Loan Funder LLC v Ibarra LLC
2025 NY Slip Op 30428(U)
January 16, 2025
Supeme Court, New York County
Docket Number: Index No. 850552/2023
Judge: Francis A. Kahn III

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **32**

Justice

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LOAN FUNDER LLC,SERIES 18644

Plaintiff,

- v -

IBARRA LLC et al

Defendant.

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INDEX NO. 850552/2023

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

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 228 West 136th Street, New York, New York. The consolidated and modified mortgage, dated April 2, 2021, was given by Defendant Ibarra, LLC ("Ibarra") to non-party Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Great Stone Capital Fund A LLC ISAOA/ATIMA ("Great") to secure a loan with an original principal amount of $1,300,000.00. The indebtedness is memorialized a mortgage note of the same date as the mortgage. The note and mortgage were executed by Defendant Diana Ibarra ("Diana") as Managing Member of Ibarra. Concomitantly with the loan documents, Defendant Diana executed a guarantee of the indebtedness. On April 2, 2022, and July 2, 2022, the parties executed forbearance agreements wherein Defendants acknowledged the indebtedness, and their maturity default. Plaintiff commenced this action and pled in the complaint that Defendants defaulted in repayment on or about October 2, 2022. Defendants answered and pled six affirmative defenses, including lack of standing. Defendants answered and forty-eight affirmative defenses and two counterclaims. 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 affidavits from Amar Shah, ("Shah"), the Deputy Chief Credit Officer for the Plaintiff and for its authorized loan servicer Loan Funder LLC ("Funder"), as well as Scott Hacker ("Hacker"), the Vice President of Superior Loan Servicing ("Superior"), the sub-servicer retained by Funder. Shah averred his affidavit was based on "personal knowledge and based upon the books and records of [Funder]". Shah's affidavit laid a proper foundation for the admission Funder's records 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]). The records of prior entities were also admissible since Shah established that those records were received from the makers and incorporated into the records Funder kept and that it routinely relied upon such documents in its business (*see eg U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]). Similarly, Hacker established the requisites under CPLR §4518 for the admission of Superior's records into evidence as business records. Both affiants demonstrated the authority of their respective employers to act on behalf of Plaintiff with the production of their loan servicing agreements (*see U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *US Bank N.A. v Louis*, 148 AD3d 758 [2d Dept 2017]). Further, the records referenced by Shah and Hacker were annexed to their affirmations (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Shah's review of the attached records demonstrated the mortgage and note, and Hacker evidenced 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). Accordingly, Plaintiff established its entitlement to summary judgment on its cause of action for foreclosure against Defendant Ibarra.

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]). Standing is evaluated when an action is commenced, not thereafter (*see eg 1S REO Opportunity 1, LLC v Harlem Premier Residence, LLC,* ___AD3d___, 2025 NY Slip Op 00016 [1st Dept 2025]) and may not be cured retroactively (*see U.S. Bank N.A. v Dellarmo*, 94 AD3d 746 [2d Dept 2012]).

"Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2d Dept 2015] [citations omitted]). The indorsement must be made either on the face of the note or on an allonge "so firmly affixed thereto as to

become a part thereof" (UCC §3-202[2]). "The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster,* 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513 [2d Dept 2019]). However, "mere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing or to make a plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note" (*U.S. Bank N.A. v Moulton*, 179 AD3d 734, 737 [2d Dept 2020]).

Shah avers that "[s]aid Note with allonge firmly affixed thereto was delivered to the plaintiff's servicer by national courier prior to 4/7/21 as shown by the annexed 'screenshot' of the loan closing file scanned into the servicer's system.". Nevertheless, Shah's affidavit is defective as he did not profess personal examination of the note nor did he attest "when [he] reviewed the copy of the note and the allonge" (*Wells Fargo Bank, N.A. v Mitselmakher*, 216 AD3d 1056, 1058 [2d Dept 2023]). Accordingly, Plaintiff failed to establish, *prima facie*, it had standing when this action was commenced.

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, except that claiming lack of standing, and the counterclaims are entirely conclusory and unsupported by any facts in the answer or by the papers submitted in opposition. As such, these affirmative defenses and counterclaims are nothing more than an 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 no specific legal argument was proffered in support of a particular affirmative defense or claim, those 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 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 Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment on its causes of action for foreclosure and appointment of a referee are denied, and it is

ORDERED that all the affirmative defenses in Defendants' answer, except the first as it relates to standing, are stricken, and it is

ORDERED that the DOE defendants are stricken from the caption as the New York County Clerk will not accept any judgment with a "Doe" Defendant in the caption; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK
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LOAN FUNDER LLC, SERIES 1864,

Plaintiff,

-against-

IBARRA LLC, DIANA IBARRA, NYC ENVIRONMENTAL CONTROL BOARD, NYS DEPARTMENT OF TAXATION & FINANCE,

Defendants.
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and it is

ORDERED that this matter is set down for a status conference on **March 13, 2024 @ 11:40 am** via Microsoft Teams.

1/16/2025
DATE

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

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE