

25th St. Multifamily LLC v 208-214 E. 25th St, LLC

2023 NY Slip Op 32566(U)

July 12, 2023

Supreme Court, New York County

Docket Number: Index No. 850189/2021

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. 850189/2021

25TH STREET MULTIFAMILY LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 003

- v -

208-214 E. 25TH ST, LLC, STEVEN CROMAN, CRIMINAL
COURT OF THE CITY OF NEW YORK, JOHN DOE 1
THROUGH JOHN DOE 100,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 179, 180, 181, 184, 196, 197, 198, 200, 234, 260, 263, 264, 266

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, the motion is determined as follows:

This is an action to foreclose on a consolidated and restated mortgage encumbering multiple parcels of improved real property located at 208-214 East 250th Street, New York, New York. The mortgage secures a restated note that memorializes a loan of \$25,000,000.00 made by the assignor of Plaintiff, 25th Street Multifamily LLC (“Multifamily”), to Defendant 208-214 E. 25th LLC (“Mortgagor”). Concomitantly with the note, Defendant Steven Croman (“Croman”) executed a personal guaranty of the loan.

Plaintiff alleged in the complaint that Defendants defaulted in repayment of the loan by failing to make installment payments due on July 10, 2021, and August 10, 2021. Prior to answering, Mortgagor and Guarantor moved to dismiss the complaint pursuant to CPLR §3211[a][7]. In support of that motion, Defendants argued that Plaintiff’s “attempt to accelerate the Loan and foreclose upon it the day after the August payment was missed is unconscionable given the *de minimis* nature of the default compared with the severity of the consequence, especially considering Borrower’s efforts to cure in full and the lack of prejudice to Plaintiff”. The Court denied the motion holding “Defendants . . . failed to conclusively establish, for pleading purposes, that Plaintiff’s actions were incontrovertibly unconscionable”. Thereafter, Defendants filed an answer wherein they pled sixteen affirmative defenses, including lack of standing.

Now, Plaintiff moves for summary judgment against Defendants, striking the answer and affirmative defenses, a default judgment against all non-appearing parties, and to appoint a Referee to compute. Defendants oppose the 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 mortgagors' default in repayment (see *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]). 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]).

Plaintiff's motion was supported with an affidavit from Jason Lebowitz ("Lebowitz"), a Manager for Plaintiff. Also proffered was Croman's affidavit submitted in support of Defendants' motion to dismiss. Lebowitz's affidavit established the mortgage, note, and evidence of mortgagor's default and was sufficiently supported by appropriate documentary evidence (see *eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra). Moreover, Croman's affidavit contains admissions of the indebtedness and Defendants' default thereunder (see *Board of Directors of Hunt Club at Coram Homeowners Assn., Inc. v Hebb*, 72 AD3d 997 [2d Dept 2010]; see also *Redrock Kings, LLC v Kings Hotel, Inc.* 109 AD3d 602 [2d Dept 2013]). Based on the foregoing, Plaintiff demonstrated its entitlement to judgment as a matter of law.

In opposition, Defendants' allegation that Plaintiff failed to comply with 202.8-g of the Uniform Rules for Trial Courts [22 NYCRR] is moot as this Court rendered a decision on that issue in its decision on Motion Sequence Number 4 (NYSCEF Doc No 199). Defendants' reliance on the defense of unconscionability based upon Plaintiff's alleged precipitous acceleration of the indebtedness is without merit. "The law is clear that when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene" (*First Fed. Sav. Bank v Midura*, 264 AD2d 407 [2d Dept 1999], citing *New York Guardian Mortgagee Corp. v Olexa*, 176 A.D.2d 399, 401 [2d Dept 1991]; see also *Home Sav. of Am. v Isaacson*, 240 AD2d 633 [2d Dept 1997]). Upon default, a Mortgagor can only reinstate upon tendering all the arrears along with any fees and costs associated with the default (see *eg United Cos. Lending Corp. v Hingos*, 283 AD2d 764, 765-766 [3d Dept 2001]). However, after a lender accelerates the loan, the borrower's only option is to redeem the entire debt (*id.*). In this case, it is undisputed that Defendants did not tender the arrears until almost a month after Plaintiff affirmatively accelerated the debt and commenced this action (see *First Fed. Sav. Bank v Midura*, supra at 407-408). Defendants' claim they did not default, and that Plaintiff acted in bad faith are entirely belied by the established facts (*cf. New York Guardian Mortgagee Corp. v Olexa*, 176 AD3d 399 [3d Dept 1991]).

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 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 Bellafigiore*, 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 (*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 (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Plaintiff is awarded summary judgment against the appearing parties and a default judgment against the non-appearing defendants; and it is further

ORDERED that that **Matthew D. Hunter III, Esq., 108-18 Queens Blvd Forest Hills, NY 10016 (718) 309-1660** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing or is required to perform other significant services in issuing the report, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee and to defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may sua sponte vacate this order and direct plaintiff to move again for an order of reference and the Court may sua sponte toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/suptmanh)); and it is further

All parties are to appear for a virtual conference via Microsoft Teams on November 2, 2023, at 10:00 a.m. If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

7/12/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

Francis A. Kahn III

FRANCIS A. KAHN III
HON. FRANCIS A. KAHN III
J.S.G.