1S REO Opportunity 1, LLC v Harlem Premier Residence LLC
2023 NY Slip Op 31748(U)
May 19, 2023
Supreme Court, New York County
Docket Number: Index No. 850151/2021
Judge: Francis A. Kahn III

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **32**

Justice

----------X

1S REO OPPORTUNITY 1, LLC,

Plaintiff,

- v -

HARLEM PREMIER RESIDENCE LLC,DOUNGRAT EAMTRAKUL, JOHN DOE #1 THROUGH JOHN DOE #12

Defendant.

----------X

INDEX NO. 850151/2021

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

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 commercial real property located at 210 W 122nd Street, New York, New York, given by Defendant Harlem Premier Residence LLC ("Harlem") to non-party Realty Closing Solution, LLC ("Realty"). The mortgage secures a promissory note which evidences a loan with an original principal amount of $2,050,000.00. The note and mortgage, both dated June 8, 2019, were executed by Defendant Doungrat Eamtrakul ("Eamtrakul") as Managing Member of Harlem. Concomitantly with these documents, Eamtrakul executed a guaranty of the indebtedness. Plaintiff commenced this action wherein it is alleged Defendant Harlem defaulted in repayment under the loan. Defendants Harlem and Eamtrakul answered jointly and pled five affirmative defenses including lack of standing.

Now, Plaintiff moves for *inter alia* summary judgment against the appearing Defendants, for a default judgment against the non-appearing parties, appointing a referee to compute and to amend the caption. Defendants oppose the motion and cross-move to dismiss the complaint pursuant to CPLR §3211[a][3]. Plaintiff opposes the cross-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 the above 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 Stacey Talton ("Talton"), the Foreclosure Supervisor of FCI Lender Service, Inc. ("FCI"), the alleged servicing agent for 1Sharpe Opportunity Intermediate Trust ("1Sharpe"), the sole member of Plaintiff. Talton's affidavit laid a proper foundation for the admission of FCI's records into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of other entities were also admissible since Talton sufficiently established that those records were received from the makers and incorporated into the records FCI kept and routinely relied upon such documents in its business (*see U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]). Annexed to the motion were records referenced by Talton (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). Further, the servicing agreement between FCI and 1Sharpe as well as Plaintiff's operating agreement demonstrating the authority of FCI to act herein were submitted (*see Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 901 [2d Dept 2019]).

Talton's affidavit and the referenced documents sufficiently evidenced the note and mortgage. As to the Mortgagor's 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, Talton's review of the attached account records demonstrated that the Mortgagor defaulted in repayment under the note (*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).

As to standing in a foreclosure action, the note is the dispositive instrument (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). "'Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident'" (*U.S. Bank N.A. v Carnivale*, 138 AD3d 1220, 1221 [2d Dept 2016], *quoting Onewest Bank, F.S.B. v Mazzone*, 130 AD3d 1399, 1400 [2d Dept 2015]). However, "mere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing or to make a plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note" (*U.S. Bank N.A. v Moulton*, 179 AD3d 734, 737 [2d Dept 2020]). "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]). "The 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*, supra).

Here, the note was attached to the complaint, but the endorsements are contained in two allonges on separate pages which reveals no discernable evidence of firm attachment from a visual inspection (*cf. US Bank NA v Hunte*, ____AD3d____, 2023 NY Slip Op 02022 [2d Dept 2023]). 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 Talton 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 cross-motion to dismiss, Defendants waived any reliance on the defense of lack of capacity by not including it in their answer or in a pre-answer motion to dismiss (*see* CPLR §3211[e]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 280 [1st Dept 2006]). Even if true, this type of deficiency is curable as Limited Liability Company Law §808[a] only effects a suspension of the ability to prosecute an action "unless and until such limited liability company shall have received a certificate of authority in this state" (*cf. 1700 First Ave. LLC v Parsons-Novak,* 46 Misc. 3d 30, 32 [App Term 1st Dept 2014]; *Acquisition Am. VI, LLC v Lamadore*, 5 Misc. 3d 461, 462 [Sup Ct NY Cty 2004]).

The argument concerning choice of law is a red-herring as paragraph 49 mortgage clearly states that an action to enforce the mortgage shall be "governed" and "construed" according to the law where the property is located, to wit New York State.

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, except the third, 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, to the extent that specific legal arguments were not proffered in support of any affirmative defense, those defenses 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 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 Defendants' cross-motion is denied in its entirety, and it is

ORDERED that all the affirmative defenses in Defendants' answer, except the third, are stricken, and it is

ORDERED that the Defendants captioned as "JOHN DOE" and "JANE DOE" 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
----------X
IS REO OPPORTUNITY 1, LLC

Plaintiff, Index No. 850151/2021

-against-

HARLEM PREMIER RESIDENCE, LLC, DOUNGRAT EAMTRAKUL; NORTHERN LIGHTS MANSION CORP.,

Defendants.
----------X

and it is

ORDERED that this matter is set down for a status conference on **July 19, 2023 @ 11:00 am** via Microsoft Teams.

5/19/2023
DATE

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

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE