

**Kenden, LLC v Treasures & Gems, Ltd.**

2024 NY Slip Op 30406(U)

February 2, 2024

Supreme Court, New York County

Docket Number: Index No. 850092/2023

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*

INDEX NO. 850092/2023

KENDEN, LLC,  
Plaintiff,

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 001

TREASURES & GEMS, LTD, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE, NEW YORK  
CITY DEPARTMENT OF FINANCE, ENVIRONMENTAL  
CONTROL BOARD OF THE CITY OF NEW YORK,  
BENJAMIN NAZMIYAL, DAVID M. RAPETTO, AS  
ADMINISTRATOR OF THE ESTATE OF RHODA CRANE,  
MICHAEL CRANE, JOHN DOE NOS. 1-10 BEING  
FICTITIOUS AND UNKNOWN TO PLAINTIFF, THE  
PERSONS OR PARTIES INTENDED BEING THE  
TENANTS, OCCUPANTS, PERSONS OR CORPORATION,  
IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN  
UPON THE PREMISES DESCRIBED IN THE COMPLAINT,

**DECISION + ORDER ON  
MOTION**

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for JUDGMENT - FORECLOSURE & SALE

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

In this action, Plaintiff seeks to foreclose on a mortgage encumbering commercial real property located at 1739 2nd Avenue a/k/a 250 East 90th Street, New York, New York. Plaintiff commenced this action alleging *inter alia* that Defendant Treasures & Gems, LTD (“Gems”) defaulted in repayment of the loan secured by the mortgage. Defendants Gems and David M. Repetto, as administrator of the Estate of Rhoda Crane, alleged to be currently administering or managing the Mortgaged Premises, answered and pled four affirmative defenses, a counterclaim as well as three crossclaims against Defendant Michael Crane. Now, Plaintiff moves for summary judgment against the appearing Defendants, to strike their answers and affirmative defenses, for an order of reference and to amend the caption. Defendants Gems and Repetto 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 mortgagors’ default in repayment (*see U.S. Bank, N.A., v James*, 180 AD3d 594 [1<sup>st</sup> Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1<sup>st</sup> Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1<sup>st</sup> 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 [1<sup>st</sup> Dept 2019]). Plaintiff’s motion was supported with an affidavit from Lawrence Rosenblum (“Rosenblum”), the President of Plaintiff as well as supporting documentation. The affidavit, based Rosenblum’s personal

knowledge of the events, 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; see also Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019])["Admissible evidence may include 'affidavits by persons having knowledge of the facts [and] reciting the material facts'"]. In opposition, the Defendants only submitted an affirmation from an attorney having no personal knowledge of the facts which is insufficient to raise a triable issue of fact (*see Barcov Holding Corp. v. Bexin Realty Corp.*, 16 AD3d 282 [1st Dept 2005]).

As to the branch of the motion to dismiss Defendants' affirmative defenses and counterclaim, 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 and the counterclaim 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 [1<sup>st</sup> Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1<sup>st</sup> 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]). Defendants' opposition to dismissal of the affirmative defenses was, again, entirely conclusory and, by failing to raise specific legal arguments in rebuttal, those affirmative defenses found insufficient were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafigliore*, 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 for a default judgment against the non-appearing parties is granted without opposition (*see CPLR §3215; SRMOF II 2012-1 Trust v Tella*, 139 AD3d 599, 600 [1<sup>st</sup> Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted (*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 against the appearing Defendants, for a default judgment against the non-appearing parties as well as the other relief is granted; and it is further

ORDERED that **Doron Leiby, Esq., 32 Broadway, 13th Floor, New York, New York 10004 – 212-227-4200** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the property identified in the notice of pendency 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, 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 that failure to submit objections to the referee may 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 45 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 Alexander Glasberg be substituted in the caption of this action as a party defendant in the place and stead of “JOHN DOE”, all of the foregoing without prejudice to any of the proceedings heretofore had or to be had in this action; and it is further

ORDERED that the caption of this action and all papers previously filed herein shall be amended by striking defendants “John Doe #1” through “John Doe #10” all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that the caption shall be amended to read as follows:

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

-----X  
KENDEN LLC,

Plaintiff,

-against-

TREASURES & GEMS, LTD., NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE,  
NEW YORK CITY DEPARTMENT OF FINANCE,  
ENVIRONMENTAL CONTROL BOARD OF THE  
CITY OF NEW YORK, BENJAMIN NAZMIYAL,  
DAVID M. RAPETTO, as Administrator of the Estate of  
RHODA CRANE, MICHAEL CRANE;

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](http://www.nycourts.gov/supctmanh))); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **May 30, 2024, at 10:40 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](mailto: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.

2/2/2024  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

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