

U.S. Bank N.A. v Mercer 111 Retail, LLC

2024 NY Slip Op 33351(U)

September 19, 2024

Supreme Court, New York County

Docket Number: Index No. 850031/2023

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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INDEX NO. 850031/2023

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE HOLDERS OF COMM 2013-CCRE12 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, BY AND THROUGH ITS SPECIAL SERVICER, LNR PARTNERS, LLC,

MOTION DATE _____

MOTION SEQ. NO. 002

Plaintiff,

- v -

MERCER 111 RETAIL, LLC, EDMOND LI, THE BOARD OF MANAGERS OF THE MERCER 111 CONDOMINIUM, NEW YORK CITY DEPARTMENT OF FINANCE, THE CITY OF NEW YORK, PEOPLE OF THE STATE OF NEW YORK, JOHN DOE NOS. 1-25

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE

Upon the foregoing documents the motion is determined as follows:

The within action is to foreclose on an amended, restated and consolidated mortgage encumbering a parcel of real property located at 111 Mercer Street, New York, New York. The encumbrance was given to non-party Cantor Commercial Real Estate Lending, LP. ("Cantor"), by Defendant Mercer 111 Retail, LLC ("Mercer") and secures an indebtedness of \$5,650,000.00. The indebtedness is memorialized by an amended, restated and consolidated mortgage note. Both the note and mortgage, dated October 13, 2013, were executed by Defendant Edmond Li ("Li") as President of non-party Mercer 111 Special, Inc. ("Special"), the Manager of Mercer. Concomitantly with these documents, Li executed a guaranty of recourse obligations. The loan transaction is defined by a loan agreement executed by Li on the same date as all the other documents.

Plaintiff, U.S. Bank National Association, as Trustee, for the benefit of the holders of COMM 2013- CCRE12 Mortgage Trust Commercial Mortgage Pass-Through Certificates ("Trust"), commenced this action through the special servicer for the subject loan, LNR Partners, LLC ("LNR") alleging Defendants defaulted in in repayment under the note. Mercer and Li answered jointly and pled three affirmative defenses, including lack of standing. In a decision of this Court dated April 12, 2024, Plaintiff's motion for summary judgment and an order of reference was denied on the sole basis that no evidence of LNR's authority to act on behalf of Trust was proffered. Now, Plaintiff moves for, *inter*

alia, reargument and renewal of that decision and appointment of a referee to compute. Defendants oppose the motion.

The branch of the motion to reargue is denied as movant has not established the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (*see* CPLR 2221; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

The branch of the motion to renew the above decision is granted as movant set forth new facts not offered on the prior motion that would change the prior determination (*see* CPLR 2221[e][2]; *Nassau County v Metropolitan Transp. Authority*, 99 AD3d 617, 618 [1st Dept 2012]; *Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]). Moreover, Movant provided a reasonable justification for the failure to present said new facts in the prior motion (*see* CPLR 2221[e][2]; *Arena v Shaw*, 179 AD3d 415 [1st Dept 2020]). Even were renewal denied, the Court could entertain the motion as a successive request for summary judgment as doing so would clearly enhance judicial efficiency in this case (*see* *MTGLQ Invs. v Collado*, 183 AD3d 414 [1st Dept 2020]). Notably, while many issues were raised in the first summary judgment motion, the denial was contingent on a single factor (*cf* *Wells Fargo Bank, NA v Gittens*, 217 AD3d 901 [2d Dept 2023]). Substantively, Plaintiff proffered a power of attorney, dated April 25, 2014, which established LNR had the authority to act on behalf of the Trust when the action was commenced. In opposition, Defendants failed to raise a *bona fide* issue of fact on this or any other issue.

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 particular affirmative defense, those defenses were abandoned (*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]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for renewal is granted and that portion of this Court's order dated April 12, 2024, which denied summary judgment against the appearing Defendants is vacated, and it is

ORDERED that upon renewal, Plaintiff's motion summary judgment against the appearing Defendants, for a default judgment against the non-appearing parties, and the appointment of a referee is granted; and it is further

ORDERED that **Tom Kleinberger, Esq., 411 5th Avenue, New York, New York 10016 (917) 326-5523** 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 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 the caption shall be amended to read as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION (AS
SUCCESSOR-IN-INTEREST TO U.S. BANK NATIONAL ASSOCIATION),

850031/2023 U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE
HOLDERS OF COMM 2013- CCRE12 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-
THROUGH CERTIFICATES, BY AND THROUGH ITS SPECIAL SERVICER, LNR PARTNERS, LLC
vs. MERCER 111 RETAIL, LLC ET AL
Motion No. 002

Page 3 of 4

AS TRUSTEE, FOR THE BENEFIT OF THE HOLDERS OF
COMM2013-CCRE12 MORTGAGE TRUST COMMERCIAL
MORTGAGE PASS-THROUGH CERTIFICATE,

Plaintiff,

-against-

MERCER 111 RETAIL, LLC, EDMOND LI, THE BOARD
OF MANAGERS OF THE MERCER 111 CONDOMINIUM,
NEW YORK CITY DEPARTMENT OF FINANCE, THE
CITY OF NEW YORK, PEOPLE OF THE STATE OF NEW
YORK,

Defendants.

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and it is

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 **January 22, 2025, at 10:20 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.

9/19/2024

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

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

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