

50 W. 91st St. Funding, LLC v 50W91 LLC

2023 NY Slip Op 31327(U)

April 11, 2023

Supreme Court, New York County

Docket Number: Index No. 850092/2022

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. 850092/2022

50 WEST 91ST STREET FUNDING, LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

50W91 LLC, DAVID DREYFUSS, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,
ENVIIRONMENTAL CONTROL BOARD OF THE CITY OF
NEW YORK, JOHN DOE 1 THROUGH JOHN DOE 100

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 69, 71, 73, 75, 86, 87, 88, 89, 91

were read on this motion to/for JUDGMENT - SUMMARY

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

This is an action to foreclose on a consolidated and modified mortgage given by Defendant 50W91 LLC (“50W91”) which encumbers a parcel of real property located at 50 West 91st Street New York, New York (Block 1204, Lot 150). The mortgage, given to non-party Esquire Bank, NA (“Esquire”), secures aa amended, consolidated and restated mortgage note which evidences a loan with an original principal amount of \$3,400,000.00. The note and mortgage, both dated April 29, 2016, were executed by Defendant David Dreyfuss (“Dreyfuss”) as Sole Member/Managing Member of 50W91. Concomitantly with these documents, Defendant Dreyfuss executed a limited guarantee of the indebtedness. Plaintiff commenced this action wherein it is alleged Defendants defaulted in repayment of the subject note. Defendants 50W91 and Dreyfuss answered and pled thirteen affirmative defenses, including Plaintiff’s lack of standing and failure to provide contractual pre-foreclosure notices.

Now, Plaintiff moves for summary judgment against 50W91 and Dreyfuss, a default judgment against all other Defendants, an order of reference and to amend the caption. Defendants 50W91 and Dreyfuss 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]).

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 Doris Shen ("Shen"), an Asset Manager of Plaintiff. Also annexed was an affidavit from Steven Dorritie ("Dorritie"), a Senior Managing Director of CLE Lending of Esquire. Both Shen and Dorritie sufficiently established a foundation under CPLR §4518 for admission of their respective employer's documents as business records via their personal knowledge of the record-keeping procedures of Plaintiff and Esquire (see *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Further, the records reviewed and referenced by the affiants were annexed to the motion (cf. *Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Shen's affidavit and the referenced documents sufficiently evidenced the note and mortgage. Although those documents were created by Esquire, they were also admissible since Shen attested that those records were received from the makers and incorporated into the records Plaintiff kept and Esquire routinely relied upon such documents in its business (see *U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). As to Defendants' default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). Here, Dorritie review of the attached account records demonstrated that Defendants defaulted in repayment of the loan (see eg *ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]).

Accordingly, Plaintiff established the mortgage, note, and evidence of mortgagor's default (see eg *Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

With respect a pre-foreclosure notice, no provision in either the note or mortgage required Plaintiff to serve a notice prior to accelerating the debt or commencing a foreclosure action.

On the issue of standing, in a foreclosure action 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]). "Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2d Dept 2015] [citations omitted]). The indorsement must be made either on the face of the note or on an allonge "so firmly affixed thereto as to become a part thereof" (UCC §3-202[2]). Further, "[t]he attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the

time of commencement” (*Deutsche Bank Natl. Trust Co. v Webster*, 142 AD3d 636, 638 [2d Dept 2016]; cf. *JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513 [2d Dept 2019]).

Here, the note was attached to the complaint, but the endorsement from Esquire to Plaintiff is contained in an allonge on a separate page which reveals no discernable evidence of firm attachment from a visual inspection. Resultantly, Plaintiff was required, but failed, to establish the allonge was “firmly affixed” to the original note (*see Nationstar Mtge., LLC v Calomarde*, 201 AD3d 940, 942 [2d Dept 2022]; *JPMorgan Chase Bank, N.A. v Grennan*, supra at 1516). The allegations regarding Plaintiff’s holder status contained in Shen’s affidavit are conclusory and insufficient (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 524 [1st Dept 2016]; *Deutsche Bank Natl. Trust Co. v Weiss*, 133 AD3d 704, 705 [2d Dept 2015]). Not every attachment can satisfy UCC §3-202[2] and Shen offered no description of the nature of the attachment (*see HSBC Bank, USA, N.A. v Roumiantseva*, 130 AD3d 983 [2d Dept 2015]; *Slutsky v Blooming Grove Inn*, 147 AD2d 208 [2d Dept 1989]).

Accordingly, Plaintiff failed to establish, *prima facie*, it had standing when this action was commenced.

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 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]).

The first, twelfth and thirteenth affirmative defenses which relate to the legal sufficiency of Plaintiff’s complaint, are unnecessary as a general matter since dismissal cannot be effectuated without a motion pursuant to CPLR 3211[a][7] (*see Riland v Frederick S. Todman & Co.*, 56 AD2d 350 [1st Dept 1977]). Normally, this defense is nothing more than “‘harmless surplusage,’ and . . . a motion by the plaintiff to strike the same should be denied” (*Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]). However, where all other affirmative defenses fail as a matter of law, it may be dismissed (*Raine v Allied Artists Productions, Inc.*, 63 AD2d 914, 915 [1st Dept 1978]).

The second affirmative defense which claims to reserve Mortgagor’s right of redemption is unnecessary as that right exists at common-law up until the property is sold.

The third affirmative defense claiming Plaintiff lacks standing is presently viable based upon the findings supra.

The fourth, ninth and eleventh affirmative defenses claims that the action is barred by the applicable statute of limitations, res judicata, acquiescence, waiver, ratification, bad faith, laches, estoppel, unclean hands, accord and satisfaction as well as champerty. The claim the action is barred by the statute of limitations, is conclusory and meritless. Defendants failed to offer any facts, or simply allegations, to support that the indebtedness under the note was accelerated more than six-years before this action was commenced (*cf. U.S. Bank N.A. v Salvodon*, 189 AD3d 925 [2d Dept 2020]; *21st Mtge. Corp. v Balliraj*, 177 AD3d 687 [2d Dept 2019]). The other legal precepts proffered 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]).

The fifth and eighth affirmative defenses, claiming that “[a]ny and all acts that the Plaintiff alleges to have been committed by the Answering Defendants was lawful, justified and/or undertaken in good faith” and that “Plaintiff’s claims are barred by the course of dealings between Plaintiff and Answering Defendants” are incomprehensible and inadequately pled.

The sixth affirmative defense of mitigation is unavailing in a foreclosure action (*see Marine Midland Bank, N. A. v Virginia Woods Ltd.*, 201 AD2d 625 [2d Dept 1994]; *HSBC Bank USA v Rodriguez*, ___ Misc 3d ___, 2016 NY Slip Op 32123[U][Sup Ct Queens Cty 2016]). Moreover, as this defense relates to the amount due and owing, it is not a viable defense to summary judgment (*see eg 1855 E. Tremont Corp. v Collado Holdings LLC*, supra).

The seventh affirmative defense that Plaintiff caused or contributed to its own damages is without merit. Where, as here, no tortious act has been pled by Plaintiff, this concept, which can best be described as “culpable conduct”, has no application herein. Indeed, where the damages arise out of express or implied contractual relations, “[m]erely charging a breach of a ‘duty of due care’, employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim” (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 390 [1987]).

The tenth affirmative defense claiming failure to satisfy conditions precedent fails for the reasons stated supra.

The branch of Plaintiff’s motion for a default judgment against the non-appearing parties is granted without opposition (*see CPLR §3215; SRMOF II 2012-1 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 third, are stricken, and it is

ORDERED that the branch of the motion to add JOHN DOE and JANE DOE as a Defendants is denied as the New York County Clerk will not accept any judgment with a "Doe" Defendant in the caption; and it is further

ORDERED that the Defendants captioned as "JOHN DOE #1" through "JOHN DOE #100" are neither necessary nor proper party defendants and their names are hereby stricken from the caption of the action and that the caption shall read as follows:

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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50 WEST 91ST STREET FUNDING, LLC,

Plaintiff,

Index No. 850092/2022

-against-


50W91 LLC, DAVID DREYFUSS, NEW YORK
STATE DEPARTMENT OF TAXATION AND
FINANCE, ENVIRONMENTAL CONTROL BOARD
OF THE CITY OF NEW YORK,

Defendants.
-----X

This matter is set down for a status conference on **May 18, 2023 @ 11:20 am** via Microsoft Teams.

4/11/2023

DATE



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

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NOT FILED DISPOSED

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER J.S.C.

REFERENCE

HON. FRANCIS A. KAHN III