

Wells Fargo Bank, N.A. v 11 W. 34th St. Owner LLC

2025 NY Slip Op 30616(U)

January 16, 2025

Supreme Court, New York County

Docket Number: Index No. 850106/2024

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. 850106/2024

WELLS FARGO BANK, NATIONAL ASSOCIATION,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

11 WEST 34TH STREET OWNER LLC et al

Amended DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The court sua sponte vacates its decision and order on motion dated January 16, 2025, and substitutes the following in its place and stead:

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

The within action is to foreclose a mortgage encumbering a parcel of real property located at 11 West 34th Street, New York, New York. The mortgage at issue, dated December 23, 2015, was given by Defendant 11 West 34th Street Owner LLC ("West") to Plaintiff. The mortgage secures a note of the same date memorializing a loan with an original principal amount of \$23,000,000.00. The loan transaction is also documented by a loan agreement which, along with the note and mortgage, was executed by non-party Eliot Tawil ("Tawil"), an Authorized Signatory of West. On January 1, 2023, the parties executed a forbearance agreement wherein West acknowledged the indebtedness, its maturity default, and reaffirmed its obligations under the loan documents. Now, Plaintiff moves for summary judgment against Defendant West, a default judgment against the non-appearing Defendants, appointing a referee to compute and to amend the caption. Defendant West opposes 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 West's 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]).

Plaintiff's motion was supported with an affidavit from Anatole Wedmid ("Wedmid"), a Director in the Real Estate Managed Assets Group of Plaintiff, with admissible business records annexed thereto, which established the note, mortgage and Defendants' default in repayment (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]). The loan modification agreements also evidenced the indebtedness and West's default (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]).

Plaintiff also demonstrated its standing as a copy of the note, endorsed in blank by the original lender, was annexed to the complaint (*see Ocwen Loan Servicing LLC v Siame*, 185 AD3d 408 [1st Dept 2020]; *Bank of NY v Knowles*, supra at 597). Likewise, the submissions proved that the contractual pre-foreclosure requisites were fulfilled (*see generally United States Bank Trust, N.A. v Mehl*, 195 AD3d 1054 [2d Dept 2021]; *Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794 [2d Dept 2020]).

In opposition, West's assertion that Plaintiff failed to establish *prima facie* since the contractual pre-foreclosure notice was sent to wrong floor at the required address is unavailing. Contrary to West's assertion, page one of the mortgage is the title page, which clearly contains the footer, "– 1 –", and the address on that page contains no floor number. Page two of the mortgage refers to West's address as being on the "54th Floor". Nevertheless, West entirely overlooks the notice provisions in the loan agreement. In section 16.3 of that agreement, any notices are required to be sent to the "5th floor". Given the facial inconsistency, section 16.34 of the loan agreement provides as follows: "In the event of any conflict between this Agreement and any of the other Loan Documents, the terms of this Agreement shall govern". Accordingly, Plaintiff's default notices were correctly addressed.

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 are entirely conclusory and unsupported by any facts in the answer or by the papers submitted in opposition. 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 no specific legal argument was proffered in support any particular affirmative defense, such defense was 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 2012-1 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's motion for summary judgment against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

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

ORDERED that **Mark McKew, Esq., 1725 York Ave, Ste 29A, New York, New York, 212-876-6783** 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 of this action is amended by removing those remaining parties named herein as "JOHN DOE" and "JANE DOE" and all proceedings heretofore filed herein shall be deemed amended accordingly, 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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WELLS FARGO BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

11 WEST 34TH STREET OWNER LLC, NEW YORK
STATE DEPARTMENT OF TAXATION AND
FINANCE, NEW YORK CITY DEPARTMENT OF
FINANCE, 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/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 May 8, 2025, at 11:40 p.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.

1/16/2025
DATE

[Handwritten Signature]

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

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

CHECK ONE:

Form with checkboxes for CASE DISPOSED, GRANTED, DENIED, SETTLE ORDER, INCLUDES TRANSFER/REASSIGN

Form with checkboxes for NON-FINAL DISPOSITION, GRANTED IN PART, SUBMIT ORDER, FIDUCIARY APPOINTMENT, OTHER, REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: