

Valley Natl. Bank v 325 Greenwich St. LLC

2024 NY Slip Op 33287(U)

September 13, 2024

Supreme Court, New York County

Docket Number: Index No. 850452/2023

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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VALLEY NATIONAL BANK, <div style="text-align: center;">Plaintiff,</div>	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;">INDEX NO.</td> <td style="width: 50%; border-bottom: 1px solid black;">850452/2023</td> </tr> <tr> <td>MOTION DATE</td> <td style="border-bottom: 1px solid black;"></td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td style="border-bottom: 1px solid black;">001</td> </tr> </table>	INDEX NO.	850452/2023	MOTION DATE		MOTION SEQ. NO.	001
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- v -

325 GREENWICH STREET LLC, FREDERICK J. RUDD,
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents the motion is determined as follows:

The within action is to foreclose on a mortgage and security agreement encumbering a parcel of real property located at 325 Greenwich Street a/k/a 325/327 Greenwich Street a/k/a 187 Duane Street New York, New York. The encumbrance was given to Plaintiff by Defendant 325 Greenwich Street LLC (“Greenwich”) and secures an indebtedness of \$4,800,000.00. The loan is memorialized by a mortgage promissory note. Both documents, dated January 23, 2019, were executed by Defendant Frederick J. Rudd (“Rudd”) as managing member of mortgagor. Concomitantly therewith, Rudd executed a guaranty of the indebtedness. Plaintiff commenced this action alleging Defendant mortgagor defaulted under the loan documents when it failed to pay real estate taxes that accrued on the premises between 2021 and 2023. Greenwich and Rudd answered jointly and pled seven affirmative defenses.

Now, Plaintiff moves for *inter alia* summary judgment against Greenwich and Rudd, for a default judgment against the non-appearing parties, striking the appearing Defendants’ affirmative defenses, appointing a referee to compute 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 under the loan documents (*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]). 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 with an affirmation from Tony Zeleszko ("Zeleszko"), a First Vice President of Plaintiff. Zeleszko avers that his submission was based upon a review of Plaintiff's records and knowledge of its record keeping practices. Zeleszko's affidavit laid a proper foundation for the admission of the records of Plaintiff into evidence under CPLR §4518 by sufficiently showing 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*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). Further, annexed to the motion were all the records referenced by Zeleszko (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

As to the note and mortgage, these documents were referenced by Zeleszko and annexed to his affidavit (*cf. 938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 218 AD3d 417 [1st Dept 2023]). As such, proof of the loan documents was established in the first instance. Concerning 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]). It is undisputed that Defendants are responsible for paying the real estate taxes that come due during the existence of the lien. Section 8.8 of the mortgage provides that, among other things, a default event occurs when "[a]ny warrant of attachment or for distraint, or notice of tax or other lien shall be issued relating to, or encumbering, any portion of the Mortgaged Property that is not discharged, or stayed and bonded, to the reasonable satisfaction of Mortgagee within thirty (30) days of entry". The proffered evidence demonstrated unpaid real estates taxes of some \$278,810.15 existed, that a default/cure notice was served and that the unpaid taxes continue to subsist. "[T]he failure to pay real estate taxes as required by the terms of the note and mortgage constituted a default event under the note and mortgage and entitled the plaintiff to foreclose on the mortgaged property" (*ARS Invs. II 2012-1 HVB, LLC v Trilogy, LLC*, 160 AD3d 918, 919 [2d Dept 2018]).

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]). Here, since Plaintiff was lender when the note and mortgage were given, it was in direct privity with the mortgagors when the action was commenced and, therefore, unquestionably had standing (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]).

Accordingly, Plaintiff established its *prima facie* entitlement to summary judgment with proof of the mortgage, note, and evidence of mortgagor's default and its standing.

In opposition, Defendants do not deny failing to fully pay real estate taxes on the property for several years and that substantial sums remain unsatisfied. Instead, Defendants claim they cured their default by entering into a forbearance agreement with the New York City Department of Finance and are presently current in repayment thereunder. "Equity may intervene to prevent a substantial forfeiture occasioned by a trivial or technical breach, or where the default consists of a good faith mistake, promptly cured by the defaulting party, and where there is no prejudice to the creditor" (*L & L Assoc. Holding Corp. v Seventh Day Church of God of the Apostolic Faith*, 188 AD3d 1180 [2d Dept 2020][internal citations omitted]). However, the Court of Appeals has "cautioned generally against interfering with parties' agreements" (*JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373, 380 [2005]) and, therefore, "equity will only intervene to prevent a foreclosure in

“rare cases” involving some element of “fraud, exploitive overreaching or unconscionable conduct” by the mortgagee” (*L & L Assoc. Holding Corp. v Seventh Day Church of God of the Apostolic Faith*, supra). Even if strict application of the contractual results in an objectively “harsh” outcome, the “negotiated term of the agreement . . . must be enforced” (*1029 Sixth, LLC v. Riniv Corp.*, 9 AD3d 142, 149 [1st Dept 2004]). In the end, the determination of this issue is based on the particular facts of each case (*see eg Tunnell Pub. Co. v Straus Communications, Inc.*, 169 AD2d 1031, 1032 [3d Dept 1991]).

Contrary to Defendants’ assertion, failure to pay real estate taxes, especially over a protracted period, is not a trivial event. “Quite simply, the mortgage will be jeopardized if taxes are neglected” (1 Bergman on New York Mortgage Foreclosures §4.14[1][a][2024]). Its failure to pay the taxes over a substantial period did not constitute a mistake or oversight made in good faith. The claim that it has cured the default is unavailing. Most of the taxes remain unpaid, and the forbearance agreement has repayment period of a decade. As such, this case is distinguished from those where there has been a tender of all tax arrears or a bona fide attempt at same (*cf. Karas v Wasserman*, 91 AD2d 812 [3d Dept 1982]). Further, the substantial lapse of time after Defendants’ initial tax default demonstrates Plaintiff “was not unreasonably insistent on prompt payment of the defaulted sums” (*Neubauer v Smith*, 40 AD2d 790 [1st Dept 1972]). In sum, no issue of fact exists that Plaintiff’s acceleration of the indebtedness based on the tax default was inequitable or unconscionable (*see L & L Assoc. Holding Corp. v Seventh Day Church of God of the Apostolic Faith*, supra; *Neubauer v Smith*, supra; *Jamaica Sav. Bank v Cohan*, 36 AD2d 743 [2d Dept 1971]).

The assertion the motion must be denied because no discovery has been conducted is unavailing as Defendants offered nothing to demonstrate Plaintiff is in exclusive possession of facts which would support a viable defense to summary judgment (*see Island Fed. Credit Union v I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]). Indeed, all the salient facts concerning the payment of the real estate taxes appear unchallenged and, in many instances, matters of public record.

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]). Further, to the extent that specific legal arguments were not proffered in support of any affirmative defense, those 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-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 is awarded summary judgment against the appearing parties and a default judgment against the non-appearing defendants; and it is further

ORDERED that that **Roberta Ashkin, Esq., 400 East 70th Street New York New York 10021, (646) 779-8520** 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 the caption be amended by deleting “John Doe No. 1 to 10” all without prejudice to the proceedings heretofore had herein; 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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VALLEY NATIONAL BANK,

Plaintiff,

-against-

325 GREENWICH STREET LLC, FREDERICK J.
RUDD, and NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD,

Defendants.
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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/suptmanh)]; and it is further

All parties are to appear for a virtual conference via Microsoft Teams on **January 15, 2025 @ 11:20 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.

9/13/2024

DATE

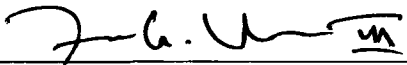
CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE


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