

DCC KA-6, LLC v 245 7th Retail LLC
2023 NY Slip Op 30206(U)
January 13, 2023
Supreme Court, New York County
Docket Number: Index No. 850265/2021
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

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INDEX NO. 850265/2021

DCC KA-6, LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 005

- v -

245 7TH RETAIL LLC, MARVIN AZRAK, VICTOR AZRAK,
NEW YORK CITY DEPARTMENT OF FINANCE, NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, JOHN DOES 1 THROUGH 10

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 118

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

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

The within action is to foreclose on a consolidated and modified mortgage encumbering a parcel of commercial real property located at 245-251 7th Avenue, Unit 2B, New York, New York. The mortgage secures a loan with an original principal amount of \$17,000,000.00 memorialized by a consolidated and modified note. The note and consolidated mortgage, both dated September 23, 2014, were given by Defendant 245 7th Retail LLC (“Retail”) to non-party Mercantil Commercebank, N.A. and were executed by Defendant Marvin Azrak, as Authorized Signatory of Retail. Concomitantly with these documents, a document titled “Non-Recourse Carve Out Guaranty Agreement” securing the indebtedness was executed by Defendants Marvin and Victor Azrak (“Guarantors”).

Plaintiff commenced this action alleging Defendants defaulted in making interest installment payments under the note and by not repaying the principal when the loan matured. Defendants Retail and Guarantors initially defaulted in appearing and a default judgment was granted by this Court in an order dated June 14, 2022. The parties stipulated to vacate these Defendants’ default and this Court’s order. Retail and Guarantors answered jointly and pled five affirmative defenses, including lack of standing.

Now, Plaintiff moves for, *inter alia*, summary judgment against all appearing Defendants, striking their answer and affirmative defenses, a default judgment against all non-appearing parties and to appoint a Referee to compute. Defendants Retail and Guarantors oppose the motion and cross-move to for summary judgment dismissing Plaintiff’s complaint as against Guarantors. Plaintiff opposes the cross-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 in repayment (*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]). As Defendants raised lack of standing in their answer, Plaintiff was required to demonstrate same (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd 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 Nathan Cann ("Cann"), an Authorized Person of Plaintiff. Cann averred that he had personal knowledge of the facts of this case and the events that transpired to date by virtue of employment with Plaintiff and review of relevant books and records. Also annexed was an affidavit from Eduardo Marino ("Marino"), a Custodian of Records of non-party Amerant Bank, N.A. ("Amerant"). Marino claimed familiarity with the recordkeeping practices of Amerant and claimed that records annexed to his affidavit related to a loan with a number ending "9663". These affidavits established the mortgage, note, and evidence of Mortgagor's default and were sufficiently supported by documentary evidence admissible pursuant to CPLR §4518 (*see eg Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*).

Concerning Plaintiff's standing, it 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]).

On standing, Defendants misconstrue the issue to be attended. Standing to bring a foreclosure action is measured when the action is *commenced* (*see id.* at 360), not thereafter. This is because when there is a transfer of any interest after an action is commenced, either the assignor or assignee may continue to prosecute or defend the action with or without formal substitution (*see* CPLR §1018; *Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574 [2d Dept 2020]; *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1st Dept 2017]). Here, it is undisputed that Amerant, not Plaintiff, commenced this action. As Amerant was the original lender, it was in direct privity with the Defendant Retail when the action was commenced and, therefore, unquestionably had standing (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]).

In opposition, Plaintiff failed to raise an issue of fact on any point. As to any affirmative defenses unaddressed by Defendants, 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 Bellafigliore*, 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]).

Turning to Defendants' cross-motion, it is granted on consent of the Plaintiff.

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 the cross-motion for summary judgment is granted on consent and the action is dismissed as to Defendants Marvin Azrak and Victor Azrak; and it is further

ORDERED that that **Clark Whitsett, Esq., 108-26 Myrtle Avenue, Richmond Hill, NY 11418-1235 - (718) 850-0003** 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 shall read as follows:

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

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DCC KA-6, LLC,

Index No. 850265/2021

Plaintiff,

-against-

245 7TH RETAIL LLC, NEW YORK CITY DEPARTMENT OF
FINANCE, NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD,
and JOHN DOES 1 THROUGH 10,

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 13, 2023, at 11:00 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.

1/13/2023

DATE

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

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE