

Arnav Indus. Inc. Profit Sharing Plan & Trust v JNY Bedford Realty LLC
2022 NY Slip Op 32953(U)
August 29, 2022
Supreme Court, Kings County
Docket Number: Index No. 500852/20
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 29th day of August, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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ARNAV INDUSTRIES INC. PROFIT SHARING PLAN
AND TRUST,

Plaintiff,

- against -

Index No. 500852/20

JNY BEDFORD REALTY LLC, LEBOW REALTY INC., EZRA UNGER, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, NYS DEPARTMENT OF TAXATION AND FINANCE, NYC DEPARTMENT OF FINANCE and JOHN DOE and MARY DOE, said name being fictitious; it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

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) Annexed _____

143-168

Opposing Affidavits (Affirmations) _____

173-180

Reply Affidavits (Affirmations) _____

181-186

Upon the foregoing papers in this action to foreclose two mortgages on the commercial property at 910 Bedford Avenue in Brooklyn, New York (Block 1914, Lot 39)

(Property), plaintiff Arnav Industries Inc. Profit Sharing Plan and Trust (Arnav or plaintiff) moves (in motion sequence [mot. seq.] seven) for an order: (1) pursuant to CPLR 3212, granting it summary judgment against defendants JNY Bedford Realty LLC (“JNY” or “borrower”), Ezra Unger (“Unger” or “guarantor”), and Lebow Realty, Inc. (“Lebow” or “guarantor”); (2) appointing a referee to compute the amount due and to examine and report whether or not the Property can be sold in parcels, pursuant to RPAPL 1321; and (3) awarding plaintiff reasonable attorney’s fees for the enforcement of defendants’ obligations under the mortgages and guarantees.

Background

On January 13, 2020, Arnav commenced this foreclosure action by filing a summons, a verified complaint and a notice of pendency against the Property. The complaint alleges that: (1) on July 20, 2017, Arnav loaned JNY \$1,100,000.00 as evidenced by a note executed by JNY in favor of Arnav, which was secured by a first mortgage on the Property (Arnav complaint at ¶¶ 41-43), and (2) on December 29, 2017, Arnav loaned JNY \$1,600,000.00 as evidenced by a note executed by JNY in favor of Arnav, which was secured by a second mortgage on the Property (*id.* at ¶¶ 12-14). The complaint further alleges that on July 20, 2017, Lebow and Unger executed personal guarantees of the amounts owed under the first note and mortgage (first guarantee) and on July 23, 2018, Lebow and Unger executed personal guarantees of the amounts owed under the second note and mortgage (second guarantee) (*id.* at ¶ 16). The complaint alleges that JNY failed to make the monthly payment due under the first and second loans as of July 1, 2018 and

failed to make the monthly payments and outstanding amounts owed since that date (*id.* at ¶¶ 20 and 49). The complaint asserts the following four causes of action: (1) foreclosure on the second mortgage; (2) breach of the second guarantee; (3) foreclosure on the first mortgage; and (4) breach of the first guarantee. When none of the defendants answered or otherwise responded to the complaint, Arnav moved on September 9, 2020 (in mot. seq. one) for a default judgment against all defendants, including JNY, Lebow and Unger, and an order of reference. By an October 26, 2020 decision and order, this court granted Arnav's motion upon default, and on November 13, 2020 issue an order of reference appointing a referee to compute the amounts owed to Arnav and to discern whether the Property could be sold in parcels.

On November 19, 2020, JNY and Unger moved (in mot. seq. two), by order to show cause, for an order vacating the default judgment issued against them. By a December 8, 2020 order, this court granted JNY and Unger's motion "only to the extent that JFS granted on default by order dated 10/26/20 is vacated & de[fendant] is granted leave to answer as submitted".

Defendants JNY and Unger collectively answered the complaint, denied the material allegations therein and asserted affirmative defenses, including lack of personal jurisdiction, lack of standing, that plaintiff's claims are barred by the doctrine of payment, fraud based on plaintiff's misrepresentation of the lending agreement and predatory lending.

On March 4, 2021, Arnav moved (in mot. seq. three) for default judgment against all non-answering defendants, and for summary judgment as against JNY and Unger and an order of reference. On March 26, 2021, Lebow opposed Arnav's motion and cross-moved (in mot. seq. four) for an order, pursuant to CPLR 2004 and 5015 (a) (1), vacating its default in appearance and granting it an extension of time to file a late answer to the complaint. Pursuant to an order of this court, dated October 1, 2021, Arnav's motion was denied with leave to renew (with respect to the first and third causes of action only) upon submission of the proper evidentiary papers, and granted Lebow's motion to vacate its default and extended its time within which to answer Arnav's complaint by 30 days after service of the decision and order with notice of entry.

Defendant Lebow answered the complaint on January 10, 2022. In its answer, Lebow denied the allegations in the complaint and asserted affirmative defenses including, criminal usury, lack of subject matter jurisdiction, lack of standing, waiver, unclean hands, unjust enrichment, promissory estoppel, and breach of contract.

Arnav's Instant Renewed Summary Judgment Motion

On January 17, 2022, Arnav filed the instant renewed motion for summary judgment against JNY, Unger, and Lebow. Arnav submits an affirmation of merit from Judah Wassner ("Wassner"), Arnav's manager, who describes the first and second mortgages and affirms that the borrower, JNY, and the guarantors, Unger and Lebow, defaulted on their repayment obligations under the mortgages and the guarantees and that "[t]he last payment by the Borrower was made in March 2019." Wassner affirms that his affirmation is based

on his review of Arnav's business records which are annexed thereto. Specifically, Wassner's affirmation has annexed to it the pleadings, the notes, mortgages and guarantees for both the first and second mortgages, proof of the defendants' default which includes the schedule of interest payments made by JNY (ledger), notices of default for both loans, and proof of delivery of the notices, Arnav's affidavits of service upon defendants, and documents relating to Arnav's prior motion for summary judgment, default judgment, and an order of reference.

Arnav, in further support of its motion, submits an affirmation from Judah Zelmanovitz ("Zelmanovitz"), its transactional counsel "in connection with the loan transactions . . ." whose firm Fink & Zelmanovitz ("F&Z") not only participated in the loan transactions but also acted as servicer for the loans. Zelmanovitz affirms that he was "directly involved" in the preparation of the loan documents for the first and second loans from Arnav to JNY. He states that when the first loan was extended, JNY was formed by Lebow, the sole member of JNY. Zelmanovitz explains that in connection with both the first and second loans, Certificates as to Corporate Resolutions of the Shareholders and Officers of Lebow (Corporate Resolution Certificates) were executed by Moishe Lebovits, the president and sole shareholder of Lebow, and Unger before a notary, and Unger was identified therein as Lebow's Vice President. Zelmanovitz affirms, upon his information and belief, that "Lebovits and Unger each had full and fair opportunity to review the [Corporate Resolution] Certificates and to consult with legal counsel before affixing their signatures to these documents." Zelmanovitz also states that F&Z, as servicer of the loans,

was responsible for collecting payments on the loans and issuing the default notices when the defendants failed to make payments on the loans. As a member of F&Z, Zelmanovitz states he had personal knowledge of defendants' default. Zelmanovitz also states that he possessed personal knowledge of the schedule of interest payments (ledger) prepared by F&Z and submitted by Arnav in support of the instant motion for summary judgment, and he confirmed that it pertains to defendants' loans.

Arnav's counsel submits an affirmation asserting that Arnav has established its prima facie entitlement to summary judgment against JNY, the borrower, Unger and Lebow, the guarantors, and to the appointment of a referee to calculate damages. Plaintiff's counsel argues that Arnav is entitled to an award of reasonable attorneys' fees, pursuant to Section 42 of both the first and second mortgages and Section Four of the guarantees. Notably, plaintiff's counsel asserts that "[e]ven if there is a dispute respecting the sums paid by JNY before its default or in the amount of damages, such in no way constitutes a basis for this Court to decline entering a judgment of foreclosure as the amounts due under the mortgages can and will be determined and calculated by the Referee appointed by this Court."

JNY and Unger's Opposition

JNY and Unger, in opposition, submit an attorney affirmation in which they argue that Unger was never properly served in this action because he was not served at his actual place of business, nor place of abode as required under CPLR 308(2). Consequently, they argue, the court lacks personal jurisdiction over Unger. JNY and Unger also argue that the

affirmation of Wassner is insufficient in that Arnav fails to establish a proper foundation for the admission of Arnav's business records as they relate to JNY. They contend that Wassner failed to set forth that he is an individual with personal knowledge of Arnav's business practices and procedures. JNY and Unger also argue that the schedule of interest payments/ledger submitted by Arnav is inadmissible in that it does not contain any identifying information such as the name of the purported debtor/client, debtor/client's address or contact information, and also lacks any information about the note or mortgage upon which the ledger was generated, and lacks the date it was produced, all of which renders it defective on its face.

Arnav's Reply

In its reply, Arnav asserts that JNY and Unger's opposition is conspicuous for what it does not dispute. JNY and Unger do not dispute the facts as set forth in the statement of material facts and in the affirmation of Arnav's counsel, Jeffrey Fleischmann, or any other facts presented in Arnav's moving papers and exhibits. Arnav argues that Unger has not moved to dismiss this action for failure to properly serve him and has otherwise participated in this action and, therefore, has consented to the court's jurisdiction over him. Arnav also contends that Unger has failed to demonstrate that service of process against him was inadequate.

Arnav also argues that Wassner has met the requirements of CPLR 3212 (b) in that he avers in his affidavit that he has knowledge of the facts, and that his reply affidavit has removed any doubt that he does in fact have full knowledge of the day-to-day business

practices and procedures of Arnav. Arnav also points to the affirmations of Zelmanovitz as providing evidence that the schedule of interest payments/ledger was made in the course of F&Z's business, was based on F&Z's own computerized system and pertains to JNY's loans. Arnav also states "[n]otably, defendants nowhere dispute the factual explanations offered by plaintiff with respect to the ledger/spreadsheet".

Discussion

As an initial matter, the court notes that JNY and Unger have waived the argument that the court lacks personal jurisdiction over Unger because he was not properly served with the complaint. Pursuant to CPLR 3211 (e), defendants were required to move to dismiss the complaint for lack of proper service on Unger within 60 days following the service of their answer (in November 2020), unless an extension of time was warranted on the ground of undue hardship. Inasmuch as no motion was made within 60 days based on improper service of process, and there has been no showing of any undue hardship that prevented defendants from making the motion within the required 60-day period, that defense is deemed waived (CPLR 3211 [e]; *see Deutsche Bank Nat'l Tr. Co. v Jorgensen*, 185 AD3d 784, 785, [2020]; *U.S. Bank Nat'l Ass'n v Roque*, 172 AD3d 948, 950 [2019]; *Deutsche Bank Natl. Trust Co. v Acevedo*, 157 AD3d 859, 861 [2018]).

Turning to the merits, the court notes that 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 *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). 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 evidence of 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 as a matter of law, 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, Arnav submitted copies of the first and second notes, the first and second mortgages and the guarantees, default letters, schedule/ledger of interest payments, as

well as the affidavits of Wassner and Zelmanovitz, who both have authenticated the documents and attest to defendants' default. Arnav also submitted a statement of material facts. Arnav has thus established its prima facie entitlement to summary judgment and an order of reference (*see Karibandi*, 188 AD3d at 651). The burden of proof now shifts to the defendants to produce admissible evidence of a triable issue of fact (*see Oppenheimer*, 148 AD2d at 494).

In opposition, defendants have failed to dispute the facts as articulated by Arnav in the statement of material facts and in its moving papers. JNY and Unger do not dispute the validity of the notes and mortgages, the amounts set forth therein, that they defaulted on the loans, or the dates of the default. Instead, JNY and Unger assert that Arnav "failed to establish a proper foundation" for the admission of Arnav's business records as they relate to JNY. In this regard, JNY and Unger state that Wassner "failed to set forth that he is an individual with personal knowledge of plaintiff's business practices and procedures".

"A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" (*City Natl Bank v Foundry Dev. Group, LLC*, 160 AD3d 920, 921 [2d Dept 2018] [citations omitted]). Here, Wassner avers in his affirmation of merit that he is the manager of Arnav and makes said affirmation based on his personal knowledge and a review of Arnav's books and records and the records maintained by Arnav's transactional counsel, F&Z, who acted as servicer for the loans at issue herein. He avers that, with respect to the loans that

are the subject of this action, he made decisions respecting those loans which included his review and approval of notices of default, and the spread sheet/ledger detailing the interest payments which F&Z kept track of. In his affirmation, Zelmanovitz, as a principal of F&Z, avers that he was directly involved with the preparation of documents pertaining to defendants' loans and their default. The Court finds that the affirmations submitted lay the necessary foundation under CPLR 4518(a) for admission of the business records herein, including the ledger pertaining to the interest payment history for the subject loans (*see Foundry Dev. Group, LLC*, 160 AD3d at 921; *Yellow Book of N.Y., L.P. v Cataldo*, 81 AD3d 638, 639-640 [2011]). Thus, Arnav has established its prima facie entitlement to judgment as a matter of law by submitting copies of the mortgages, unpaid notes, and evidence of the default (*see Deutsche Bank Natl. Tr. Co. v Finger*, 195 AD3d 789, 791 [2d Dept 2021]). JNY and Unger have failed to raise any triable issues of fact that would preclude summary judgment in Arnav's favor.

As to Lebow, the court notes that it previously held in its prior decision dated October 1, 2021 that triable issues of fact exist regarding Unger's actual or apparent authority to execute the guarantees on behalf of Lebow. As such, summary judgment is precluded as against Lebow at this time.

Accordingly, it is hereby

ORDERED that Arnav's motion for summary judgment (mot. seq. seven) is granted as against JNY and Unger; and it is further

ORDERED that Arnav is entitled to an order of reference to determine the amounts due and owing under the first and second mortgages and whether the Property can be sold in parcels, which Arnav shall settle on notice within 30 days after service of this decision and order with notice of entry thereof upon all defendants.

This constitutes the decision and order of the court.

E N T E R,

A handwritten signature in blue ink, consisting of several fluid, overlapping strokes, positioned above a horizontal line.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**

J. S. C.