

**Acres Loan Origination, LLC v 170 E. 80th St.
Mansion, LLC**

2023 NY Slip Op 30258(U)

January 24, 2023

Supreme Court, New York County

Docket Number: Index No. 850126/2021

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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ACRES LOAN ORIGINATION, LLC, INDEX NO. 850126/2021
Plaintiff, MOTION DATE _____
MOTION SEQ. NO. 002

- v -

170 EAST 80TH STREET MANSION, LLC, KATESHIN
GALLERY LLC, KATE JUNGHEE SHIN, THE NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
JOHN DOE NO I TO JOHN DOE NO. XX

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 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, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98

were read on this motion to/for

JUDGMENT - SUMMARY

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

The within matter is an action to foreclose on an amended, restated and consolidated mortgage given by Defendant 170 East 80th Street Mansion, LLC (“Mansion”) which encumbers a premises located at 170 East 80th Street, New York, New York. The mortgage secures an indebtedness in the original amount of \$23,000,00.00¹, memorialized by an amended, restated and consolidated note. The note and mortgage, both dated June 4, 2018, were executed by Defendant Kate Junghee Shin (“Shin”) is the sole member of Mansion. On the same date, the parties executed a document titled “Loan Agreement”. Concomitantly, therewith Defendants Shin and Kateshin Gallery, LLC (“Kateshin”) executed a “Recourse Guaranty” whereby they assented to individual responsibility for the indebtedness pursuant to its terms. Shin is also the sole member of Kateshin. The parties executed an amendment to the loan agreement on January 28, 2020, as well as an addendum of the former.

Plaintiff commenced this action and alleged causes of action for foreclosure and an award of attorney’s fees. By ordered dated November 19, 2021, Defendants’ pre-answer motion to dismiss pursuant to CPLR §3211 was denied. Defendants Mansion, Shin and Kateshin answered and pled twenty-five affirmative defenses, including lack of standing and failure to serve contractual pre-foreclosure notices.

Now, Plaintiff moves for *inter alia* summary judgment against Mansion, Shin and Kateshin, for a default judgment against the non-appearing parties, striking the affirmative defenses, appointing a referee to compute and to amend the caption. Defendants Mansion, Shin and Kateshin oppose the motion.

¹ According to the complaint, the principal balance is \$18,000,000.00.

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 Defendants' affirmative defense, 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]).

At the outset, on the issue of standing, it is undisputed that Plaintiff, as the original lender, was in direct privity with the Defendants 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]).

Plaintiff's motion was supported with an affidavit from Jaclyn Jesberger ("Jesberger"), Plaintiff's General Counsel. Jesberger claims the affidavit was made "personal knowledge and upon documents maintained by ACRES". However, the affidavit does not indicate what information is based on personal observation or derived from records (*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 their personal knowledge through personal observation"]. To the extent Jesberger's knowledge is based upon a review of the books and records of Plaintiff, the affiant failed to lay any 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]). At most, Jesberger's affidavit demonstrates 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]).

Accordingly, since none of the evidence proffered to demonstrate the note, mortgage and Defendants' default is in admissible form, Movant failed to establish any of the *prima facie* elements of the cause of action for foreclosure (*see Federal Natl. Mtge. Assn. v Allanah*, 200 AD3d 947 [2d Dept 2021]).

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]).

At the outset, Defendant Mansion expressly ratified the indebtedness and waived all defenses pertaining to same in paragraph eight of the amendment to the loan agreement (*see Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]). Similarly, Defendants Kateshin and Shin assented to a more extensive waiver of defenses in the guaranty (*see Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447 [1st Dept 2009]). Further, the guarantors cannot rely on any defenses personal to the borrower, except failure of consideration (*see I Bldg, Inc. v Hong Mei Cheung*, 137 AD3d 478 [1st Dept 2017]). Defendants’ opposition does not support that these waivers were rendered ineffective because Plaintiff caused or contributed to the default (*see Benefit St. Partners Operating Partnership, L.P. v 96 Wythe Acquisition LLC*, 191 AD3d 520 [1st Dept 2021]). Indeed, Defendants acknowledge that the maturity default was the result of the citywide lockdown implemented because of the Covid-19 pandemic.

Substantively, all the affirmative defenses 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]). Further, Defendant’s opposition only addressed the affirmative defenses of breach of the covenant of good faith and fair dealing. As such, the other affirmative defenses were abandoned when Defendants failed to raise specific legal arguments in support of same (*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]).

Regarding the affirmative defense of violation of the implied covenant of good faith and fair dealing, 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]). More specifically, the covenant “is breached when a party acts in a manner that—although not expressly forbidden by any contractual provision—would deprive the other party of receiving the benefits under their agreement” (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008], *citing Ellenberg Morgan Corp. v Hard Rock Cafe Assoc.*, 116 AD2d 266, 271 [1st Dept 1986]). Here, Defendants posit Plaintiff breached this covenant by entering negotiations to sell the note and mortgage to the very third-party lender Defendants were attempting to engage to provide financing to satisfy the indebtedness. Based upon the allegations contained in the affidavit in opposition, Defendants have stated a cognizable affirmative defense (*see Pansia Estate, Inc. v Broche*, ___ Misc3d ___, 2010 NY Slip Op 32298[U][Sup Ct NY Cty 2010]).

Defendants’ arguments regarding bad faith and election of remedies are unavailing as these are affirmative defenses which were not raised in the answer.

Accordingly, the branch of the motion to dismiss Defendants’ affirmative defenses is granted except as to the affirmative defense of breach of the implied covenant of good faith and fair dealing.

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (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 the caption 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 causes of action for foreclosure and appointment of a referee are denied, and it is

ORDERED that the branch of the motion for a default judgment against the non-appearing parties is granted, and it is

ORDERED that all the affirmative defenses in Defendants' answer, except the eleventh and eighteenth, are dismissed, and it is

ORDERED, that the caption is further amended to strike the names JOHN DOE #1 through JOHN DOE #XX, is granted, and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
ACRES LOAN ORIGINATION, LLC,
Plaintiff,

Index No. 850126/2021

-against-

170 EAST 80TH STREET MANSION, LLC., KATESHIN GALLERY
LLC, KATE JUNGHEE SHIN, THE NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,

Defendants.
-----X

This matter is set down for a status conference on **March 15, 2023 @ 11:20 am** via Microsoft Teams.

1/24/2023

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

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