

5AIF Sycamore 2, LLC v 201 EB Dev. III, LLC

2022 NY Slip Op 34374(U)

December 20, 2022

Supreme Court, New York County

Docket Number: Index No. 850190/2021

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

-----X
5AIF SYCAMORE 2, LLC, INDEX NO. 850190/2021
Plaintiff, MOTION DATE _____
- v - MOTION SEQ. NO. 002

201 EB DEVELOPMENT III, LLC, JEFFREY JACOBS,
THERESE OLIVA, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, CITY OF NEW YORK
DEPARTMENT OF FINANCE, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY
TRANSIT AND JUDICATION BUREAU, JOHN DOE

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 86, 87, 88, 89
were read on this motion to/for JUDGMENT - SUMMARY

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

Plaintiff commenced this action to foreclose on an amended, consolidated and modified mortgage encumbering two parcels of commercial real property located at 201 and 203 East Broadway, New York, New York that was given by Defendant 201 EB Development III, LLC ("201 EB") to non-party 5 Arch Funding Corp. The mortgage secures an amended and restated mortgage note which evidences a loan with an original principal amount of \$14,100,000.00. The note and mortgage, both dated October 31, 2018, were executed by Defendants Jeffrey Jacobs ("Jacobs") and Therese Oliva ("Oliva") as Members of 201 EB. Concomitantly with these documents, Jacobs and Oliva executed a guaranty of the note. Plaintiff commenced this action wherein it is alleged, *inter alia*, Defendant 201 EB defaulted when the note matured on January 26, 2021. Defendants 201 EB, Jacobs and Oliva answered jointly and pled ten affirmative defenses, including that Plaintiff lacks standing.

Now, Plaintiff moves for summary judgment against 201 EB, Jacobs and Olivia, a default judgment against the non-appearing parties, to appoint a referee to compute and to amend the caption. Defendants 201 EB Jacobs and Olivia 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 201 EB's default under the note and mortgage (*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 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]).

In support of the branch of the motion for summary judgment, Plaintiff submitted the affidavit of Robert Rhodes (“Rhodes”), Plaintiff’s Vice President. Rhodes’ affidavit laid a proper foundation for the admission of Plaintiff’s records into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Further, the records Rhodes relied on were referenced and annexed to the motion (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). Also proffered was the affidavit of Stacey Talon (“Talon”), a Specialty Loan Servicing Supervisor for FCI Lender Services, Inc. (“FCI”), Plaintiff’s servicer. Talon laid a proper foundation for the admission of FCI’s records into evidence under CPLR §4518. The affidavits of Rhodes and Talon, along with the referenced documents sufficiently established the mortgage, note, and evidence of mortgagor’s default and was supported by the appropriate documentary evidence (*see eg Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*).

Standing in a foreclosure action is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] holder status via physical possession of the note prior to commencement of the action which contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). As to the latter two circumstances, the note is the dispositive instrument (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). In support of the motion, Plaintiff only proffers proof in support in support of the second circumstance.

“Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff” (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2d Dept 2015] [citations omitted]). The indorsement must be made either on the face of the note or on an allonge “so firmly affixed thereto as to become a part thereof” (UCC §3-202[2]). Evidence of the nature of the attachment is required (*see One Westbank FSB v Rodriguez*, 161 AD3d 715 [1st Dept 2018]), since not every appendment can satisfy the statutory requisite (*see HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983 [2d Dept 2015][Paperclip not a firm annexation]). “The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement” (*Deutsche Bank Natl. Trust Co. v Webster*, 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513 [2d Dept 2019]).

The allegations regarding Plaintiff’s holder status contained in Rhodes’ affidavit are entirely conclusory and insufficient. Plaintiff claims holder status via some seven assignments by endorsement that allegedly occurred on the same day the note and mortgage were executed. However, the endorsements are not on the face of the note. Rather, they are contained in allonges comprised of three separate pages which reveal no discernable evidence of firm attachment from a visual inspection. Resultantly, Plaintiff was required, but failed, to establish the allonges were “firmly affixed” to the original note (*see Nationstar Mtge., LLC v Calomarde*, 201 AD3d 940, 942 [2d Dept 2022]; *JPMorgan Chase Bank, N.A. v Grennan*, *supra* at 1516). As Plaintiff’s submissions are silent on this issue, it has only demonstrated “mere physical possession of a note at the commencement of a foreclosure action [which] is insufficient to confer standing or to [prove] plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note” (*U.S. Bank N.A. v Moulton*, 179 AD3d 734, 737 [2d Dept 2020]). Plaintiff’s attempt to cure these defects with a further affidavit from Rhodes submitted in reply is inappropriate as the affidavit is not intended to clarify an issue raised for the first time in opposition but seeks to correct a defect in Plaintiff’s *prima facie* case (*see Deutsche Bank Natl. Trust Co. v Adlerstein*, 171 AD3d 868, 870 [2d Dept 2019]; *cf. Central Mtge. Co. v Jahnsen*, 150 AD3d 661, 664-665 [2d Dept 2017]).

