

L&L Capital Partners LLC v 194 Orchard Group, LLC

2023 NY Slip Op 31774(U)

May 19, 2023

Supreme Court, New York County

Docket Number: Index No. 850124/2022

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. 850124/2022

L&L CAITAL PARTNERS LLC, AS ASSIGNEE OF
PREFERRED BANK,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

194 ORCHARD GROUP, LLC, ORCHARD CSMG
LLC, HESKY HAIM, MORRIS MEHRABAN, ISAAC
SAIDMEHR, ECON AIR SUPPLY INC., PREFERRED BANK,
JOHN DOES ONE THROUGH JOHN DOES TEN

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

were read on this motion to/for APPOINT - REFEREE

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

The within action is to foreclose on three mortgages encumbering a parcel of commercial real property located at 168 East 80th Street, New York, New York. This convoluted economic saga began when Defendants 194 Orchard Group LLC (“Group”) and Orchard CSMG LLC (“CSMG”) gave a mortgage to non-party Metropolitan Commercial Bank (“MCB”), dated May 29, 2015. The MCB mortgage secured a loan with an original principal amount of \$5,500,000.00 which was memorialized by a mortgage note of the same date. The MCB note and mortgage were executed by Defendants Hesky Haim (“Haim”) and Isaac Saidmehar (“Saidmehar”) as Managers of Group and CSMG, respectively.

On April 19, 2018, Defendants Group and Orchard gave another mortgage on the premises to non-party Preferred Bank (“Preferred”) to secure a loan with an original principal amount of \$2,700,000.00. This loan was memorialized by a building loan note of the same date. The 2018 Preferred note and mortgage were again executed by Haim and Saidmehar. Concomitantly with these documents, Group and CSMG gave a consolidated, extended and modified mortgage and security agreement to Preferred to secure the MCB mortgage debt. Also on that date, two continuing guarantees securing “any existing or future indebtedness to Preferred Bank” were executed by Defendants Haim, Saidmehar and Morris Mehraban (“Mehraban”).

On July 7, 2020, Defendants Group and Orchard gave a second building loan mortgage on the premises to Preferred to secure a loan with an original principal amount of \$520,000.00. This loan was memorialized by a second building loan note of the same date. The 2020 Preferred note and mortgage were also executed by Haim and Saidmehar.

On March 22, 2022, Defendants Group and CSMG entered a forbearance agreement with Preferred wherein, *inter alia*, the Mortgagors and Guarantors acknowledged the Mortgagors’ default in repayment and their “absolute and unconditional” obligation to pay the outstanding debts.

Plaintiff, L&L Capital Partners LLC (“Capital”), commenced this action alleging Defendants defaulted in repayment of the loans and under the guarantees. Defendants Group, CSMG, Haim, Saidmehr and Mehraban answered jointly and pled five affirmative defenses, including failure to provide contractual pre-foreclosure/acceleration notices. Twenty days later, Plaintiff filed an amended complaint, ostensibly pursuant to CPLR §3025[a]. Defendants filed an amended answer.

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. Mortgagor and Guarantor Defendants oppose the motion and cross-move pursuant CPLR §3025[b] for leave to amend their answer to assert, *inter alia*, an affirmative defense of standing. Plaintiff opposes the cross-motion.

As the proposed affirmative defense directly impacts what Plaintiff must proffer as a *prima facie* case for summary judgment (*see generally Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]), the Court will address that branch of the cross-motion first. Leave to amend a pleading under CPLR §3025[b] is to be freely given “absent prejudice or surprise resulting directly from the delay” (*see e.g. O’Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 [1st Dept 2017]; *Anoun v City of New York*, 85 AD3d 694 [1st Dept 2011]; *see also Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). All that need be shown is that “the proffered amendment is not palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). To justify denial of such a motion, the opposing party “must overcome a heavy presumption of validity in favor of [allowing amendment]” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]).

Defendants demonstrated that their affirmative defense of standing, is, at present, viably pled. Plaintiff was not the original lender and appears to have become holder of the note through a series of endorsements contained in allonges which it will have to prove with admissible evidence. In opposition, Plaintiff failed to demonstrate the existence of any prejudice based upon the delay in seeking leave to amend (*see GMAC Mtge., LLC v Coombs*, 191 AD3d 37, 50-51 [2d Dept 2020]; *cf. HSBC Bank USA, N.A. v Szoffer*, 149 AD3d 1400 [2d Dept 2017]). Since Defendants have raised an issue for the first time in opposition to a motion for summary judgment, Plaintiff is entitled to submit rebuttal evidence in reply to cure any deficiencies in its *prima facie* case occasioned by the amendment (*see GMAC Mtge., LLC v Coombs*, *supra*; *Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2d Dept 2015]).

