

Owemanco Mtge. NY LP v Q.Y. Tang's Hwa Yan Inc.
2022 NY Slip Op 34373(U)
December 16, 2022
Supreme Court, New York County
Docket Number: Index No. 850100/2020
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 850100/2020

OWEMANCO MORTGAGE NY LIMITED PARTNERSHIP,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 004

- v -

Q.Y. TANG'S HWA YAN INC., CHEN LIEH TANG, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN DOE NO. 1 TO JANE DOE NO. 10 INCLUSIVE, THE LAST TEN NAMES BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF, THE PERSONS OR PARTIES INTENDED BEING PERSONS, CORPORATIONS OR OTHERS, HAVING AN INTEREST IN OR LIEN UPON OR TENANTS, OCCUPANTS OR PERSONS,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180

were read on this motion to/for

SUMMARY JUDGMENT

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

The within action is to foreclose on a first consolidated commercial mortgage, dated February 28, 2019, and a second mortgage dated, July 17, 2019, encumbering a parcel of commercial real property located at 42 East Broadway, New York, New York. The mortgages secure loans in the original amount of \$6,750,000.00 and \$600,000.00 given to Defendant Q.Y. Tang's Hwa Yan, Inc. ("Tang"). The loans are memorialized by a consolidated, amended and restated promissory note, dated February 28, 2019, and a promissory note, dated July 19, 2019. The notes and mortgages were all executed by Defendant Chen Lieh Tang a/k/a Tang Chen Lieh ("Chen") as President of Tang. Concomitantly with the each note and mortgage, Defendant Chen executed unconditional personal guarantees of the loans.

Plaintiff commenced this action and pled three causes of action, including two to foreclose on the subject mortgages. Defendants Tang and Chang answered and pled eighteen affirmative defenses, including lack of standing. Plaintiff's initial motion for summary judgment on its foreclosure causes of action and for the appointment of a referee to compute was denied by order of this Court dated April 26, 2022. Now, Plaintiff moves again for summary judgment against Defendants Tang and Chen, to strike their affirmative defenses and answers, to appoint a Referee to compute and to amend the caption. Defendants Tang and Chen 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 Tang's and Chen's default under the notes and mortgages (*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]). "There is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a *prima facie* case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518 (a), and the records themselves actually evince the facts for which they are relied upon" (*Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]). As Defendants Tang and Chen raised lack of standing as an affirmative defense in their answer, Plaintiff was required to demonstrate it had standing to prosecute the action when it was commenced (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]).

Plaintiff's motion was supported with an affidavit from Sohail Zayona ("Zayona"), Chief Operating Officer of Ontario Wealth Management Corporation, the manager of Plaintiff. Zayona also purports to be the Chief Operating Officer of Owemanco Mortgage Holding Corporation ("OWEMANCO") the predecessor-in-interest to Plaintiff. Zayona averred that the affidavit was based upon personal knowledge of the facts and review of documents maintained by Ontario. Zayona's affidavit laid a proper foundation under CPLR §4518 for the admission of Ontario's records (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Further, 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).

As to standing, unlike the prior motion, Zayona averred that the allonges which transferred the notes were annexed by the affiant and Plaintiff physically possessed the notes when the action was commenced. This evidence, along with the notes and allonges annexation to the complaint, establishes *prima facie* Plaintiff's standing in this matter (*see PNC Bank, N.A. v Salcedo*, 161 AD3d 571 [1st Dept 2018]; *Bank of NY v Knowles*, supra). In opposition, Defendants' complaint about the sufficiency of the notarization of Zayona's affidavit are unavailing. Contrary to Defendants' assertion, Plaintiff was entitled to cure the certification defect in Zayona's affidavit in reply (*see Olmeur Med., P.C. v. Nationwide Gen. Ins. Co.*, 41 Misc. 3d 143[A][App Term 2d Dept 2013]). The document annexed to Plaintiff's reply complied with certificate of conformity requirements (*see* CPLR § 2309[c]; CPLR §3012-b; *Moccia v Carrier Car Rental, Inc.*, 40 AD3d 504 [1st Dept 2007]).

Defendants' arguments concerning possible irregularities in assignment of the note and mortgage are unavailing considering Plaintiff's established holder status (*see JPMorgan Chase Bank NA v Weinberger*, 142 AD3d 643 [2d Dept 2016]). Defendants' assertions regarding Plaintiff's failure to annex the written assignment of the guarantees is of no moment. Zayona's averments regarding assignment of the guarantees were based upon her personal knowledge of the events, not a review of documents. In any event, the assignments were annexed to the prior motion as Exhibit "NN" and are part of the Court record on NYSCEF. Based on the foregoing, third, fourth and sixth affirmative defenses are no longer viable.

No issue of fact was raised regarding Defendants' default. That an interest payment may have been credited to Defendants' account at most establishes an issue as to the amount due which does not defeat summary judgment (*see 1855 E. Tremont Corp. v Collado Holdings LLC*, 102 AD3d 567 [1st Dept 2013]).

Any assertion the motion must be denied because no discovery has been conducted is unavailing as Defendants have offered nothing to demonstrate Plaintiff is in exclusive possession of facts which would establish a viable defense to summary judgment (*see Island Fed. Credit Union v. I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]). Moreover, despite some two years passing since service of their answer, as well as, three months between denial of the prior motion and this motion, Defendants did not show what steps it took to obtain disclosure in that those intervals (*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 to amend the complaint is granted only to the extent that 42-44 East Broadway Restaurant, Inc. may be added as a Defendant based upon its status as a possessor of the premises and, therefore, a necessary party under RPAPL §1311. To the extent Plaintiff may be seeking judgment against this new Defendant as allegedly previously served, that relief is denied as that claim was based on nothing more than information and belief.

Accordingly, it is

ORDERED that Plaintiff is awarded summary judgment against the appearing parties; and it is further

ORDERED that that **Haley Greenberg Esq., 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 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 complaint and caption are amended to add 42-44 East Broadway Restaurant, Inc. as a party Defendant and the amended caption shall read as follows:

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

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OWEMANCO MORTGAGE NY LIMITED PARTNERSHIP,

Index No. 850195/2022

Plaintiff,

-against-

Q.Y. TANG'S HWA YAN INC., CHEN LIEH TANG a/k/a
Tang Chen Lieh, 42-44 East Broadway Restaurant, Inc.
NEW YORK STATE DEPARTMENT OF TAXATION AND
FINANCE,

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 **April 12, 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.

12/16/2022

DATE



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

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NOTED, DISPOSED

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

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