

88 Global Partners LLC v 141 E. 88th St. Realty LLC
2023 NY Slip Op 34348(U)
November 17, 2023
Supreme Court, New York County
Docket Number: Index No. 850089/2022
Judge: Francis A. Kahn III
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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

-----X

INDEX NO. 850089/2022

88 GLOBAL PARTNERS LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 005

- v -

141 EAST 88TH STREET REALTY LLC, BEN ASHKENAZY,
BOARD OF MANAGERS OF THE PHILIP HOUSE
CONDOMINIUM, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE, NEW YORK CITY
DEPARTMENT OF TAXATION AND FINANCE, FEDEX
OFFICE AND PRINT SERVICES, INC., FLOWERS BY
PHILIP CORP., PB UPPER EAST SIDE LLC, WILLOW POP
INC. D/B/A WILLOW POP, PATIS 1311 LLC D/B/A PATIS,
JOHN DOE #1 THROUGH JOHN DOE #10,

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199 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 severed mortgage encumbering six parcels of commercial real property located at 141 East 88th Street a/k/a 1327-1329 and 1311-1337 Lexington Avenue, Commercial Units 1, 2, 3, 4, 4A and 5, New York New York (Block: 1517, Lot 1101, 1102, 1103, 1104, 1105 and 1106). The mortgage was given by Defendant 141 East 88th Street Realty, LLC ("Realty") to non-party 88th Street NY Funding LLC ("Funding") to secure a loan with an original principal amount of \$13,000,000.00 which is memorialized by a restated mortgage note. The note and mortgage are both dated February 7, 2014. The note was executed by non-parties Daniel Levy ("Levy") as vice president of Realty, and the mortgage was executed by non-party Susan Hewitt ("Hewitt") as president of Realty. On the same date, a "modification and extension agreement" was signed by Realty and non-party BankUnited, NA. ("BankUnited"). Concomitantly with these documents, Defendant Ben Ashkenazy ("Ashkenazy") executed two guarantees, one titled "partial" and the other "non-recourse". On May 20, 2020, Realty, Ashkenazy and BankUnited executed a "Commercial Loan Payment Deferral Agreement".

Plaintiff commenced this action alleging *inter alia* Defendants defaulted in repayment under the note. With leave of the Court, Plaintiff filed an amended complaint. Defendants Realty and Ashkenazy answered jointly and pled three [3] affirmative defenses. Now, Plaintiff moves for *inter alia* summary judgment against Realty and Ashkenazy, striking the appearing Defendants' answer, for a default judgment against the non-appearing parties, for a money judgment against Guarantor Ashkenazy, severance of Plaintiff's fourth and fifth

causes of action, appointing a referee to compute, and to amend the caption. Defendants Realty and Ashkenazy 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 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]). 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 Isaac Aryeh ("Aryeh"), a member of Plaintiff. Aryeh stated that his affidavit was based upon both his personal knowledge and examination of business records. His affidavit laid a proper foundation for the admission of Plaintiff's records into evidence under CPLR §4518 (see *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of other entities were also admissible since Aryeh sufficiently established that those records were received from the makers and incorporated into the records Plaintiff 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]). Further, annexed to the motion were records referenced by Aryeh (cf. *Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Aryeh'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]). Here, Aryeh's personal knowledge and the attached account records demonstrated that the Mortgagor defaulted in repayment under the notes (see eg *ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]).

In opposition, Defendants proffered no arguments on the branches of Plaintiff's motion related to summary judgment on its foreclosure cause of action.

As to the guaranty, "[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" (see *4 USS LLC v DSW MS LLC*, 120 AD3d 1049, 1051 [1st Dept 2014], quoting *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Under the "partial" guaranty, Ashkenazy "[u]nconditionally and absolutely guarantee[d] payment of ten (10%) percent of the principal amount of the Loan required to be paid pursuant to the Loan Documents". The guaranty also provides that it "may be enforced by the Mortgagee without first resorting to or exhausting any other security or collateral or without first having recourse to the note(s) executed by the Debtor in favor of the Mortgagee or any of the property covered by the Mortgage through foreclosure proceedings or otherwise". Ashkenazy also "absolutely, unconditionally and irrevocably waive[d] any and all right to assert any defense, set-off, counterclaim or cross-claim of any nature whatsoever with respect to th[e] Guaranty". Aryeh's affidavit and the supporting documents demonstrated a *prima facie* case for summary judgment on the cause of action based upon the "partial" guaranty.

Defendants' assertion that the terms of the "limited" guaranty prohibit enforcement of the "partial" guaranty unless one of the conditions triggering liability under the "limited" guaranty is met is without merit. That argument is belied by the express terms of these guarantees. The only potential limitation in enforcement of the "partial" guaranty was a termination clause which provided that if certain of the lots were leased as provided, Ashkenazy's obligation under the "partial" guaranty was terminated. No proof of satisfaction of this contingency was submitted by Defendants. Reliance on RPAPL §1371 is entirely misplaced given the terms of the "limited" guaranty which "waived any defense, reduction or setoff, including as a result of any legal action by mortgagee against the mortgagor" (*Anglo Irish Bank Corp. Ltd. v Ashkenazy*, 107 AD3d 602, 603 [1st Dept 2013]). Indeed, Defendants expressly waived reliance on all defenses to enforcement of the guaranty at issue (*see eg Citibank v Plapinger*, 66 NY2d 90 [1985]; *Red Tulip, LLC v Neiva*, 44 AD3d 204 [1st Dept 2007]).

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]).

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 Bellafigore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

Plaintiff has established that it is entitled to a default judgment against all non-appearing Defendants (*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 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 Plaintiff is awarded summary judgment on its causes of action for foreclosure against the appearing parties and a default judgment against the non-appearing defendants; and it is further

ORDERED that Plaintiff is awarded summary judgment against Defendant Ben Ashkenazy on the "limited" guarantee and the Clerk of the Court for New York County is directed to enter judgment in favor of Plaintiff and against Defendant Ben Ashkenazy in the amount of \$1,300,000.00; and it is further

ORDERED that Plaintiff's fourth and fifth causes of action are severed from this action; and it is further

ORDERED that that **Clark Whitsett, Esq., 108-26 Myrtle Avenue, Richmond Hill, NY 11418-1235 (718) 850-0003** 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 the caption is hereby amended by striking therefrom the "JOHN DOE" defendants as parties herein; and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
88 GLOBAL PARTNERS LLC,

Plaintiff,

-against-

141 EAST 88TH STREET REALTY LLC, BEN
ASHKENAZY, BOARD OF MANAGERS OF THE
PHILIP HOUSE CONDOMINIUM, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
NEW YORK CITY DEPARTMENT OF TAXATION AND
FINANCE, FEDEX OFFICE AND PRINT SERVICES, INC.,
FLOWERS BY PHILIP CORP., PB UPPER EAST SIDE LLC,
WILLOW POP INC. D/B/A WILLOW POP, PATIS 1311 LLC
D/B/A PATIS,

Defendants.
-----X

and it is 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/supctmanh)); and it is further

All parties are to appear for a virtual conference via Microsoft Teams on **March 14, 2024, 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.

11/17/2023

DATE

CHECK ONE:

☐

CASE DISPOSED

X

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☒

FIDUCIARY APPOINTMENT

☐

OTHER J.S.C.

☐

REFERENCE

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

HON. FRANCIS A. KAHN III