

Flushing Bank v Philomen Realty Corp.

2023 NY Slip Op 34668(U)

February 22, 2023

Supreme Court, Bronx County

Docket Number: Index No. 811454/2012E

Judge: Fidel E. Gomez

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This opinion is uncorrected and not selected for official publication.

PART 32

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

-----X
FLUSHING BANK,

Plaintiff,

Index No. **811454/2021E**

- against -

Hon. **FIDEL E. GOMEZ**
Justice

**PHILOMEN REALTY CORP.,
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, NEW YORK CITY DEPARTMENT
OF FINANCE, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, URY A. LEID, "JOHN DOE NO.1
TO JOHN DOE NO.XXX", INCLUSIVE, THE LAST
THIRTY NAMES BEING FICTITIOUS AND
UNKNOWN TO PLAINTIFF, THE PERSONS OR
PARTIES INTENDED BEING THE TENANTS,
OCCUPANTS, PERSONS OR LIEN UPON THE
PREMISES DESCRIBED IN THE COMPLAINT,**

Defendants.

-----X
The following papers numbered 1 to 2, Read on this motion noticed on 1/10/22, and duly submitted as no. 1 on the Motion Calendar of 12/08/22.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order and Order Appointing a Receiver and Granting Related Relief		
Memorandum of Law	2	

Plaintiff's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 2/22/2023

Hon. 
FIDEL E. GOMEZ, AJSC

1. CHECK ONE

CASE DISPOSED NON-FINAL DISPOSITION

2. MOTION/CROSS-MOTION IS

GRANTED (MOTION)

DENIED (MOTION)

3. CHECK IF APPROPRIATE.

GRANTED IN PART

OTHER

SETTLE ORDER

SUBMIT ORDER

DO NOT POST

FIDUCIARY APPOINTMENT

REFEREE APPOINTMENT

NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
FLUSHING BANK,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **811454/2021E**

**PHILOMEN REALTY CORP.,
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, NEW YORK CITY DEPARTMENT
OF FINANCE, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, URY A. LEID ,**

**“JOHN DOE NO.1 to JOHN DOE NO. XXX”,
inclusive, the last thirty names being fictitious
and unknown to plaintiff, the persons or parties
intended being the tenants, occupants, persons or
lien upon the premises described in the complaint,**

Defendants.
-----X

In the instant foreclosure action, non-party LFC Acquisition 4, LLC (LFC) seeks an order granting it summary judgment¹ on its complaint pursuant to CPLR § 3212, default judgment against non-answering defendants pursuant to CPLR § 3215, the appointment of a referee pursuant

¹ The instant motion to the extent that it fails to seek LFC’s substitution as plaintiff, pursuant to CPLR § 1018 is procedurally defective. However, in the interest of judicial economy and because the instant motion is unopposed, this Court will treat the portion of the motion seeking to amend the caption as a motion for substitution. **Error! Main Document Only.** Pursuant to CPLR § 1018, “[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action.” Thus, in an action to foreclose a mortgage, substitution pursuant to CPLR § 1018 is warranted if it is established that ownership of the note and mortgage occurred after the action was initiated (*Aurora Loans Services, LLC v Mandel*, 148 AD3d 965, 967 [2d Dept 2017] [“Furthermore, the Supreme Court prominently exercised its discretion in granting that branch of the plaintiff’s motion which was to amend the caption to substitute Nationstar as the plaintiff. The plaintiff submitted evidence demonstrating that the subject note was in Nationstar’s possession at the time of the plaintiff’s motion, and that the mortgage was assigned to Nationstar after the commencement of the action. The plaintiff, therefore, established that Nationstar is now the real plaintiff in interest.” [internal citations omitted]; *Aurora Loan Services, LLC v Lopa*, 130 AD3d 952, 952 [2d Dept 2015]; *Citibank, N.A. v Van Brunt Properties, LLC*, 95 AD3d 1158, 1160 [2d Dept 2012]).

to RPAPL § 1321, amendment of the caption, and striking the affirmative defenses² in the verified answer submitted by PHILOMEN REALTY CORP. (Philomen) and URY A. LEID (Leid).

For the reasons that follow hereinafter, LFC's motion is granted, on default and without opposition.

SUMMARY JUDGMENT

LFC asserts that it should be granted summary judgment on its cause of action for foreclosure and sale of the mortgaged property. This Court agrees. Significantly, LFC establishes that it owns and holds the note and mortgage between the parties, that Philomen and Leid defaulted under the terms thereunder, and that foreclosure is remedy under the agreements.

