

Wells Fargo Bank, N.A. v Walsam 36 Del. LLC

2025 NY Slip Op 33251(U)

August 19, 2025

Supreme Court, New York County

Docket Number: Index No. 850538/2023

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. 850538/2023

WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE, FOR THE BENEFIT OF THE HOLDERS OF COMM 2018-COR3 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2018-COR3,

MOTION DATE

MOTION SEQ. NO. 008

Plaintiff,

- v -

WALSAM 36 DELAWARE LLC, DAVID BERLEY, NYC DEPARTMENT OF FINANCE, NYS DEPARTMENT OF TAXATION AND FINANCE, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, NYS DEPARTMENT OF STATE, JOHN DOE NO. 1 THROUGH JOHN DOE NO. 100,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 201, 202, 203, 204, 222

were read on this motion to/for

JUDGMENT - SUMMARY

The present matter is an action to foreclose on a consolidated, amended and restated mortgage encumbering a parcel of real property located at 315-325 36th Street, New York, New York. The mortgage secures a loan in the original principal amount of \$77,000,000.00 given by Defendant Walsam 36 Delaware LLC ("Walsam") to non-party Deutsche Bank AG, New York Branch. The indebtedness is broken into three sums and memorialized by three corresponding notes identified as follows: A-1 -- \$42,000,000.00; A-2 -- \$30,000,000.00; and A-3 -- \$5,000,000.00. The entire loan transaction is subject to a separate loan agreement. All the loan documents are dated February 9, 2018, and were executed by Defendant Marc Berley ("Berley") as an authorized signatory of Walsam. Concomitantly with these documents, Defendant Berley executed a guaranty of recourse obligations.

Plaintiff commenced this action on September 20, 2023, and pled in the complaint, inter alia, that it is entitled to foreclose since Defendant Walsam defaulted in making monthly installment payments beginning on April 6, 2023, and on each due date thereafter. Additional subsequent defaults are alleged based upon Walsam's failure to remit all security deposits, rents and the full amount of the two security letters of credit under Sections 4.11.4 and 6.1 of the loan agreement. Further, Plaintiff avers that a default occurred when Berley neglected to submit an updated financial statement and statement of net worth pursuant to Section 5.4(c) of the guaranty. Plaintiff included a cause of action for breach of contract against Berley based upon the guarantee. Defendant Walsam answered and pled ten

affirmative defenses, including lack of standing. Berley answered separately and pled ten identical affirmative defenses as Walsam. Now, Plaintiff moves for *inter alia* summary judgment against Walsam and Berley, for a default judgment against the non-appearing parties, striking the appearing Defendants' affirmative defenses, appointing a referee to compute and to amend the caption. Defendants 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, 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]). 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]). Also, based on the affirmative defenses pled, Plaintiff was required to demonstrate its standing (see *eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). 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]). 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 specific business records must be proffered, provided 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 affirmation from Hayden Frevert, ("Frevert"), an Asset Resolution Consultant at Midland Loan Services, a division of PNC Bank, National Association ("Midland"), the Special Servicer for of Plaintiff. Frevert avers that his submission was based upon a review of Midland's records and knowledge of its record keeping practices. Frevert's affidavit laid a proper foundation for the admission of the records of Frevert into evidence under CPLR §4518 by sufficiently showing that the records Plaintiff relied upon "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 [was] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record [was] 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]). The records of Plaintiff were also admissible since Frevert established that those records were received from the makers and incorporated into the records Midland 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 Frevert were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). Midland's authority to act on Plaintiff's behalf was established with submission of a power of attorney dated June 5, 2018 (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]).

Proof of the loan documents, including the note and mortgage, was established in the first instance through the affirmation of Frevert and the annexed documents (*cf. 938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 218 AD3d 417 [1st Dept 2023]). A defendant'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]). Frevert averred that Defendants defaulted by failing to pay the monthly installment due on April 6, 2023, and every month thereafter. After the payment default, Frevert states Defendants committed two further defaults by failing to remit lessee security deposits and rents after due demand and by terminating the major lease at the premises. Frevert’s affidavit and the loan history demonstrated the 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 [1st Dept 2011]; *see also Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*). Similarly, *prima facie* proof of the above non-monetary defaults was also proffered (*see generally Jeffrey Towers, Inc. v Straus*, 31 AD2d 319, 323 [2d Dept 1969], *affd* 26 NY2d 812 [1970]).

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]). In this case, Plaintiff established its (*see eg Bank of NY v Knowles*, *supra* at 597). Also, annexed to Frevert’s affidavit were two written assignments of the mortgage, both dated before the action was commenced, which contained language sufficient to transferred the notes to Plaintiff (*see Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307 [3d Dept 2012]; *see also Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1st Dept 2023]; *US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1st Dept 2018]).

Accordingly, Plaintiff established its *prima facie* entitlement to summary judgment with proof of the mortgage, note, and evidence of mortgagor’s default in repayment¹ and its standing. This shifted the burden to Defendants to raise a bona fide issue of fact as to one of their affirmative defenses to foreclosure (*see Bernstein v Dubrovsky*, 169 AD3d 692 [1st Dept 2019]).

In opposition, Defendants do not deny their failure to make installment payments due from April 2023 to July 2023. Uncontradicted facts established in support of a motion for summary judgment are “deemed to be admitted” (*Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1st Dept 2017]) and “[t]he law is clear that when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene” (*Home Sav. of Am. v Isaacson*, 240 AD2d 633, 633 [2d Dept 1997], *citing New York Guardian Mortgage Corp. v Olexa*, 176 AD2d 399 [3d Dept 1991]). superfluous

However, Defendants contend that they tendered all arrears before Plaintiff accelerated the debt by commencing this action. A defendant establishes a defense to acceleration only with evidence that an unconditional proffer of *all arrears*, including interest and late fees, was made before the entire debt was called due (*see eg Cardella v Giancola*, 297 AD2d 618 [2d Dept 2002]; *First Fed Sav Bank v Midura*, 264 AD2d 407 [2d Dept 1999]; *Nat’l Sav. Bank v Hartmann*, 179 AD2d 76, 78 [3d Dept 1992]). Reinstatement also includes cure of any non-monetary breaches (*see* 1 Bergman on New York Mortgage Foreclosures § 4.07 [2025]; *see also Jeffrey Towers, Inc. v Straus*, *supra*). Here, Defendants’ claim of tender is supported via the affirmation of Peter B. Weiss (“Weiss”), Chief Executive Officer of non-party Walter & Samuels, Inc. (“W&S”), the alleged property manager for Defendant Walsam.

¹ As a payment default was demonstrated, the alleged lease termination and letter of credit defaults are superfluous.

Initially, Weiss's affirmation is deficient as he failed to offer any proof of his authority, or that of W&S, to act on Walsam's behalf or to otherwise account for his familiarity with the facts (*cf. U.S. Bank N.A. v Tesoriero*, supra). "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 [1st 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 [1st 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”]). One with a relation to the parties (eg. an employee), to the cause of action or an eyewitness to events, related to the action or otherwise, often constitutes, in and of itself, satisfactory proof of an affiant's knowledge (*see eg Wallace v Baring*, supra at 478; *see also Klein v Trout Lake Preserve Homeowners' Assn.*, 179 AD2d 967, 968 [3d Dept 1992]). Conversely, an affiant, even an agent of a party or an employee thereof, who fails to demonstrate personal knowledge is incompetent to proffer a fact based affidavit (*see eg Barraillier v City of New York*, 12 AD3d 168 [1st Dept 2004]; *Israelson v Rubin*, 20 AD2d 668 [2d Dept 1964]).

In application of these principles, Weiss's claim that W&S is the “property manager” for Walsam is only cursorily addressed and no corroborating documentation (ie. power of attorney, contract, etc.) was annexed to his affirmation. As to his own knowledge, Weiss only states in conclusory fashion that “I am fully familiar with the facts and circumstances set forth herein”. No indication is given whether his knowledge is personal, based on a review of records or a combination thereof.

Even without this defect, Defendants failed to raise an issue of fact as to their tender of all arrears. Weiss' assertion that Defendants made payment to Plaintiff of “\$2,876,941”, before this action was commenced, is corroborated by the loan history annexed to Plaintiff's moving papers (NYSCEF Doc No 180). Nevertheless, Defendants neglected to demonstrate that this amount constituted the full amount of all arrears on loans A-1, A-2 and A-3. Defendants' reliance on monthly invoices it received from Midland is misplaced. Absent from those documents is the amount of default interest authorized under section 2.2.2 of the mortgage which is immediately applicable upon a default. Any supposed reliance on the notations that “Past Due Default Interest” is “\$0.00” is futile as the statements expressly state that part due amounts are “Estimates Only - Subject to change”. In reply, Plaintiff demonstrated with an affirmation from Frevert, and documentation annexed thereto, that default interest was not included in the monthly statements and that Defendants' payment did not constitute full payment of all arrears. At most, Defendants made partial tender by which the “quantum of the default [was] been reduced, but a default exist[ed] nevertheless” (1 Bergman on New York Mortgage Foreclosures § 4.04[6][2025]; *see also D'Ull v. 1872 Monroe Ave. Hous. Dev. Fund Corp.*, 172 AD2d 181 [1st Dept 1991]).

The assertion the motion must be denied because no discovery has been conducted is unavailing as Defendants offered nothing to demonstrate Plaintiff is in exclusive possession of facts which would support a viable defense to summary judgment (*see Island Fed. Credit Union v I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]).

As pled, all the affirmative defenses are entirely conclusory and unsupported by any facts in the answer. 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 specific legal arguments were not proffered in support of any affirmative defense, those defenses were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafore*, 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-I 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 is awarded summary judgment against the appearing parties and a default judgment against the non-appearing defendants; and it is further

ORDERED that 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 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 "Doe" Defendants are stricken as the New York County Clerk will not accept a judgment for filing with a “Doe” defendant in the caption; 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, AS TRUSTEE, FOR THE
BENEFIT OF THE HOLDERS OF COMM 2018-
COR3 MORTGAGE TRUST COMMERCIAL
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2018-COR3, and on behalf of any Related
Serviced Companion Loan Noteholder, acting by and
through Midland Loan Services, a division of PNC
Bank, National Association, as special servicer,

Plaintiff,

-against-

WALSAM 36 DELAWARE LLC, DAVID
BERLEY, NYC DEPARTMENT OF FINANCE,
NYS DEPARTMENT OF TAXATION AND
FINANCE, NYC OFFICE OF ADMINISTRATIVE

TRIALS AND HEARINGS FORMERLY ENVIRONMENTAL CONTROL BOARD, NYS DEPARTMENT OF STATE,

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/suptmanh)); and it is further

All parties are to appear for a virtual conference via Microsoft Teams on January 14, 2026 @ 10:00 a.m. If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.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.

8/19/2025

DATE

CHECK ONE:

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

CASE DISPOSED

X

GRANTED

Denial checkbox

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

Form with checkboxes for NON-FINAL DISPOSITION, SUBMIT ORDER, FIDUCIARY APPOINTMENT

NON-FINAL DISPOSITION

X

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

Other checkbox

OTHER

Reference checkbox

REFERENCE

Signature of FRANCIS A. KAHN III A.J.S.C. HON. FRANCIS A. KAHN III J.S.C.