

Brick Air Capital LLC v NLD Props., Inc.

2025 NY Slip Op 33721(U)

October 1, 2025

Supreme Court, New York County

Docket Number: Index No. 850613/2023

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

INDEX NO. 850613/2023

BRICK AIR CAPITAL LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 004

- v -

NLD PROPERTIES, INC., VASILIOS STITHOS, NEW YORK
STATE DEPARTMENT OF TAXATION & FINANCE,
BELKIN BURDEN GOLDMAN LLP, NEW YORK CITY
DEPARTMENT OF FINANCE, JOHN DOE NO. 1
THROUGH JOHN DOE

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 59, 60, 61, 62, 63, 74, 77, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98

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 and modified mortgage encumbering a parcel of commercial real property located at 2310 Second Avenue, New York, New York. The mortgage was given by Defendant NLD Properties, Inc. ("NLD") to non-party Ridgewood Savings Bank ("Ridgewood") to secure a loan with an original principal amount of \$2,400,000.00 which is memorialized by a consolidated, amended and restated promissory note. The note and mortgage, both dated August 23, 2016, were executed by Defendant Vasilios Stithos ("Stithos") as President of NLD. Concomitantly with these documents, Defendant Stithos executed a limited guarantee of the indebtedness. Plaintiff commenced this action alleging inter alia Defendants defaulted in repayment under the note on or about January 1, 2023. Defendant NLD and Stithos answered jointly and s Borrower, Vogel, Smullyan and Mosbacher Properties Group, LLC ("MPG") answered jointly and pled twelve affirmative defenses, including lack of standing and contractual pre-foreclosure notices, as well as three counterclaims. Plaintiff's first motion for summary judgment and an order of reference was denied by order of this Court dated January 12, 2024. Now, Plaintiff again moves for inter alia summary judgment against NLD and Stithos, striking the appearing Defendants' affirmative defenses, appointing a referee to compute and to amend the caption. Defendants NLD and Stithos 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]) and its substantial compliance with any contractual pre-foreclosure notice requirements in the loan documents (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 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 the affidavits from Eric C. Roth ("Roth"), the Manager of Plaintiff, as well as from Thomas Kennedy ("Kennedy"), Vice President of Ridgewood, Plaintiff's alleged assignor. Despite being an employee of Plaintiff, Roth does not indicate his affidavit is based upon personal knowledge of the events and transactions (see *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019]). Rather, he vaguely states he is "personal knowledge of the Mortgagee's business practices and procedures". "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]; see also *Castro v N.Y. Univ.*, 5 AD3d 135, 136 [1st Dept 2004]). To the extent Roth's affidavit is based on a review of records, he was required, but failed, to establish 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]). Most fundamentally, Roth neglected to aver that he is familiar with the record keeping practices of Plaintiff (see *Bank of IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). Also, Roth neglected to sufficiently show that all records he 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]).

The affidavit of Kennedy established a foundation for the admission of Ridgewood's records into evidence under CPLR §4518 by attesting to knowledge of his employer's record keeping procedures and the other statutory requisites (*Bank of N.Y. Mellon v Gordon*, supra; see also *Bank of Am v Brannon*, supra). The documents referenced by Kennedy were also referenced in his affidavit (*cf. 938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 218 AD3d 417 [1st Dept 2023]). As such, proof of the loan documents was established in the first instance. As to Defendants' default, it "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]). Here, Kennedy's review of the attached account records demonstrated that the Mortgagor defaulted 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]). Accordingly, Plaintiff established the material facts underlying the claim for foreclosure, to wit the mortgage, note, and evidence of mortgagor's default (see *eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

Standing in a foreclosure action 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, the written assignment of the mortgage proffered demonstrates Plaintiff's standing since the documents states the transfer is "TOGETHER with the bond(s) or note(s) or obligations described in said Mortgage" (see *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]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2d Dept 2012]).

Regarding service of a contractual pre-foreclosure notice, nothing in the loan documents requires service of such a notice where a failure in repayment is the event of default. Unlike sections 2.1.1[q] and [r], which require notice and a cure period before a default exists, subsection [a], which concerns failure to pay any installment of principal or interest, contains no such limitation. Any reliance on the notice provision in section 3.1 is unavailing as that only concerns how service of a notice must be served *if required*. Section 8 of the note is similarly inapplicable.

As to the guarantor Stithos, "[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" (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). However, in the present case, the guaranty is limited and creates individual liability only for occurrences defined in section 1.2 of the guaranty (see eg *Nexbank, SSB v Soffer*, 129 AD3d 485 [1st Dept 2015]). As such, *prima facie* proof that one or more of the contractual conditions occurred is necessary on this branch of the motion. Other than citing to the guaranty, Plaintiff failed to proffer any argument for Stithos' liability under the limited guaranty. A movant seeking summary judgment must explain how the evidence proffered entitles it to same (see *Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 496 [1st Dept 2010]).

In opposition, Defendants' claim that Plaintiff failed to demonstrate all the elements of a cause of action for foreclosure is without merit. Plaintiff failed to lay a proper foundation under CPLR §4518 for of all the salient and necessary records which rendered same in admissible form. To the extent, Defendants assert the motion must be denied because no discovery has been conducted is unavailing as they have offered nothing more than speculation to support that Plaintiff is in exclusive possession of facts to support its defenses (see *Island Fed. Credit Union v I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]). Defendants' arguments concerning the existence of a forbearance agreement are unavailing as the loan ledger annexed to Kennedy's affidavit demonstrates a default under that plan. Similarly, Defendants' claims of timely payment of installments are unavailing as they are not corroborated by the proffered financial records (see *255 Co. v World Wide Trend Setters, Inc.*, 148 AD3d 336 [1st Dept 1989]; *Peerless Constr. Co. v Mancini*, 95 AD3d 666 [3d Dept 1983]). The argument that Plaintiff interfered with tender of arrears before acceleration of the indebtedness is not established. There is no evidence of Defendants' attempt to pay *all* arrears, which encompasses, among other items, accrued interest and late charges (see *EMC Mortg. Corp. v Stewart*, 2 AD3d 772, 773 [2d Dept 2003]; *United Cos. Lending Corp. v Hingos*, 283 AD2d 764, 766 [3d Dept 2001]; *First Fed. Sav. Bank v. Midura*, 264 AD2d 407 [2d Dept 1999]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment against the appearing Defendants, except on the cause of action against Vasilios Stithos under the guaranty, for a default judgment against the non-appearing parties as well as the other relief is granted; and it is further

ORDERED that **Mark McKew, Esq., 1725 York Ave, Ste 29A, New York, New York, 212-876-6783** 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 the caption of this action and all pleadings and papers filed or served in this action are hereby amended, without prejudice to all proceedings herein, to substitute “Pharmacy a/k/a Healthworld RX Inc.” in place and stead of “John Doe No. 1” and to delete references to “John Doe No. 2” through “John Doe No. 20”, and the caption is amended as provided below; and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
BRICK AIR CAPITAL LLC,

Plaintiff,

-against-

NLD PROPERTIES, INC., VASILIOS STITHOS, NEW
YORK STATE DEPARTMENT OF TAXATION &
FINANCE, BELKIN BURDEN GOLDMAN LLP, NEW
YORK CITY DEPARTMENT OF FINANCE, and
PHARMACY A/K/A HEALTHWORLD RX INC.,

Defendants.

-----X
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/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, 2026, at 11:00 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.

10/1/2025

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

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.