

**U.S. Bank Trust N.A. v Torzi**

2025 NY Slip Op 31658(U)

April 18, 2025

Supreme Court, New York County

Docket Number: Index No. 850554/2023

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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*

-----X  
U.S. BANK TRUST NATIONAL ASSOCIATION, NOT IN ITS  
INDIVIDUAL CAPACITY BUT SOLELY AS OWNER  
TRUSTEE FOR RCF 2 ACQUISITION TRUST,

INDEX NO. 850554/2023  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003

Plaintiff,

- v -

GIANLUIGI TORZI, SUNSET U.S. CORPORATION,  
BOARD OF MANAGERS OF THE SOHO APARTMENTS,  
PARADIGM CREDIT CORPORATION II, NEW YORK CITY  
PARKING VIOLATIONS BUREAU, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY  
TRANSIT ADJUDICATION BUREAU, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE, NEW YORK  
CITY DEPARTMENT OF FINANCE, JOHN DOE

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 92, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110

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

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This is an action to foreclose on a consolidated mortgage encumbering a parcel of real property located at 46 Mercer Street, Unit 4W, New York, New York. The initial mortgage was given by Defendant Sunset US Corporation (“Sunset”) to non-party Paradigm Credit Corporation (“Paradigm”) The mortgage secures a loan given by Paradigm to Sunset in an original principal amount of \$2,557,750.00 which is memorialized by a mortgage note. The note and mortgage, both dated August 27, 2018, were executed by Defendant Gianluigi Torzi (“Torzi”) as President of Sunset. On February 6, 2019, Torzi executed<sup>1</sup>, in his individual capacity, a consolidated note which chronicled a loan of \$2,497,750.00 given by non-party HSBC Bank USA, NA (“HSBC”). The note is secured by a consolidated mortgage of the same date given by Sunset. As part of the latter transaction, Sunset, HSBC and MERS executed a consolidation, extension, and modification agreement (“CEMA”). In addition to agreeing to combine the notes and mortgages, Sunset acknowledged it had “no right of set-off or counterclaim, or any defense to the obligations of Consolidated Note or the Consolidated Mortgage”. Plaintiff commenced this action, and pled Defendants defaulted in repayment of the indebtedness

<sup>1</sup> The consolidated note, mortgage and CEMA were all executed by Brian L. Berlandi, Esq. as authorized agent of Sunset and agent of Torzi.

beginning on or about June 1, 2020. Defendant Sunset answered and pled seven affirmative defenses. Torzi answered separately and pled, in their amended answer, thirty-five affirmative defenses.

Now, Plaintiff moves for summary judgment against the appearing Defendants, to strike their answers and affirmative defenses, for a default judgment against the non-appearing Defendants, for an order of reference and to amend the caption. Defendants Sunset and Torzi, now represented by the same counsel, oppose the motion and cross-move for summary judgment dismissing Plaintiff's complaint. Plaintiff opposes the cross-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 [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]). A mortgagor's default "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]).

Proof supporting a *prima facie* case on a motion for summary judgment a cause of action for foreclosure 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]). 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 precise set of business records must be proffered, so 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 an affirmation from Korey McGovern ("McGovern"), a Document Execution Specialist of Selene Finance LP ("Selene"), attorney in fact for of Plaintiff. McGovern avers that her affidavit is based on personal review of Selene's business records. McGovern's affidavit laid a proper foundation for the admission Selene'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 [1<sup>st</sup> Dept 2017]). The records of other entities were also admissible since McGovern established that those records were received from the makers and incorporated into the records Selene 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]). Further, the records referenced by McGovern were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1<sup>st</sup> Dept 2020]). Selene's authority to act on Plaintiff's behalf was established with submission of a power of attorney dated November 2, 2023 (*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]).

McGovern's review of the attached records demonstrated the material facts underlying the claim for foreclosure, to wit the mortgage, note, and evidence of 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 [1<sup>st</sup> Dept 2011]; see also *Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra). Likewise, the submissions proved that any applicable statutory and 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, and in support of the cross-motion, Defendants argue that because Sunset, the sole mortgagor and owner of the property, did not sign the 2019 note, the 2019 mortgage is unenforceable. This argument is without merit. The purported absence of a note executed by Sunset “at the date of the execution and delivery of the mortgage does not impair it, since there was other sufficient consideration therefor” (*Sullivan v Corn Exch. Bank*, 154 AD 292, 294 [2d Dept 1912]). The validity of the mortgage “does not depend upon the form of the indebtedness, whether by note, bond or otherwise, but upon the existence of the debt which it was given to secure” (*id.*). In this case a right to foreclose is also established by “plaintiff’s submission of the mortgage and the CEMA, in which [Sunset] acknowledges the existence and validity of the unpaid note and mortgage” (*Weiss v Phillips*, 157 AD3d 1, 7 [1<sup>st</sup> Dept 2017]). Moreover, “[w]here, as here, balances of first mortgage loans are increased with second mortgage loans and CEMAs are executed to consolidate the mortgages into single liens, the first notes and mortgages still exist” (*Wells Fargo Bank, N.A. v Douglas*, 186 AD3d 532, 534 [2d Dept 2020], quoting *Benson v Deutsche Bank Natl. Trust, Inc.*, 109 AD3d 495, 498 [2d Dept 2013]). In any event, the waiver of defenses contained in the CEMA executed by Sunset is an enforceable bar to this defense (*id.* at 10).

Notwithstanding the foregoing waiver, 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 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 [1<sup>st</sup> Dept 2019]; see also *Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1<sup>st</sup> 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]). 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]).

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 [1<sup>st</sup> 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 foreclosure claim against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that the Defendants' cross-motion is denied and the affirmative defenses and counterclaims pled by all the appearing Defendants are 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

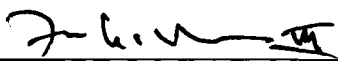
ORDERED that counsel for Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the parties being removed pursuant hereto; 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 20, 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](mailto: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.

4/18/2025  
DATE

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

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NOT FOR DISPOSITION	<input type="checkbox"/>	OTHER J.S.C.
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE