

**TD Bank, N.A. v 205 W. 107th St. LLC**

2025 NY Slip Op 32129(U)

June 6, 2025

Supreme Court, New York County

Docket Number: Index No. 850242/2024

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. 850242/2024

TD BANK, N.A.,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002

- v -

205 WEST 107TH STREET LLC, CHARLES NICHOLAS, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, JOHN DOE NO. 1 THROUGH JOHN DOE NO. 10, THE LAST TEN (10) NAMES BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF, THE PERSONS OR PARTIES INTENDED BEING THE TENANTS, OCCUPANTS, PERSON OR PARTIES, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

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, modified and extended mortgage encumbering a parcel of real property located at 205 West 107th Street, New York, New York. The mortgage was given by Defendant 205 West 107th Street, LLC ("West") to Plaintiff. The mortgage secures a loan in an original principal amount of \$5,850,000.00 which is memorialized by a mortgage note. The note and mortgage, both dated May 7, 2020, were executed by Defendant Charles Nicholas ("Nicholas") as Managing Member of West. Concomitantly with the loan documents, Nicholas executed a guaranty of payment of the indebtedness. Plaintiff commenced this action, and pled Defendants defaulted in repayment of the indebtedness beginning on or about March 10, 2024. Defendants West and Nicholas answered and pled ten 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 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 [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]). 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]). Also, based on the affirmative defenses pled, Plaintiff was required to demonstrate, *prima facie*, its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2<sup>nd</sup> Dept 2020]), as well as its substantial compliance with any contractual pre-foreclosure requirements contained in the mortgage (*see eg Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [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 affidavit from Phillip Sherry (“Sherry”), a Vice President of Plaintiff. Initially in the affidavit, Sherry avers that the affidavit is based upon “full personal knowledge of the facts and circumstances of this matter”. However, Sherry also states that his “determination of the amount due to the plaintiff and the facts surrounding 205 West 107th’s default on its obligations under the Loan Documents is based upon my review of plaintiff’s records regarding the subject Loan”. Construing this evidence most favorably to Defendants as required (*see eg Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]), Sherry failed to establish a *prima facie* case.

To the extent Sherry’s knowledge is based upon a review of the books and records, he was required, but failed, to lay a foundation for the admission of any of these documents as business records under CPLR §4518 (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]). Contrary to Plaintiff’s assertion, the affiant failed to sufficiently show that the records relied upon “reflect 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 be made pursuant to established procedures for the routine, habitual, systematic making of such a record” and “that the record be 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]). At most, the affidavit demonstrates a naked “review of records maintained in the normal course of business [which] does not vest an affiant with personal knowledge” (*JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1517 [2d Dept 2019]). Accordingly, since none of documents proffered are in admissible form, Plaintiff failed to establish any of the *prima facie* elements of the cause of action for foreclosure (*see Federal Natl. Mtge. Assn. v Allanah*, 200 AD3d 947 [2d Dept 2021]).

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]). Here, since Plaintiff was the lender when the note and mortgage were given, it was in direct privity with the mortgagor when the action was commenced and, therefore, unquestionably had standing (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]).

Defendants' cross-motion for summary judgment fails for the same reason as Plaintiff's motion. None of the proffered documents are in evidentiary form. More fundamentally, although the cross-motion is supported by an affidavit from Nicholas, it contains no recitation whatsoever as to the basis of his knowledge for his attestations. When a motion for summary judgment is supported by an affidavit *see* CPLR §3212[b]), that document must "by nature and definition, contain information from a person with direct knowledge of the subject matter discussed within the four corners of the document" (Mark C. Dillon, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:21). "Personal knowledge is not presumed from a mere positive averment of the facts. A court should be shown how the deponent knew or could have known such facts and if there is no evidence from which the inference of personal knowledge can be drawn than it is presumed that such does not exist" (*Bova v Vinciguerra*, 139 AD2d 797, 798 [3d Dept 1988][internal citations omitted]).

In other words, an assertion of facts from which the affiant's personal knowledge may be inferred is an essential and ancient principle (*see Castro v N.Y. Univ.*, 5 AD3d 135, 136 [1<sup>st</sup> Dept 2004]; *see also Jock v Landmark Healthcare Facilities, LLC*, 62 AD3d 1070, 1072 [3d Dept 2009]; *Martin v Aluminum Compound Plate Co.*, 44 AD 412, 413 [1<sup>st</sup> Dept 1899][“the mere averment of facts as upon personal knowledge is not sufficient, unless the circumstances are such that it can fairly be inferred that the affiant had personal knowledge of the facts so positively stated”]; *Wallace v Baring*, 21 AD 477 [1st Dept 1897]; *Hoormann v Climax Cycle Co.*, 9 AD 579 [1st Dept 1896]). Thus, even an agent of a party or an employee thereof, who fails to demonstrate personal knowledge is incompetent to proffer an affidavit in support of a motion for accelerated judgment (*see eg Barraillier v City of New York*, 12 AD3d 168 [1st Dept 2004]; *Israelson v Rubin*, 20 AD2d 668 [2d Dept 1964]).

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 Plaintiff's motion is denied except to the extent that the affirmative defense related to standing is stricken; and it is

ORDERED that Defendants' cross-motion is denied in its entirety, 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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TD BANK, N.A.,

Plaintiff,

-against-

205 WEST 107TH STREET LLC, CHARLES NICHOLAS  
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD  
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE  
NEW YORK CITY DEPARTMENT OF FINANCE,


Defendants.

-----X  
and it is

ORDERED that the parties shall e-file a discovery stipulation outlining all discovery to be conducted in this matter within five days of e-filing of this order, and it is

ORDERED that this matter is set down for a status conference on **August 14, 2025 @ 10:00 pm** via Microsoft Teams.

6/6/2025  
DATE

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

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	