

West 45th Retail LLC v Alandalous Props. Corp.

2022 NY Slip Op 34375(U)

December 22, 2022

Supreme Court, New York County

Docket Number: Index No. 850207/2021

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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INDEX NO. 850207/2021

WEST 45TH RETAIL LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001 002

- v -

ALANDALOUS PROPERTIES CORP. F/K/A PEOPLES FOREIGN EXCHANGE CORPORATION, ABDELILAH ALAMI BINANI, NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, BOARD OF MANAGERS OF THE ACADEMY HOUSE CONDOMINIUM, JOHN DOE #1 THROUGH JOHN DOE #20 (SAID JOHN DOE DEFENDANTS BEING FICTITIOUS, IT BEING INTENDED TO NAME ALL OTHER PARTIES WHO MAY HAVE SOME INTEREST IN OR LIEN UPON THE PREMISES SOUGHT TO BE FORECLOSED),

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 92, 93, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 89, 90, 91, 94, 95

were read on this motion to/for RESTORE

Upon the foregoing documents, the motions and cross-motions are determined as follows:

This is an action to foreclose on a consolidated, extended and modified mortgage encumbering commercial real property located at 24 West 45th Street, Unit 1-C, New York, New York. The mortgage, given by Defendant Alandalous Properties Corp. ("Alandalous"), secures a promissory note which evidences a loan with an original principal amount of \$1,300,000.00. The note and mortgage, both dated March 14, 2016, were executed by Defendant Abdelilah Alami Binani ("Binani") as President of Alandalous. Concomitantly with these documents, Binani executed a commercial guaranty of payment of the note.

It is undisputed that Defendant Alandalous failed to remit its December 14, 2020, installment payment under the note. On September 1, 2021, Plaintiff commenced this action and pled, *inter alia*, causes of action to foreclose on the mortgage and enforce the guaranty. On November 5, 2021, Plaintiff, Alandalous and Binani entered into two forbearance agreements. The first concerned the present loan. The second related to a loan between non-parties Liberty Avenue Retail, LLC ("Liberty"), the lender, and Lebchir Properties, LLC ("Libchir"), the borrower. The principals of Liberty and Lebchir are the same as Plaintiff and Alandalous,

respectively. The forbearance agreements contain reciprocal default provisions which provide that the occurrence of a "Termination Event" under one agreement constitutes a "Termination Event" under the other.

Plaintiff claims Defendants Alandalous and Binani defaulted under the forbearance agreements and demanded that they serve an answer as required thereunder. Defendants answered and pled fifteen affirmative defenses, including failure to comply with a contract condition precedent to foreclosure. Defendant Board of Managers of the Academy House Condominium ("Condominium"), an alleged holder of a subordinate lien for unpaid common charges, answered and pled, among other things, a crossclaim against Alandalous to foreclose on its common charge lien. An answer to the crossclaim was not demanded. Prior to commencement of this action, Condominium commenced an action (*Board of Managers of the Academy House Condominium v Peoples Foreign Exchange, et al*, NY Cty Index No 158796/2017) to recover its unpaid common charges and, on March 10, 2022, entered a money judgment against Defendant Alandalous in the amount of \$149,131.98.

By order dated May 26, 2022, Plaintiff's *ex parte* application for the appointment of a receiver was granted and the Court designated Roberta Ashkin, Esq. as the Receiver of the premises at issue.

Now, Plaintiff moves (Motion Seq No 1) for summary judgment against the appearing parties, a default judgment against the non-appearing Defendants, an order of reference and to amend the caption. Defendants Alandalous and Binani oppose the motion and cross-move pursuant to CPLR §§2201 to stay this matter. Defendant Condominium cross-moves, *inter alia*, for foreclosure on the Board of Manager's common charge lien and to grant Plaintiff a judgment of foreclosure and sale. The Receiver moves (Motion Seq No 2), by order to show cause, for authorization to retain counsel, directing Plaintiff to fund an operating account and to set the Receiver's compensation. Plaintiff and Defendants Alandalous and Binani oppose Receiver's 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 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]). "A default is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]).

