

Wilmington Trust, N.A. v American Equities LLC

2022 NY Slip Op 34262(U)

December 9, 2022

Supreme Court, New York County

Docket Number: Index No. 850026/2022

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 A. KAHN, III PART 32
Justice

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WILMINGTON TRUST, NATIONAL ASSOCIATION AS TRUSTEE FOR THE BENEFIT OF THE REGISTERED HOLDERS OF BANK 2019 BNK19, COMMERCIAL MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2019 BNK19, BY AND THROUGH ITS SPECIAL SERVICER, LNR PARTNERS, LLC,

INDEX NO. 850026/2022
MOTION DATE _____
MOTION SEQ. NO. 002

Plaintiff,

- v -

AMERICAN EQUITIES LLC, UNTIED GROUP LLC, SHAPOUR SOHAYEGH, RONI MOVAHEDIAN, COLGATE RENTALS CORP., SHA HOME IMPROVEMENTS INC., THE CITY OF NEW YORK, PEOPLE OF THE STATE OF NEW YORK, JOHN DOE NOS. 1-25

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 80, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for JUDGMENT - SUMMARY

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

In this action to foreclose on a mortgage encumbering commercial real property, Plaintiff moves for summary judgment against the appearing parties, for an order of reference, for a default judgment against the non-appearing Defendants and to amend the caption. Defendants American Equities, United Group LLC, Shapour (Paul) Sohayegh and Roni Movahedian, the appearing Defendants, 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 unpaid note, and evidence of Cuneo's default in payment under the note (*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]).

Plaintiff's motion was supported with an affirmation from John Yee ("Yee"), an Asset Manager for non-party LNR Partners, LLC, the servicing agent of Plaintiff, as well as annexed documentation.

The affirmation 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 Plaintiff's failed to negotiate in good faith is entirely conclusory. "A mortgagor may be relieved from his default under a mortgage upon a showing of waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct by the mortgagee" (*see Ebc Amro Asset Mgmt. v Kaiser*, 256 AD2d 161 [1st Dept 1998]). However, "conclusory, self-serving, facially unpersuasive evidence" which is not supported by documentary proof is insufficient to defeat summary judgment where evidence of Defendants' acceptance of the disputed funds and failure to make repayment is proffered (*see Connecticut Nat'l Bank v Hack*, 186 AD2d 387, 388 [1st Dept 1992]; *Silver v Silver*, 17 AD3d 281 [1st Dept 2005]). To the extent Defendants cite economic forces beyond their control, appeals for equity and sympathy are ineffective as application of the former in foreclosure proceedings is rare and the latter cannot undermine the stability of contractual relations (*see L & L Assoc. Holding Corp. v Seventh Day Church of God of the Apostolic Faith*, 188 AD3d 1180 [2d Dept 2020]).

As to the other affirmative defenses, by failing to raise specific legal arguments in rebuttal of the branch of the motion to dismiss same they were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafore*, 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 (*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 is awarded summary judgment against the appearing parties and a default judgment against the non-appearing defendants; and it is further

ORDERED that that **Scott H. Siller, Esq., 706 Equestrian Way, Westbury, NY 11590 -- 516-644-6769** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and examine whether the tax parcel 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 or is required to perform other significant services in issuing the report, 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 the failure by defendants to submit objections to the referee shall 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 30 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 to strike the defendants sued herein as "John Doe Nos. 1-25," so that the action is discontinued as against them, all without prejudice to any of the proceedings heretofore had herein or to be had herein; and it is further

ORDERED that the caption shall read as follows:

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

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WILMINGTON TRUST, NATIONAL ASSOCIATION, AS :
TRUSTEE FOR THE BENEFIT OF THE REGISTERED :
HOLDERS OF BANK 2019-BNK19, COMMERCIAL :
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES :
2019-BNK19, BY AND THROUGH ITS SPECIAL :

SERVICER, LNR PARTNERS, LLC,

Index No. 850026/2022

Plaintiff,

-against-

AMERICAN EQUITIES LLC, UNITED GROUP LLC, :
SHAPOUR (PAUL) SOHAYEGH, RONI MOVAHEDIAN, :
COLGATE RENTALS CORP., SHA HOME
IMPROVEMENTS INC., THE CITY OF NEW YORK, :
PEOPLE OF THE STATE OF NEW YORK,

Defendants.

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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

All parties are to appear for a virtual conference via Microsoft Teams on **March 23, 2023, 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.

12/9/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

F.A.K. III

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

HON. FRANCIS A. KAHN III

J.S.C.