Pursuant to CPLR § 3212, "any party may move for summary judgment in any action, after issue has been joined." The proponent seeking summary judgment must establish prima facie entitlement to such relief by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Upon a moving party's demonstration of its entitlement to summary judgment, the opposing party must establish, with admissible evidence, the existence of a triable issue of material fact (*Washington Mut. Bank v Valencia*, 92 AD3d 774, 774 [2d Dept 2012]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] ["We have repeatedly held that one opposing a motion for

² Although, LFC seeks to strike the answer, such relief is not warranted simply because LFC seeks summary judgment. Accordingly, this portion of the instant motion is treated as one seeking summary judgment with respect to the affirmative defenses asserted by defendants Philomen and Leid.

summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.”)]. General denials are insufficient to raise an issue of fact (*Marine Midland Bank, N.A. v Micheli Contracting Corp.*, 95 AD2d 946, 947 [3d Dept 1983]; *Pathmark Graphics Inc. v J. M. Fields, Inc.*, 53 AD2d 531, 531 [1st Dept 1976]). The defendant’s assertions shall be supported by evidentiary proof or based on personal knowledge and any affirmative defenses asserted, must not be vague or conclusory (*One W. Bank, FSB v Rosenberg*, 189 AD3d 1600, 1602 [2d Dept 2020] [“Specifically, the defendant’s sixth affirmative defense generally and conclusorily alleged that the ‘plaintiff has failed to comply with all conditions precedent to commencement of this action.’ This Court has held such language to be insufficient to raise the issue of the plaintiff’s compliance with either statutory or contractual notice requirements.”]; *U.S. Bank Tr. Nat. Ass’n Tr. v Butti*, 16 AD3d 408, 408 [2d Dept 2005]; *Marton Assocs. v Vitale*, 172 AD2d 501, 502 [2d Dept 1991] [“The vague assertions and unsupported statements made by Alaska Associates do not raise issues of fact relative to the failure to make the payments as required under the mortgage and note.”]; *Iandoli v Lange*, 35 AD2d 793, 794 [1st Dept 1970]).

In a foreclosure action, a plaintiff moving for summary judgment establishes its prima facie case by producing the mortgage, unpaid note, and evidence of default (*Deutsche Bank Nat. Tr. Co. v Brewton*, 142 AD3d 683, 684 [2d Dept 2016]; *Washington Mut. Bank v Valencia*, 92 AD3d 774, 774 [2d Dept 2012]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 856 [2d Dept 2009] [“Here, the plaintiff bank sustained its initial burden of demonstrating its entitlement to judgment as a

matter of law by submitting proof of the existence of the note, mortgage, and consolidation agreement, and the defendants' default in payment.”)].

Here, LFC submits the Amended, Consolidated and Restated Note (note), dated November 30, 2018, wherein Philomen agreed to repay plaintiff a loan totaling \$550,000. LFC also submits the Mortgage Consolidation, Extension, and Modification Agreement (mortgage), dated November 30, 2018, wherein Philomen pledged premises located at 958 Anderson Avenue, Bronx, NY, as security for the note. LFC submits the General Guaranty (guaranty), dated November 30, 2018, executed by defendant Leid in favor of plaintiff, wherein Leid agreed to personally guarantee Philomen’s obligations under the note. Per the note, Philomen was required to repay the loan in 120 monthly installments each totaling \$3,336.55. Paragraph 8 of the note states that the entire principal under the note would become due in the event of a default as defined by the mortgage. Section 2.1.1(a) of the mortgage defines a default as, *inter alia*, a “default in the payment of any installment of principal or interest as provided in the Note.” Section 2.2(iii) of the mortgage, authorizing the initiation of a foreclosure action upon default states that upon default plaintiff could “[i]nstitute proceedings for the complete foreclosure of this Mortgage, in which case the Mortgaged Property may be sold for cash or credit in one or more parcels, and in such order as the Mortgagee shall determine.”

LFC also submits an Assignment of Mortgage (ASM), dated September 28, 2021, wherein plaintiff assigns the mortgage in this action to LFC.

LFC also submits an affidavit, dated September 28, 2021, by Joanne Orelli (Orelli), plaintiff’s Senior Vice President, wherein she lays a business record³ foundation for the note, mortgage, and guaranty appended to the instant motion.