Accordingly, the branch of Plaintiff's motion for summary judgment and the appointment of a referee to compute is denied.

As to the branch of Plaintiff's 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]).

The first affirmative defense, which is directed to the legal sufficiency of Plaintiff's complaint, is unnecessary as a general matter since dismissal cannot be effectuated without a motion pursuant to CPLR 3211[a][7] (*see Riland v Frederick S. Todman & Co.*, 56 AD2d 350 [1st Dept 1977]). Normally, this defense is nothing more than "'harmless surplusage,' and . . . a motion by the plaintiff to strike the same should be denied" (*Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]). However, where all other affirmative defenses fail as a matter of law, it may be dismissed (*Raine v Allied Artists Productions, Inc.*, 63 AD2d 914, 915 [1st Dept 1978]).

The second affirmative defense is viable based upon the above findings of the Court.

The third, fourth and fifth affirmative defenses alleging bad faith, unclean hands, estoppel, waiver, laches and the doctrine of good faith and fair dealing 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]).

The sixth affirmative defense asserting Plaintiff is not entitled to recover attorney's fees is belied by the notes and mortgages at issue which expressly permit reimbursement of same.

The seventh affirmative defense fails as "documentary evidence is not by itself an affirmative defense, but merely one way in which a defense may be raised or proven" (*see Sotomayor v Princeton Ski Outlet Corp.*, 199 AD2d 197 [1st Dept 1993]).

The eighth affirmative defense of mitigation is unavailing in a foreclosure action (*see Marine Midland Bank, N. A. v Virginia Woods Ltd.*, 201 AD2d 625 [2d Dept 1994]) as the amount due is not a defense to summary judgment (*see eg Excel Capital Group Corp. v 225 Ross St. Realty, Inc.*, 165 AD3d 1233 [2d Dept 2018]).

The ninth affirmative defense of usury fails as it is not available to a limited liability company or an individual guarantor of such an entity's debt (*see General Obligations Law 5-521[1]; LLCL §1104[a]; Schneider v Phelps*, 41 NY2d 238, 242; *Bankers Trust Co. v Braten*, 184 AD2d 239 [1st Dept 1992]). In any event, the note contains a fixed interest rate of 9.85%, well below the statutory maximum, and Plaintiff provides no explanation or calculation demonstrating that the interest rate charged by the lender was usurious. Further,

the default rate of interest is expressly limited to "the maximum interest rate . . . which may be collected from Borrower under applicable law."

The tenth affirmative defense concerning a reduction of interest relates to the amount due which is generally irrelevant to the viability of the claim for foreclosure (see *Wilmington Sav. Fund Socy., FSB v Moriarty-Gentile*, 190 AD3d 890, 892-893 [2d Dept 2021] [Defaulting mortgagor can appear and contest the amount due and owing]; see also *Board of Mgrs. of Cent. Park Place Condominium v Potoschnig*, 111 AD3d 586 [1st Dept 2013] *Bank of Am., N.A. v Terry*, 177 AD3d 669 [2d Dept 2019]).

The attempt to reserve the right to assert further affirmative defenses during this action is incomprehensible and inadequately pled. Any rights in this regard are contained in the applicable sections of the Civil Practice Law and Rules.

To the extent Defendants' opposition failed to address any of the above affirmative defenses, reliance on same was 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]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment on its cause of action for foreclosure is denied, and it is

ORDERED that all the affirmative defenses in Defendants' answer, except the second are dismissed

ORDERED that all parties are directed to appear for a preliminary conference on **January 18, 2023 @ 11:20am** via Microsoft Teams.

12/20/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

Francis A. Kahn III

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

HON. FRANCIS A. KAHN III

J.S.C.