

Onestone Lending LLC v Alta Operations, LLC

2022 NY Slip Op 33059(U)

September 9, 2022

Supreme Court, New York County

Docket Number: Index No. 850198/2020

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. FRANCIS A. KAHN, III PART 32

Justice

-----X

INDEX NO. 850198/2020

ONESTONE LENDING LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

ALTA OPERATIONS, LLC, GARY FLOM, SVITLANA FLOM,
AMERICAN EXPRESS NATIONAL BANK, BEAS1
LLC, ATLANTIC SPECIALTY INSURANCE COMPANY,
KINGS AUTOMOTIVE HOLDINGS, LLC, NISSAN MOTOR
ACCEPTANCE CORPORATION, GEORGETOWN
ELEVENTH AVENUE OWNERS, LLC, VENIAMIN NILVA,
625 W 55 LLC, 624 WEST 47TH STREET LLC, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW
YORK CITY TRANSIT ADJUDICATION BUREAU,
JOHN/JANE DOE NO. 1 THROUGH JOHN/JANE DOE NO.
10

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion is determined as follows:

The within action is to foreclose on a commercial mortgage encumbering a parcel of real property located at 50 Riverside Boulevard, Unit 10A, New York, New York. The mortgage secures a loan with an original principal amount of \$499,000.00 which is memorialized by a note dated November 8, 2017. The note was executed by Defendant Svitlana Flom (“Svitlana”) as Operating Manager. The collateral mortgage was given by Defendants Svitlana and Gary Flom (“Gary”), record owners of the property, ostensibly as tenants-in-common. Concomitantly therewith, Svitlana and Gary executed an unconditional guaranty of the indebtedness. Plaintiff commenced this action alleging Defendants defaulted in making installment payments under the note. Defendants Alta and the Floms answered jointly and pled thirty affirmative defenses, including lack of standing and failure to comply with RPAPL §1304.

Now, Plaintiff moves for summary judgment against Defendants Alta and Floms, striking their answer and affirmative defenses, a default judgment against all non-appearing parties, to appoint a Referee to compute and to amend the caption. Defendants Alta and Floms 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 Defendants' 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]). Plaintiff was also required to show that it strictly complied with RPAPL §1304 or that this statute is inapplicable (*see Wells Fargo Bank, N.A. v Tricario*, supra at 850; *U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]).

On the issue of standing, it is undisputed that Plaintiff, as the original lender, was in direct privity with the Defendant Alta 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]). Defendant's reliance on RPAPL §1304 is misplaced as neither are applicable here. Compliance with RPAPL §1304 is limited to "home loans" where, *inter alia*, the borrower is a "natural person" and the where, *inter alia*, the "debt is incurred by the borrower primarily for personal, family, or household purposes" and "[t]he loan is secured by a mortgage [on] . . . a one to four family dwelling . . . which is or will be occupied by the borrower as the borrower's principal dwelling" (*see* RPAPL § 1304[6][a][1][ii] and [iii]; *HSBC Bank USA, N.A. v Tigani*, 185 AD3d 796, 799 [2d Dept 2020]). The undisputed facts of this case demonstrate that the borrower was a limited liability company, and the debt was incurred for commercial purposes (*see Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]; *Independence Bank v Valentine*, 113 AD3d 62 [2d Dept 2013]).

In support of a motion for summary judgment on a cause of action for foreclosure, 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]). No particular set of business records must be proffered, 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 from Marco Casella ("Casella"), the managing member of Plaintiff. Although Casella's knowledge was not entirely based upon personal knowledge of the facts, to the extent it was not, it was sufficiently founded by the business records of Plaintiff (*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]). Casella 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]). Annexed to Casella's affidavit were the records which the affiant relied upon (*see eg Ciras, Inc. v Katz*, 202 AD3d 590 [1st 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' claim that Onestone, via its principal Casella, feigned interest in a separate business venture, the income from which would have enabled Defendants to satisfy the Loan. Defendants also assert that negotiations resulted in proposed written agreements that were never executed because Casella balked on the basis Defendant Flom was subject to impending money

judgments. As a result of Casella's delays in closing this other loan, Defendants assert they were unable to secure alternate reasonable financing ultimately resulting in Defendants' loss of this new business interest.

Contrary to Defendants' assertion, Plaintiff's unwillingness to extend further loans and other alleged conduct does not demonstrate the existence of an issue of fact based on bad faith. A discrete loan transaction not inextricably intertwined with the loan sought to be foreclosed does not excuse a Defendant's unconditional obligations under the note and guaranty (*see Woori Am. Bank v Global Universal Group Ltd.*, 134 AD3d 699, 700-701 [2d Dept 2015]; *Naugatuck Sav. Bank v Gross*, 214 AD2d 549, 549-550 [2d Dept 1995]). Moreover, even a lender's breach of an existing distinct contract—here, the negotiations were nothing more than an agreement to agree—which frustrates a borrower's performance under a loan subject to foreclosure is not a defense (*see German Am. Capital Corp. v Oxley Dev. Co., LLC*, 102 AD3d 408, 409 [1st Dept 2013]). Absent bad faith, a claim of equitable estoppel also fails (*see Friesch-Groningsche Hypotheekbank Realty Credit Corp. v Ward Equities*, 188 AD2d 397, 398 [1st Dept 1992]).

Defendants' reliance on the doctrine of unclean hands is also unavailing. "The doctrine of unclean hands applies when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct" (*see Citimortgage, Inc. v Heyman*, 186 AD3d 1487, 1488-1489 [2d Dept 2020], *citing Kopsidas v Krokos*, 294 AD2d 406, 407 [2d Dept 2002]). Here, even assuming Defendants' allegations are true, Plaintiff was under no obligation to make a subsequent loan to Defendants and there is nothing immoral or unconscionable in determining to not close that deal (*see Bank of Smithtown v 264 W. 124 LLC*, 105 AD3d 468, 469 [1st Dept 2013]). Likewise, Defendants cite no actual promise by Plaintiff to loan them the money (*see New York Community Bank v Parade Place, LLC*, 96 AD3d 542, 543 [1st Dept 2012]) and the conduct complained of also was not directly related to the note and mortgage that is the subject of this action.

As to the branch of Plaintiff's motion to dismiss all 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. Thus, 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]). Also, other than the arguments made regarding unclean hands, bad faith and equitable estoppel, since Defendants proffered no argument in support of the other affirmative defenses, they 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]).

Any 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 Defendants' repayment default (*see Island Fed. Credit Union v. I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]). Moreover, despite some 14 months passing between service of their answer and this motion, Defendants did not show what steps it took to obtain disclosure in that time (*see Cooper v 6 West 20th St. Tenants Corp.*, 258 AD2d 362 [1st Dept 1999]). In any event, 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]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted (*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 (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that the affirmative defenses and counterclaim pled by the appearing Defendants are dismissed; and it is further

ORDERED that **Hayley Greenberg 521 5th Avenue Suite 1700 New York NY 10175 (212) 593-6111** 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 Defendants served herein as John Doe, Samantha Simoneaux, Zachary Getz, Abinav Shah, Monica Clifford, Mason Dudas, Tirath Patel, Vinit Shah, Maise Jarrell, Tori Schoen, Puja Rotar, Dan Rotar, Julie Horton, Occupant-Apt.4 @421 East 12th St., Occupant-Apt. 3@ 421 East 12th St., Falcon Messenger Service Inc., Coty New York Inc., B&C Consular Service Inc., Jefron Messenger Service Inc., Jefron Consular Services Inc., Abbey Kellar, Natalie Partigiononi, Greta Bharathi, Kendall Brodie, Michael Bairdi, Michael Cohen, Elena Saviano, Adele Davis, Carly McCabe, Amanda Frame, Michael Ryan, Sam Caushaj, Occupant -Apt 5F@ 511 East 6th Street, Amer Al Jarrah be substituted in the place and stead of "John Doe #1 through "John Doe #34; and it is further

ORDERED that the caption be amended by discontinuing the action against Defendants sued herein as "John Doe #35" through "John Doe #100" and deleting the language appearing thereafter; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
ONESTONE LENDING LLC,

Plaintiff,

Index No. 850198/2020

-against-

ALTA OPERATIONS, LLC, GARY FLOM,
SVITLANA FLOM, AMERICAN EXPRESS
NATIONAL BANK, BEASI LLC, ATLANTIC
SPECIALTY INSURANCE COMPANY, KINGS
AUTOMOTIVE HOLDINGS, LLC, NISSAN MOTOR
ACCEPTANCE COPORATION, GEORGETOWN
ELEVENTH AVENUE OWNERS, LLC, VENIAMIN
NILVA, 625 W 55 LLC, 624 WEST 47TH STREET
LLC, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE NEW YORK, CITY
PARKING VIOLATIONS BUREAU, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD,

NEW YORK CITY TRANSIT ADJUDICATION BUREAU,

Defendants.

-----X

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/suptctmanh)); 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 January 5, 2023 at 11:00 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.

9/9/2022 DATE

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

CHECK ONE:

Case disposition checkboxes: [] CASE DISPOSED, [X] GRANTED, [] SETTLE ORDER, [] INCLUDES TRANSFER/REASSIGN

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

[] DENIED

Disposition checkboxes: [X] NON-FINAL DISPOSITION, [] GRANTED IN PART, [] SUBMIT ORDER, [X] FIDUCIARY APPOINTMENT

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

[] OTHER

[] REFERENCE

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

APPLICATION:

CHECK IF APPROPRIATE: