

**BMARK 2018-81 Bleecker St., LLC v 156
Bleecker Owner LLC**

2024 NY Slip Op 31922(U)

May 17, 2024

Supreme Court, New York County

Docket Number: Index No. 850257/2021

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. 850257/2021

BMARK 2018-B1 BLEECKER STREET, LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 003

- v -

156 BLEECKER OWNER LLC, JOSEPH MATTHEW
CASSIN, DAVID TAYLOR, NEW YORK CITY
DEPARTMENT OF FINANCE, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD, THE BOARD
OF MANAGERS OF THE ATRIUM CONDOMINIUM,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 129, 130, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149

were read on this motion to/for

JUDGMENT - SUMMARY

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

This is an action to foreclose on a consolidated and modified commercial mortgage encumbering a parcel of real property located at 156-168 Bleecker Street, New York, New York. The mortgage was given by Defendant 156 Bleecker Owner LLC (“Owner”) to non-party Deutsche Bank AG, New York Branch (“Deutsche”). The mortgage secures an indebtedness, memorialized by a consolidated, amended and restated promissory note, with an original principal amount of \$34,000,000.00. The note and mortgage, both dated November 10, 2017, were executed by Defendant Joseph Matthey Cassin (“Cassin”) as Authorized Signatory of Owner. Concomitantly therewith, Defendants Cassin and David Taylor (“Taylor”) executed a guaranty of recourse obligations.

Non-party Wilmington Trust, National Association, as Trustee, for the benefit of the holders of benchmark 2018-B1 Mortgage Trust Commercial Mortgage Pass-Through Certificates, Series 2018-B1 (“Wilmington”) commenced this action and pled in the complaint that Defendant Owner defaulted in making monthly installment payments beginning in September 2020. Owner and Guarantors did not answer, rather they consented to entry of a judgment of foreclosure and sale by stipulation with Wilmington, dated June 17, 2022. A judgment was entered pursuant to that agreement on October 12, 2022.

By order dated May 17, 2023, Wilmington’s assignee, Plaintiff, moved to vacate the judgment and amend the complaint to, *inter alia*, reflect the above assignment and to add The Board of Managers

of the Atrium Condominium (“Atrium”) as a defendant. Atrium answered and pled five affirmative defenses, including a claim that its lien for common charges “is superior to Plaintiff’s mortgage lien, as well as two counterclaims and two crossclaims against Bleecker. Plaintiff replied to the counterclaims. Now, Plaintiff moves for summary judgment against Owner and Atrium, to strike their answers and affirmative defenses, for a default judgment against the non-appearing parties, for an order of reference. Defendant Atrium opposes 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 mortgagors’ 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]).

Plaintiff’s motion was supported with an affidavit from John Yee (“Yee”), an Asset Manager with LNR Partners, LLC (“LNR”), Plaintiff’s loan servicer, as well as supporting documentation. The affidavit, supported by the appropriate business records, established the mortgage, note, and evidence of mortgagor’s default and was sufficiently supported by appropriate documentary evidence (*see eg Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*; *see also Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019]).

In opposition, Atrium’s assertion that Plaintiff failed to demonstrate that no undisputed issue of fact exists that its consolidated mortgage is the first mortgage of record and has priority under RPL §339-z is inapposite. Initially, the fifth affirmative defense which attempts to raise this issue is entirely conclusory, unsupported by any facts in the answer, and, therefore, it is 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 [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]).

To the extent the issue of lien priority is proffered to show the existence of an issue of fact, it also fails. Initially, since Atrium only offered the facts and precise legal theory underlying its claim of priority in opposition to this motion, Plaintiff was entitled to rebut this argument and submit evidence to cure any deficiency in its *prima facie* case in its reply papers (*see eg GMAC Mtge., LLC v Coombs*, 191 AD3d 37, 50-51 [2d Dept 2020]; *Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2d Dept 2015]). Atrium claims that Plaintiff has not sufficiently eliminated the possibility of “intervening” liens coming into existence before the consolidated mortgage was created. But it failed to identify, much less offer evidence of same, what intervening lien exists on the property that creates an issue of fact as to priority. Atrium also raises the specter of an unsatisfied mortgage from 1987 claiming it would relegate Plaintiff’s lien to a second mortgage over which Atrium’s lien would have priority under RPL §339-z. Atrium is correct that a mortgage was recorded by Manufacturers Hanover Trust Company on June 22, 1987. However, Atrium either overlooked or ignored that the mortgage was extinguished when that entity foreclosed on same (*see Manufacturers Hanover Trust Company v 160 Bleecker Street Associates, et al*, NY Cty Index No 6490/1990).

Atrium's argument that summary judgment is defeated as issues of fact exist as to whether the receiver is obligated to pay outstanding common charges and a capital assessment predating the receivership is meritless. The appointment of a receiver is ancillary to an action to foreclose on a mortgage and solely within the discretion of a court (*see Copeland v Salomon*, 56 NY2d 222, 228 [1982]). Further, "[a] receiver is a fiduciary and an officer of the court who acts at its direction and on its behalf" (*Coronet Capital Co. v Spodek*, 279 AD2d 600, 602 [2d Dept 2000]). Ergo, a receiver does not serve or act under the control of the party who sought same (*see Kaplan v 2108-2116 Walton Avenue Realty Co., Inc.*, 74 AD2d 786 [1st Dept 1980]) and a receiver's actions do not affect a plaintiff's cause of action for foreclosure nor affect its entitlement to summary judgment (*see 1 Bergman on New York Mortgage Foreclosures* §10.02 [2023][*"an assertion that the receiver's monies would cure a default [cannot] be a basis to defeat a foreclosing plaintiff's motion for summary judgment"*]).

As to the branch of the motion to dismiss Defendants' affirmative defenses and counterclaim, 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]). Also by failing to raise specific legal arguments in support of the first and second affirmative defenses, those 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 two counterclaims also fail as the lien asserted by Atrium is subordinate to Plaintiff's lien and, therefore, Atrium is relegated to seeking satisfaction of its lien from any surplus monies in this action (*see generally Bankers Trust Co. v. Board of Managers of Park 900 Condominium*, 81 NY2d 1033 [1993]; *see also Shankman v Horoshko*, 291 AD2d 441 [2d Dept 2002]; *Anderman v 1395 E. 52nd St. Realty Corp.*, 60 Misc 2d 437, 439 [Sup Ct Sullivan Cty 1969]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties, other than the guarantors, is granted without opposition (*see CPLR* §3215; *SRMOF II 2012-1 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, other than the guarantors, as well as the other relief is granted; and it is further

ORDERED that **Tom Kleinberger, Esq., 411 5th Avenue, New York, New York 10016 (917) 326-5523** 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

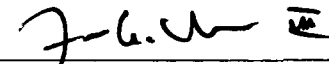
ORDERED that counsel for Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; 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 **September 25, 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.

5/17/2024
DATE


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

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	