Chang Hwa Commercial Bank, Ltd. v Waterscape Resort II, LLC
2025 NY Slip Op 30614(U)
February 14, 2025
Supreme Court, New York County
Docket Number: Index No. 850050/2021
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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CHANG HWA COMMERCIAL BANK, LTD., IN ITS CAPACITY AS ADMINISTRATIVE AGENT FOR HUA NAN COMMERCIAL BANK, LTD. AND ITSELF, THE SYNDICATED LENDERS,

Plaintiff,

- v -

WATERSCAPE RESORT II, LLC,70 WEST 45TH STREET HOLDING, LLC,HNA HOSPITALITY GROUP CO., LTD., THE ASSOCIATED CORPORATION, PAVARINI & MCGOVERN LLC,I.M.P. PLUMBING & HEATING CORP., STANDARD PUMP AND MOTOR INC. INC. D/B/A SUPERIOR PUMP MOTOR INC.,CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF FINANCE, ENVIRONMENTAL CONTROL BOARD, 45TH STREET BLT RESTAURANT LLC,CASSA NY RESTAURANT LLC,ELITE GC NY INC.,

Defendant.

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INDEX NO. 850050/2021

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 205, 206, 207, 208, 209, 210, 211

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, the motion is determined as follows:

The within action is to foreclose on a consolidated, extended and modified mortgage encumbering three parcels of real property located 66-70 West 45th Street, Hotel Unit 1, Hotel Unit 2 and Commercial Unit 3, New York, New York. The mortgage at issue, dated August 26, 2016, was given by Defendant Waterscape Resort II, LLC ("Waterscape") to Plaintiff Chang Hwa Commercial Bank, Ltd. ("Chang"). The within mortgage consolidated certain prior mortgages and amendments thereto. The 2016 mortgage secures an indebtedness in an original principal amount of $63,000,000.00 which is memorialized by a consolidated mortgage note of the same date as the mortgage. The foregoing documents were executed as part of a loan transaction that is documented in a senior secured term loan agreement, also dated August 26, 2016, executed by Waterscape, Chang and Hua Nan Commercial Bank, Ltd. ("Hua Nan"), also Plaintiff herein. In that contract, Chang is identified as "Agent" and "Lender" and Hua Nan is also identified as "Lender". All the loan documents were executed by non-party Ted Chen ("Chen") as Authorized Signatory of Waterscape. Concomitantly, with these loan documents Defendants 70 West 45th Street Holding, LLC ("70 West") and HNA Hospitality Group Co. ("HNA") executed separate guarantees of the indebtedness. Chen executed 70 West's guaranty as Authorized Signatory. HNA's guaranty does not identify the signatory on its face.

On August 7, 2017, Plaintiffs, Waterscape and Guarantors executed an amended and restated senior secured term loan agreement. On September 6, 2019, these same entities executed a second amendment to the senior secured term loan agreement. In the latter amendment, Waterscape and Guarantors admitted in section 4[d], they lacked "any defense, off-set, claim, counterclaim or cause of action of any kind or nature whatsoever against Lenders with respect to the Loan, the Guaranties or the Loan Documents to which such party is a party or any debt incurred by such party pursuant to the Loan Documents".

Plaintiff Chang, itself, and in its capacity as the administrative agent for Hua, commenced this action via filing a summons in complaint on March 18, 2021, wherein it was pled Defendants defaulted in repayment of the indebtedness beginning on or about February 3, 2020. Defendant Standard Pump and Motor Inc. D/B/A Superior Pump and Motor Inc. ("Superior"), an alleged mechanic's lien holder, answered and pled five affirmative defenses. It also pled crossclaims and a counterclaim for foreclosure of its lien claiming its lien has priority over Plaintiff's mortgage. Defendants 45th Street BLT Restaurant LLC ("BLT") and Cassa NY Restaurant LLC ("Cassa") answered and pled four affirmative defenses. All the other Defendants defaulted in appearing. Plaintiff's motion for a default judgment against Waterscape, Guarantors, and the other non-appearing Defendants, appointing a referee to compute and to amend the caption was granted by order of this Court dated July 12, 2024.

Now, Plaintiff moves for partial summary judgment on its first cause of action for foreclosure against Defendants Superior, BLT and Cassa, as well as dismissing their affirmative defenses and counter/cross claims. Defendants Superior, BLT and Cassa oppose the motion.

On the branches of the motion for summary judgment, Plaintiff established the mortgage, note, and evidence of Mortgagor's default in repayment via the affidavit of David C.Y. Hsieh ("Hsieh"), Vice President and General Manager for Plaintiff's servicer, which was sufficiently supported by admissible business records annexed thereto (*see eg Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]).

As to the branch of Plaintiff's motion to dismiss Defendants' affirmative defenses and counterclaims, 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 third affirmative defense pled by Defendants BLT and Cassa based upon RPAPL §1307 fails as a matter of law. Nothing in that statute creates an affirmative defense to foreclosure based upon a lender's purported failure to maintain an eligible property thereunder. Indeed, the only remedy provided is for a tenant or municipality to bring a plenary action for damages.

BLT and Cassa's fourth affirmative defense is an exercise in semantics that could have been avoided had they or Plaintiff acted with a degree of common sense. Initially, the Subordination, Non-Disturbance and Attornment Agreement ("Agreement") executed by BLT and Plaintiff's assignor is

expressly binding on Plaintiff under paragraph 15. Paragraphs 1 and 2 make clear that Defendants' tenancy is "subject and subordinate" to the mortgage at issue, but not subject to termination by a foreclosure sale. Given this circumstance, paragraph 2 provides BLT and Cassa "not be named" as parties herein, presumably to avoid the confusion that inevitably arose.[1] On the other hand, the Agreement provides that joinder of the tenant "shall not result in the termination of the Lease or disturb the Tenant's possession or use of the premises demised thereunder". Indeed, Paragraph 200 of the complaint pleads that the property be sold "subject" to "any rights of tenants".

As to Defendant Superior's third affirmative defense, Plaintiff established *prima facie* that none of the loan documents constituted a "building loan contract" as defined by Lien Law §2[13].[2] Thus, the subordination penalty contained in Lien Law §22 is inapplicable and Superior's claim of priority fails as a matter of law. The branch of the motion to sever the crossclaim to foreclose the mechanic's lien is granted as it is dissimilar and separable from the action to foreclose the mortgage (*see generally Valley Sav. Bank v Rose*, 228 AD2d 666 [2d Dept 1997]). Moreover, Superior's subordinate lien upon being extinguished against the property will transfer to any surplus funds (*see NYCTL 1997-1 Trust v Stell*, 184 AD3d 9, 14 [2d Dept 2020]).

All the remaining affirmative defenses are entirely conclusory and unsupported by any facts in the answer or by the papers submitted in opposition. As such, these affirmative defenses and claims 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]). Further, to the extent that no specific legal argument was proffered in support of a particular affirmative defense or claim, they 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]).

Defendants' assertion the motion must be denied because no discovery has been conducted is unavailing as they have offered nothing to demonstrate Plaintiff is in exclusive possession of facts which would establish a viable defense to foreclosure (*see Island Fed. Credit Union v. I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]). Moreover, as "the affirmative defenses are precluded, no discovery could lead to facts that would warrant denial of plaintiff's summary judgment motion" (*Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]).

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[1] Although provides Paragraph 2 states the tenant not be named as a party in a foreclosure action "unless such joinder shall be required by law" and tenants like BLT and Cassa are mandated by RPAPL §1311[1] to be named as party defendants to a foreclosure action, they are not indispensable parties (*see Polish Nat. Alliance of Brooklyn, USA v White Eagle Hall Co., Inc.*, 98 AD2d 400, 406 [2d Dept 1983]; *see also 517-525 W. 45 LLC v Avrahami,* 202 AD3d 611, 612 [1st Dept 2022]). Their absence would not have precluded the issuance of a judgment herein, but left their interest unaffected which was the intended outcome of the Agreement.

[2] Summarized, "'[a] classic building loan mortgage is characterized, *inter alia*, by (1) a requirement in the loan agreement that the mortgagor construct a building or improvement with the loan and (2) a disbursement of the loan in installments — as the construction progresses — rather than in one lump sum, and is subject to the subordination provisions of Lien Law § 22'" (*Dienst v Paik Constr., Inc.*, 139 AD3d 607, 607- 608 [1st Dept 2016], *quoting Juszak v Lily & Don Holding Corp.*, 224 AD2d 588, 588-589 [2d Dept 1996]). None of those provisions exist here.

Accordingly, it is

ORDERED that the motion for summary judgment against Superior, BLT and Cassa is granted, and their answers are stricken; and it is further

ORDERED that Defendant Superior's crossclaims against the Mortgagor based on its mechanic's lien are severed.

2/14/2025
DATE

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

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