

Merchants Bank of Indiana v 19 W 55 LLC

2024 NY Slip Op 30885(U)

March 12, 2024

Supreme Court, New York County

Docket Number: Index No. 850114/2023

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. 850114/2023

MERCHANTS BANK OF INDIANA,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 004

- v -

19 W 55 LLC, ABRAHAM LEIFER, THE ALLURE GROUP,
LLC, CLIVE LONSTEIN INC., CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD, AMERICAN PIPE
AND TANK LINING CO. INC., JOHN DOE NUMBER ONE
THROUGH JOHN DOE NUMBER TEN,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 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, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 187, 188

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 an amended, restated and consolidated mortgage encumbering two parcels of real property located at 19 West 55th Street, New York, New York 10019. The encumbrance was given to Plaintiff by Defendants 19 W 55 LLC and secures an indebtedness of \$36,760,000.00. The indebtedness is memorialized by an amended, restated and consolidated mortgage note. Both documents, dated December 30, 2019, were executed by Defendant Abraham Leifer ("Leifer") as sole member of non-party A View 19 W 55 LLC, the sole member of the Mortgagor. Concomitantly with these documents, Leifer executed a continuing guaranty of the indebtedness. Plaintiff, Mortgagor and Leifer executed a forbearance agreement dated March 30, 2021, wherein the Defendants acknowledged the indebtedness, their default and reaffirmed their promise to repay the loan.

Plaintiff commenced this action alleging Defendants defaulted in in repayment under the note. Mortgagor and Leifer answered jointly and pled one affirmative defense pursuant to RPAPL §1301. A non-party alleged tenant of the premises, Bella N. Hanna, answered *pro se*. Now, Plaintiff moves for *inter alia* summary judgment against Mortgagor and Leifer, for a default judgment against the non-appearing parties, striking the appearing Defendants' affirmative defenses, appointing a referee to compute and to amend the caption. Defendants 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]). In support of the motion, 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 affirmation from Robert Burtner, the Executive Vice President and Chief Credit Officer of Plaintiff. The affidavit established the mortgage, note, and evidence of mortgagor's default and was sufficiently supported by appropriate evidentiary documents (*see eg Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*). The indebtedness and default were also established based on the terms of the forbearance agreement (*see Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602 [2d Dept 2013]; *EMC Mortg. Corp. v Stewart*, 2 AD3d 772 [2d Dept 2003]).

In opposition, the only argument Mortgagor and Leifer proffered in opposition was to challenge Plaintiff's standing. Initially, these defendants waived any reliance on the issue of Plaintiff's standing as that affirmative defense was waived when not pled in the answer (*see Bank of Am., N.A. v Brannon*, 156 AD3d 1, 7 [1st Dept 2017]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278 [1st Dept 2006]). In any event, since Plaintiff was the lender under when the amended, restated and consolidated mortgage and note were given, it was in direct privity with the Mortgagor when the action was commenced and, therefore, unquestionably had standing (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]; *see also 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]). As to sole affirmative defense pled by Mortgagor and Leifer, it was determined to be defective by order of this Court, dated November 9, 2023, which denied the Defendants' pre-answer motion to dismiss based on that affirmative defense. Non-party Bella Hannah failed to raise any issue of fact that would preclude summary judgment.

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 [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 Plaintiff is awarded summary judgment against the appearing parties and a default judgment against the non-appearing defendants; and it is further

ORDERED that that **Clark Whitsett, Esq. 66-05 Woodhaven Blvd., Rego Park, New York 11374 – 718-850-0003** 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 and all papers previously filed herein shall be amended by substituting in the place and stead of "John Doe #1" with "Bella Hanna" and striking defendants "JOHN DOE #2" through "JOHN DOE #10" all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that the caption shall read as follows:

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

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MERCHANTS BANK OF INDIANA

Plaintiff,

-against-

19 W 55 LLC; ABRAHAM LEIFER; THE ALLURE GROUP, LLC; CLIVE LONSTEIN INC.; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; AMERICAN PIPE AND TANK LINING CO. INC; BELLA HANNA,

Defendants.
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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 **July 10, 2024, @ 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.

3/12/2024
DATE

CHECK ONE:

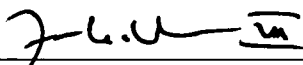
CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

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.