Roys Realty Group, LLC v Eighth Ave. 154 LLC
2023 NY Slip Op 32678(U)
August 2, 2023
Supreme Court, New York County
Docket Number: Index No. 850022/2022
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

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ROYS REALTY GROUP LLC,

Plaintiff,

- v -

EIGHTH AVENUE 154 LLC,DAVID SHEMEL, NEW YORK STATE DEPT. OF TAXATION & FINANCE, NEW YORK CITY DEPT. OF FINANCE, JOHN DOE NOS. 1-25,

Defendant.

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INDEX NO. 850022/2022

MOTION DATE ______

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 59, 60, 61, 62, 63, 64, 65, 66, 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, 99, 100

were read on this motion to/for JUDGMENT - SUMMARY.

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

The within action is to foreclose on a mortgage encumbering a parcel of commercial real property located at 154 8th Avenue, New York, New York given by Defendant Eighth Avenue 154, LLC ("Eighth") to non-party 154 Roys Realty, LLC ("154 Roys"). The mortgage secures a loan with an original principal amount of $4,750,000.00 which is memorialized by a mortgage note which was allegedly assigned via endorsement to Plaintiff. The note and mortgage, both dated January 12, 2016, were and were executed by Defendant David Shemel ("Shemel"), as Authorized Signatory of Eighth. Concomitantly with these documents, Shemel executed a carveout guaranty of the indebtedness.

Plaintiff commenced this action alleging, *inter alia*, Defendants defaulted in repayment under the note. Defendants Eighth and Shemel answered jointly and pled fifteen [15] affirmative defenses, including lack of standing as well as four [4] counterclaims. Now, Plaintiff moves for *inter alia* summary judgment against Eighth and Shemel, for a default judgment against the non-appearing parties, to strike the affirmative defenses, to appoint a referee to compute and to amend the caption. Defendants Eighth and Shemel oppose the motion.

In moving for summary judgment on its foreclosure cause of action, 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 Defendant's 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]). Since Defendant Milner raised lack of standing and failure to provide a contractual pre-foreclosure notice in the answer, Plaintiff was required to demonstrate its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]) as well as its substantial compliance with the requisites under paragraph 22 of the mortgage (*see eg Wells Fargo Bank, N.A. v McKenzie,* 186 AD3d 1582, 1584 [2d Dept 2020]). Similarly, Plaintiff was obliged to

demonstrate its strict compliance with RPAPL §§1303 and 1304 (*see U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]).

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 by an affidavit from Roy Savelli ("Savelli"), a member of Plaintiff. Savelli claims his affidavit was made based upon "review and upon my personal knowledge of the stated facts and circumstances and books and records which Plaintiff maintains and are in my possession". However, he 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"]). Savelli established a foundation under CPLR §4518 for admission of his employer's documents as business records via his personal knowledge of the record-keeping procedures of Plaintiff (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). However, the salient loan documents were created by 154 Roys and Savelli failed to show knowledge of any other entity's record keeping practices (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). Savelli also failed to attest that any records received from prior makers were incorporated into the records Plaintiff 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]).

As to Defendants' 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]). Since Savelli's knowledge of Defendants' default was admittedly 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 Savelli's 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, since none of the evidence proffered to demonstrate the note, mortgage and Defendants' default is in admissible form, Movant failed to establish any of 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 guarantor's 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

[1] The multiple default notices were contained on letterheads from Plaintiff's attorneys. Savelli laid no foundation for those entities' records.

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 absence of admissible evidence, neither the guarantee nor the underlying debt has been proven.

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 endorsement is contained in an allonge on a separate page which reveals no discernable evidence of firm attachment from a visual inspection (*cf. US Bank NA v Hunte*, 215 AD3d 887 [2d Dept 2023]). Resultantly, Plaintiff was required, but failed, to establish the allonge was "firmly affixed" to the original note (*see 938 St. Nicholas Ave. Lender LLC v. 936-938 Cliffcrest Hous. Dev. Fund Corp.*, ___AD3d___, 2023 NY Slip Op 03885 [1st 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 Savelli 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. To the extent Plaintiff may have attempted to cure these defects 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]).

As to the branch of Plaintiff's 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]).

The affirmative defense of standing is, at present, viable based upon the determination supra.

The affirmative defenses claiming "laches, release, and/or waiver" as well as statute of frauds, documentary evidence, unjust enrichment and unreasonable restraints on alienation are entirely conclusory and unsupported by any facts in the answer or by the papers submitted in opposition. As such, these affirmative defenses are nothing more than an unsubstantiated legal conclusion which is 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]).

The affirmative defense claiming an absence of necessary parties is insufficiently pled as Defendants do not specify which parties is indispensable to Plaintiff's foreclosure action, as opposed to simply necessary or permissive (*see* RPAPL §1311; *Polish Natl. Alliance v White Eagle Hall Co.*, 98 AD2d 400, 403 [2d Dept 1983]).

The affirmative defenses alleging violations of RPRPL §§1302, 1304 and 1306 all fail as those sections are not applicable as the property neither involves a residential mortgage as defined in those statutes nor is the mortgagor a natural person (*see* RPAPL §1304[6][a][1][ii] and [iii]; *Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]; *Independence Bank v Valentine*, 113 AD3d 62 [2d Dept 2013]). Since RPAPL §1304 is inapplicable, compliance with RPAPL §1306 was not required (see RPAPL §1306[1]).

The affirmative defense which asserts the mortgagors were not served with a notice pursuant to RPAPL §1303[1][a] fails as the subject properties are not "owner-occupied" dwellings as the owners are limited liability companies. With respect to notice required by RPAPL §1303[1][a], Plaintiff annexed an affidavit of service wherein service of the required notice upon the tenants of the premises was established.

The affirmative defense alleging Plaintiff violated unidentified sections of the Federal Truth in Lending Act is completely conclusory and, as a result, insufficiently pled.

The affirmative defense sounding in culpable conduct and/or mitigation is unavailing. Where, as here, no tortious act has been pled by Plaintiff, the concept of culpable conduct has no application herein. Indeed, where the damages arise out of express or implied contractual relations, "[m]erely charging a breach of a 'duty of due care', employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim" (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 390 [1987]). Further, in a foreclosure action, the defense of mitigation is unavailable (*see Marine Midland Bank, N. A. v Virginia Woods Ltd.*, 201 AD2d 625 [2d Dept 1994]; *HSBC Bank USA v Rodriguez*, ____Misc 3d____, 2016 NY Slip Op 32123[U][Sup Ct Queens Cty 2016]). As this defense relates to the amount due and owing, it is not a viable defense to summary judgment (*see eg 1855 E. Tremont Corp. v Collado Holdings LLC,* supra).

The affirmative defense of documentary evidence fails as such a claim "is not by itself an affirmative defense, but merely one way in which a defense may be raised or proven" (*see Sotomayor v Princeton Ski Outlet Corp.*, 199 AD2d 197 [1st Dept 1993]).

The affirmative defense alleging the action is barred by the statute of limitations, is conclusory and meritless. Defendants failed to offer any facts, or simply allegations, to support that the indebtedness under the note was accelerated more than six-years before this action was commenced (*cf. U.S. Bank N.A. v Salvodon*, 189 AD3d 925 [2d Dept 2020]; *21st Mtge. Corp. v Balliraj*, 177 AD3d 687 [2d Dept 2019]).

With respect to the counterclaims, Defendants validly waived the right to assert same in the loan documents (*see Petra CRE CDO 2007-1, Ltd. v 160 Jamaica Owners, LLC*, 73 AD3d 883 [2d Dept 2010]). In any event, the claim of violation of the implied covenant of good faith and fair dealing was abandoned when not addressed in the opposition papers (*see generally U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]). Further, Eighth's second and third counterclaim as well as Shemel's first counterclaim for declaratory relief are entirely unnecessary. Plaintiff's standing and the Defendants' liability under either a deficiency judgment or the guaranty are not distinct from the relief sought in Plaintiff's complaint (*see Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355, 358 [1st Dept 2006]).

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 all the affirmative defenses in Defendants' answer, except the first as it relates to standing, and all the counterclaims are stricken, and it is

ORDERED that the Defendants captioned as "JOHN DOE" are hereby stricken from the caption, and it is further

ORDERED the caption is amended as follows:

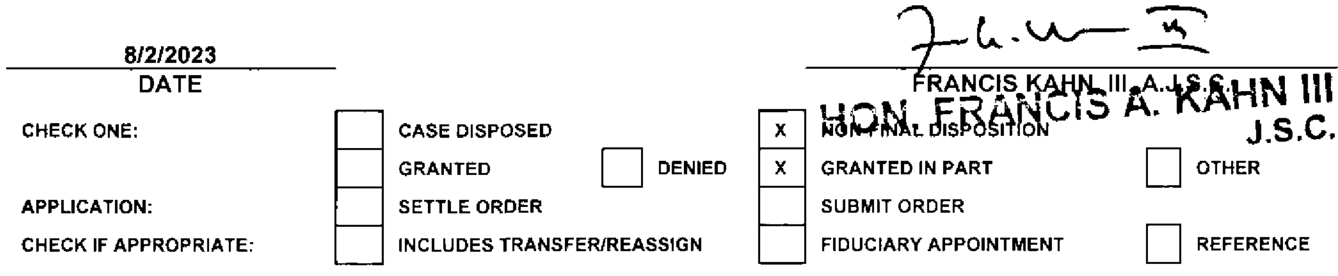
SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK
--X
ROYS REALTY GROUP LLC,
Plaintiff, Index No. 850022/2022

-against-

EIGHTH AVENUE 154 LLC, DAVID SHEMEL,
NEW YORK STATE DEPT. OF TAXATION &
FINANCE, NEW YORK CITY DEPT. OF FINANCE
Defendants.
--X

and it is

ORDERED that this matter is set down for a status conference on **October 12, 2023 @ 11:00 am** via Microsoft Teams.



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