

2 Cap Invs., LLC v Frog Invs., LLC

2024 NY Slip Op 30671(U)

March 1, 2024

Supreme Court, New York County

Docket Number: Index No. 850074/2022

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

-----X

INDEX NO. 850074/2022

2 CAP INVESTMENTS, LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002

- v -

FROG INVESTMENTS, LLC, VIOLY MCCAUSLAND,
BOARD OF MANAGERS OF THE ONE MORNINGSIDE
PARK CONDOMINIUM, NEW YORK CITY DEPARTMENT
OF TRANSPORTATION, NEW YORK CITY DEPARTMENT
OF TAXATION AND FINANCE, JOHN DOE NO. 1
THROUGH JOHN DOE NO. 10

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 102, 103, 104, 105,
106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126,
127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147,
148, 149, 150, 151, 152

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

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

This is an action to foreclose on multiple mortgages securing multiple loans evidenced by various notes
for which Plaintiff was not the original lender. No less than sixteen documents (ie notes, allonges, assignment,
modifications and mortgages) are referenced in and annexed to the complaint herein to evidence the
transactions and encumbrance that that are the subject of this action. It appears the note at issue was a
consolidated promissory note, dated August 30, 2019, which evidenced an indebtedness with an original
principal amount of \$1,800,000.00. The mortgagor/borrower in these transactions was Defendant Frog
Investments, LLC ("Frog") and that the salient loan/mortgage documents were all executed by Defendant Violy
McCausland ("McCausland") as Managing Member of Frog. It also appears that in a document dated February
28, 2018, McCausland executed a guaranty of \$1,700,000.00 of the indebtedness. An amendment to the note
was executed by Plaintiff and Frog on October 1, 2020. Plaintiff commenced this action wherein it is alleged
Defendants defaulted in repayment under the subject note[s]. Defendants Frog and McCausland answered and
pled seven affirmative defenses, including Plaintiff's lack of standing.

By order of this Court dated April 13, 2023, Plaintiff's motion for summary judgment was denied on the
basis that prima facie proof in evidentiary form of the note, mortgage, Defendant's default and Plaintiff's
standing was not established. Now, Plaintiff again moves for summary judgment against the Defendants Frog
and McCausland, for an order of reference and to amend the caption. Defendants Frog and McCausland 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 [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]). 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 [2nd 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 with an affidavit from Christopher J. Capuano ("Capuano"), a member of Plaintiff. Capuano claims that her affidavit was made based upon "personal knowledge" through direct oversight of Plaintiff's loan portfolio. 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'"]. Capuano demonstrated knowledge of the record keeping practices of his employer and, unlike his 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). The records of prior servicers were also admissible since Capuano attested those records were received from prior entities, incorporated into the records Plaintiff kept and were routinely relied upon in its businesses (see *Bank of Am., N.A. v Brannon*, 156 AD3d 1, 8 [1st Dept 2017]; *Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 AD3d 418, 419 [1st Dept 2012]; see also *U.S. Bank Trust, N.A. v Bank of Am., N.A.*, 201 AD3d 769, 772 [2d Dept 2022]). Further, the records attached to the affidavit supported Plaintiff's claims (see *U.S. Bank, N.A. v Saraceno*, 147 AD3d 1005 [2nd Dept. 2017]; *HSBC Bank USA, N.A. v Simmons*, 125 AD3d 930 [2d Dept 2015]). 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 an 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]). A written assignment of a only the mortgage is often a nullity in this context since "a mortgage is merely security for a debt, it cannot exist independently of the debt" (*U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]). In this case the assignment and assumption agreement, dated August 30, 2019, provides for transfer of "all right, title and interest of Assignor in and to the Loan, the Note, the Mortgage, and all other documents and instruments executed in connection with the Loan". This language sufficiently established conveyance of the notes (see *Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1st Dept 2023]; *US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1st 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]).

Concerning the affirmative defense that contractual pre-foreclosure notice was not given, the August 30, 2019, consolidated mortgage expressly provides in section 3.2 that upon default, "all sums secured hereby shall become immediately due and payable, without notice or demand except as provided in the Loan Agreement" and that Plaintiff may "[p]roceed to foreclose". The note executed the same date contains no such notice

provision. In any event, Plaintiff proffered proof that a notice of default was served before this action was commenced.

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 [1st Dept 2020]; *Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1st Dept 2017])[Uncontradicted facts on a motion for summary judgment are "deemed to be admitted"]. Defendants' assertions 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.

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' first, second and third affirmative defenses are stricken; and it is further

ORDERED that **Allison Furman, Esq., 260 Madison Avenue, 15th Floor, New York, New York 10016, 212-684-9400** 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 11:40 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

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

Francis A. Kahn III

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

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