereto (*see eg Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Plaintiff also demonstrated its standing with the affidavit of Thomas Makkos (“Makkos”), a managing member of Plaintiff and the admissible supporting documents that it was holder of the note when the action was commenced (*see eg Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015]).

Defendants Bridge, Luckner, and Midway offered no substantive opposition to Plaintiff’s *prima facie* case. Rather, Defendants’ objections are entirely procedural. Their claim Plaintiff has filed a cross-motion is factually incorrect and their protest against entering a default judgment against certain lienor Defendants is futile as is the reiteration of their request to re-venue this matter in Nassau County.

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]). Further, the affirmative defenses were abandoned by Defendants by failing to address the viability of same in their opposition (*see One W. Bank, FSB v Rosenberg*, 189 AD3d 1600 [2d Dept 2020]).

The branch of Plaintiff’s motion for a default judgment against the non-appearing parties, including New York City Environmental Control Board, is granted (*see CPLR §3215; SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of the motion for an order “Confirming the Stipulation of Discontinuance Without Prejudice dated August 29, 2017” is denied as incomprehensible and the branch of the motion to discontinue the action against the parties to the stipulation pursuant to CPLR §3217[b] is denied as redundant.

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 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 the names “JOHN DOES Numbered 1 through 25 are stricken from the caption; and it is further

ORDERED that the amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK-----X
STREET SNACKS, LLC,,

Index No. 602374/2009

Plaintiff,
-against-BRIDGE ASSOCIATES OF SOHO, INC.,
ADAM D. LUCKNER, MIDWAY HOLDINGS CORP.,
YORK RESOURCES LLC, STERLING NATIONAL
BANK, NEW YORK STATE DISTRICT ATTORNEY,
STATE OF NEW YORK, CITY OF NEW YORK, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD,
and NEW YORK CITY DEPARTMENT OF FINANCEDefendants.
-----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 **December 7, 2022, at 10:00 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.

8/18/2022

DATE

CHECK ONE:

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CASE DISPOSED

GRANTED

☐

DENIED

SETTLE ORDER

APPLICATION:

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

☒
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☒

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

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

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