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]). 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 Ariel Jacobov ("Jacobov"), a member of the Plaintiff. Jacobov properly attested that the knowledge was based upon his personal knowledge as well as the business records of his employer (*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]). Jacobov laid a proper foundation for the admission of Plaintiff's records by demonstrating the requisites of CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of non-party Habib American Bank, the original lender and Plaintiff's assignor, were also admissible since Jacobov attested those records were received from the maker, incorporated into the records his employer kept and were routinely relied on by Plaintiff in its

business (*see Bank of Am., N.A. v Brannon*, 156 AD3d 1, 10 [1st Dept 2017]; *see also U.S. Bank Trust, N.A. v Bank of Am., N.A.*, 201 AD3d 769, 772 [2d Dept 2022]). Annexed to Jacobov's affidavits were the records which he 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 which 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 the default, in the forbearance agreement executed by Alandalous and Binani, they acknowledged the debt, ratified the loan documents, and admitted the existence of a default thereunder (*see Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602 [2d Dept 2013]; *EMC Mortg. Corp. v Stewart*, 2 AD3d 772 [2d Dept 2003]).

Where, as here, a defendant pleads affirmative defenses claiming lack of standing and failure to comply with contractual pre-foreclosure notice requirements, a plaintiff is ordinarily required to demonstrate its standing and substantial compliance with the notice requisites (*see eg Deutsche Bank Natl. Trust Co. v Pariser*, 207 AD3d 518 [2d Dept 2022]; *Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]; *Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [2d Dept 2020]). However the defense of standing is not jurisdictional in nature and, therefore, is waivable (*see Wells Fargo Bank, N.A. v Muskopf*, 44 Misc3d 1223[A] [Sup Ct, Suffolk Cty 2014]).

In the recitals contained in the forbearance agreement, the parties agreed that the "Loan and the Loan Documents have been assigned by Habib American Bank to Lender and Lender is now the sole, true, and lawful owner and holder of the Loan Documents". As such, Defendants Alandalous and Binani waived any reliance on lack of standing (*see U.S. Bank N.A. v R/JF 110 Realty LLC*, ___ Misc3d ___, 2016 NY Slip Op 31273[U][Sup Ct NY Cty 2016]). Similarly, in paragraph eight of that agreement, any pre-foreclosure notice requirement contained in the note and mortgage was waived.

In opposition, Defendants' claim that an issue of fact exists based upon their exercise of an option to extend the moratorium on prosecution of this action contained in the forbearance agreement is not established. That extension option provides that "[s]o long as a Termination Event has not occurred", Defendants could extend the termination date of the forbearance, along with the required full re-payment of the loan, by giving notice and making monthly payments to Plaintiff of \$10,000.00. Defendant Binani avers in an affidavit that the option was exercised, and that Plaintiff accepted same as well as compulsory payments for April, May and June 2022. Defendants proffered a letter dated April 14, 2022, purporting to exercise the option, but no corroboration of the alleged payments was submitted. More importantly, Defendants did not demonstrate that no termination event occurred before attempting to extend the forbearance. On the contrary, Plaintiff proved, *inter alia*, that an uncured repayment default under the Lebchir forbearance agreement occurred thereby precluding exercise of the extension option herein.

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, fourth and fifth affirmative defenses of lack of standing and failure to provide pre-foreclosure notice fail for the reasons stated by the Court supra.

The third affirmative defense claiming the action is barred by operation of the COVID-19 Emergency Protect Our Small Business Act of 2021 (L. 2021, c. 73) ("CEPOSBA") is without merit as dismissal for noncompliance with that legislation is not a remedy thereunder (*see Acres Loan Origination LLC v. 170 E. 80th St. Mansion, LLC*, ___ Misc3d ___, 2021 NY Slip Op 32477[U][Sup Ct NY Cty 2021]).

