

Union Labor Life Ins. Co. v 670 6th Retail LLC

2024 NY Slip Op 32878(U)

July 2, 2024

Supreme Court, New York County

Docket Number: Index No. 850571/2023

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X
THE UNION LABOR LIFE INSURANCE COMPANY,
Plaintiff,
INDEX NO. 850571/2023
MOTION DATE
MOTION SEQ. NO. 002

- v -

670 6TH RETAIL LLC, ABY J. ROSEN, MICHAEL FUCHS,
JOHN DOE AND JANE DOE 1-20, SAID NAMES BEING
FICTITIOUS, IT BEING THE INTENTION OF PLAINTIFF TO
DESIGNATE

**DECISION + ORDER ON
MOTION**

Defendant.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 87, 88, 89,
90, 91, 92, 93, 94, 95, 96, 97, 98, 99

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 mortgage encumbering a parcel of commercial real property located at 670 Avenue of the Americas, New York, New York. The mortgage, dated May 15, 2014, was given by Defendant 670 6th Retail LLC (“Retail”) to Plaintiff to secure a loan with an original principal amount of \$15,000,000.00. The indebtedness is memorialized by a 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 non-party Graham O’Brien as Vice President of Retail. Concomitantly with these documents, Defendants Michael Fuchs (“Fuchs”) and Aby J. Rosen (“Rosen”) executed a guaranty of recourse obligations (“conditional guaranty”) along with a guaranty of partial payment and carry costs (“payment guaranty”). Defendants Retail, Fuchs and Rosen executed two omnibus amendments to mortgage loan, dated May 15, 2019, and August 15, 2019. In these documents, Defendants acknowledged the indebtedness and reiterated their promise to repay. Defendants also waived and released “any and all” claims, counterclaims, causes of action and defenses to repayment.

Plaintiff commenced this action and pled in the summons and complaint that Defendants defaulted in payment of the installment due on July 10, 2023, and every other thereafter. Defendants initially defaulted in appearing, but the parties executed a stipulation extending their time to answer. Defendants filed an answer wherein they purported to plead four affirmative defenses. The first “affirmative defense” appears to be nothing more than a series of admissions and denials to the allegations in the complaint (*see* CPLR §3018[a]). The second, third and fourth affirmative defenses plead impossibility and force majeure, breach of contract and of good faith and fair dealing, as well as failure to mitigate.

Now, Plaintiff moves for summary judgment against the appearing Defendants, to strike their 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]).

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 affirmation from Herbert A. Kolben, ("Kolben"), a Senior Vice President of Plaintiff. Kolben avers that his submission was based upon a review of Plaintiff's records and his knowledge of its record keeping practices. Kolben's affidavit laid a proper foundation for the admission of the records of Plaintiff's into evidence under CPLR §4518 by sufficiently showing that the records "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[s][were] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record[s] [were] 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]).

Kolben's review of the attached records demonstrated the material facts underlying the claim for foreclosure, to wit the mortgage, note, and evidence of mortgagor's default in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]; *see also Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*). The loan amendments were also *prima facie* evidence of the indebtedness (*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]). Accordingly, Plaintiff established its entitlement to summary judgment on its cause of action for foreclosure against Defendant Retail.

As to the guarantors Fuchs and Rosen, "[o]n a motion for summary judgment to enforce a written guaranty all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (*see 4 USS LLC v DSW MS LLC*, 120 AD3d 1049, 1051 [1st Dept 2014], *quoting City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). However, where liability under the a guaranty is expressly limited by the occurrence of specified events, a plaintiff must proffer "*prima facie* proof that one or more of the contractual conditions occurred" (*A10 Capital, LLC v Lispenard 3J, LLC*, ___ Misc3d ___, 2023 NY Slip Op 30547[U][Sup Ct NY Cty 2023]; *see also Nexbank, SSB v Soffer*, 129 AD3d 485 [1st Dept 2015]).

Concerning the conditional guaranty, Article XXII of the loan agreement, which is incorporated by reference into the guarantees, provides that the “principals, owners, shareholders, partners, investors, employees, directors, agents or representatives in any such action or proceeding, under or by reason of or under or in connection with the Note, this Agreement, the other Loan Documents, or the Security Instrument” are exculpated from liability under the “Note, the Security Instrument or this Agreement” unless a partial or full recourse event as defined in Sections 22.3 or 22.4 occur. In support of the motion, Plaintiff failed to allege or prove what condition under either of these sections was violated.

Nevertheless, the payment guaranty contains no such limitations. It provides Defendants Fuchs and Rosen are “hereby jointly and severally absolutely, irrevocably and unconditionally guaranty to Lender and its successors and assigns the payment of the Guaranteed Obligations as and when the same shall be due and payable, whether by lapse of time, by acceleration of maturity or otherwise”. That guaranty also stated that the “Guarantor hereby irrevocably and unconditionally covenants and agrees that such Guarantor is liable for the Guaranteed Obligations as a primary obligor”. Liability under the payment guaranty is limited to \$2,000,000.00 and enforcement costs as defined therein. Accordingly, Plaintiff has demonstrated *prima facie* its entitlement to summary judgment on its cause of action against Defendants Fuchs and Rosen under the payment, but not the conditional guaranty.

In opposition, none of the Defendants raised an issue of fact as to the existence of the note, mortgage and Retail’s default in repayment. Indeed, since none of the salient facts on these issues were contradicted by any of the appearing defendants, they are “deemed to be admitted” (*Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1st Dept 2017]). The claim by Defendants that Plaintiff lacks capacity to transact business in this state as it is not registered as a foreign corporation with the New York Secretary of State was waived when that affirmative defense was not pled in their answer (*see* CPLR §3211[e]). In any event, Defendants’ reliance on BCL §1312 is inapposite as that section is expressly inapplicable to “an incorporated foreign insurer” (Insurance Law §108[e]). Were that statute applicable, failure to comply therewith would be a non-jurisdictional, curable defect (*see Bancorp v Pompee*, 82 AD3d 935 [2d Dept 2011]; *Showcase Limousine, Inc. v Carey*, 269 AD2d 133 [1st Dept 2000]). Defendants’ assertion that Plaintiff’s motion must be denied as Plaintiff is not licensed with the department of financial services to make mortgage loans is also misplaced (Banking Law §340).

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]).

The second affirmative defense of impossibility and frustration of purpose based upon the economic sequelae of the COVID-19 pandemic is unavailing as the Appellate Division, First Department has “squarely” and repeatedly “rejected” this type of affirmative defense (*see eg Pentagon Fed. Credit Union v Popovic*, 217 AD3d 480 [1st Dept 2023]).

The third affirmative defense based upon breach of contract and lack of good faith and fair dealing fails as it was inadequately pled. Naked assertions that the parties were negotiating an extension

or forbearance do not constitute a viable defense (*see New York State Urban Dev. Corp. v. Marcus Garvey Brownstone Houses, Inc.*, 98 AD2d 767 [2d Dept 1983]). Moreover, this defense was waived by the express terms in the loan documentation and its amendments (*see SKW Hillside Bleeker Lender LLC v 145 Bleeker LLC*, 217 AD3d 536 [1st Dept 2023]).

The fourth affirmative defense of mitigation is unavailable in a foreclosure action (*see Marine Midland Bank, N. A. v Virginia Woods Ltd.*, 201 AD2d 625 [2d Dept 1994]; *HSBC Bank USA v Rodriguez*, ___ Misc 3d ___, 2016 NY Slip Op 32123[U][Sup Ct Queens Cty 2016]). Moreover, this defense is not a defense to summary judgment as it relates to the amount due and owing (*see eg 1855 E. Tremont Corp. v Collado Holdings LLC*, 102 AD3d 567 [1st Dept 2013]).

The attempt to reserve the right to plead subsequent affirmative defenses during this action inadequately pled and subject to the applicable sections of the Civil Practice Law and Rules (*see eg CPLR §3025[b]*).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (*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 Laszlo*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment on its foreclosure claim against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment on its claim under the guarantees against Defendants Michael Fuchs and Aby J. Rosen is granted under the payment guaranty only; and it is further

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

ORDERED 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 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 John Doe and Jane Doe 1-20 are removed as defendants in this action and the caption of this action is amended to reflect the removal of John Doe and Jane Doe 1-20 as defendants; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
THE UNION LABOR LIFE INSURANCE COMPANY, a
Maryland corporation, on behalf of Separate Account J,

Plaintiff,

-against-

670 6TH RETAIL LLC, a Delaware limited liability
company, ABY J. ROSEN and MICHAEL FUCHS,

Defendants.
-----X

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 **October 9, 2024, at 10:00 a.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.

7/2/2024
DATE


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

CHECK ONE:

CASE DISPOSED

NOT FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER J.S.C.

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE