SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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FANNIE MAE,

Plaintiff,

- v -

RESIDENTIAL INDUSTRIES I, LLC,JEREMY MARKOWITZ, DROR ROSENFELD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, JOHN AND JANE DOES 1-10, ABC LLC 1-10, XYZ CORP. 1-10,

Defendant.

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INDEX NO. 850270/2021

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 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

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

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

The within action is to foreclose on a consolidated, extended and modified mortgage encumbering three parcels of commercial real property located at 306-308 West 142nd Street, New York, New York. The mortgage was given by Defendant Residential Industries I, LLC ("Residential") to non-party Berkadia Commercial Mortgage LLC ("Berkadia") to secure a loan with an original principal amount of $11,574,000.00 which is memorialized by a consolidated, extended and modified multifamily note. The note and mortgage, both dated August 31, 2018, were executed by Defendant Jeremy Markowitz ("Markowitz") as Managing Member of non-party RESI GP LLC ("RESI"), the Manager of Residential. Concomitantly with these documents, Defendant Markowitz ("Markowitz") executed a document titled "Guaranty of Non-Recourse Obligations" which provided Markowitz would be personally liable for the indebtedness should an event specified therein occur. On the same date as these, Berkadia apparently assigned the mortgage "and the Notes secured thereby" to Plaintiff but remained as the servicer of the loan.

On September 22, 2020, Defendant Residential entered a forbearance agreement with Plaintiff through Berkadia wherein, *inter alia*, the Mortgagors and Guarantors admitted its default in repayment and "unconditionally acknowledge[d] to be indebted to Fannie Mae for all amounts presently unpaid and outstanding under the Note, in principal, interest, and other amounts, without defense, setoff, deduction or counterclaim of any kind whatsoever, all of which are forever waived and released". The forbearance period was extended by a subsequent agreement dated January 1, 2021. Both agreements were precipitated by a financial incurred by Residential because of the economic sequelae of the COVID-19 pandemic.

Plaintiff commenced this action alleging *inter alia* Defendants defaulted in repayment under the notes. Defendants Residential and Moskowitz answered jointly and pled twenty [20] affirmative defenses, including lack of standing. Now, Plaintiff moves for *inter alia* summary judgment against Residential and Moskowitz, for a default judgment against the non-appearing parties, striking the appearing Defendants' affirmative defenses, appointing a referee to compute and to amend the caption. Defendants Residential and Moskowitz 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]). Based upon Defendants' affirmative defense, Plaintiff was also required to demonstrate it had standing when this action was commenced (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). 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 Amy Sogga ("Sogga"), a Senior Asset Manager for Plaintiff, and Julie Gschwind ("Gschwind"), an authorized representative of Berkadia. Both Sogga and Gschwind averred that their knowledge was based upon the records of their respective employers. Although the subject records were proffered, neither affiant established a foundation for the admission of any of these documents as business records under CPLR §4518 (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]). Contrary to Plaintiff's assertion, the affiants failed to state, in any respect, that the records "reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record be made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). Even more fundamentally, neither affiant stated they were familiar with the record keeping practices of either entity (*see Bank of IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). At most, affidavits demonstrate a naked "review of records maintained in the normal course of business [which] does not vest an affiant with personal knowledge" (*JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1517 [2d Dept 2019]).

Accordingly, since none of the documentary evidence proffered to demonstrate the note, mortgage, guaranty, Defendants' default and Plaintiff's standing is in admissible form, Movant failed to establish any of the *prima facie* elements of the cause of action for foreclosure or for summary judgment on the guaranty (*see Federal Natl. Mtge. Assn. v Allanah*, 200 AD3d 947 [2d Dept 2021]).

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]).

Here, legal argument was proffered in support of only three affirmative defenses, the seventh, eleventh and nineteenth[1]. As such, all the other affirmative defenses were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 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 the branch of Plaintiff's motion for summary judgment and appointment of a referee are denied, and it is

ORDERED that all the affirmative defenses in Defendants' answer, except the seventh, eleventh and nineteenth, 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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FANNIE MAE,

Plaintiff,

-against-

RESIDENTIAL INDUSTRIES I, LLC, JEREMY MARKOWITZ, DROR ROSENFELD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; NEW YORK CITY DEPARTMENT OF FINANCE; and

[1] Defendants' arguments in support of the first and twelfth affirmative defenses are futile. A defense which relates to the legal sufficiency of Plaintiff's complaint, is unnecessary as a general matter since dismissal cannot be effectuated without a motion pursuant to CPLR 3211[a][7] (*see Riland v Frederick S. Todman & Co.*, 56 AD2d 350 [1st Dept 1977]) and "documentary evidence 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]).

ENVIRONMENTAL CONTROL BOARD OF
THE CITY OF NEW YORK

Defendants.

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and it is

ORDERED that this matter is set down for a status conference on **February 15, 2024 @ 10:20 pm** via Microsoft Teams.

12/1/2023
DATE

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

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