

**Wilmington Trust, N.A. v Eklecco Newco LLC**

2025 NY Slip Op 31497(U)

April 3, 2025

Supreme Court, New York County

Docket Number: Index No. 850051/2023

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. 850051/2023

WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BENEFIT OF HOLDERS OF PALISADES CENTER TRUST 2016-PLSD, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2016-PLSD,

MOTION DATE

MOTION SEQ. NO. 003

Plaintiff,

- v -

EKLECCO NEWCO LLC, QUEENS COMIC'S NEWCO LLC, RIESLING ASSOCIATES, THREE J'S FAMILY TRUST, CS HUDSON INC., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN DOES 1-100,

**DECISION + ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 114, 115, 116, 117

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 consolidated, extended and modified mortgage ("CEMA") encumbering three parcels of commercial real property described as the Palisades Center Mall located in Clarkstown, New York<sup>1</sup>. The mortgage was given by Defendant Eklecco Newco LLC ("Eklecco") to non-parties JPMorgan Chase Bank, NA ("JPMorgan") and Barclays Bank PLC ("Barclays") to secure a loan with an original principal amount of \$418,500,000.00 which is memorialized by a consolidated, amended and restated promissory note. That note consolidated nine individual notes, all dated April 7, 2016, that were given by Eklecco to JPMorgan and Barclays. The note and CEMA, both dated April 7, 2016, were executed by non-party Michael A. Mammolito ("Mammolito") as Vice President of Eklecco and are subject to a loan agreement executed by Eklecco, JPMorgan and Barclays of the same date. Also, part of the transaction under the loan agreement, was a collateral mortgage given by Defendant Queens Comic's Newco LLC ("Queens"). Concomitantly with these documents, Defendants Riesling Associates ("Riesling") and Three J's Family Trust ("Trust") executed a document titled "Guaranty Agreement" which provided these entities would be "irrevocably and unconditionally" for the defined "Obligations" upon the occurrence of certain events specified in the loan agreement.

On June 19, 2020, and February 26, 2021, Defendants Eklecco, Riesling and Trust entered "standstill" agreements with Plaintiff wherein, *inter alia*, Plaintiff agreed to a "moratorium" on certain installment payments under the loan documents. In the latter agreement, Defendant acknowledged Plaintiff is "the current owner and holder of the Loan and Loan Documents", the indebtedness, and that "of the date hereof, no Obligor has any claims, defenses, set-offs, rights of recoupment, counterclaims, demands, causes of action or rights of any kind or nature". On October 9, 2022, the same parties executed a forbearance agreement which contained

<sup>1</sup> Despite the property being located in Rockland County, the parties contracted to venue in this Court.

an admission of the existence of the loan documents, an acknowledgement of the indebtedness, reaffirmance of the promise to repay, Eklecco's default in repayment, as well as the assignment of the loan documents to Plaintiff.

Plaintiff commenced this action alleging, *inter alia*, Defendants defaulted in repayment under the above documents and pled, among other things, causes of action to: [1] foreclose the CEMA mortgage, [2] foreclose its "security interest" in the collateral mortgage and [3] possession of Eklecco's personal property. Defendants Eklecco, Queens, Riesling and Trust answered jointly and pled five affirmative defenses, including lack of standing. By order of this Court dated April 12, 2024, Plaintiff's motion for summary judgment was denied on the basis that Plaintiff failed to proffer *prima facie* proof of their affiant's authority to act on its behalf. Now, Plaintiff again moves for summary judgment against the Defendants Eklecco, Queens, Riesling and Trust, for an order of reference and to amend the caption. Defendants Eklecco, Queens, Riesling and Trust 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, evidence of mortgagors' default and its standing in repayment (*see U.S. Bank, N.A., v James*, 180 AD3d 594 [1<sup>st</sup> Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1<sup>st</sup> Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1<sup>st</sup> 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 [1<sup>st</sup> Dept 2019]). No specific 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 affidavit from Roger Briggs ("Briggs"), a Managing Director of Special Servicing in the Commercial Mortgage Servicing division of Wells Fargo Bank, National Association ("Wells Fargo"), which is allegedly the special servicer of the subject loan for Plaintiff. The affidavit established the mortgage, note, evidence of mortgagor's default as well as its standing and was sufficiently supported by appropriate documentary evidence (*see eg Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*). Also, unlike the prior motion, annexed to Briggs' affidavit is the relevant excerpts of the "Trust and Servicing Agreement" referenced in the power of attorney which establishes that Plaintiff is trustee thereof and expressly includes the authority to "initiate any action, suit or proceeding". That document, along with the power of attorney, demonstrated Wells Fargo's authority to act (*see Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *Deutsche Bank Natl. Trust Co. v Rudman*, 170 AD3d 950 [2d Dept 2019]).

In opposition, Defendants' reliance on the Rule 19-a of the Commercial Division is inapposite as this Court is not assigned to the Commercial Division. Even were that rule applicable, it only mandates submission of a statement of material facts if "the court may direct". No order or part rule of this Court so directs. Defendants' argument that the within motion is an inappropriate successive motion for summary judgment is unavailing. Multiple disputed issues are not presented here as the only disputed issue was the authority of Wells Fargo to act (*cf. Wells Fargo Bank v Gittens*, 217 AD3d 901, 903 [2d Dept 2023]). Moreover, entertaining a second summary judgment motion furthers the ends of justice by allowing the Court to eliminate the need for a trial on issues that Defendants have not contested, to wit the existence of the note, mortgage and their default thereunder (*see MTGLQ Invs, LP v Collado*, 183 AD3d 414 [1<sup>st</sup> Dept 2020]; *Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1<sup>st</sup> Dept 2017][Uncontradicted facts on a motion for summary judgment are "deemed to be admitted"]).

Defendants' arguments concerning Plaintiff's standing are unavailing as that affirmative defense was previously stricken by the Court based upon their acknowledgement in the "standstill" agreement that Plaintiff is "the current owner and holder of the Loan and Loan Documents". In any event, annexed to Briggs's affidavit was a written assignment of the mortgage, dated before the action was commenced. Although a written assignment of a mortgage is often a nullity in this context (*see eg U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]), the assignment provides the mortgage was transferred "Together with any and all notes and obligations therein described". This language sufficiently established conveyance of the note and rendered any issues concerning the allonges and physical delivery of the note are irrelevant (*see Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1<sup>st</sup> Dept 2023]; *US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1<sup>st</sup> Dept 2018]).

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 affirmative defense of standing pled by the appearing Defendants is dismissed; and it is further

ORDERED 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 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 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 **August 6, 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.

4/3/2025

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

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

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