

U.S. Bank N.A. v 167th St. CF Unit LLC

2023 NY Slip Op 31329(U)

April 13, 2023

Supreme Court, New York County

Docket Number: Index No. 850177/2022

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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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR
READY CAPITAL MORTGAGE FINANCING 2020-FL4,
LLC, BY AND THROUGH ITS SPECIAL SERVICER,
KEYBANK NATIONAL ASSOCIATION,

INDEX NO. 850177/2022
MOTION DATE _____
MOTION SEQ. NO. 001 002

Plaintiff,

- v -

167TH STREET CF UNIT LLC, AMIR HASID, NIR AMSEL,
ERAN POLACK

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 83, 84, 85, 86, 87, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 121

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 122, 123, 124, 125, 126, 127, 128, 129

were read on this motion to/for

JUDGMENT - SUMMARY

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

This is an action to foreclose on a mortgage encumbering a parcel of commercial real property located at 446-448 West 167th Street, Unit CF, New York, New York. The mortgage is evidenced by a consolidation, extension and modification agreement ("CEMA"). The CEMA secures a loan with an original principal amount of \$3,931,798.00 memorialized by an amended and restated note. The mortgage and note were given by Defendant 167th Street CF Unit LLC ("167th") to non-party Readycap Commercial, LLC ("Readycap") and executed by non-party Andrea Lawrence as Authorized Signatory of non-party HAP Development, LLC ("HAP"). HAP appears to be the third in a series of "shell" limited liability companies with ultimate control of 167th. Concomitantly, Defendants Amir Hasid ("Hazid"), Nir Amsel ("Amsel"), Eran Polack ("Polack") executed both a guaranty of recourse obligations and a payment guaranty of the indebtedness. Defendant 167th and non-party Keybank NA, as servicer, executed a forbearance agreement dated December 1, 2021, wherein a default in repayment was acknowledged.

Plaintiff commenced this action wherein it is alleged Defendant 167th defaulted in repayment of the loan and the individual guarantors defaulted in their contractual obligations. Defendant 167th answered and pled thirteen [13] affirmative defenses, including Plaintiff's lack of standing and personal

jurisdiction. Defendants Hasid, Amsel and Polack answered separately, but through the same counsel as 167th, and pled identical affirmative defenses.

Now, Plaintiff moves (Mot Seq No 1) for summary judgment against the appearing Defendants, a default judgment against all other Defendants and an order of reference. Defendants Hasid and Amsel oppose the motion. Defendants 167th and Polack oppose the motion and cross-move to dismiss the complaint pursuant to CPLR §3211[a][8]. Plaintiff opposes the cross-motion. Defendants Hasid and Amsel move (Mot Seq No 2) for summary judgment dismissing the complaint based upon a lack of personal jurisdiction. Plaintiff opposes the motion.

Plaintiff's motion for summary judgment is denied as the moving papers fail to comply with sections 202.8-b[c] and 202.8-g of the Uniform Rules for Trial Courts [22 NYCRR]. In any event, even were the motion considered on the merits, it would still fail.

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 affirmation from Shawyan Ahmadian ("Ahmadian"), an Asset Manager of Key Bank, the alleged special servicer for Plaintiff, U.S. Bank National Association, as Trustee for Ready Capital Mortgage Financing 2020-FL4, LLC ("US Bank"). Ahmadian 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 Ahmadian's knowledge was based upon a review of books and records, his affidavit laid a proper foundation for the admission of Key Bank's records into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Further, the records of US Bank were also admissible since Ahmadian sufficiently established that those records were received from the maker, incorporated into the records Key Bank kept and that it routinely relied upon such documents in its business (*see U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]).

However, Ahmadian failed to lay an appropriate foundation for the admission the records created by the assignor and original lender, ReadyCap (*eg* the note and mortgage). He demonstrated no

knowledge of Readycap's record keeping practices nor did he attest that Readycap's records were received and incorporated into KeyBank's records (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). At most, Ahmadian's affidavit demonstrates that he conducted a naked "review of [Readycap's] 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]).

Further, absent from Ahmadian's affidavit is any evidence demonstrating Key Bank's authority to act on behalf Plaintiff (*see US Bank v Tesoriero*, 204 AD3d 1066, 1068 [2d Dept 2022]; *HSBC Banyk USA, NA v Betts*, 67 AD3d 735 [2d Dept 2009]).

Accordingly, since necessary documentary evidence proffered to demonstrate Plaintiff's *prima facie* case is not in admissible form, Movant failed to establish a basis for summary judgment on its cause of action for foreclosure (*see Federal Natl. Mtge. Assn. v Allannah*, 200 AD3d 947 [2d Dept 2021]).

The cross-motion by 167th and Polack made pursuant to CPLR §3211[a][8] is untimely as it was filed more than 60 days after pleading that affirmative defense (*see* CPLR §3211[e]).

As to the motion for summary judgment dismissing the complaint based upon a lack of personal jurisdiction by Defendants Hasid and Amsel, "[t]he court does not have personal jurisdiction over a defendant when a plaintiff fails to properly effectuate service of process" (*Washington Mut. Bank v Murphy*, 127 AD3d 1167, 1173 [2d Dept 2015]). Ordinarily, "[a] process server's affidavit of service constitutes *prima facie* evidence of proper service and, therefore, gives rise to a presumption of proper service" (*Bethpage Fed. Credit Union v Grant*, 178 AD3d 997, 997 [2d Dept 2019]). A conclusory denial of service is insufficient to rebut the presumption and a hearing is mandated only when the defendant submits an affidavit substantiated by specific, detailed facts denying the process server's allegations (*id.*; *see also Wells Fargo Bank, NA v Spaulding*, 177 AD3d 817, 819 [2d Dept 2019]; *NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]).

As to Hasid and Amsel, the process server avers in two affidavits, that on September 22, 2022, he served, among other things, a summons and complaint on these parties, ostensibly pursuant to CPLR §308[2], by delivering those documents to "JOHN DOE (Authorized Agent)" at 3 East 54th Street, New York, New York. The process server also averred that the location was the actual place of business of Hasid and Amsel and attested to the required mailing. Plaintiff's evidence is *prima facie* proof of proper service (*see eg Jampolskaya v. Ilona Genis, MD, P.C.*, 205 AD3d 785 [2d Dept 2022]).

The affidavits Hasid and Amsel are insufficient to rebut the process server's affidavit. Both claim they were residents of Israel at the time service was made, that the location was not their place of business and that they never authorized anyone there to accept service. However, absent any documentary corroboration of their non-residency claims, Hasid and Amsel failed to rebut the presumption of proper service (*see BAC Home Loans Servicing, LP v Carrasco*, 160 AD3d 688 [2d Dept 2018]; *US Bank, N.A. v Peralta*, 412 AD3d 988 [2d Dept 2016]). More importantly, Hasid and Amsel both admitted in their answer Plaintiff's allegations in paragraphs 5 and 6 of the complaint that each "is an individual with an address of c/o Hap Investments, LLC, 3 East 54th Street, 15th Floor, New York, New York 10022". Further, in the guaranty of recourse obligations signed by Hasid and Amsel it is

expressly provided that any notice thereunder be served at "HAP Development LLC c/o HAP Investments LLC 3 East 54th Street, 15th Floor".

Accordingly, it is

ORDERED that motions and cross-motion by Plaintiff, Defendant's Hasid and Amsel, as well as Defendants 167th and Polack are denied.

ORDERED that all parties shall appear for a status conference on **June 1, 2023 @ 11:40 am** via Microsoft Teams.

4/13/2023
DATE

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

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |
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