

Namdar E. Vil. Holdings LLC v 219 Ave. A NYC LLC

2023 NY Slip Op 32108(U)

June 23, 2023

Supreme Court, New York County

Docket Number: Index No. 850009/2021

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. 850009/2021

NAMDAR EAST VILLAGE HOLDINGS LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 003

- v -

219 AVE A NYC LLC A.K.A 219AVE A. NYC LLC, 158
FIRST AVE NYC LLC, 75 SECOND AVENUE LLC, 324 EAST
14TH STREET LLC, NEJATOLLAH SASSOUNI, SASSAN
SASSOUNI, SUSAN SASSOUNI, CRIMINAL COURT OF
THE CITY OF NEW YORK, CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149

were read on this motion to/for JUDGMENT - FORECLOSURE & SALE.

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

In this action, Plaintiff seeks to foreclose on a commercial consolidated and extended mortgage, dated June 18, 2019, encumbering four parcels of improved real property located at 219 Avenue A (Block 441, Lot 32), 158 First Avenue (Block 437, Lot 6), 324 East 14th Street (Block 455, Lot 19) and 75 Second Avenue (Block 460, Lot 39). The mortgage was given by Defendants 219 Ave. A NYC LLC, 158 First Ave NYC LLC, 324 East 14th Street LLC and 75 Second Avenue LLC (“LLC Defendants”) to former Plaintiff EV4 Associates LLC (“EV4”). By order dated February 16, 2022, Namdar East Village Holdings LLC (“Namdar”) was substituted as Plaintiff. The mortgage secures a consolidated, amended and restated note, of the same date as the mortgage, which memorializes loans with an original principal amount of \$11,500,000.00. The note and mortgage were executed on behalf of the LLC Defendants by Defendants Nejatollah Sassouni and Sassan Sassouni as Managers thereof. Concomitantly with these documents, Defendants Nejatollah Sassouni, Sassan Sassouni and Susan Sassouni (“Sassouni Defendants”) executed an unconditional personal guaranty of the note.

Plaintiff commenced this action wherein it is alleged Defendants defaulted in repayment of the note, payment of real estate taxes and insurance. Plaintiff also joined Defendant City of New York Environmental Control Board (“ECB”) as an alleged subordinate lien holder and seeks to extinguish same. Sassouni and LLC Defendants answered jointly and raised twenty-one affirmative defenses, including standing and pursuant to RPAPL §1303, §1304 and §1306. The

City of New York (“City”) also answered on behalf of Defendant ECB and pled four affirmative defenses, including a claim of lien priority, as well as a counterclaim and crossclaim.

The branches Plaintiff’s initial motion for summary judgment and an order of reference were denied by order of this Court dated May 10, 2022, for failure to establish a *prima facie* case. However, the branch of the motion to dismiss Defendants’ affirmative defenses was partially granted. All the affirmative defenses pled by Sassouni and LLC Defendants, except the thirteenth based on RPAPL §1303¹, were dismissed. The City’s affirmative defenses, except the first regarding lien priority, and its counterclaim were dismissed.

Now, Plaintiff again moves for [1] summary judgment against Sassouni and LLC Defendants as well as partial summary judgment against ECB; and [2] to appoint a referee to compute the sums due and owing to Lender. Sassouni and LLC Defendants oppose the motion.

In support of the branch of the motion for summary judgment on its cause of action for foreclosure, Plaintiff posits that its *prima facie* case is established based upon this Court’s dismissal of all Sassouni and LLC Defendants’ affirmative defenses. This argument is factually and legally incorrect. The Court’s ordered paragraph which stated that all the Sassouni and LLC Defendants’ affirmative defenses were dismissed was clearly erroneous. On page four of the prior decision, the Court held that Plaintiff failed to establish a basis for dismissal of the thirteenth affirmative defense based on RPAPL §1303[1][b].

Even were this allegation factually true, dismissal of Defendants’ affirmative defenses does not *ipso facto* demonstrate the requisite elements of Plaintiff’s foreclosure claim. This argument confuses an affirmative defense, which must be pleaded and proved by a defendant (CPLR §3018[b]), with a denial (CPLR §3018[a]). Unlike, for instance, standing and personal jurisdiction, “[i]n order to place in issue any of [Plaintiff’s] essential elements of the cause of action [for foreclosure], a defendant need only deny them in the answer” (*US Bank NA v Nelson*, 169 AD3d 110, 114 [2d Dept 2019]). Here, Sassouni and LLC Defendants’ answer, and the denials contained therein, were not dismissed.