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 amendment, 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 any required pre-foreclosure notice requirements contained in the loan documents (*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]).

Plaintiff's motion was supported with affidavits from Sylvia Tseng ("Tseng"), a Senior Vice President of Preferred, Adam Nagin ("Adam"), "a member, principal and authorized signatory of plaintiff", as well as Jason Nagin ("Jason"), who claims personal involvement in the loan sale agreement. Tseng claims the affidavit was made "based upon personal knowledge and business records of Avatar". However, Tseng 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 Tseng's knowledge is based upon a review of the books and records of Preferred, no foundation for the admission of any of the proffered documents as business records under CPLR §4518 was established (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]). Further, Tseng did not demonstrate knowledge of the record keeping practices of any other entity, for instance MCB, the lender in 2015 (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). Tseng also failed to attest that any records received from prior makers were incorporated into the records Preferred kept and were routinely relied on 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, Tseng'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]).

With respect to the issue of standing, the affidavits of Adam and Jason demonstrate that Plaintiff obtained physical possession of the notes at issue on August 31, 2022, before the action was commenced. However, absent from these affidavits is any reference to the allonges containing the endorsements at issue, including whether same were firmly affixed to the notes upon receipt (*see Wells Fargo Bank v Mitselmakher*, ___ AD3d ___, 2023 NY Slip Op 02709 [2d Dept 2023]; *Nationstar Mtge., LLC v Calomarde*, 201 AD3d 940, 942 [2d Dept 2022]; *JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513 [2d Dept 2019]; *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 Adam and Jason offered no description of the nature of any 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]). Further, no evidence of affixation is discernable from a visual inspection of the notes and allonges (*cf. US Bank NA v Hunte*, ___ AD3d ___, 2023 NY Slip Op 02022 [2d Dept 2023]). Parenthetically, the Court notes that the written assignment of the 2015 note and mortgage from MCB to Preferred, if it were in admissible form, could ostensibly document the transfer between these parties (*see US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1st Dept 2022]).

Accordingly, since none of the evidence proffered to demonstrate the note, mortgage, Defendants' default¹, issuance of pre-foreclosure notices and Plaintiff's standing are admissible, Movant failed to establish any of the *prima facie* elements of the cause of action for foreclosure (*see Federal Natl. Mtge. Assn. v Allannah*, 200 AD3d 947 [2d Dept 2021]).

The branch of the motion for a default judgment against all non-appearing Defendants is granted without opposition (*see CPLR §3215; SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

¹ Although acknowledgements in a forbearance agreement can constitute sufficient proof of the indebtedness and a mortgagor's default (*see Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602 [2d Dept 2013]; *EMC Mortg. Corp. v Stewart*, 2 AD3d 772 [2d Dept 2003]), in this case that document is not in admissible form.

The branch of Plaintiff's motion to amend caption to correct the names of "L&L CAITAL PARTNERS LLC." to "L&L CAPITAL PARTNERS LLC", "ECON AIR SUPPLY INC." to "ECONAIR SUPPLY INC." and removing PREFERRED BANK as defendant from the caption, and removing "JOHN DOES ONE THROUGH JOHN DOES TEN" 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 claim for foreclosure, appointment of a referee is denied, and it is

ORDERED that the Defendants' cross-motion is granted only to the extent that they may file an amended answer in the form annexed to their moving papers, and it is

ORDERED that the branch of Plaintiff's motion for a default judgment is granted as against all non-appearing Defendants, and it is

ORDERED that the branch of Plaintiff's motion to amend the caption is granted and the amended caption is as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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L&L CAPITAL PARTNERS LLC,
As Assignee of Preferred Bank,

Plaintiff

-against-

194 ORCHARD GROUP, LLC, ORCHARD
CSMG LLC, HESKY HAIM, MORRIS
MEHRABAN, ISAAC SAIDMEHR,
ECONAIR SUPPLY INC.,

Defendants

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This matter is set down for a status conference on **July 19, 2023 @ 10:00 am** via Microsoft Teams.

5/19/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NOT FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

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

FRANCIS A. KAHN III
J.S.C.