³ **Error! Main Document Only.** To be sure, business records, such as the agreements herein can generally be admitted for consideration at trial or on a motion for summary judgment upon a proper foundation that the same are

LFC submits an affidavit, dated November 10, 2021 by Ari Schwartz (Schwartz), LFC's Manager and Authorized Signatory, of LFC Acquisitions 4 LLC, dated November 10, 2021. Schwartz states that on September 28, plaintiff assigned the mortgage to LFC and also delivered the note and guaranty, which LFC now owns and holds. In addition to laying a business records foundation for the note, mortgage and ASM, Schwartz states that Philomen defaulted under the terms of the note and mortgage by failing to make a payment on March 1, 2021.

Based on the foregoing, LFC establishes prima facie entitlement to summary judgement on the cause of action seeking foreclosure on the mortgage between plaintiff and Philomen and the sale of the premises. Significantly, the evidence tendered establishes that the agreements between Philomen and plaintiff required that Philomen repay the loan in monthly installments, that a failure to make a payment when due was a default authorizing the initiation of this action, and that on March 1, 2021, Philomen defaulted by failing to make a payment when due. Moreover, LFC establishes that it owns and holds the note, mortgage, and guaranty, which it acquired from plaintiff after the instant action was commenced.

Since the instant motion is unopposed, no questions of fact preclude summary judgment.

Having granted the instant motion for summary judgment, the motion to strike the affirmative defenses in the answer is denied as moot.

DEFAULT JUDGMENT

LFC's motion seeking the entry of a default judgment against the non-appearing defendants is granted. Significantly, LFC establishes that the cause of action in the complaint seeking a

business records - namely, that (1) the record was made in the regular course of business; (2) it was the regular course of business to make said record and; (3) the records were made contemporaneous with the events contained therein (CPLR § 4518; *People v Kennedy*, 68 NY2d 569, 579 [1986]).

judgment of foreclosure and the sale of the mortgaged property has merit and that several defendants have failed to appear.

CPLR § 3215(a) provides in relevant part that: “When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial . . . the plaintiff may seek a default judgment against him.”

CPLR § 3215(f) provides in relevant part that:

On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party. . . Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.

Thus, “[o]n a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant’s default” (*Deutsche Bank National Trust Company v Hall*, 185 AD3d 1006, 1008 [2d Dept 2020]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59 [2d Dept 2013]; *Pampalone v Giant Bldg. Maintenance, Inc.*, 17 AD3d 556, 557 [2d Dept 2005]).

Here, Philomen and Leid interposed an answer, but no other party has appeared in this action. As required by CPLR § 3215(f), LFC established that all defendants were served with the summons and complaint, as evinced by the copies of each defendant’s corresponding affidavits of service, which are annexed to the instant motion. Despite the foregoing, defendants NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE and NEW YORK CITY ENVIRONMENTAL CONTROL BOARD have failed to interpose answers. Moreover, Schwartz’ affidavit states that Philomen had an obligation to repay the loan made to it, Leid guaranteed the loan payments, but upon Philomen’s default in making

payments, Leid has failed to do so. Accordingly, Schwartz establishes that LFC has a meritorious cause of action for foreclosure and for Leid's breach of the guaranty⁴. Significantly, as against the no-appearing defendants, the allegations are the they may have an interest and the mortgaged property such that they are necessary defendants.

Accordingly, plaintiff establishes entitlement to the entry of a default judgment against defendants NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, and NEW YORK CITY ENVIRONMENTAL CONTROL BOARD.

ORDER OF REFERENCE

RPAPL § 1321(1) states that:

[i]f the defendant fails to answer within the time allowed or the right of the plaintiff is admitted by the answer, upon motion of the plaintiff, the court shall ascertain and determine the amount due, or direct a referee to compute the amount due to the plaintiff and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels and, if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due.

If the Defendant has answered, a reference to compute the amount due may be prescribed where the plaintiff is granted summary judgment (*Excel Capital Group Corp. v 225 Ross St. Realty, Inc.*, 165 AD3d 1233, 1235 [2d Dept 2018]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 1037 [3d Dept 1996] ["The summary judgment motion of plaintiff was properly granted. Therefore, there were no questions of fact to prevent the reference. As the calculation of the amount due to plaintiff requires detailed mathematical calculations, the court's reference was proper."]; *Neighborhood*

⁴ **Error! Main Document Only.** A guaranty agreement must be strictly construed (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]; *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015]). Summary judgment seeking an order enforcing a guaranty is warranted upon proof of "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A.* at 492; *Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]; *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]).

Hous. Servs. of New York City, Inc. v Meltzer, 67 AD3d 872, 873 [2d Dept 2009] [Court granted appointment of a referee to compute the amount owed where plaintiff established prima facie entitlement to judgment as a matter of law by presenting mortgage, unpaid note, and evidence of default.]).

Inasmuch as plaintiff is entitled to summary judgment against Philomen and Leid and a default judgment against defendants NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, and NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, this Court grants the appointment of a referee to ascertain the amounts due.

AMENDMENT OF CAPTION

LFC's motion seeking an order amending the caption is granted. Significantly, LFC establishes that it owns the note, mortgage, and guaranty and that there is no need to include defendants JOHN DOE NO. I to JOHN DOE NO. XXX in the caption, since the instant premises is not occupied by tenants.

Pursuant to CPLR § 1018, "upon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." Furthermore, CPLR § 305 provides in relevant part:

At any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.

Upon evidence that a mortgage and the underlying debt obligation were validly assigned, the court may exercise its discretion in granting amendment of the caption to substitute a plaintiff, even subsequent to the commencement of the action (*Wilmington Sav. Fund Soc'y, FSB v Finn*, 170 AD3d 1246, 1248 [2d Dept 2019]; *JPMorgan Chase Bank, Nat'l Ass'n v Deblinger*, 201 AD3d

900, 900 [2d Dept 2022] “Amendment of caption in mortgagee's foreclosure action against mortgagor to substitute mortgage assignee as the plaintiff was appropriate, where mortgagee established that mortgage and underlying debt were validly assigned to assignee subsequent to commencement of the action.”).

Here, per Schwartz’ affidavit LFC establishes that on September 28, 2021, plaintiff assigned the mortgage and LFC and delivered the note and guaranty to it as well. Accordingly, substitution pursuant to CPLR § 1018 is warranted.

Additionally, since LFC asserts that there are no occupants at the mortgaged premises, removal of the John Doe defendants is warranted pursuant to CPLR § 305(c), is also warranted.

CPLR § 305(c) allows a party to amend the caption or the summons and verified complaint in a proceeding and authorizes the court to “allow any summons or proof of service to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.” CPLR § 2001 further states that at any stage of an action, a court may permit a mistake, omission, defect or irregularity to be corrected upon such terms as may be just. In allowing such amendments, the relevant inquiry is whether the correct party was actually served, whether the amendment would prejudice the party in any way, and whether the correct party was on notice that despite the mistake in the caption or summons or complaint, he/she was the entity or person against whom the suit was brought (*Medina v City of New York*, 167 AD2d 268, 270 [1st Dept 1990] [The court, relying on CPLR § 305(c) and § 2001, granted plaintiff leave to amend, *inter alia*, the caption to name the correct defendant when no prejudice would result therefrom.]; see *Fink v Regent Hotel, Ltd.*, 234 AD2d 39, 41 [1st Dept 1996] [“It is well settled that an application to amend the caption to reflect the true name of the defendant should be granted where, as here, the designated entity was the intended subject of the law suit, knew or should have known of the existence of the litigation

against it, and will not be prejudiced thereby.”]; *Pinto v House*, 79 AD2d 361, 364 [1st Dept 1981]; *Ober v Rye Town Hilton*, 159 AD2d 16, 19-20 [2d Dept 1990]).]. Here, because none of the John Doe defendants answered, and their removal from the caption is in essence a discontinuance of this action, there is no prejudice by the amendment sought. It is hereby

ORDERED that judgment be entered in LFC’s favor to the extent of appointing a referee to compute all sums due. It is further

ORDERED that LFC be substituted as plaintiff in this action, that defendants JOHN DOE NO. I to JOHN DOE NO. XXX be removed from the caption, and that the caption in this action be amended to read as follows:

-----X
LFC ACQUISITION 4, LLC,

Plaintiff,

- against -

**PHILOMEN REALTY CORP.,
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, NEW YORK CITY DEPARTMENT
OF FINANCE, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, URY A. LEID ,**


Defendants.
-----X

It is further

ORDERED that LFC submit an Order of Reference within 45 days hereof. It is further
ORDERED that LFC serve this Decision and Order with Notice of Entry upon all
defendants within 30 days hereof.

This constitutes the Decision and Order of this Court.

Dated: 02/22/23

Hon 
FIDEL E. GOMEZ, J.S.C.