

Tico Inv. Veh. VIII, LP v Baricevic

2025 NY Slip Op 33573(U)

September 22, 2025

Supreme Court, New York County

Docket Number: Index No. 453275/2022

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. 453275/2022

TICO INVESTMENT VEHICLE VIII, LP,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002

- v -

GOJKO BARICEVIC, MARCIA BARICEVIC

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 137, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166

were read on this motion to/for APPOINT - REFEREE

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

The within action is to foreclose on a consolidated, extended and modified mortgage encumbering a parcel of real property located at 198-32 32nd Avenue, Flushing, New York. The mortgage, dated January 20, 2016, was given by Defendants Gojko Baricevic and Marcia Baricevic ("Baricevic") to Plaintiff. The mortgage secures an indebtedness of \$1,000,000.00, which is part of a loan with an original principal amount of \$2,950,000.00. The indebtedness is evidenced by a credit and security agreement between Plaintiff and non-party Project Tri-Force LLC ("Project") of the same date as the mortgage. This agreement was executed by non-party Robert Baricevic as Chief Operating Officer of Project. Concomitantly with these documents, Defendants Baricevic signed a non-recourse guaranty of the indebtedness.

Plaintiff commenced this action to foreclose on the Queens County property alleging inter alia Defendants defaulted in repayment under the notes. Defendants Baricevic answered jointly and pled fifteen [15] affirmative defenses, including failure to comply with RPAPL §1304, as well as two counterclaims. By order of this Court dated January 1, 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 appearing Defendants, for an order of reference and to amend the caption. Defendants Baricevic 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 [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

1 Despite the mandate in CPLR §507 that the venue of actions which affect title to real property "shall" be in the county where the property is situated, which in this case is Queens County, the parties stipulated to venue in this County.

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]). 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 Stephen Schifrin ("Schifrin"), "the General Counsel and Chief Compliance Officer of non-partes TICO Management Company, LP ("TICO Management") and TICO GP, LLC ("TICO GP)". Unlike the affiant's prior submission, Schifrin explained that Plaintiff was formed by TICO GP and Terrapin Income and Credit Opportunities Partnership, via an Amended and Restated Limited Partnership Agreement of TICO Investment Vehicle VIII, LP, dated February 10, 2016. The excerpts of that agreement demonstrated TICO GP's authority to act for Plaintiff through its status as general partner (*see 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]).

Also distinct from the prior affidavit, Schifrin attested to knowledge of the record keeping procedures of Plaintiff as well as a related partnership. He also established a proper foundation for the admission Plaintiff'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 [1st Dept 2017]). The records referenced by Schifrin were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

This affidavit established the mortgage, note, evidence of mortgagor's default and was sufficiently supported by appropriate documentary evidence (*see eg Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*). 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]). Annexed to the moving papers was the account ledger, in admissible form, demonstrating Defendants' failure to repay the indebtedness (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

As to the guaranty "[o]n a motion for summary judgment to enforce a written guaranty all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (*see 4 USS LLC v DSW MS LLC*, 120 AD3d 1049, 1051 [1st Dept 2014], *quoting City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). However, the guaranty in this case is expressly non-recourse and provides in section 4 as follows:

Notwithstanding any term or provision of this Guaranty, the Credit Agreement, or any other Loan Document to the contrary, the *sole recourse* Lender shall have and may exercise to enforce the payment and performance of the obligations of any Guarantor under this Guaranty *shall be enforcement of all rights and remedies granted by such Guarantor to Lender under Mortgage and the property subject to the Mortgage, and no*

deficiency shall be rendered against any Guarantor in any action or proceeding brought on or in respect of this Guaranty.

[emphasis added]

Here, Plaintiff failed to demonstrate the existence of any exception to this limitation or otherwise how Defendants are liable under the a guaranty (*see generally A10 Capital, LLC v Lispenard 3J, LLC*, ___ Misc3d ___, 2023 NY Slip Op 30547[U][Sup Ct NY Cty 2023]; *see also Nexbank, SSB v Soffer*, 129 AD3d 485 [1st Dept 2015]).

In opposition, the argument that the within motion is an inappropriate successive motion for summary judgment is unavailing. Multiple disputed issues are not presented here as Plaintiff's only failed to establish Defendants' default in repayment on the prior motion (*cf. Wells Fargo Bank v Gittens*, 217 AD3d 901, 903 [2d Dept 2023]). On the contrary, 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 and mortgage.

The argument that Plaintiff failed to demonstrate all the elements of a cause of action for foreclosure is without merit. The affidavit and proffered business documents were all in admissible form. Defendants' assertion that an issue of fact as to whether a default exists based upon misallocation of settlement proceeds is unestablished. Initially, this argument is made solely by Defendants' counsel, who did not attest to having personal knowledge of all these facts. Rather, Defendants' counsel alleged he also relied on his review of "the file", without further edification as to its contents, and hearsay discussions with Defendants. Neither Defendant submitted an affidavit or affirmation in opposition to corroborate this information. The only affidavit submitted was from non-party Robert Baricevic, Defendants' son, which contained nothing more than an inventory of assets Plaintiff is alleged to have "seized" from non-party Tri-Force Sales, LLC ("Tri-Force"). Substantively, the Minnesota action was entirely unrelated to the loan transaction and nothing in the orders or settlement agreement supports Defendants' supposition. Indeed, neither Defendant was a party to that proceeding, nor is there any reference to them in the documents. Defendants' arguments concerning the value of the inventory and how it should be credited, and as well as the accuracy of the loan history are not an impediment to summary judgment (*see Orchard Hotel, LLC v DAB Group, LLC*, 106 AD3d 628 [1st Dept 2013]).

To the extent Defendants' arguments are based on its affirmative defenses, they are unavailing as those defenses were previously stricken by the Court. The counterclaim for discharge of the mortgage fails as it is largely reflective of their affirmative defenses, as well as the arguments in opposition to this motion which were rejected (*see Deutsche Ban, NA v Marino*, 234 AD3d 587 [1st Dept 2025]). The second counterclaim fails as Defendants have not succeeded in their defenses against Plaintiff (*cf. US Bank, NA v Bajwa*, 208 AD3d 1197 [2d Dept 2022]).

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment against the appearing parties on its cause of action for foreclosure, only, and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that Defendants counterclaims are stricken; and it is further

ORDERED that **Tom Kleinberger, Esq., 411 5th Avenue, New York, New York 10016 (917) 326-5523** 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.

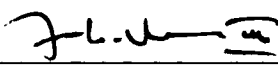
All parties are to appear for a virtual conference via Microsoft Teams on **January 29, 2025, at 10:00 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk (SFC-Part32-Clerk@nycourts.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

9/22/2025
DATE

CHECK ONE: CASE DISPOSED GRANTED DENIED

APPLICATION: SETTLE ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN


FRANCIS KAHN, III, A.J.S.C.
NON-FINAL DISPOSITION

NON-FINAL DISPOSITION GRANTED IN PART OTHER

SUBMIT ORDER REFERENCE

FIDUCIARY APPOINTMENT