MMG Invs. III, LLC v Maruru Holdings, LLC

2024 NY Slip Op 32153(U)

June 21, 2024

Supreme Court, New York County

Docket Number: Index No. 850460/2023

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

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MMG INVESTMENTS III, LLC,

Plaintiff,

- v -

MARURU HOLDINGS, LLC,DAVID SIROIS COMPREHENSIVE DENTISTRY, PLLC,DAVID SIROIS, ROBIN SCHLENGER, NEW YORK CITY BUREAU OF HIGHWAY OPERATIONS, JOHN DOES 1 TO 10, XYZ CORPORATION 1 TO 10

Defendant.

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INDEX NO. 850460/2023

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for JUDGMENT - SUMMARY.

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

This is an action to foreclose on a consolidated, extended and modified mortgage encumbering a parcel of real property located 131 East 38th Street, New York, New York. The mortgage, dated December 8, 2016, was given by Defendant Maruru Holdings LLC ("Maruru") to non-party Santander Bank, NA ("Santander"). The mortgage secures a loan with an original principal amount of $3,580,000.00 which is evidenced by a consolidated note of the same date as the mortgage. Defendant David Sirois ("Sirois") executed the note and mortgage as the Managing Member of Maruru. Concomitantly with these documents, Sirois and Defendant Robin Schlenger ("Schlenger") executed a guaranty of the indebtedness. On June 9, 2022, Maruru, Sirios and CIO MW Loan 1 LLC ("CIO"), the alleged assignee of the note and mortgage at the time, executed a forbearance agreement. In paragraph 14 of that agreement, Maruru and Sirios admitted their default under the loan documents, acknowledged the indebtedness, and admitted they had "no claim, defense, offset or counterclaim" to their default.

Plaintiff commenced this action and alleged that Defendants defaulted in repayment of the indebtedness under the terms of the loan documents and forbearance agreement. Defendants Maruru and Sirois answered jointly and pled twenty-eight [28] affirmative defenses, including lack of standing. Now, Plaintiff moves for summary judgment against Defendants Maruru and Sirois, striking their answer and affirmative defenses, a default judgment against all non-appearing parties, to appoint a Referee to compute and to amend the caption. Defendants Maruru and Sirois 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]).

Based on the affirmative defenses in the answer, Plaintiff was also required to demonstrate, *prima facie*, its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd 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 [1st Dept 2019]). In support of such 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 Timothy P. Sheehan ("Sheehan"), an authorized representative of Plaintiff who claims that his affidavit was based upon personal knowledge and review of "certain business records". Concerning Sheehan's authority to act, the principle that an affidavit supporting a motion for summary judgment in a foreclosure action must be from an affiant with "authority to act" is well recognized (*see Citibank, N.A. v Herman,* 215 AD3d 629, 630 [2d Dept 2023]; *U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066, 1068 [2d Dept 2022]; *see also Wilmington Sav. Fund Socy., FSB v Diehl*, 219 AD3d 781, 783 [2d Dept 2023]). The rationale underlying the above decisions, although not expressly stated therein, is clearly founded in the requirements of CPLR §3212[b] which provides that an affidavit supporting such a motion must "by nature and definition, contain information from a person with direct knowledge of the subject matter discussed within the four corners of the document" (Mark C. Dillon, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:21). "Personal knowledge is not presumed from a mere positive averment of the facts. A court should be shown how the deponent knew or could have known such facts and if there is no evidence from which the inference of personal knowledge can be drawn than it is presumed that such does not exist" (*Bova v Vinciguerra*, 139 AD2d 797, 798 [3d Dept 1988][internal citations omitted]). In other words, an assertion of facts from which the affiant's personal knowledge may be inferred is an essential and ancient principle (*see Castro v N.Y. Univ.*, 5 AD3d 135, 136 [1st Dept 2004]; *see also Jock v Landmark Healthcare Facilities, LLC*, 62 AD3d 1070, 1072 [3d Dept 2009]; *Martin v Aluminum Compound Plate Co.*, 44 AD 412, 413 [1st Dept 1899]["the mere averment of facts as upon personal knowledge is not sufficient, unless the circumstances are such that it can fairly be inferred that the affiant had personal knowledge of the facts so positively stated"]; *Wallace v Baring*, 21 AD 477 [1st Dept 1897]; *Hoormann v Climax Cycle Co.*, 9 AD 579 [1st Dept 1896]).

In application of these principles, one with a relation to the parties (eg. an employee), to the cause of action or an eyewitness to events, related to the action or otherwise, often constitutes, in and of itself, satisfactory proof of an affiant's knowledge (*see eg Wallace v Baring*, supra at 478; *see also Klein v Trout Lake Preserve Homeowners' Assn.*, 179 AD2d 967, 968 [3d Dept 1992]). Conversely, an affiant, even an agent of a party or an employee thereof, who fails to demonstrate personal knowledge is incompetent to proffer an affidavit in support of a motion for accelerated judgment (*see eg Barraillier v City of New York*, 12 AD3d 168 [1st Dept 2004]; *Israelson v Rubin*, 20 AD2d 668 [2d Dept 1964]). Based on the foregoing, Sheehan's statement that as "an Authorized Representative for the Plaintiff, I am one of Plaintiff's *employees* principally responsible for managing the loan [emphasis added]" establishes Sheehan's bonafides. Even if this representation was insufficient, Plaintiff was entitled to submit proof supporting Sheehan's authority to act in reply (*see Bank of N.Y. Mellon v Hoshmand*, 158 AD3d 600, 601 [2d Dept 2018]; *see also Deutsche Bank Natl. Trust Co. v Rudman*, 170 AD3d 950, 952 [2d Dept 2019]).

As to the substance of the affidavit, although a witness may always testify as to matters which are within his or her personal knowledge (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019]), Sheehan does not indicate what information is based on personal observation or derived from records. To the extent Sheehan's knowledge is based upon a review of records, he laid a proper foundation for the admission Plaintiff's records into evidence under CPLR §4518. Sheehan stated he was familiar with the record keeping practices of Plaintiff and sufficiently showed that the records Plaintiff relied upon "reflect[ed] a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record [was] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record [was] made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, supra at 204; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]).

Nevertheless, virtually all the salient loan documents were created by Plaintiff's assignors and Sheehan failed to demonstrate knowledge of any other entity's record keeping practices (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). Sheehan also failed to attest that Plaintiff received any records from prior makers which were incorporated into the records Plaintiff kept and were routinely relied on in its business (*see U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780, 782-783 [2d Dept 2019]; *cf. Bank of Am., N.A. v Brannon*, supra at 10). With respect to these documents, Sheehan showed, at most, a naked "review of records maintained in the normal course of business [which] does not vest an affiant with personal knowledge" (*JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1517 [2d Dept 2019]).

As to Defendants' 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]). Ostensibly, since Plaintiff was the assignee of the note and mortgage when the default allegedly occurred on or about June 30, 2023, Sheehan did not specify the basis of his knowledge for that claim. If his knowledge was founded in Plaintiff's business records, those records were required to be, but were not, produced (*see US Bank v Rowe*, 194 AD3d 978 [2d Dept 2021]). The terms contained in the forbearance agreement could establish Defendants' default (*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]), but again, those records were not created by Plaintiff and no evidentiary foundation for the admission of those records was demonstrated.

Standing in a foreclosure action 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]). Here, the written assignments of the mortgages proffered ostensibly demonstrate Plaintiff's standing since both documents state the transfer includes the "notes" and/or the "indebtedness" (*see US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1st Dept 2018]; *GRP Loan, LLC v Taylor,* 95 AD3d 1172 [2d Dept 2012]). Nevertheless, absent proof these documents were created by Plaintiff, neither is presently in admissible form.

Accordingly, Movant failed to establish any of the *prima facie* elements of the cause of action for foreclosure (*see generally Federal Natl. Mtge. Assn. v Allanah*, 200 AD3d 947 [2d Dept 2021]).

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, except the seventh which pleads lack of standing, 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 failed to posit specific legal arguments in support of any particular affirmative defense, those are also deemed abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]). This includes Defendants' eighth affirmative defense based upon lack of contractual pre-foreclosure notice. As expressly stated in paragraph 14 of the forbearance agreement Defendants "waive[d] any right it may have to notice of a breach or maturity of the Agreement". Paragraph 16 further states that Defendants "shall have no right to cure any breach of this Agreement".

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 without opposition (*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 branches of Plaintiff's motion for summary judgment on its causes of action for foreclosure and the appointment of a referee are denied, and it is

ORDERED that all the affirmative defenses in Defendants' answer, except the seventh, are stricken, and it is

ORDERED, that the caption of this action be amended by striking therefrom the Defendants herein as JOHN DOES "1" – "10" and XYZ CORPORATION "1" - "10"; and it is further

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

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK
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MMG INVESTMENTS III, LLC,
Plaintiff,

-against-

MARURU HOLDINGS, LLC; DAVID SIROIS COMPREHENSIVE DENTISTRY, PLLC; DAVID SIROIS; ROBIN SCHLENGER; NEW YORK CITY BUREAU OF HIGHWAY OPERATIONS;
Defendants.
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and it is

ORDERED that this matter is set down for a status conference on **August 15, 2024 @ 10:40 am** via Microsoft Teams.

6/21/2024
DATE

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

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE