

Wilmington Trust, N.A. v 153 Elizabeth St., LLC

2024 NY Slip Op 30496(U)

February 9, 2024

Supreme Court, New York County

Docket Number: Index No. 850275/2021

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. 850275/2021
WILMINGTON TRUST, NATIONAL ASSOCIATION, MOTION DATE _____
Plaintiff, MOTION SEQ. NO. 003

- v -

153 ELIZABETH STREET, LLC, 153 ELIZABETH HOTEL
LLC, 30 KENMARE MASTER, LLC, EDMOND LI,
ENVIRONMENTAL CONTROL BOARD OF THE CITY OF
NEW YORK, THE CITY OF NEW YORK, PEOPLE OF THE
STATE OF NEW YORK, JOHN DOE,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 136, 137, 138, 139,
140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160,
161, 162, 163, 164, 165, 166, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198,
199, 200

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 consolidated and modified mortgage encumbering a parcel of commercial real property located at 153 Elizabeth Street, New York, New York. The mortgage was given by Defendant 153 Elizabeth Street LLC (“Elizabeth”) and 153 Elizabeth Hotel LLC (“Hotel”) and secures a loan with an original principal amount of \$24,000,000.00 which is memorialized by a consolidated, amended and restated note. The note and mortgage, both dated April 8, 2016, were given to non-party Silverpeak Real Estate Finance LLC and were executed by Defendant Edmund Li (“Li”), as Authorized Signatory of both borrowers. Concomitantly with these documents, a “Guaranty of Recourse Obligations” securing the indebtedness was executed by Defendant Li. Plaintiff commenced this action alleging Defendants defaulted under the note. Defendants Elizabeth, Hotel and Li answered jointly and pled a single combined affirmative defense/counterclaim alleging that Plaintiff breached the implied covenant of good faith and fair dealing.

By order of this Court dated January 13, 2023, Plaintiff’s motion for summary judgment was denied on the basis that *prima facie* proof of the note, mortgage, Defendant’s default and Plaintiff’s standing was not established. Now, Plaintiff again moves for summary judgment against Elizabeth, Hotel and Li, a default judgment against all other Defendants, an order of reference and to amend the caption. Defendants Elizabeth, Hotel and Li 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, evidence of mortgagors’ default and its standing 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]). Plaintiff's motion was supported with an affidavit from Josef Bittman ("Bittman"), an Asset Manager of LNR Partners LLC ("LNR"), the special servicer for Plaintiff, as well as supporting documentation. The affidavit established the mortgage, note, evidence of mortgagor's default as well as its standing 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, the sole argument proffered is that the within motion is an inappropriate successive motion for summary judgment. In support of its opposition, Defendants saw fit to cite this Court's decision in *Wells Fargo Bank, N.A. v Lafayette 199, LLC*, ___ Misc3d ___, 2023 WL 7997875 [Sup Ct NY Cty 2023], another foreclosure action in which Li is a defendant.

Unlike this Court's decision in *Lafayette*, multiple disputed issues are not presented here (cf. *Wells Fargo Bank v Gittens*, 217 AD3d 901, 903 [2d Dept 2023]). In the Court's January 13, 2023, decision it was determined that since Defendant raised its affirmative defense of standing for "the first time in opposition to Plaintiff's motion for summary judgment, Plaintiff [was] entitled to submit rebuttal evidence in reply to cure any deficiencies in its *prima facie* case on this issue occasioned by the amendment". However, this Court mistakenly failed to consider, or mention therein, the evidence submitted in reply, to wit an additional affidavit from Bittman as well as an affidavit from Scott T. Tross ("Tross"), when assessing Plaintiff's standing on that motion. The affidavit of Tross, an attorney employed by Plaintiff's counsel, was based upon his personal observations regarding the note, allonges and fixation of same. That affidavit, alone, demonstrated Plaintiff's standing when this action was commenced (see *U.S. Bank, N.A. v Villatoro*, 186 AD3d 777, 778 ["the plaintiff submitted evidence that established that its law firm received physical delivery of the original note on a date prior to the commencement of this action"]). In this case, considering Plaintiff's second motion for summary judgment furthers the ends of justice by allowing the Court to correct its oversight, and eliminates the need for a trial on issues that Defendants have not contested, to wit the existence of the note, mortgage and Defendants' default.

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 **Scott H. Siller, Esq., 706 Equestrian Way, Westbury, NY 11590 -- 516-644-6769** 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 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/suptctmanh)); 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 **June 5, 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) 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.

2/9/2024

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

J. G. W.
FRANCIS A. KAHN III, J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.