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. 850042/2022

MOTION DATE

MOTION SEQ. NO. 003

WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE HOLDERS OF CD 2019-CD8 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2019-CD8,

Plaintiff,

- v -

63 SPRING LAFAYETTE, LLC,JACK TERZI, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, JOHN DOES 1 THROUGH 10,

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND) .

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 63 Spring Street, New York, New York, given by Defendant 63 Spring Lafayette LLC ("Spring") to non-party MUFG Union Bank ("MUFG"). The mortgage secures a promissory note which evidences a loan with an original principal amount of $18,500,000.00. The note and mortgage, both dated May 28, 2019, were executed by Defendant Jack Terzi ("Terzi") as Authorized Signatory of Spring. Concomitantly with these documents, the parties executed a loan agreement and Terzi executed a guaranty of the indebtedness. Plaintiff commenced this action wherein it is alleged that on or about April 1, 2020, Defendant Spring defaulted in repayment under the loan. Further, it is claimed that Plaintiff took assignment of the note and mortgage on or about August 22, 2019. Defendants Spring and Terzi answered jointly and pled eight 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][1] and [7] as well as §3212. 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 Ana G. Nunez ("Nunez"), an Asset Manager with LNR Partners, LLC ("LNR"), which is the "Special Servicer of the subject . . . commercial mortgage loan". Nunez's affidavit laid a proper foundation for the admission of the records of Plaintiff and LNR into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Nunez also claimed familiarity with the record keeping practices of the Master Servicer of the Loan, Midland Loan Services, a division of PNC Bank, National Association ("Midland"), but no foundation for Midland's records was proffered. Nevertheless, the records of Plaintiff and Midland were admissible since Nunez sufficiently established that those records were received from the makers and incorporated into the records LNR 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]). Annexed to the motion were certain of the records referenced by Nunez (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). Further, the power of attorney dated August 3, 2021, demonstrated LNR's authority to act on behalf of Plaintiff (*see Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 901 [2d Dept 2019]).

Nunez'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]). As Nunez' knowledge of Defendants' default was based solely upon a review of documents, the records evidencing the default (ie. an account ledger or similar records) were required to be proffered (*see US Bank v Rowe*, 194 AD3d 978 [2d Dept 2021]). The default notices annexed to Nunez' affidavit, even if admissible[1], were insufficient to establish the default in payment (*see Bank of N.Y. Mellon v Mannino*, 209 AD3d 707 [2d Dept 2022]).

Accordingly, as admissible evidence of Defendants' default was not proffered, Plaintiff failed to establish *prima facie* entitlement to summary judgment on the cause of action for foreclosure (*see generally Federal Natl. Mtge. Assn. v* Allanah, 200 AD3d 947 [2d Dept 2021]).

[1] The default notice was contained on a letterhead for Ballard Spahr LLC, counsel to Midland. Nunez laid no foundation for that entity's records.

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*, 175 AD3d 1513 [2d Dept 2019]).

Here, the note was attached to the complaint, but the endorsement in blank was contained in an undated allonge on a separate page, and annexed as a separate exhibit, 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 to establish the allonge was "firmly affixed" to the original note (*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*, supra at 1516). Not every attachment can satisfy UCC §3-202[2] and Nunez 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]).

As the assignment of the mortgage make no reference to the note, it conveys nothing and it a nullity (*see eg U.S. Bank N.A. v Dellarmo,* 94 AD3d 746, 748 [2d Dept 2012]["[W]hile assignment of a promissory note also effectuates assignment of the mortgage, the converse is not true: since a mortgage is merely security for a debt, it cannot exist independently of the debt, and thus, a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it"]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 280 [2d Dept 2011]).

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

As to the cross-motion to dismiss, a motion pursuant to CPLR §3211[a][1] may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and does not include, for instance, affidavits (*see Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]).

On a motion pursuant to CPLR §3211[a][7], a movant is required to establish either that a cause of action is facially insufficient (*see 298 Humboldt, LLC, v Torres*, 197 AD3d 1081, 1083 [2d Dept 2021], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]) or proffer evidence which flatly contradicts the legal conclusions and factual claims contained in the complaint (*see id.*; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). In assessing facial sufficiency, the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *Palazzolo v Herrick, Feinstein, LLP,* 298 AD2d 372 [2d Dept 2002]; *Schulman v Chase Manhattan Bank,* 268 AD2d 174 [2d Dept 2000]). In that context, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). As to evidentiary based motions, in the uncommon circumstance the evidence reaches the requisite threshold, the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller*, *supra*; *see also Lawrence v Miller*, 11 NY3d 588, 595 [2008]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

As to the guarantees, any claim that the Terzi, as the guarantor Defendant, is not a proper party to this action is without merit. "Any person who is liable to the plaintiff for payment of the debt secured by the mortgage may be made a defendant in the action" (RPAPL §1313). As such, "[a] guarantor of the mortgage debt, while not a necessary party, is a permissible party in a mortgage foreclosure action" (2 Bergman, New York Mortgage Foreclosures §12:13[2]; *see also Trustco Bank, N.A. v Cannon Bldg. of Troy Assocs.*, 246 AD2d 797 [3d Dept 1998]; *Bank of E. Asia v Smith*, 201 AD2d 522, 523 [2d Dept 1994]; *Morrison v Slater,* 128 AD 467, 468 [1st Dept 1909]).

Defendants' argument that Plaintiff's causes of action seeking a deficiency judgment and recovery under the guaranty fail to state a claim is without merit. The guaranty stated that Terzi "absolutely, irrevocably and unconditionally guarantees to the Lender (i) payment and the full, faithful and timely performance of any and all liabilities and obligations of Borrower whether now existing or hereafter incurred under the Environmental Indemnity, and (ii) payment of the Recourse Obligations defined in Article X of the Loan Agreement (all of which payments, liabilities and obligations in (i) and (ii) are hereinafter collectively referred to as the "Guaranteed Obligations")". At a minimum, Article X creates personal liability for "actual loss or damage to Lender arising from . . . the failure to pay any of the taxes, assessments or similar charges as specified in the Loan Documents, or . . . the failure to maintain insurance in compliance with the provisions of the Loan Documents". The guarantor is also liable for "all legal costs and expenses (including reasonable attorneys' fees) reasonably incurred by Lender in connection with litigation or other legal proceeding involving the collection or enforcement of the Loan".

In opposition to the cross-motion to dismiss, Plaintiff proffered another affidavit from Nunez wherein she avers the taxes and insurance were not paid on the premises and that Plaintiff has incurred legal expenses because of Defendant's default in repayment. Affidavits "may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, supra). When these allegations are assumed as true, as the Court must, the cause of action is sufficiently pled (*see generally Leon v Martinez*, 84 NY2d 83, 88 [1994]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course,

plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

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 first as it relates to standing, 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 first as it relates to standing, are stricken, and it is

ORDERED that the Defendants captioned as "JOHN DOES 1 THROUGH 10" are hereby stricken from the caption, and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE HOLDERS OF CD 2019-CD8 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2019-CD8,

Plaintiff,

Index No. 850042/2022

-against-

63 SPRING LAFAYETTE, LLC, JACK TERZI, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,

Defendants.

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and it is

ORDERED that this matter is set down for a status conference on **August 24, 2023 @ 10:40 am** via Microsoft Teams.

7/12/2023
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