

Wilmington Savs. Fund Socy., FSB v Korol

2022 NY Slip Op 34989(U)

July 14, 2025

Supreme Court, Kings County

Docket Number: Index No. 506464/2017

Judge: Cenceria P. Edwards

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At an IAS Term, Part FRP1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of June 2022.

P R E S E N T:

HON. CENCERIA P. EDWARDS, C.P.A.,

Justice.

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WILMINGTON SAVINGS FUND SOCIETY, FSB, DBA
CHRISTIANA TRUST, et al,

Plaintiff(s),

-against-

NATALIYA KOROL, ANDREY KOROL, 2ND CHANCE MORTGAGES INC., THE BOARD OF MANAGERS OF THE 2788 EAST 16TH STREET CONDOMINIUM HOMEOWNERS ASSOCIATION, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU, JOHN DOE SAID NAME BEING FICTITIOUS IT BEING THE INTENTION OF PLAINTIFF TO DESIGNATE ANY AND ALL OCCUPANTS OF PREMISES BEING FORECLOSED HEREIN AND ANY PARTIES CORPORATIONS OR ENTITIES IF ANY HAVING OR CLAIMING AN INTEREST OR LIEN UPON THE MORTGAGED PREMISES,

Defendant(s).

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The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion, Affidavits (Affirmations) and Exhibits _____

71-84

Opposing Affidavits (Affirmations) and Exhibits _____

None

Reply Affidavits (Affirmations) and Exhibits _____

None

In this action to foreclose a mortgage encumbering the residential property located at 2788 East 16th Street, Apartment 3, Brooklyn, NY, Plaintiff was granted an Order of Reference entered May 24, 2018, and a judgement of foreclosure and sale entered November 13, 2019, against defendant-borrowers Nataliya and Andrey Korol (Collectively the "Borrowers"). Subsequently,

ORDER

Calendar #(s): 48

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a foreclosure sale was held, with Referee Philip Kamara, Esq., depositing the surplus funds to the King's County clerk's office on November 13, 2020, pursuant to RPAPL 1354.

Now, Bronte Avenue Partners, LLC ("Movant"), assignee of Defendant 2ND Chance Mortgage Inc. ("Defendant"), moves to confirm the Referee's Report of Sale, to appoint a referee to compute/distribute the surplus and for an Order directing disbursement of the surplus monies to it, in the amount of \$14,928.61, no papers being filed in opposition.

It is alleged that Borrowers executed a home equity agreement promising to repay Defendant's predecessor-in-interests, National City Bank, a "total principal amount" that "at any one time shall not exceed \$164,000.00," which debt was secured by the subject premises, and they have failed to make the monthly installment payments due under the agreement, starting with the payment due on October 8, 2015.

"Where a foreclosure complaint is not verified, CPLR 3215(f) states, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit made by the party" (*Aurora Loan Servs., LLC v Jemal*, 205 AD3d 661, 664 [2d Dept 2022]). "To demonstrate the facts constituting the claim, the movant need only submit sufficient proof to enable a court to determine if the claim is viable" (*Lancer Ins. Co. v Fishkin*, 211 AD3d 719, 721 [2d Dept 2022]). Hence, "where the allegations of a complaint or affidavit of facts fail to establish a prima facie case, 'the applicant is not entitled to the requested relief, even on default'" (*Wynkoop v 622A President St. Owners Corp.*, 169 AD3d 1100, 1103 [2d Dept 2019], quoting *Dyno v Rose*, 260 AD2d 694, 698 [3d Dept 1999]).

"To establish a prima facie case in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and evidence of default" (*Bank of NY Mellon v Gordon*, 171 AD3d 197, 208 [2d Dept 2019]). In contrast to a note that evinces an unequivocal promise to pay a sum certain, a line of credit agreement permitting a mortgagor to obtain cash advances does not, in and of itself, constitute proof that the mortgagor "owe[s] an obligation that can be foreclosed upon" (*see Urban Equity Partners, LLC v Aribisala*, 143 AD3d 887, 888 [2d Dept 2016]). Hence, where, as here, a plaintiff seeks to foreclose on a mortgage securing debt arising from a line of credit agreement, said plaintiff must submit "evidence that [the mortgagor] actually received any such cash advances" (*id.*).

In support of the motion, Movant submits the affidavit of its Vice President, Brandon Campbell, who attests to making it “based upon personal knowledge that I obtained through the review of and reliance upon those business records concerning the loan” (*see NYSCEF Doc #73*, ¶2). Campbell explains that upon executing and delivering the home equity agreement, Borrowers “executed and delivered a Note/Mortgage in the amount of \$164,000” secured by the subject premises, that thereafter, the note and mortgage were assigned to Movant and that Borrowers “defaulted on the terms of the Note and Mortgage by failing to make the mortgage payment that was due on October 8, 2015, and all subsequent payments” (*see id.*, ¶2-6). Campbell’s testimony surrounding Borrower’s alleged default under the line of credit agreement is set forth in paragraphs “7” and “8” of the affidavit, reproduced in relevant part below:

“Defendants NATALIYA KOROL AND ANDREY KOROL defaulted on the terms of the Note and Mortgage by failing to make the mortgage payment that was due on October 8, 2015, and all subsequent payments” (*id.*, ¶ 6);

“As of May 4, 2021 (as reflected in the business records attached as Exhibit "D"), there is due and owing on the mortgage loan the sum of \$236,703.09” (*id.*, ¶ 7).

At the end of these paragraphs, Campbell references a breakdown of the unpaid principal, current interest and various charges, as support for the allegations within Exhibit “D” to the motion, a copy of the “Beneficiary’s Demand For Payment” of Main Street Asset Solutions, Inc. (*see NYSCEF Doc #77*). However, Movant has not pointed anywhere in the record to evidence that it previously filed a lien on the subject premises or obtained a judgment entitling it to surplus funds (*see O’Connell*, 221 AD3d at 885, [“[U]pon the foreclosure of the first mortgage, [only] the lien of a junior mortgagee follow[s] the surplus”]). More importantly, the only mention of Defendant’s having received funds under the line of credit agreement is Campbell’s statement in paragraph “6” of the affidavit, reproduced in full above, that Borrowers “defaulted on the terms of the Note and Mortgage by failing to make the mortgage payment that was due on October 8, 2015, and all subsequent payments.” Defendant cannot make out a *prima facie* case to foreclose on a credit line mortgage in the absence of evidence that Defendant received any cash advances under the subject line of credit agreement (*see Aribisala*, 143 AD3d at 888).

Surplus funds are a judicial remedy for foreclosure (*see Maspeth Federal v O’Connell*, 221 AD3d 883, 885 [2nd Dept 2023] [internal quotations omitted] (“Surplus money from

a foreclosure sale is not a general asset of the owner of the equity of redemption, but stands in the place of the property for the purpose of distribution among those having vested interests in or liens on the property”), thus, Movant must demonstrate entitlement to distribution of funds therefrom. The Court finds that Movant attempts to piggyback off of Plaintiff’s successful foreclosure action, but has failed to submit adequate proof of the facts constituting the claim and, thus, has not demonstrated its entitlement to a surplus monies.

Accordingly, the above-mentioned motion by Movant for, inter alia, an Order directing disbursement of the surplus monies to Bronte Avenue Partners, LLC is **DENIED with leave to renew** upon proper papers.

The foregoing constitutes the Decision and Order of this Court.

E N T E R:

Dated: July 14, 2025



S.C.J. Cenceria P. Edwards, CPA