

**BDS III NY 1369 Broadway LLC  
v Broadway Star Realty, LLC**

2024 NY Slip Op 30670(U)

March 1, 2024

Supreme Court, New York County

Docket Number: Index No. 850029/2022

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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BDS III NY 1369 BROADWAY LLC,

Plaintiff,

- v -

BROADWAY STAR REALTY, LLC, JOSHUA GOLDBERG,

Defendant.

INDEX NO. 850029/2022

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

MOTION SEQ. NO. 005

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114

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

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

In this action Plaintiff seeks to foreclose on a consolidated, amended and restated mortgage encumbering commercial real property located at 1369 Broadway, New York, New York. The mortgage, dated November 15, 2018, was given by Defendant Broadway Star Realty LLC (“Broadway”) to non-party BDS III Mortgage Capital J LLC, (“Capital”) and secures a loan with an original principal amount of \$30,300,000.00 which is memorialized by a consolidated, amended and restated note of the same date. Further, the parties also executed a loan agreement. The note, mortgage and loan agreement were executed by Defendant Joshua Goldberg (“Goldberg”) as Manager of Broadway. Concomitantly with these documents, Goldberg executed a guaranty of recourse obligations with respect to the indebtedness.

On February 8, 2018, Capital purportedly executed a general assignment of the loan documents to non-party BDS III Loan Seller LLC (“Seller”). On the same day, Seller allegedly executed a general assignment of the loan documents to non-party BDS 2019-FL3 LTD (“BDS 2019”). On October 13, 2020, BDS 2019 apparently executed a general assignment of the loan documents to Capital. Non-party Capital commenced this action on January 31, 2022, alleging *inter alia* that Mortgagor defaulted in repayment of the loan when it matured on December 1, 2021. Defendants Broadway and Goldberg answered and pled four affirmative defenses, including lack of standing. By order of this Court dated November 9, 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 Defendants Broadway, for an order of reference and to amend the caption. Defendants Broadway and Goldberg 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 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]). Based on the affirmative defenses pled, Plaintiff was required to demonstrate, *prima facie*, its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2<sup>nd</sup> Dept 2020]) and its strict compliance with RPAPL §§1304 and 1306 (*see U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d 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 an affidavit from Teresa M. Hough ("Hough"), a Senior Managing Director and the Chief Asset Officer with Bridge Debt Strategies Fund Manager LLC ("Bridge"), the manager of Plaintiff. Hough claims that her affidavit was made based upon "direct involvement and personal knowledge". Such evidence can be sufficient to demonstrate a *prima facie* case for summary judgment (*see 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'"]]. Hough also demonstrated knowledge of the record keeping practices of her employer and, unlike her prior affidavit, the other entities which created the loan documents and assignments thereof (*see generally Bank of N.Y. Mellon v Gordon*, *supra* at 209). Here, the affidavits, based upon personal knowledge, as well as the annexed records, established the material facts underlying the claim for foreclosure, to wit the mortgage, note, and evidence of mortgagor's default (*see eg Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*).

As relevant to the circumstances in this action, standing can be demonstrated by a written assignment of the underlying note (*see Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *U.S. Bank N.A. v Carnivale*, 138 AD3d 1220, 1221 [2d Dept 2016]). Although a written assignment of a mortgage is often a nullity in this context (*see eg U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]), all the assignments herein provide for transfer of the "Mortgages . . . securing payment of note(s) of even date therewith, in the original principal amount of \$30,300,000.00". The assignments also provide the mortgages were transferred "[t]ogether with any and all other liens, privileges, security interests, rights, entitlements, equities, claims and demands". This language sufficiently established conveyance of the notes (*see Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1<sup>st</sup> Dept 2023]; *US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1<sup>st</sup> Dept 2018]; *see also Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307 [3d Dept 2012]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2d Dept 2012]).

In opposition, Defendants argument that the within motion is an inappropriate successive motion for summary judgment is unavailing. Multiple disputed issues are not presented here (*cf. Wells Fargo Bank v Gittens*, 217 AD3d 901, 903 [2d Dept 2023]) and entertaining a second summary judgment motion furthers the ends of justice by allowing the Court to eliminate the need for a trial on issues that Defendants have not contested, to wit the existence of the note, mortgage and Defendants' default (*see MTGLQ Invs, LP v Collado*, 183 AD3d 414 [1<sup>st</sup> Dept 2020]; *Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1<sup>st</sup> Dept 2017])[Uncontradicted facts on a motion for summary judgment are "deemed to be admitted"]. Defendants' assertion that the foundational statements in the affidavit in support of the of amount due were too generalized to lay a proper foundation under CPLR §4518[a] and are not supported

by corroborating documentation are without merit. Also, to the extent Defendant cites economic forces caused by the COVID-19 pandemic, as a basis for this Court to invoke its equitable powers, it is unavailing. Equity will only intervene in a foreclosure action in a rare case where there is an element of fraud, exploitive overreaching or unconscionable conduct demonstrated (*see Key International Mfg., Inc. v. Stillman*, 103 AD2d 475, 477 [2d Dept 1985]). Further, “[s]ympathy for the defendants cannot be permitted to undermine the stability of contractual obligations” (*L & L Assoc. Holding Corp. v Seventh Day Church of God of the Apostolic Faith*, 188 AD3d 1180, 1181 [2d Dept 2020]; *see also Pentagon Fed. Credit Union v. Popovic*, 217 AD3d 480 [1<sup>st</sup> Dept 2023]).

Accordingly, it is

ORDERED that the branch of Plaintiff’s motion for summary judgment against the appearing Defendants is granted; and it is further

ORDERED that Defendants’ fourth affirmative defense is stricken; and it is further

ORDERED that **Mark McKew, Esq., 1725 York Ave, Ste 29A, New York, New York, 212-876-6783** 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/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 **June 27, 2024, at 11:00 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk (SFC-Part32-Clerk@nycourts.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.

3/1/2024

DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  
DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

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

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