

**Wilmington Trust, N.A. v 153 Elizabeth St., LLC**

2023 NY Slip Op 30207(U)

January 13, 2023

Supreme Court, New York County

Docket Number: Index No. 850275/2021

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. 850275/2021

WILMINGTON TRUST, NATIONAL ASSOCIATION,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

153 ELIZABETH STREET, LLC, 153 ELIZABETH HOTEL  
LLC, 30 KENMARE MASTER, LLC, EDMOND LI,  
ENVIRONMENTAL CONTROL BOARD OF THE CITY OF  
NEW YORK, THE CITY OF NEW YORK, PEOPLE OF THE  
STATE OF NEW YORK, JOHN DOE

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion 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 153 Elizabeth Street, New York, New York given by Defendant 153 Elizabeth Street LLC ("Elizabeth") and 153 Elizabeth Hotel LLC ("Hotel"). The mortgage secures a loan with an original principal amount of \$24,000,000.00 which is memorialized by a consolidated, amended and restated note. The note and mortgage, both dated April 8, 2016, were given to non-party Silverpeak Real Estate Finance LLC and were executed by Defendant Edmund Li ("Li"), as Authorized Signatory of both borrowers. Concomitantly with these documents, a document titled "Guaranty of Recourse Obligations" securing the indebtedness was executed by Defendant Li. Plaintiff commenced this action alleging Defendants defaulted under the note. Defendants Elizabeth, Hotel and Li answered jointly and a single combined affirmative defense/counterclaim alleging that Plaintiff breached the implied covenant of good faith and fair dealing.

Now, Plaintiff moves for *inter alia* summary judgment against Elizabeth, Hotel and Li, for a default judgment against the non-appearing parties, appointing a referee to compute and to amend the caption. Defendants Elizabeth, Hotel and Li oppose the motion and cross-move pursuant CPLR §3025[b] for leave to amend her answer to assert, *inter alia*, an affirmative defense of standing as well as to plead certain corrections. Plaintiff opposes the cross-motion.

As the proposed affirmative defense directly impacts what Plaintiff must proffer as a *prima facie* case for summary judgment (*see generally Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2<sup>nd</sup> Dept 2020]; *U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]), the Court will address that branch of the cross-motion first. Leave

to amend a pleading under CPLR §3025[b] is to be freely given “absent prejudice or surprise resulting directly from the delay” (*see e.g. O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 [1st Dept 2017]; *Anoun v City of New York*, 85 AD3d 694 [1st Dept 2011]; *see also Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). All that need be shown is that “the proffered amendment is not palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). To justify denial of such a motion, the opposing party “must overcome a heavy presumption of validity in favor of [allowing amendment]” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]).

Defendants demonstrated that standing, for pleading purposes, has merit. Plaintiff was not the original lender and appears to have become holder of the note through a series of endorsements contained in allonges. In opposition, Plaintiff failed to demonstrate the existence of any prejudice based upon the delay in seeking leave to amend (*see GMAC Mtge., LLC v Coombs*, 191 AD3d 37, 50-51 [2d Dept 2020]; *cf. HSBC Bank USA, N.A. v Szoffer*, 149 A.D.3d 1400 [2d Dept 2017]). Since Defendants have raised an issue for the first time in opposition to Plaintiff’s motion for summary judgment, Plaintiff is entitled to submit rebuttal evidence in reply to cure any deficiencies in its *prima facie* case on this issue occasioned by the amendment (*see GMAC Mtge., LLC v Coombs*, supra; *Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2d Dept 2015]).

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 eg 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]). Based upon the above amendment, Plaintiff was also required to demonstrate it had standing when this action was commenced (*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 Josef Bittman (“Bittman”), an Asset Manager of LNR Partners LLC (“LNR”), the special servicer for Plaintiff. Nowhere in his affidavit does Bittman claim his knowledge was founded in his personal observations (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019]) [“a witness may always testify as to matters which are within his or her personal knowledge through personal observation”]. Rather, Bittman averred that he had personal knowledge of the facts of this case by virtue of a review of the books and records of his employer. However, he failed to lay an appropriate foundation for the admission of any of the proffered documents as business records under CPLR §4518 (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]). The records evidencing the note and mortgage were created by the original lender, not Plaintiff, and Bittman also demonstrated no knowledge of the lender’s record keeping practices (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). Further, he did not attest any records relied on were

received from the makers, incorporated into the records their employers kept and that Plaintiff routinely relied on such records in its business (*see U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780, 782-783 [2d Dept 2019]; *cf. Bank of Am., N.A. v Brannon*, 156 AD3d 1, 10 [1st Dept 2017]). At most, Bittman's affidavit demonstrates that he conducted a naked "review of records maintained in the normal course of business [which] does not vest an affiant with personal knowledge" (*JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1517 [2d Dept 2019]).

Plaintiff's attempt to cure these defects with a further affidavit Bittman submitted in reply is inappropriate and may not be considered by the Court (*see Deutsche Bank Natl. Trust Co. v Adlerstein*, 171 AD3d 868, 870 [2d Dept 2019]; *see also Ditech Fin., LLC v Cummings*, 208 AD3d 634, 636 [2d Dept 2022]). Unlike the issue of standing, which was raised for the first time in opposition (*see Central Mtge. Co. v Jahnsen*, 150 AD3d 661, 664-665 [2d Dept 2017]), a *prima facie* case for foreclosure cannot be met upon reply. Accordingly, since none of the evidence proffered to demonstrate the note, mortgage, Defendants' default and Plaintiff's standing are admissible, Movant failed to establish any of the *prima facie* elements of the cause of action for foreclosure (*see Federal Natl. Mtge. Assn. v Allannah*, 200 AD3d 947 [2d Dept 2021]).

Regarding the counter claim, it is established that implicit in all contracts is an implied covenant of fair dealing and good faith (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153, [2002]), "which encompasses any promises that a reasonable promisee would understand to be included" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). Here, Defendants posit Plaintiff's breached this covenant "by sending its notice of acceleration and commencing this action when it did, thereby interfering with the Elizabeth Street Defendants' ability to market and sell the mortgaged property at fair market value and without the need for and expense of foreclosure proceedings" (Defendants' Answer ¶18). This claim fails, however, as "no obligation can be implied that 'would be inconsistent with other terms of the contractual relationship'" (*Dalton v Educ. Testing Serv.*, 87 N.Y.2d 384, 389 [1995], *citing Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304, [1985]). To accept Defendants' cause of action as viable could lead to the incongruous determination that Plaintiff breached the implied covenant by exercising its express right to accelerate the debt under the same contract.

Plaintiff has established that it is entitled to a default judgment against all non-appearing Defendants (*see CPLR §3215; SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend caption to substitute John Doe and Jane Doe in place of John Doe #1, John Doe #2, John Doe #3 through John Doe # 12 is granted without opposition (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment on its claim for foreclosure, appointment of a referee is denied, and it is

ORDERED that the branch of the motion for summary judgment dismissing the counterclaim is granted, and it is

ORDERED that the Defendants' cross-motion is granted only to the extent that they may file an amended answer containing the affirmative defense of lack of standing and the typographical and grammatical corrections, and it is

ORDERED that the branch of Plaintiff's motion for a default judgment is granted as against all non-appearing Defendants, and it is

ORDERED that the branch of Plaintiff's motion to amend the caption is granted and the amended caption is as follows:

SUPREME COURT STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
WILMINGTON TRUST, NATIONAL ASSOCIATION, AS  
TRUSTEE FOR THE BENEFIT OF THE REGISTERED  
HOLDERS OF WELLS FARGO COMMERCIAL  
MORTGAGE TRUST 2016-C34, COMMERCIAL  
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES  
2016-C34, BY AND THROUGH ITS SPECIAL SERVICER,  
LNR PARTNERS, LLC,

Plaintiff

Index No. 850275/2021

-against-

153 ELIZABETH STREET, LLC, 153 ELIZABETH HOTEL  
LLC, 30 KENMARE MASTER, LLC, EDMOND LI,  
ENVIRONMENTAL CONTROL BOARD OF THE CITY OF  
NEW YORK, THE CITY OF NEW YORK, PEOPLE OF THE  
STATE OF NEW YORK,

Defendants  
-----X

This matter is set down for a status conference on **March 15, 2023 @ 10:40 am** via Microsoft Teams.

1/13/2023  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

*John A. Kahn III*  
FRANCIS A. KAHN, III  
HON. FRANCIS A. KAHN III  
NON-FINAL DISPOSITION J.S.C.

OTHER  
 REFERENCE  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

APPLICATION:

CHECK IF APPROPRIATE: