

BDS III NY 1369 Broadway LLC v Broadway Star Realty, LLC

2023 NY Slip Op 34034(U)

November 9, 2023

Supreme Court, New York County

Docket Number: Index No. 850029/2022

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 PART 32

Justice

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INDEX NO. 850029/2022

BDS III NY 1369 BROADWAY LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 003

- v -

BROADWAY STAR REALTY, LLC, JOSHUA GOLDBERG, JOHN DOE NOS. 1-12, THE NAMES OF THE LAST TWELVE DEFENDANTS BEING UNKNOWN TO PLAINTIFF, PLAINTIFF INTENDING TO DESIGNATE THEREBY PERSONS OR PARTIES HAVING OR CLAIMING TO HAVE AN INTEREST IN OR LIEN UPON THE DESCRIBED PREMISES,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

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

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

In this action Plaintiff seeks to foreclose on a consolidated, amended and restated mortgage encumbering commercial real property located at 1369 Broadway, New York, New York. The mortgage, dated November 15, 2018, was given by Defendant Broadway Star Realty LLC ("Broadway") to non-party BDS III Mortgage Capital J LLC, ("Capital") and secures a loan with an original principal amount of \$30,300,000.00 which is memorialized by a consolidated, amended and restated note of the same date. Further, the parties concurrently executed a loan agreement. The note, mortgage and loan agreement were executed by Defendant Joshua Goldberg ("Goldberg") as Manager of Broadway. Concomitantly with these documents, Goldberg executed a guaranty of recourse obligations with respect to the indebtedness. On February 8, 2018, Capital purportedly executed a general assignment of the loan documents to non-party BDS III Loan Seller LLC ("Seller"). On the same day, Seller allegedly executed a general assignment of the loan documents to non-party BDS 2019-FL3 LTD ("BDS 2019"). On October 13, 2020, BDS 2019 apparently executed a general assignment of the loan documents to Plaintiff.

Non-party Capital commenced this action on January 31, 2022, alleging inter alia that Mortgagor defaulted in repayment of the loan when it matured on December 1, 2021. Defendants Broadway and Goldberg answered and pled four affirmative defenses, including lack of standing. Now, Plaintiff moves for summary judgment against the Defendant Broadway, for an order of reference and to amend the caption. Defendants Broadway and Goldberg 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 Defendants' 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]). Based on the affirmative defenses pled, Plaintiff was required to demonstrate, *prima facie*, its standing (see eg *Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]) and its strict compliance with RPAPL §§1304 and 1306 (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]). In support of a motion for summary judgment on a cause of action for foreclosure, 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 Teresa M. Hough ("Hough"), a Senior Managing Director and the Chief Asset Officer with Bridge Debt Strategies Fund Manager LLC ("Bridge"), the manager of Plaintiff. Hough claims that her affidavit was made based upon "my personal knowledge and knowledge I have acquired in reviewing the BDS Fund Manager and BDS III records concerning the loan and property at issue in this action". Hough established a foundation under CPLR §4518 for admission of Plaintiff's documents as business records via her personal knowledge of the record-keeping procedures of Plaintiff (see *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). However, affiant does not indicate what information in the affidavit 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 Hough's knowledge is based upon a review of the books and records of Plaintiff's assignors, which seemingly created the salient records, Hough failed to demonstrate knowledge of any other entity's record keeping practices and, as such, no foundation for the admission the business records of any other entity under CPLR §4518 was established (see eg *Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]; *Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]). Hough also failed to attest that any assignor's records received from those 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]). With respect to these records, Hough's affidavit demonstrates, at most, a naked "review of records maintained in the normal course of business [was conducted which] does not vest an affiant with personal knowledge" (*JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1517 [2d Dept 2019]).

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 Hough'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 in admissible form (see *US Bank v Rowe*, 194 AD3d 978 [2d Dept 2021]). Ostensibly, Hough could establish that Broadway defaulted when the loan matured but as presently constituted, the proof is insufficient. Hough does not indicate whether her knowledge on this point is personal or founded in records created by Plaintiff. If it is indeed from the latter, the records evidencing the default (ie. an account ledger or similar records) were not proffered (see eg *US Bank v Rowe*, 194 AD3d 978 [2d Dept 2021]).

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 standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor/defendant and mortgagee/plaintiff, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). As to the latter two circumstances, 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]). Standing is assessed when an action is commenced (*Aurora Loan Servs., LLC v Taylor*, supra). Here, since there is no indication that the written assignments or allonges were created by Plaintiff, the evidence to support standing in those manners is not in admissible form. Concerning direct privity, non-party Capital, the original lender, was the Plaintiff when the action was commenced. Ordinarily, this would be adequate to demonstrate standing. However, Movant has affirmed in multiple affidavits and affirmations filed in this action that, months prior to commencement of this action, the note and mortgage were assigned to the current Plaintiff.

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

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 other affirmative defenses and counterclaims 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]). Further, as no specific legal arguments were proffered in support of any affirmative defense or counterclaim, other than standing, those defenses and claims were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafore*, 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 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 fourth 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

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BDS III NY 1369 BROADWAY LLC,

Plaintiff,

-against-

BROADWAY STAR REALTY, LLC, JOSHUA
GOLDBERG,

Defendants.
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and it is

ORDERED that this matter is set down for a status conference on **December 7, 2023 @ 12:00 pm** via Microsoft Teams.

11/9/2023

DATE



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

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

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

APPLICATION:

GRANTED

DENIED

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

SETTLE ORDER

SUBMIT ORDER

REFERENCE

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT