

**Flushing Bank v Cabrera Realty Corp.**

2024 NY Slip Op 30407(U)

February 2, 2024

Supreme Court, New York County

Docket Number: Index No. 850134/2019

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*

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INDEX NO. 850134/2019

FLUSHING BANK,

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

Plaintiff,

MOTION SEQ. NO. 005

- v -

CABRERA REALTY CORP., THE NEW SOWER  
CHRISTIAN CHURCH INC., 2184 AMSTERDAM REALTY  
CORP., ANGELA M. CABRERA, JUAN CABRERA, NEW  
YORK STATE DEPARTMENT OF TAXATION AND  
FINANCE, CITY OF NEW YORK DEPARTMENT OF  
FINANCE, CITY OF NEW YORK ENVIRONMENTAL  
CONTROL BOARD, NY AMERICAN EMERGENCY  
SERVICE INC., JOHN DOE

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 276, 277, 278, 279, 280, 281, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340

were read on this motion to/for

JUDGMENT - SUMMARY

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

The within action is to foreclose on a mortgage on commercial real property located at 2184 Amsterdam Avenue, New York, New York. The present owner of the property is Defendant, The New Sower Christian Church, Inc. ("New Sower"). The mortgage to be foreclosed was given by Defendant Cabrera Realty Corp ("Cabrera") to secure a loan with an original principal amount of \$650,000.00 which is memorialized by a note. The mortgage and note are both dated March 15, 2004. After this mortgage was recorded, Cabrera transferred its entire interest in the premises to Defendant New Sower by deed dated November 11, 2011, which was recorded on December 1, 2011. On the same date as the transfer, New Sower gave a mortgage on the property at issue to Defendant 2184 Amsterdam Realty Corp. ("Amsterdam") to secure a loan of \$227,935.00. Plaintiff asserts it was not given notice of the transfer of ownership or the Amsterdam mortgage.

Plaintiff initially commenced this action to foreclose on its mortgage based upon Defendant Cabrera and New Sower's alleged default in payment of the mortgage. In an amended complaint, Plaintiff withdrew its claim of non-payment and pled Defendants defaulted by failing to obtain Plaintiff's written consent to transfer the premises and by New Sower encumbering the premises with a second mortgage without Plaintiff's written consent. New Sower answered and pled an affirmative defense of ratification claiming that it unfaithfully paid the installments on the mortgage for eight years after being deeded the premises and that Plaintiff unilaterally determined to stop accepting payments in 2019. New Sower also pled two counterclaims. Plaintiff replied to the counterclaims.

An earlier motion by Plaintiff for summary judgment was denied by order of this Court dated April 15, 2020, on the basis that it sought summary judgment on unpleaded claims, that the amended complaint was not timely filed, and that issue was not joined on the latter pleading. Now, Plaintiff moves for summary judgment against the appearing Defendants, a default judgment against the non-appearing Defendants, an order of reference and to amend the caption. Defendant New Sower opposes 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 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]). A mortgagor's default, "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]).

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]). In support of a motion for summary judgment on 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 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 by affidavits from Joanne Orelli ("Orelli"), a Senior Vice President of Plaintiff, William B. Corcoran ("Corcoran"), a Vice President at Dovenmuehle Mortgage, Inc. ("DMI"), purportedly a "sub-servicer" for Plaintiff, and Patrick Gurdgiel ("Gurdgiel"), a Senior Leader of Operations at CoreLogic Tax Services LLC ("CoreLogic"), an alleged provider of real estate tax services to DMI. Attached to the affidavits were the documents which formed the basis of some of the affiants' knowledge. The affidavits and referenced documents established the mortgage, note, and evidence of mortgagor's default and was sufficiently supported by appropriate documentary evidence in evidentiary form (*see eg Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*).

As to the default by the Mortgagor Cabrera, Plaintiff demonstrated it violated the provisions in the mortgage (¶¶ 16 and 32[i]), commonly referred to a "due-on-sale" clause, when it sold the property to New Sower without Plaintiff's prior consent (*see Beacon Federal Sav. & Loan Asso. v Marks*, 91 AD2d 1010 [2d Dept 1983]; *see also* 12 USCS § 1701j-3[b][2-3]). That the transfer occurred some eight years before this action was commenced is of no moment as "by the terms of the mortgage agreement, the 'due on sale' covenant was optional with [Mortgagee], not self-executing, and therefore, some manifestation on the part of [Mortgagee] was necessary to effectuate it" (*Roosevelt Sav. Bank v A.V.R. Realty Corp.*, 153 AD2d 616 [2d Dept 1989]). However, Plaintiff's reliance on the covenant in the mortgage against granting subordinate liens (¶ 17[a]) is misplaced as application of that restriction is limited to the Mortgagor, which was Cabrera, not New Sower.

In opposition, Defendant's assertion that Plaintiff's failure to submit a statement of material facts renders its motion defective is unavailing. Section 202.8-g of the Uniform Rules for Trial Courts was amended, effective July 1, 2022, before this motion was made, to leave the necessity of submission such

a statement to a court's direction. This Court has made no such direction either by order herein or in its part rules. Further, that amendment added subdivision [e] which affords the court with the discretion to permit correction of any defect of compliance. Substantively, Defendant New Sower does not attack Plaintiff's *prima facie* case or the admissibility of the evidence it proffered. Rather, New Sower proffers evidence it claims demonstrates its affirmative defense of ratification "by way of a waiver and estoppel"<sup>1</sup>.

New Sower's reliance on the concept of ratification is inapt. "Ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it" (*Allen v Riese Org., Inc.*, 106 AD3d 514, 517 [1<sup>st</sup> Dept 2013]). Here, Plaintiff is not attempting to repudiate the existence of the note and mortgage, rather they rely on same and plead it was breached (*see Wind Point Partners VII-A, L.P. v Hoya Corp.*, 185 AD3d 478 [1<sup>st</sup> Dept 2020])[<sup>1</sup>"Ratification is inapplicable because plaintiff is not trying to repudiate the contract"]).

Concerning the defense of estoppel, this equitable doctrine exists "to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another" (*American Bartenders School v 105 Madison Co.*, 59 NY2d 716, 718 [1983]). It is imposed "in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought" (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]). "To establish an estoppel, a party must prove that it relied upon another's actions, its reliance was justifiable, and that, in consequence of such reliance, it prejudicially changed its position" (*Flushing Unique Homes, LLC v Brooklyn Fed. Sav. Bank*, 100 AD3d 956, 958 [2d Dept 2012]). Absence of any of these essential elements renders an estoppel defense lacking (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96, 106 [2006]).

In this case, New Sower posits that it dutifully submitted all required installment payments under the loan documents for approximately eight years which Plaintiff accepted with knowledge of its acquisition of the property in 2011. Further, it claims that Plaintiff unilaterally rejected their continued payments without justification. Even assuming these allegations are true, these facts do not demonstrate the existence of an issue of fact as to the existence of an estoppel. "Simply put, one cannot be induced to tender a performance which is required as a part of a preexisting contractual obligation" (*see Megaris Furs v Gimbel Bros.*, 172 AD2d 209, 212 [1<sup>st</sup> Dept 1991]). Stated differently, a party "cannot claim to have been defrauded into doing what it was legally bound to do" (*New York State Urban Dev. Corp. v Marcus Garvey Brownstone Houses*, 98 AD2d 767, 771 [2d Dept 1983]). Moreover, "[p]ayment in accordance with contractual terms, in and of itself, does not constitute an injustice" (*Key International Mfg., Inc. v Stillman*, 103 AD2d 475, 478 [2d Dept 1984]).

Lastly, "[w]hile estoppel requires detriment to the party claiming to have been misled, waiver requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable" (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, *supra*). Nevertheless, "[w]aiver is an intentional relinquishment of a known right and should not be lightly presumed" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]). As such, silence, oversight, mistake, negligence and thoughtlessness does not constitute intent supporting existence of a waiver (*see Matthew Adam Props., Inc. v United House of Prayer for All People of the Church on the*

<sup>1</sup> Despite not being expressly pled in the answer, the Court may consider the additional affirmative defenses of waiver and estoppel in opposition to this motion for summary judgment (*see eg Kapchan v 31 Mt. Hope, LLC*, 111 AD3d 530 [1<sup>st</sup> Dept 2013]).

*Rock of the Apostolic Faith*, 126 AD3d 599, 601 [1<sup>st</sup> Dept 2015]). Contrary to New Sower's claim, acceptance of installment payments from a grantee of the mortgagor does not constitute a waiver of breach of a "due-on-sale" provision (see *Marine Midland Bank, N.A. v Northeast Kawasaki, Inc.*, 92 AD2d 952 [3d Dept 1983]; see also *75 St. Servicing LLC v CLST Enters. LLC*, 220 AD3d 590 [1<sup>st</sup> Dept 2023]). In any event, the express "no waiver" clause contained in the mortgage (§49), which courts uniformly enforce, bars the defense of waiver (see *Rosenzweig v Givens*, 62 AD3d 1, 7 [1<sup>st</sup> Dept 2009]; see also *City Natl. Bank v Foundry Dev. Group, LLC*, 129 AD3d 1011, 1013 [2d Dept 2015]; *Flushing Unique Homes, LLC v Brooklyn Fed. Sav. Bank*, supra).

Any remaining affirmative defenses and counterclaims are entirely conclusory and unsupported by any facts in the answer or by the papers submitted in opposition. As such, these affirmative defenses are nothing more than an unsubstantiated legal conclusion which is 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 [1<sup>st</sup> 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, as no specific legal arguments were proffered in support of any affirmative defense or counterclaim, other than ratification, estoppel and waiver, the remaining defenses and claims were abandoned (see *U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

Accordingly, Defendant New Sower failed to establish any issue of fact on any defenses.

Plaintiff has also established that it is entitled to a default judgment against all non-appearing Defendants (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 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 the branch of Plaintiff's motion for summary judgment against Defendant Therese Flaherty on the cause of action to enforce the guaranty is granted; and it is further

ORDERED that that **Matthew D. Hunter III, Esq., 108-18 Queens Blvd Forest Hills, NY 10016 (718) 309-1660** 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 John Doe defendant is excised from the caption as the New York County Clerk will not accept a judgment with a “Doe” defendant in the caption, and is further

ORDERED that the caption shall read as follows:

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

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FLUSHING BANK,

Plaintiff,

-against-

CABRERA REALTY CORP., THE NEW SOWER CHRISTIAN CHURCH INC., 2184 AMSTERDAM REALTY CORP., ANGELA M. CABRERA, JUAN CABRERA, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, CITY OF NEW YORK DEPARTMENT OF FINANCE, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, NY AMERICAN EMERGENCY SERVICE INC.,

Defendants.

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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

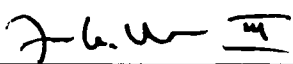
All parties are to appear for a virtual conference via Microsoft Teams on June 5, 2024, at 10:00 a.m. If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

2/2/2024  
DATE

CHECK ONE:  CASE DISPOSED  GRANTED  DENIED

APPLICATION:  SETTLE ORDER  SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

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