

New York Life Ins. Co. v 717 GFC, LLC

2023 NY Slip Op 34351(U)

December 8, 2023

Supreme Court, New York County

Docket Number: Index No. 850164/2022

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

-----X

INDEX NO. 850164/2022

NEW YORK LIFE INSURANCE COMPANY,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

717 GFC, LLC, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, NEW YORK CITY
DEPARTMENT OF FINANCE, JOHN DOE NO. 1
THROUGH JOHN DOE NO. 100

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103

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 717 Fifth Avenue, New York, New York. The mortgage, dated June 29, 2012, was given by Defendant 717 GFC, LLC (“GFC”) to Plaintiff and non-party Teachers Insurance and Annuity Association of America, Co. (“Teachers”).¹ The mortgage secures two loans, each with an original principal amount of \$150,000,000.00. These loans are evidenced by separate amended and restated promissory notes of the same date as the mortgage. The parties also executed a loan agreement. The notes and mortgage were executed by former Defendant Jeff Sutton as an authorized signatory of GFC. Plaintiff commenced this action and alleged that Defendant GFC defaulted in repayment of the indebtedness. GFC answered and pled one [1] affirmative defense.

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]). In support of such 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

¹ Teachers assigned its interest in the note, mortgage and other loan documents to Plaintiff by written assignment dated October 14, 2021.

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]).

Here, Plaintiff's motion was supported with the affidavit of Roger Braxton ("Braxton"), a Corporate Vice President for plaintiff, as well as the documents annexed thereto. The 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*).

In opposition, Defendant posits that an issue of fact precluding summary judgment exists as to whether Plaintiff frustrated Defendant's right to fully tender all mortgage arrears. "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" (*Home Sav. of Am. v Isaacson*, 240 AD2d 633 [2d Dept 1997], quoting *New York Guardian Mortgage Corp. v Olexa*, 176 AD2d 399, 401 [3d Dept 1991]). A "tender of payment is a valid defense in a mortgage foreclosure action" and "constructively reject[ing a] defendant's efforts to tender payment satisfying the mortgage" can constitute an issue of fact barring summary judgment (*see Cassara v Wynn*, 55 AD3d 1356 [4th Dept 2008]; *see also New York Guardian Mortgage Corp. v Olexa*, 176 AD2d 399 [3d Dept 1991]; *cf. First Fed. Sav. Bank v Midura*, 264 AD2d 407, 408 [2d Dept 1999]). However, for a tender to be effective a mortgagor must proffer all mortgage arrears, which generally encompasses accrued interest and late charges (*see EMC Mortg. Corp. v Stewart*, 2 AD3d 772, 773 [2d Dept 2003]; *United Cos. Lending Corp. v Hingos*, 283 AD2d 764, 766 [3d Dept 2001]; *First Fed. Sav. Bank v Midura, supra*).

Here, Defendant asserts that Plaintiff's inclusion in its August 5, 2022, payoff letter of a total late fee of \$9,977,299.28 was inconsistent with the terms of the loan documents and a constructive rejection of its tender. In opposition, Defendant submitted the affidavit of Sutton who averred that upon receipt of the payoff letter he contacted Plaintiff and "explained that the imposition of a 4% late fee in addition to the collection of Default Interest in the amount of over \$1.83 million was an attempt to penalize Defendant", apparently to no avail. The provision relied upon by Defendant is contained in section 2.3.4. of the loan agreement and provides:

Late Payment Charge. If any principal, interest or any other sums due under the Loan Documents, including the payment of principal due on the Maturity Date, is not paid by Borrower within five (5) days of the date on which it is due, Borrower shall pay to Lender upon demand an amount equal to the lesser of (a) five percent (5%) of such unpaid sum, and (b) the maximum amount permitted by applicable law, in order to defray the expense incurred by Lender in handling and processing such delinquent payment and to compensate Lender for the loss of the use of such delinquent payment. Any such amount shall be secured by the Mortgage and the other Loan Documents to the extent permitted by applicable law.

In this case, Defendant does not cite, and the Court could not find, any contractual provision requiring Plaintiff to issue a payoff letter prior to commencing foreclosure proceedings. It appears, though, a borrower is entitled to payoff figures from a lender as an adjunct of the common-law right to redeem (*see Luna Light, Inc. v Just Indus., Inc.*, 45 AD3d 814, 816 [2d Dept 2007]["[Borrower] is entitled to redeem the subject real property, and is entitled to a calculation of the redemption price"]; *see also* 1 Bergman on New York Mortgage Foreclosures §4.07 [2023]). Defendant does not deny that

Plaintiff issued a payoff statement, albeit later than rather than sooner. Instead, it only takes issue with the late fees included in payoff amount demanded. Ordinarily, disputes as to the amount owed are not a defense to a motion for summary judgment on a foreclosure cause of action (*see eg Emigrant Bank v Cohen*, 205 AD3d 103, 109 [2d Dept 2022]; *Heywood Condominium v Rozencraft*, 148 AD3d 38 [1st Dept 2017]; *see also NYCTL 2009-A Trust v Tsafatinos*, 101 AD3d 1092 [2nd Dept 2012]). This is because the amount owed does not affect the validity of a mortgage nor whether a mortgagor defaulted (*see Johnson v Gaughan*, 128 AD2d 756, 757 [2d Dept 1987]). Whether Plaintiff's imposition of the late fee was necessary to "defray the expense incurred by Lender in handling and processing such delinquent payment and to compensate Lender for the loss of the use of such delinquent payment" is not a reason to depart from this rule under the present circumstances (*see Orchard Hotel LLC v DAB Group, LLC*, 106 AD3d 628 [1st Dept 2013]). Defendant does not dispute its default; Plaintiff is not alleged to have precipitated the default and Plaintiff does not seek to recover a fee that is entirely incognizable under the loan documents.

The assertion the motion must be denied because no discovery has been conducted is unavailing as Defendant offered nothing to demonstrate Plaintiff is in exclusive possession of facts which would establish a viable defense to summary judgment (*see Island Fed. Credit Union v I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]).

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 that **Roberta Ashkin, Esq., 400 East 70th Street New York New York 10021, (646) 779-8520** 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 of this action should be amended by striking the John Doe #1 through #100; 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
NEW YORK LIFE INSURANCE COMPANY,

Plaintiff,

-against-

717 GFC, LLC, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, NEW YORK CITY
DEPARTMENT OF FINANCE,

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/suptmanh)); and it is further

All parties are to appear for a virtual conference via Microsoft Teams on **April 10, 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.

12/8/2023

DATE

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

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

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE