

Valley Natl. Bank v 252 W. 31 St. Corp.

2023 NY Slip Op 31087(U)

April 4, 2023

Supreme Court, New York County

Docket Number: Index No. 850269/2021

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. 850269/2021

VALLEY NATIONAL BANK,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 003

- v -

252 WEST 31 ST. CORP., JUAN ORTIZ, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, JOHN AND JANE
DOE 1-10

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130

were read on this motion to/for

JUDGMENT - SUMMARY

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

In this action, Plaintiff seeks to foreclose on a mortgage on commercial real property located at 252 West 31st Street, New York, New York given by Defendant 252 West 31 St. Corp. ("West"). The mortgage secures a note which evidences a loan with an original principal amount of \$2,230,000.00. The note and mortgage, both dated January 23, 2020, were executed by Defendant Juan Ortiz ("Ortiz") as President and Secretary of West. Concomitantly with these documents, Ortiz executed a guaranty of payment of the note. Plaintiff commenced this action wherein it is alleged Defendant West defaulted in repayment of the loan. Defendants West and Ortiz answered and pled who raised fifty-seven [57] affirmative defenses, including Plaintiff's lack of standing, as well a counterclaim.

Now, Plaintiff moves for summary judgment against West and Ortiz, a default judgment against all other Defendants, an order of reference and to amend the caption. Defendants West and Ortiz oppose the 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 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]) as well as its substantial compliance with the pre-foreclosure notice requirements under the mortgage (*see eg Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [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]).

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 affirmation from Angela M. Morisco ("Morisco"), a First Vice President of Plaintiff. While Morisco claimed she was "fully familiar with the facts in this matter", no claim of "personal knowledge" of the events in this action was claimed (*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 Morisco's knowledge was based upon a review of the books and records of Plaintiff, the affiant failed to lay a 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, Morisco'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]). To the extent Plaintiff attempted to cure these defects with a further affidavit 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]).

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 the 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]).

As pled, 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]).

In opposition to the motion, Defendants only proffered an argument in support of the affirmative defenses that relate to Plaintiff's alleged premature acceleration of the note and failure to provide contractual pre-foreclosure notices. When this opposition is considered, the twenty-ninth through thirty-second affirmative defenses presently are viable. With respect to all the other affirmative defenses, by failing to raise specific legal arguments in rebuttal, these were 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 counterclaim appears to sound in "slander of title" based upon the commencement of this action and the concomitant filing of the *lis pendens*. Defendants also posit that splitting the mortgages caused a "stain" on title to the premises. "The elements of slander of title are (1) a communication falsely casting doubt on the validity of complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages" (*Brown v Bethlehem Terrace Associates*, 136 AD2d 222, 224 [3d Dept 1988]). The cause of action also requires a showing of malice (*see eg Regan v Lanze*, 42 AD2d 831 [4th Dept 1973]) and must be pleaded with specificity (*see CPLR §3016[a]*). The statement in the notice of pendency that this action was pending is undeniably true and cannot satisfy the first element (*id.*; *see also Sopher v Martin*, 243 AD2d 459 [2d Dept 1997]). With the finding Plaintiff had standing to commence this action, it cannot be shown Plaintiff acted with a reckless disregard for the truth or falsity of its claims when it commenced this action (*see Fink v Shawangunk Conservancy, Inc.*, 15 AD3d 754, 756 [3d Dept 2005]; *see also Vollbrecht v Jacobson*, 40 AD3d 1243, 1247 [3d Dept 2007]). Further, the counterclaim does not adequately particularize the special damages allegedly sustained. A claim of slander of title does not arise until a prospective sale is lost based upon the false cloud on title (*see Hanbidge v Hunt*, 183 AD2d 700, 701 [2d Dept 1992]). Here, Defendants offer no specifics as to the prospective buyer, the contract of sale, or what profit was lost (*see Kriger v Industrial Rehabilitation Corp.*, 8 AD2d 29, 33 [1st Dept 1959]). The claim regarding splitting the mortgages is entirely conclusory and incomprehensible. As such, the counterclaim fails.

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]).

The branch of the motion for the imposition of sanctions pursuant to 22 NYCRR § 130-1.1, awarding is denied as entirely meritless.

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment on its causes of action for foreclosure, appointment of a referee and imposition of sanctions 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 as well as the counterclaim are dismissed, and it is

ORDERED, that the caption is further amended to strike the names JOHN DOE #1 through JOHN DOE #10, is granted, and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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VALLEY NATIONAL BANK,

Plaintiff,

Index No. 850269/2021

-against-

252 WEST 31 ST. CORP., JUAN ORTIZ, NEW YORK
CITY DEPARTMENT OF TRANSPORTATION,

Defendants.
-----X

This matter is set down for a status conference on **May 25, 2023 @ 11:20 am** via Microsoft Teams.

4/4/2023
DATE

Francis A. Kahn III
FRANCIS KAHN, III, A.J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

HON. FRANCIS A. KAHN III
J.S.C.
FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: