

**973 Amsterdam Ave Funding LLC v Jo-Al Real
Estate, Inc.**

2024 NY Slip Op 32836(U)

August 8, 2024

Supreme Court, New York County

Docket Number: Index No. 850115/2024

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. 850115/2024

973 AMSTERDAM AVE FUNDING LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002

- v -

JO-AL REAL ESTATE, INC., JOSE OLIVARES,
ALTAGRACIA OLIVARES, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, CITY OF
NEW YORK DEPARTMENT OF FINANCE, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD, 3 P
TRADING, INC., JOHN DOE #1 THROUGH JOHN DOE # 99

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

ORDER OF REFERENCE/REFERENCE TO COMPUTE

were read on this motion to/for

Pursuant to the parties' stipulation dated July 29, 2024 (NYSCEF Doc No 83), the Court vacates its order dated June 27, 2024 (NYSCEF Doc No 78) and substitutes the following in its place and stead:

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

This is an action to foreclose on an amended, restated and consolidated mortgage encumbering a parcel of commercial real property located at 973 Amsterdam Avenue, New York, New York. The mortgage, dated February 9, 2022, was given by Defendant Jo-Al Real Estate, Inc. ("Jo-Al") to Plaintiff to secure a loan with an original principal amount of \$2,500,000.00. The indebtedness is memorialized by an amended, restated and consolidated promissory note of the same date as the mortgage. In addition to the note and mortgage, the parties executed a separate loan agreement. All the loan documents were executed by Defendant Jose Olivares as President of Jo-Al. Concomitantly with these documents, Defendants Jose Olivares and Altagracia Olivares ("Olivares") executed a guaranty of the indebtedness. Thereafter, Defendants Jo-Al, Olivares and Plaintiff executed two extension agreements, dated March 1, 2023, and August 15, 2023.

Plaintiff commenced this action and pled in the summons and complaint that Defendants defaulted in payment of the installment due on May 1, 2024, and every other thereafter. Defendants answered and pled nine affirmative defenses, including standing. Now, Plaintiff moves for summary judgment against Defendants, to strike the answer and affirmative defenses, a default judgment against the non-appearing Defendants, an order of reference 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]). 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]). Also, 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 Doris Shen ("Shen"), an asset manager and authorized signatory of the Plaintiff. Despite being an employee of Plaintiff, Shen does not indicate her affidavit is based upon personal knowledge (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019])["a witness may always testify as to matters which are within his or her personal knowledge through personal observation"]. Rather, Shen avers that her submission is based upon a review of Plaintiff's records. As such, she was required, but failed, to establish a foundation for the admission of any of these documents as business records under CPLR §4518 (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]). Contrary to Plaintiff's assertion, the affiants failed to sufficiently show that the records they relied upon "reflect 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 be made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record be made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). Even more fundamentally, Shen neglected to aver that she is familiar with the record keeping practices of Plaintiff (*see Bank of IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). At most, the affidavits demonstrate 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]).

Accordingly, since none of the documentary evidence proffered is in admissible form, Movant failed to establish any of the *prima facie* elements of the cause of action for foreclosure or for summary judgment on the guaranty (*see generally Federal Natl. Mtge. Assn. v Allanah*, 200 AD3d 947 [2d Dept 2021]).

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]). Presently, since Plaintiff was the lender when the mortgages were given, it was in direct privity with the Defendants when the action was commenced and, therefore, established its standing (*see eg Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-19 [2d Dept 2021]; *Valley Natl. Bank v 152 Sherman Holding LP*, ___ Misc3d ___, 2023 NY Slip Op 33811[U][Sup Ct NY Cty 2023]). In opposition, Defendants' claims concerning Plaintiff's possession of the note are speculative and conclusory.

As to the branch of Plaintiff's 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]).

All the 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 [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]). Further, to the extent that no specific legal argument was proffered in support of a particular affirmative defense, such defenses were 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]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted (*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 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 are stricken, and it is

ORDERED that the caption of this action be amended by adding MARIANNA ERES as a Defendant and striking therefrom the remaining Defendants sued herein as "John Doe #1" to "John Doe #99" 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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973 AMSTERDAM AVE FUNDING LLC

Plaintiff,

-against-

JO-AL REAL ESTATE, INC.; JOSE OLIVARES;
ALTAGRACIA OLIVARES; NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE; CITY OF
NEW YORK DEPARTMENT OF FINANCE; NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD; 3 P
TRADING, INC. and MARIANNA ERES,

Defendants.
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and it is

ORDERED that this matter is set down for a status conference on **October 9, 2024 @ 10:40 am**
via Microsoft Teams.

8/8/2024

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

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