

**Six Gramercy LLC v Westside Units 17th St. LLC**

2024 NY Slip Op 30672(U)

March 1, 2024

Supreme Court, New York County

Docket Number: Index No. 850084/2022

Judge: Francis A. Kahn III

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART 32

Justice

INDEX NO. 850084/2022

SIX GRAMERCY LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 003

- v -

WESTSIDE UNITS 17TH STREET LLC, MORDECHAI WEISZ, BOARD OF MANAGERS OF 10 EAST 18TH STREET CONDOMINIUM, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, JOHN DOE #1 THROUGH JOHN DOE #50,

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion and cross-motion are determined as follows:

The within action is to foreclose on a mortgage encumbering a parcel of commercial real property located at 7 East 17th Street, Unit 3N, New York, New York a/k/a 10 East 18th Street, Unit 3N, New York, New York. Defendant Westside Units 17th Street LLC ("Westside") gave a mortgage, dated October 11, 2018, to non-party Mortgage Electronic Registration Systems ("MERS") as nominee for former Plaintiff East West Bank ("East West"). The mortgage secures a loan with an original principal amount of \$1,499,000.00.00 which is memorialized by an adjustable rate note the same date as the mortgage. The note and mortgage were executed by Defendants Mordechai Weisz ("Weisz") as Managing Member of Westside. Concomitantly with these documents, Leon executed a commercial guaranty of the indebtedness.

East West Bank commenced this action alleging Defendants defaulted in repayment of the loans and under the guarantees. Defendants Westside and Weisz answered and pled eight affirmative defenses, including lack of standing. By order of this Court dated September 21, 2023, Six Gramercy LLC was substituted as Plaintiff herein without opposition. Now, Plaintiff moves for inter alia summary judgment against the appearing Defendants, for a default judgment against the non-appearing parties, appointing a referee to compute and to amend the caption. Defendants oppose the motion and cross-move pursuant CPLR §3025[b] for leave to amend their answer to assert, inter alia, an affirmative defense of non-compliance with a contractual prerequisite to foreclosure. Plaintiff opposes the cross-motion.

As Defendants proposed affirmative defense directly impacts what Plaintiff must proffer as a *prima facie* case for summary judgment (*see generally Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2<sup>nd</sup> Dept 2020]), the Court will address that branch of their cross-motion first. Leave to amend a pleading under CPLR §3025[b] is to be freely given “absent prejudice or surprise resulting directly from the delay” (*see e.g. O’Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 [1st Dept 2017]; *Anoun v City of New York*, 85 AD3d 694 [1st Dept 2011]; *see also Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). All that need be shown is that “the proffered amendment is not palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). To justify denial of such a motion, the opposing party “must overcome a heavy presumption of validity in favor of [allowing amendment]” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]).

Defendants demonstrated that their defense based upon Plaintiff’s alleged non-compliance with paragraph 22 in the mortgage is viably pled. As to the contractual pre-foreclosure notice, paragraph 22 of the mortgage, a ubiquitous provision in mortgages, provides that as a prior to acceleration of the note, the lender must send a notice containing the information specified in paragraph 22[b][1] – [6] in the manner described in paragraph 15 of the mortgage. Given the common nature of this affirmative defense, Plaintiff failed to demonstrate the existence of any prejudice based upon the delay in seeking leave to amend (*see GMAC Mtge., LLC v Coombs*, 191 AD3d 37, 50-51 [2d Dept 2020]; *cf. HSBC Bank USA, N.A. v Szoffer*, 149 AD3d 1400 [2d Dept 2017]). Since Defendants have raised an issue for the first time in opposition to a motion for summary judgment, Plaintiff is entitled to submit rebuttal evidence in reply to cure any deficiencies in its *prima facie* case occasioned by the amendment (*see GMAC Mtge., LLC v Coombs*, supra; *Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2d Dept 2015]).

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 eg 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]). Based upon the above amendment, Plaintiff was also required to show its substantial compliance with the requisites under paragraph 22 of the mortgage (*see eg Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [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]). 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]).

Here, Plaintiff established the note, mortgage and Defendants’ default with the affidavit of Bryan Kang (“Kang”), the managing member of Plaintiff, and the documents annexed thereto. Kang’s affidavit laid a proper foundation for the admission of the records of Plaintiff into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of other entities were also admissible since Kang sufficiently established that those records were received from the

makers and incorporated into the records Plaintiff kept and that it routinely relied upon such documents in its business (*see U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, annexed to the motion were records referenced by Kang (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1<sup>st</sup> Dept 2020]). As to the Mortgagor's default, it "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]). Here, Kang's review of the attached account records demonstrated that the Mortgagor defaulted in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1<sup>st</sup> Dept 2011]).

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). In the second and third instances, the note is the dispositive instrument (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank N.A. v Carnivale*, 138 AD3d 1220, 1221 [2d Dept 2016], quoting *Onewest Bank, F.S.B. v Mazzone*, 130 AD3d 1399, 1400 [2d Dept 2015]). However, "mere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing or to make a plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note" (*U.S. Bank N.A. v Moulton*, 179 AD3d 734, 737 [2d Dept 2020]). "Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2d Dept 2015] [citations omitted]). The indorsement must be made either on the face of the note or on an allonge "so firmly affixed thereto as to become a part thereof" (UCC §3-202[2]). "The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster*, 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, supra).

In support of the motion, Plaintiff posits that its standing is established through a written assignment of the mortgage from MERS to East West dated April 1, 2022. After the action was commenced, Plaintiff claims it obtained the note, *inter alia*, via an assignment from East West, dated July 27, 2022. Contrary to Defendants' assertions, the language in the written assignment of the mortgage from MERS to East West was sufficiently broad that the note was also assigned under that document (*see Deutsche Bank Natl. Trust Co. v Romano*, 147 AD3d 1021 [2d Dept 2017]). Specifically, the operative phrases in assignment indicate that the mortgage was "given to secure the payment of a *promissory note* in the original amount of One Million Four Hundred Ninety Nine Thousand and xx/100 Dollars (\$1,499,000.00) (emphasis added)" and that the "Assignor does hereby assign and transfer to Assignee all rights accrued under said Mortgage and all *indebtedness secured thereby* (emphasis added)" (*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]). Since standing is assessed when an action is commenced (*see Aurora Loan Servs., LLC v Taylor*, supra) and East West was the original Plaintiff, standing is demonstrated.

With respect to the transfer from East West to Plaintiff after this action was commenced, the assignment of the mortgage is even clearer and expressly provides that the “assignment of the Mortgage is made *together with the note* which the Mortgage secures and all other loan documents executed in connection with the loan evidenced by such note” (*see Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1<sup>st</sup> Dept 2023]). In any event, CPLR §1018 controls this transfer and provides that either the transferee or transferor is authorized to continue prosecution of the action (*see CPLR §1018; Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574 [2d Dept 2020]; *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1<sup>st</sup> Dept 2017]).

Accordingly, Plaintiff demonstrated *prima facie* the note, mortgage, Defendant’s default in repayment thereunder as well as its standing.

In opposition, Defendant failed to raise an issue of fact as to the existence of the note, mortgage and Westside’s default in repayment. Indeed, since none of the salient facts on these issues were contradicted by any of the appearing defendants, they are “deemed to be admitted” (*Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1<sup>st</sup> Dept 2017]). Defendants’ arguments concerning the propriety of an allonge annexed to the note to facilitate its transfer from East West to Plaintiff is unavailing based upon the written assignment (*see Mortgage Stanley Private Bank, N.A. v Ceccarelli*, 210 AD3d 478, 479 [1<sup>st</sup> Dept 2022]).

As to the guaranty, “[o]n a motion for summary judgment to enforce a written guaranty all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty” (*see 4 USS LLC v DSW MS LLC*, 120 AD3d 1049, 1051 [1<sup>st</sup> Dept 2014], *quoting City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1<sup>st</sup> Dept 1998]). Under the guaranty, Defendant Weisz “absolutely and unconditionally guarantee[d] full and punctual payment and satisfaction of the Indebtedness of Borrower to Lender”. The affidavits submitted by Plaintiff and the supporting documents demonstrated a *prima facie* case for summary judgment against Weisz on the cause of action based upon the guaranty.

As to the branch of Plaintiff’s motion to dismiss Defendants’ other affirmative defenses, 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]).

All the other affirmative defenses 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 [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]). Further, as no specific legal arguments were proffered in support of any affirmative defense, other than standing, those unaddressed defenses and claims 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 (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1<sup>st</sup> Dept 2016]).

The branch of Plaintiff's motion to amend 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 Plaintiff is awarded summary judgment on its causes of action for foreclosure against the appearing parties and a default judgment against the non-appearing parties; and it is further

ORDERED that Plaintiff is awarded summary judgment on its cause of action against Defendant Weisz based upon the guaranty; and it is further

ORDERED that that **Paul Sklar, Esq., 551 5<sup>th</sup> Avenue, Ste 2200, New York, New York 10176-0001- (212) 972-8845** 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 caption of this action should be amended by substituting Carolyn Lord as John Doe #1 and striking John Doe #2 through #50, all without prejudice to the proceedings heretofore had herein, as follows

ORDERED that the caption shall read as follows:

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

-----X  
SIX GRAMERCY LLC,

Plaintiff,

-against-

WESTSIDE UNITS 17" STREET LLC, MORDECHAI WEISZ, BOARD OF MANAGERS OF 10 EAST 18TH STREET CONDOMINIUM, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and CAROLYN LORD,

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)); and it is further

All parties are to appear for a virtual conference via Microsoft Teams on **June 27, 2024, at 10:20 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.

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