The sixth, seventh, tenth, twelfth and fourteenth affirmative defenses alleging the occurrence of the COVID-19 pandemic, Plaintiff's receipt of an "exorbitant profit", unclean hands, estoppel and champerty 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 eighth and ninth affirmative defenses are superfluous as they relate to the amount due, which is an issue for determination in the reference and, therefore, 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 fifteenth affirmative defense which attempts to reserve the right to assert further affirmative defenses during this action is incomprehensible and inadequately pled. Any rights in this regard may be exercised in accordance with 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 Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The 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 Defendants' default (*see Island Fed. Credit Union v I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]). Moreover, 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 2012-1 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]).

The cross-motion by Defendants Alandalous and Binani for a stay of this matter based upon their purported "substantial compliance" with the forbearance agreement is denied based upon the foregoing findings of the Court.

The branch of Defendant Condominium's cross-motion for summary judgment on its cause of action for foreclosure of its common charge lien is granted as it demonstrated its authority to collect common charges as well as the way the amounts were calculated (*see Board of Mgrs. of W. Amherst Off. Park Condominium v RMFSG, LLC*, 153 AD3d 1611 [4th Dept 2017]; *Board of Mgrs. of Natl. Plaza Condominium I v. Astoria Plaza, LLC*, 40 AD3d 564 [2d Dept 2007]). That Condominium obtained a money judgment while this action was pending is no bar to foreclosure (*see* RPL §339-aa; *Board of Mgrs. of Cent. Park Place Condominium v Potoschnig*, 178 AD3d 489 [1st Dept 2019]). However, irrespective of the existence of the judgment, Condominium's lien is subordinate to Plaintiff's mortgage lien (*see Plotch v Citibank, N.A.*, 120 AD3d 1210 [2d Dept 2014]).

The Receiver moves (Motion Seq No 2) for leave to retain counsel and other relief. The Court appointed Roberta Ashkin, Esq. as Receiver based upon Plaintiff's attestation that it believed "material injury or destruction or deterioration" to the property would result without a receiver in place. Nevertheless, Receiver avers in her affirmation in support of the motion that Plaintiff has not accommodated her attempts to fulfil the duties she was assigned. Plaintiff also opposes all branches of Receiver's motion essentially arguing that the only role it intended the Receiver to satisfy was as a conduit of rent from a commercial tenant at the premises. Further, while this motion was *sub judice*, Plaintiff reached a stipulation with Alandalous and Binani to discharge the receiver and for disposition of rents at issue (NYSCEF Doc No 104). The stipulation was not signed by the Receiver or Defendant Condominium.

Plainly, Plaintiff's actions after appointment of the Receiver demonstrate that not only is there no longer a need for a receiver, but that one was never required in the first instance. As such, the Receiver's motion is denied, and the Receiver is discharged with the regrets of the Court for her valuable time and effort having been wasted on Plaintiff's "fool's errand." Plaintiff's request that the Court so-order its stipulation is denied. The Court will not add its imprimatur to that ersatz agreement.

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 all the affirmative defenses in the answer of Defendants Alandalous and Binani are dismissed, and it is further

ORDERED that the Receiver Roberta Ashkin, Esq. is discharged, and Plaintiff is directed to pay any disbursements she may have incurred forthwith; and it is further

ORDERED that the Receiver's motion is denied as moot; and it is further

ORDERED that that **Elaine Shay, Esq., 800 3rd Avenue, Ste. 2800, New York, New York 10022 (212) 520-2690** 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 by striking therefrom the remaining Defendants sued herein as “John Doe #1” to “John Doe #20”, all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that the caption of this action as amended, shall read as follows:

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

-----X
WEST 45TH RETAIL LLC

Index No. 850207/2021

Plaintiff,

-against-

ALANDALOUS PROPERTIES CORP. f/k/a
PEOPLES FOREIGN EXCHANGE
CORPORATION, ABDELILAH ALAMI BINANI,
NEW YORK STATE DEPARTMENT OF LABOR,
NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, NEW YORK CITY
DEPARTMENT OF FINANCE, BOARD OF
MANAGERS OF THE ACADEMY HOUSE
CONDOMINIUM,

Defendants.
-----X

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 20, 2023, at 10:20 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.

12/22/2022

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, A.J.S.C.

HON. FRANCIS A. KAHN III

J.S.C.