

Axos Bank v Hudson 805 LLC

2024 NY Slip Op 32852(U)

July 12, 2024

Supreme Court, New York County

Docket Number: Index No. 850233/2022

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. 850233/2022
MOTION DATE _____
MOTION SEQ. NO. 001

AXOS BANK,

Plaintiff,

- v -

HUDSON 805 LLC, BARNET L LIBERMAN, PHYLLIS LIBERMAN, INTERNAL REVENUE SERVICE, BOARD OF MANAGERS OF PRINTING HOUSE CONDOMINIUM, GARY M ROSENBERG, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, "JOHN DOE NO. 1" TO "JOHN DOE NO. 20"

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109
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 mortgage encumbering parcels of real property located at 421 Hudson Street, Units 805 and 806, New York, New York. The mortgage was given by Defendant Hudson 805 LLC ("Hudson") to non-party Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for BOFI Federal Bank ("BOFI"), the lender. The mortgage secures a loan given by BOFI to Defendant Barnet Liberman ("Liberman") in an original principal amount of \$6,150,000.00 which is memorialized by a consolidated adjustable-rate note given by Liberman. The note and mortgage, both dated March 1, 2017, were executed by Liberman in his individual capacity and as designated agent and member of Hudson. As part of this transaction, Hudson and Liberman also executed a gap note and mortgage. To unite the above transactions, Hudson, BOFI and MERS executed a consolidation, extension, and modification agreement ("CEMA").

Plaintiff commenced this action and pled Defendants defaulted in repayment of the indebtedness beginning on or about January 1, 2020 and pled four causes of action, including to foreclose on the subject mortgage. Defendant Hudson answered and pled four affirmative defenses. Defendant Board of Managers of the Printing House Condominium ("Board"), an alleged lien holder for unpaid common charges, answered and pled twelve affirmative defenses, including lack of standing, as well as a counterclaim and two crossclaims. Defendant Gary M. Rosenberg ("Rosenberg"), an alleged subordinate lien holder, answered and pled thirteen affirmative defenses. Defendants Internal Revenue Service ("IRS") and New York State Department of Taxation and Finance ("NYS") each filed a notice of appearance.

Now, Plaintiff moves for summary judgment against the appearing Defendants, to strike their answers, for a default judgment against the non-appearing parties, to appoint a Referee to compute and to amend the caption. Defendants Hudson and Board oppose the motion. Opposition was also proffered by Defendant IRS. 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 West 134 and Feldheim'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]). As Defendant Board raised lack of standing as an affirmative defense in its answer, Plaintiff was required to demonstrate it had standing to prosecute the action when it was commenced (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]).

Plaintiff's motion was supported with an affidavit from Charles Thompson ("Thompson"), Assistant Vice President, Loss Mitigation & Default Manager of Plaintiff. Thompson's affidavit, which was sufficiently supported by admissible business records, established the mortgage, note, and evidence of mortgagor's default (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra). As to standing, Thompson's affidavit and the annexed assignment sufficiently demonstrated Plaintiff's standing in this matter (*see Broome Lender LLC v. Empire Broome LLC*, 220 AD3d 611 [1st Dept 2023]). In any event, Board abandoned any reliance on this affirmative defense when it failed to proffer an argument in support of same in its opposition to the motion (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

In opposition, Defendant Board's notation that it has a pending action to foreclose its lien for common charges wherein an order of reference was issued, does not defeat summary judgment. Board's lien is subordinate to Plaintiff's mortgage and no cause of action for a declaration of superiority was pled. Defendant Rosenberg's opposition fails as it only parrots Board's opposition. Despite filing a memorandum of law in opposition, Defendant IRS expressly stated it "does not object to Axos's Motion".

The other affirmative defenses pled by all the Defendants 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]).

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's motion for summary judgment against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that the answers and affirmative defenses pled by all the appearing Defendants are stricken; and it is further

ORDERED that **Jeffrey R. Miller, Esq, 32 Broadway, 13th Floor, New York, New York 10004, 212-227-4200** 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 “JOHN DOE NO. 1” to “JOHN DOE NO. 20,” be removed as party defendants in this action as no tenants or other occupants reside at the property and the caption of this action be amended to reflect the removal of “JOHN DOE NO. 1” to “JOHN DOE NO. 20,” as party defendants; 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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AXOS BANK,

Plaintiff,

-against-

HUDSON 805, LLC, BARNETT L. LIBERMAN,
PHYLLIS LIBERMAN, INTERNAL REVENUE
SERVICE, BOARD OF MANAGERS OF PRINTING
HOUSE CONDOMINIUM, GARY M. ROSENBERG,
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, AND ENVIRONMENTAL CONTROL
BOARD OF THE CITY OF NEW YORK,

Defendants.
-----X

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 **November 13, 2024, at 12:00 p.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk (SFC-Part32-Clerk@nycourts.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.

7/12/2024

DATE



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

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

J.S.C.
REFERENCE