

**B King Chick LLC v Organization for Defense of Four
Freedoms for Ukraine, Inc.**

2024 NY Slip Op 30673(U)

March 1, 2024

Supreme Court, New York County

Docket Number: Index No. 850122/2022

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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INDEX NO. 850122/2022

B KING CHICK LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 009

- v -

ORGANIZATION FOR DEFENSE OF FOUR FREEDOMS
FOR UKRAINE, INC., ESTEBAN A. KACZURAK, NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE
CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF FINANCE, JOHN DOES 1-100,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 275, 276, 277, 281, 282, 283, 288, 289, 290, 291, 292, 293, 294, 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, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335

were read on this motion to/for APPOINT - REFEREE

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

Plaintiff B King Chick LLC (“B King”) commenced this action to foreclose on a mortgage encumbering a parcel of real property located at 136 Second Avenue a/k/a 43 St. Marks Place, New York, New York. The mortgage secures an indebtedness in the original amount of \$850,000.00 which is memorialized in a note dated June 25, 2008. The note and mortgage were given to non-party Ukrainian National Federal Credit Union (“UNFCU”) by Defendant Organization for Defense of Four Freedoms for Ukraine, Inc. (“Four Freedoms”) and were executed by Defendant Esteban A. Kaczurak (“Kaczurak”) as Vice President. The note was allegedly assigned by UNFCU to Plaintiff by an endorsement dated December 29, 2020. In the complaint, Plaintiff pled it accelerated the note because Four Freedoms defaulted in repayment. Defendant (“Four Freedoms”) answered and pled five affirmative defenses.

Now, Four Freedoms moves to: compel Plaintiff to issue a new payoff amount based upon the Mortgage default rate of 1.5% compounded simply, toll the default interest and attorney’s fees, and have the Court compute interest rather than a referee. Plaintiff opposes the motion and cross-moves for *inter alia* for summary judgment against the appearing Defendants, a default judgment against the non-appearing Defendants, striking Defendants’ answers, for an order of reference and to amend the caption. Defendant Four Freedoms opposes the cross-motion.

As to the branch of Defendant Four Freedoms' motion regarding a payoff letter, it is established that a borrower is entitled to payoff figures from a lender as an adjunct of the common-law right to redeem (*see Luna Light, Inc. v Just Indus., Inc.*, 45 AD3d 814, 816 [2d Dept 2007])["[Borrower] is entitled to redeem the subject real property, and is entitled to a calculation of the redemption price"]; *see also* 1 Bergman on New York Mortgage Foreclosures §4.07 [2023]). Regarding the method for computation of default interest, by order of this Court dated June 23, 2023, the Court resolved that issue and directed that "upon a reference to compute, the referee appointed shall calculate simple, not compound, default interest". Contrary to Defendant's assertion, this order did not require issuance of a payoff letter utilizing a calculation of simple rather than compound default interest. Parenthetically, the Court notes, without so holding, that while Plaintiff may believe that this Court's legal conclusion concerning the calculation of interest erroneous, and claims it has preserved its right to appeal that issue, if Plaintiff is incorrect, then failure to issue a payoff letter containing a simple interest calculation would ostensibly be wrongful conduct which could result in cancellation of interest and other sums sought by Plaintiff (*see Preferred Group of Manhattan, Inc. v Fabius Maximus, Inc.*, 51 AD3d 889 [2d Dept 2008]; *Sloane v Gape*, 216 AD2d 285 [2d Dept 1995]).

The branches of Defendant's motion to toll interest and attorney's fees are again denied. These issues are premature and shall not be made the subject of a motion again until after a calculation of the amount due is made. The demand that the Court compute interest rather than a referee is also denied. Defendant has not demonstrated why appointing a referee in this matter would be an inappropriate exercise of this Court's discretion.

As to the cross-motion, 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 Defendant's 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]). 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 Jerry Lebedowicz ("Lebedowicz"), the principal of Plaintiff. Lebedowicz avers the affidavit was made based upon "personal knowledge and/or my review of Plaintiff's business records, the business records of Plaintiff's predecessor-in-interest". Personal knowledge 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'"]. Lebedowicz laid a proper foundation for the admission of Plaintiff's records into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of Plaintiff's assignor, UNFCU were also admissible since Lebedowicz sufficiently established that those records were received from UNFCU 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, the records referenced by Lebedowicz were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). The affidavit and referenced documents sufficiently evidenced the note and mortgage (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra). 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, Lebedowicz'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 [1st Dept 2011]).

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]), the assignment herein provides the mortgage was transferred "together with the note or notes therein described or referred to, the money due or to become due thereon with interest". This language sufficiently established conveyance of the note (*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]).

In opposition, Four Freedoms contends that an issue of fact exists regarding the validity of the note and mortgage. Christine Balko ("Balko"), an officer and Treasurer of Four Freedoms, avers in an affidavit that after a search, she could not locate any records for the 2008 loan. Therefore, Balko postulates that an issue of fact exists "as to whether KACZURAK was authorized to take out the loan with the CREDIT UNION". Balko's affidavit is insufficient as it is conclusory and founded entirely in speculation (*see generally Excel Capital Group Corp. v 225 Ross St. Realty, Inc.*, 165 AD3d 1233 [2d Dept 2018]). More importantly, no cause of action or affirmative defense concerning the validity of the mortgage or Kaczurak's lack of authority to give the mortgage is pled by Four Freedoms in its answer (*see Gelmin v Sequa Capital Corp.*, 269 AD2d 492 [2d Dept 2000]). Even considered on its merits, this claim would still fail.

"[T]he law is clear that [mortgagees] do not have a duty of care [to] ascertain the validity of the documentation presented by an individual who claims to have the authority to act on behalf of a borrower corporation or entity" (*LZG Realty, LLC v H.D.W. 2005 Forest, LLC*, 87 AD3d 727, 729 [2d Dept 2011]; *see also Gross v Neiman*, 147 AD3d 505 [1st Dept 2017]). In reply, Plaintiff proffered a copy of a corporate resolution to borrow, dated June 18, 2008, apparently issued by Four Freedom's board of directors and executed by a "Director" and "Acting Secretary", neither of whom was Kaczurak. This document may be considered in rebuttal as Four Freedoms raised the issue of lack of corporate authority for the first time in opposition to this motion (*see generally GMAC Mtge., LLC v Coombs*, 191 AD3d 37, 50-51 [2d Dept 2020]; *Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2d Dept 2015]).

Additionally, Four Freedoms proffered no evidence to establish the note and mortgage were not ratified. "[W]here a contract (such as a mortgage) may be signed by a party without authorization, failure to timely disavow, coupled with performance can ratify the unauthorized signature—one evaluation of ratification being adoption of the acts of another by one for whom the other purports to be acting" (3 Bergman on New York Mortgage Foreclosures §1.20[2023]; *see also Decana Inc. v Contogouris*, 55 AD3d 325 [1st Dept 2008]; *1230 Park Assoc., LLC v Northern Source, LLC*, 48 AD3d

355 [1st Dept 2008]; *Odell v 704 Broadway Condo.*, 284 AD2d 52 [1st Dept 2001]). Here, the note and mortgage were given in 2008, but the issue of invalidity of the loan was not raised until Four Freedoms opposed the cross-motion some fifteen years later. Further, the account history records produced by Plaintiff evidence that Four Freedoms paid its monthly installments for approximately eleven years before defaulting.

To the extent Defendant posits that an issue of fact exists as to the amount due and owing, this does not preclude issuance of summary judgment as it is a matter for resolution as part of the reference to compute (*see Orchard Hotel, LLC v DAB Group, LLC*, 106 AD3d 628 [1st Dept 2013]).

As to the branch of the motion to dismiss Defendants' 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]).

As pled, all the affirmative defenses are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v Johnson*, 177 AD3d 561 [1st 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]). To the extent Defendants' opposition failed to raise specific legal arguments in support of the affirmative defenses, those were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafigiore*, 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 without opposition (*see CPLR §3215; SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the 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 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 **Matthew D. Hunter III, Esq., 71-01 Austin Street, Forest Hills, NY 11575 (718) 309-1660** 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 the caption of this action be amended by striking therefrom the remaining defendant(s) sued herein as JOHN DOES, all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that the caption shall be amended to read as follows:

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

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B KING CHICK LLC,

Plaintiff,

-against-

ORGANIZATION FOR DEFENSE OF FOUR
FREEDOMS FOR UKRAINE, INC., ESTEBAN A.
KACZURAK, NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE, ENVIRONMENTAL
CONTROL BOARD OF THE CITY OF NEW YORK,
NEW YORK CITY DEPARTMENT OF FINANCE,

Defendants.

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and it is further

ORDERED that the Notice of Pendency filed on March 16, 2023, be deemed filed, *nunc pro tunc*, to the date of the expiration of the Notice of Pendency on October 17, 2022; 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

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 **July 10, 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.

3/1/2024

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NOT TO BE DISPOSED

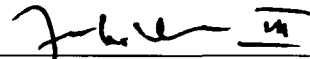
GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER J.S.C.

REFERENCE



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

HON. FRANCIS A. KAHN III