Plaintiff’s reliance on Defendants’ responses to its notice to admit dated June 13, 2022, to prove the elements of its foreclosure cause of action is unavailing. It has been held, in this context, that responses to a notice to admit can constitute new evidence to support an otherwise proscribed successive motion for summary judgment (*compare United States Bank Nat’l Ass’n v Ioannides*, 192 AD3d 1405 [3d Dept 2021], *with Wells Fargo Bank, NA v Gittens*, ___AD3d___, 2023 NY Slip Op 03373 [2d Dept 2023]). Further, a notice to admit may make a “request for admission by the [party served] of the genuineness of any papers or documents” (CPLR 3123[a]). Nevertheless, “[a]ny admission shall be subject to all pertinent objections to admissibility which may be interposed at the trial” (CPLR 3123[b]). Therefore, such an admission “is not necessarily of such probative value as to relieve a party of the necessity of establishing its right to ultimate relief upon the trial” (*see Bajaj v General Assur.*, 18 Misc. 3d 25, 27 [App Term 2d 2007]; *Midland Funding LLC v Valentin*, 40 Misc3d 266 [Nassau Dist Ct 2013]; *see also United States Bank Nat’l Ass’n v Ioannides*, *supra* at 1408 [Notice to admit “[t]ogether” with admissible business records established *prima facie* case]).

¹ See *infra*.

Plaintiff also proffered an affidavit from Joshua Sabzevari (“Subzevari”), the Director of Capital Markets for Plaintiff. Unlike the affiant on the prior motion, Subzevari demonstrated the authority to act on behalf of the current Plaintiff Namdar. But Subzevari’s affidavit suffers from the same defect as the prior one, that neither personal knowledge of the transactions was demonstrated (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]), nor was a foundation for the admission of any business records, particularly those of EV4, under CPLR §4518 established (*see eg Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *Bank of NY v Gordon*, 171 AD3d 197 [2d Dept 2019]; *Bank of Am., N.A. v Brannon*, 156 AD3d 1 [1st Dept 2017]).

Even assuming the note and mortgage were admissible via the notice to admit, Plaintiff failed to demonstrate mortgagor and guarantor Defendants’ default. Defendants did not admit their default in their response. Rather, they appropriately declined to respond as the request concerned an issue the disputed in their answer and, therefore, in the litigation (*see generally Priceless Custom Homes, Inc. v O'Neill*, 104 AD3d 664 [2d Dept 2013]).

Plaintiff also failed to demonstrate its compliance with RPAPL §1303[1][b] as a matter of law in its moving papers. The attempt by Plaintiff to cure this defect with a further affidavit submitted in reply is inappropriate and may not be considered by the Court (*see Deutsche Bank Natl. Trust Co. v Adlerstein*, 171 AD3d 868, 870 [2d Dept 2019]; *see also Ditech Fin., LLC v Cummings*, 208 AD3d 634, 636 [2d Dept 2022]).

Accordingly, Plaintiff failed to establish the *prima facie* elements of the cause of action for foreclosure (*see Federal Natl. Mtge. Assn. v Allanah*, 200 AD3d 947 [2d Dept 2021]). As to the guarantors’ liability, typically, “[o]n a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty” (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Based upon the foregoing, proof of their default is absent.

The branch of the motion for summary judgment against ECB is granted without opposition. Plaintiff admits in its moving papers that ECB’s lien of \$67,317.64 has priority over its mortgage. Therefore, ECB’s defenses and affirmative to foreclosure are moot.

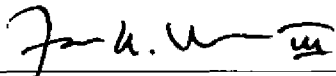
Accordingly, it is

ORDERED that the branches of Plaintiff’s motion for summary judgment on its causes of action for foreclosure and the appointment of a referee to compute are denied, and it is

ORDERED that the branch of Plaintiff’s motion for summary judgment against Defendant ECB is granted, and it is

ORDERED that the Court *sua sponte* amends the second ordered paragraph in its decision dated May 10, 2022, to the extent to that all the affirmative defenses of the LLC Defendants and Sassouni Defendants, except as to the thirteenth affirmative defense, are dismissed, and it is

ORDERED that all parties shall appear in-person for a status conference on **August 1, 2023 @ 10:00 am** in Courtroom 1127[b] of the Courthouse located at 111 Centre Street.

<u>6/23/2023</u> DATE			 FRANCIS A. KAHN III, A.J.S.C. HON. FRANCIS A. KAHN III J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>
		DENIED	<input checked="" type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>
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