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| <b>2 Cap Invs., LLC v Frog Invs., LLC</b>                                                                                                                                                                                      |
| 2023 NY Slip Op 31326(U)                                                                                                                                                                                                       |
| April 13, 2023                                                                                                                                                                                                                 |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 850074/2022                                                                                                                                                                                           |
| 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*INDEX NO. 850074/2022

2 CAP INVESTMENTS, LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

FROG INVESTMENTS, LLC, VIOLY MCCAUSLAND,  
BOARD OF MANAGERS OF THE ONE MORNINGSIDE  
PARK CONDOMINIUM, NEW YORK CITY DEPARTMENT  
OF TRANSPORTATION, NEW YORK CITY DEPARTMENT  
OF TAXATION AND FINANCE, JOHN DOE NO. 1  
THROUGH JOHN DOE NO. 10

## DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 73, 74, 75, 76, 77, 78, 79, 80, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

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

This is an action to foreclose on a multiple mortgages securing multiple loans evidenced by various notes for which Plaintiff was not the original lender. No less than sixteen documents (*ie* notes, allonges, assignment, modifications and mortgages) are referenced in and annexed to the complaint herein to evidence the transactions and encumbrance that that are the subject of this action. The mortgagor/borrower in these convoluted transactions was Defendant Frog Investments, LLC ("Frog") and that the salient loan/mortgage documents were all executed by Defendant Violy McCausland ("McCausland") as Managing Member of Frog. It also appears that in a document dated February 28, 2018, McCausland executed a guaranty of \$1,700,000.00 of the indebtedness. Plaintiff commenced this action wherein it is alleged Defendants defaulted in repayment under the subject note[s]. Defendants Frog and McCausland answered and pled seven affirmative defenses, including Plaintiff's lack of standing.

Now, Plaintiff moves for summary judgment against Frog and McCausland, a default judgment against all other Defendants, an order of reference and to amend the caption. Defendants Frog and McCausland 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 [1<sup>st</sup> Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1<sup>st</sup> Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1<sup>st</sup> 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 [2<sup>nd</sup> 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 [1<sup>st</sup> 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 Christopher J. Capuano ("Capuano"), a member of Plaintiff. Capuano claims his affidavit was made upon "personal knowledge" as well as the books and records of Plaintiff. However, he 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 his or her personal knowledge through personal observation"]. To the extent Capuano's knowledge was based upon a review of books and records, the affiant 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]). Capuano failed to state, in relation to either Plaintiff or prior holders, that he was familiar with their record keeping practices (*see IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]; *Bank of N.Y. Mellon v Gordon*, *supra*). Further, Capuano did not attest any records from prior makers were received from same, incorporated into the records his 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, Capuano'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 documentary evidence proffered to demonstrate the note, mortgage, Defendants' default and Plaintiff's standing 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]).

To the extent Defendants claim McCausland is somehow an improper party, that argument is inapposite. Defendant McCausland, as "[a] guarantor of the mortgage debt, while not a necessary party, is a permissible party in a mortgage foreclosure action" (2 Bergman, *New York Mortgage Foreclosures* §12:13[2]; *see also Trustco Bank, N.A. v Cannon Bldg. of Troy Assocs.*, 246 AD2d 797 [3d Dept 1998]; *Bank of E. Asia v Smith*, 201 AD2d 522, 523 [2d Dept 1994]; *Morrison v Slater*, 128 AD 467, 468 [1<sup>st</sup> Dept 1909]).

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]).

The first, second and third affirmative defenses pleading lack of standing and failure to provide contractual pre-foreclosure notices are presently still viable based upon the findings supra.

The fourth affirmative defense alleging failure to comply with RPAPL §1304 fails as a matter of law. RPAPL §1304 is inapplicable as it is for the benefit of borrowers who are “natural person[s]” and Frog is a limited liability corporation (*see* RPAPL §1304[6][a][1][i]; *HSBC Bank USA, N.A. v Tigani*, 185 AD3d 796, 799 [2d Dept 2020]).

The fifth affirmative defense under RPAPL §1303 fails as Movant demonstrated that notices in the appropriate form were served in accordance with the statutory requisites (*see eg US Bank v Nathan*, 173 AD3d 1112 [2<sup>nd</sup> Dept 2019]).

The sixth affirmative defense seeking an interest toll is not a viable defense as it relates to the amount due which is an issue for determination in the reference and, therefore, irrelevant to the viability of the claim for foreclosure (*see Wilmington Sav. Fund Socy., FSB v Moriarty-Gentile*, 190 AD3d 890, 892-893 [2d Dept 2021] [Defaulting mortgagor can appear and contest the amount due and owing]; *see also Board of Mgrs. of Cent. Park Place Condominium v Potoschnig*, 111 AD3d 586 [1<sup>st</sup> Dept 2013] *Bank of Am., N.A. v Terry*, 177 AD3d 669 [2d Dept 2019]).

The seventh affirmative defense alleging unclean hands, unconscionability, fraud and overreaching is 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 [1<sup>st</sup> Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1<sup>st</sup> 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]).

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 [1<sup>st</sup> 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 the fourth, fifth sixth and seventh affirmative defense in Defendants' answer is dismissed, and it is

ORDERED, that defendants "John Doe No. 1" through "John Doe No. 10" are hereby stricken and the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
2 CAP INVESTMENTS, LLC,

Plaintiff,

Index No. 850074/2022

-against-

FROG INVESTMENTS LLC,  
VIOLY McCAUSLAND,  
BOARD OF MANAGERS OF THE ONE  
MORNINGSIDE PARK CONDOMINIUM,  
NEW YORK CITY DEPARTMENT  
OF TRANSPORTATION,  
NEW YORK CITY DEPARTMETN OF  
TAXATION AND FINANCE,

Defendants.  
-----X

This matter is set down for a status conference on **June 21, 2023 @ 11:00 am** via Microsoft Teams.

4/13/2023

DATE

CHECK ONE:

☐

CASE DISPOSED

☐

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☒

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

*F. A. Kahn III*  
FRANCIS KAHN III, A.J.S.C.

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