

Wilmington Trust, N.A. v Nyack 2 Wash. LLC

2025 NY Slip Op 33993(U)

October 10, 2025

Supreme Court, New York County

Docket Number: Index No. 850020/2024

Judge: Francis A. Kahn III

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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. 850020/2024

WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE ON BEHALF OF THE REGISTERED HOLDERS OF CITIGROUP COMMERCIAL MORTGAGE SECURITIES, INC., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2016-P3,

MOTION DATE

MOTION SEQ. NO. 001 002

Plaintiff,

- v -

NYACK 2 WASHINGTON LLC, NYACK COLLEGE, THE 17 BATTERY PLACE CONDOMINIUM, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, OCEAN PRIME LLC, LINK RENOVATION, INC., JOHN DOE

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 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, 85, 86, 87, 88, 89, 90, 125, 126, 127, 128, 129, 130, 131, 147, 152

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 91, 92, 93, 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, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 148, 153

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motions are determined as follows:

Plaintiff commenced this action to foreclose on a consolidated, amended and restated mortgage encumbering a parcel of commercial real property known as Condominium Unit 3B, The 17 Battery Place Condominium, 2 Washington Street, New York, New York. The mortgage, dated March 17, 2016, was given by Defendant Nyack 2 Washington LLC ("Nyack") to non-party Natixis Real Estate Capital LLC ("Natixis"). The mortgage secures a loan with an original principal amount of \$55,000,000.00 which is memorialized by a consolidated, amended and restated promissory note the same date as the mortgage. The loan transaction also included a loan agreement which governed and defined the transaction. All the loan documents were executed by non-party David C. Jennings ("Jennings"), as Authorized Signatory of Nyack. Concomitantly with these documents, Defendant Nyack College ("College"), via Jennings, executed a guaranty of recourse obligations. The encumbered property is located in The 17 Battery Place Condominium ("Battery"), which is operated by its Board of Managers. On or about December 13, 2023, Battery filed a lien for unpaid common charges against the mortgaged premises, pursuant to Real Property Law §§339-aa and 339-z, in the amount of \$1,967,258,61.

Plaintiff commenced this action and pled that Mortgagors defaulted in repayment of the indebtedness. Defendants Nyack and College answered and pled sixteen affirmative defenses. Defendant Battery answered and pled fourteen affirmative defenses, as well as three joint counter/cross claims. Primary amongst Battery's claims is a cause of action to foreclose its lien for common charges. Battery claims that its lien has priority over Plaintiff's mortgage by virtue of the application of RPL §339-z and the terms of the condominium declaration. Plaintiff replied to the counterclaims. Nyack and College answered the crossclaims.

Now, Plaintiff moves (Mot Seq No 1) for summary judgment against Nyack and College on its foreclosure cause of action, to dismiss Battery's counterclaims and crossclaims, to strike all the affirmative defenses, for a default judgment against the non-appearing parties, for appointment of a referee to compute and to amend the caption. Battery opposes the motion and, by separate notice of motion (Mot Seq No 2), seeks summary judgment on its counter/cross claims, dismissing Plaintiff's defenses to same and for a default judgment against any non-appearing parties. Plaintiff opposes Battery's motion. Defendants Nyack and College submitted no opposition to either motion.

In moving for summary judgment, each party was required to establish *prima facie* entitlement to judgment as a matter of law (*see generally 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]).

The overarching principle in disputes over the priority of successive encumbrances on the same property is that such liens are prioritized in the order in which they have attached to the property (*see RPL §291; Varon v Annino*, 170 AD2d 445 [2d Dept 1991]; *see also Empire Trust Co. v Park-Lexington Corp.*, 243 AD 315 [1st Dept 1934]). That precept is subject to exceptions, most notably in New York by its "race-notice" recording act (RPL §290, *et seq*) and by the Condominium Act (Article 9-B of the Real Property Law). Included in that Article is RPL §339-z, which addresses the priority of liens for unpaid common charges and provides as follows [emphasis added]:

The board of managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon, prior to all other liens except only (i) liens for taxes on the unit in favor of any assessing unit, school district, special district, county or other taxing unit, (ii) all sums unpaid on a first mortgage of record, and (iii) all sums unpaid on a subordinate mortgage of record held by the New York job development authority, the New York state urban development corporation, the division of housing and community renewal, the housing trust fund corporation, the New York city housing development corporation, or in a city having a population of one million or more, the department of housing, preservation and development. Upon the sale or conveyance of a unit, such unpaid common charges shall be paid out of the sale proceeds or by the grantee. Any grantor or grantee of a unit shall be entitled to a statement from the manager or board of managers, setting forth the amount of the unpaid common charges accrued against the unit, and neither such grantor nor grantee shall be liable for, nor shall the unit conveyed be subject to a lien for, any unpaid common charges against such unit accrued prior to such conveyance in excess of the amount therein set forth. *Notwithstanding the above, the declaration of an exclusive non-residential condominium may provide that the lien for common charges will be superior to any mortgage liens of record.*

The overarching principle “lucidly” expressed in the statute is the intention for “the first mortgage to retain its natural superiority to a subsequent condo lien” (4 Bergman on New York Mortgage Foreclosures § 36.02 [2025]). This was the intent of the Legislature when it originally enacted this provision in 1964 (*see Bankers Trust Co. v Board of Managers of Park 900 Condominium*, 181 AD2d 274, 278 [1st Dept 1992][“The Legislative history supports this interpretation of the statute”]). The provision Battery relies on was ratified in 1974 as a “merely permissive” change to permit “lending institutions and developers [to decide whether such procedure would be superior to the present absolute requirement that first mortgage liens precede liens for common charges in priority” (Judiciary Comm in Support of Senate Bill S 7933, Jan. 29, 1974, at 3). Plainly, then, this amendment is an exception, rather than merely a proviso, to the ordinary operation of priority (*see McKinney's Statutes* §211). This conclusion is apparent from the first phrase of the section which states “[n]otwithstanding the above” (*see In re Livingston's Estate*, 14 AD 264, 265 [1st Dept 1961][“the words ‘provided, however’, are deemed to denote the expression of a limitation or exception”]). “Such exception, therefore, must be strictly construed in order that the major policy underlying the legislation itself is not defeated” (*In re Charles' Estate*, 200 Misc 452, 461 [Surr Ct NY Cty 1951], *aff'd* 279 AD 741 [1st Dept 1951], *aff'd* 304 NY 776 [1952]). In other words, “all doubts should be resolved in favor of the general provision rather than the exception” (*Radich v The Council of The City of Lackawanna*, 93 AD2d 559, 562 [4th Dept 1983]).

In Articles III and IV of Battery's original declaration, the condominium is comprised of three units which are contained in two buildings designated as the South Building and the North Building. Units 1 and 2 are in the South Building and Unit 3 is in the North Building. By operation of the fourth amendment to the declaration, which was enacted some two-weeks before the loan transaction, Unit 3 was subdivided into Units 3A and 3B, the latter being the mortgaged premises. Pursuant its terms, the consent of Natixis, the original mortgagee, to the fourth amendment was obtained by document dated March 2, 2016. In that consent, Natixis is referred to as the “Registered Mortgagee of Unit 3”.

Battery posits that Article XX of the original condominium declaration fulfills the exception contained in last sentence of RPL §339-z and that its lien has priority despite the recordation of Plaintiff's mortgage more than seven years earlier. Article XX states that “[e]xcept as provided in this Article, the lien of any mortgage on a Unit shall be subordinate to the lien for Common Charges”. The exemption limits the superiority of a common charge lien to twelve months in the case of an “Institutional Mortgage” held by an “Institutional Lender” as both terms are defined therein. Superiority of an Institutional Mortgage is also dependent on four additional contingencies denominated under romanettes i, ii, iii and iv.

Contrary to its argument, Battery's original declaration fails to fall with a strict construction of a “declaration of an exclusive non-residential condominium”. Article VII states that the South Building Units may be used for any lawful “residential” use or a “residential complex”. Although, the declaration prohibits use of North Building Units as a “residential complex”, that restriction expired on “the third anniversary of the date of this Declaration”. The Fourth Amendment, which is expressly deemed “paramount” should any inconsistency arise with the declaration and other amendments, does not state the use of Unit 3B is exclusively non-residential. It limits use of Unit 3B to “Higher Education and Other Permitted Uses” but also permits other “uses” or “services” “ancillary thereto” or “customarily offered by Higher Education Institutions to their student bodies but not to the general public”. Also, absent from a list of “Prohibited Uses”, titled Exhibit D to the declaration of Unit 3B, is residential uses. This omission is conspicuous as the list comprehensively specifies dozens of excluded uses but does not expressly proscribe residential ones. Ultimately, the fourth amendment does not reflect, in accordance with the legislative purpose of the 1974 amendment, that the “lending

institutions and developers”, to wit Nyack and Natixis, “decide[d]” that it was “superior” to subvert subordinate the ordinary principle that “first mortgage liens precede liens for common charges in priority”¹.

Turning to Plaintiff’s motion, in moving for summary judgment, it 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, *prima facie*, its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). In support of a motion for summary judgment on a cause of action for foreclosure, 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, 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 affirmation from Douglas Scott (“Scott”), a Senior Asset Manager at Greystone Servicing Company LLC, successor to C-III Asset Management LLC, (the “Special Servicer”), in its capacity as the Special Servicer of Plaintiff. Scott’s affirmation and 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 [1st Dept 2011]; *see also Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*).

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]). Annexed to Scott’s affidavit was a written assignment of the mortgage dated before the action was commenced. Although a written assignment of a mortgage is often a nullity in this context (*see eg U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]), the assignment here provided the mortgage was transferred with the “[t]ogether with any and all notes and obligations therein described”. This language sufficiently established conveyance of the note and rendered any issues concerning the allonge and physical delivery of the note irrelevant (*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]). Defendants’ opposition did not address the merits of Plaintiff’s *prima facie* case for foreclosure or the existence of an issue of fact in this regard.

As to the branch of Plaintiff’s motion to dismiss Defendants’ other affirmative defenses, CPLR §3211[b] provides that “[a] party may move for judgment dismissing one or more defenses, on the ground that a

¹ Parenthetically, the Court notes that even were the common charge superiority provisions of Article XX applicable by operation of RPL §339-z, contrary to Battery’s assertions, the express exception for an Institutional Lender applies. Here, there is no question Natixis was an “Institutional Lender”, and it was the registered mortgagee with an “Institutional Mortgage”. That Natixis and/or Plaintiff waited some nine months after Battery allegedly notified them of a common charge delinquency, does not demonstrate, as a matter of law, they failed to “promptly” or “diligently” seek foreclosure of its lien.

defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). 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 [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 no specific legal argument was proffered in support of a particular affirmative defense or claim, those were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafigliore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]). The counterclaims lack merits as addressed supra. To the extent they are largely reflective of the affirmative defenses, those claim fails as well (*see Deutsche Bank, NA v Marino*, 234 AD3d 587 [1st Dept 2025]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted (*see* CPLR §3215; *SRMOF II 2012-1 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 the motion for summary judgment against the appearing parties, a default judgment against the non-appearing parties and the appointment of a referee to compute is granted without opposition; and it is further

ORDERED that Defendant Battery's motion for summary judgment and other relief is denied and its affirmative defenses and counterclaims are stricken, and it is

ORDERED that **Clark Whitsett, Esq., 66-05 Woodhaven Blvd., Rego Park, New York 11374 – 718-850-0003** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff to 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 amended caption shall read as follows:

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

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WILMINGTON TRUST, NATIONAL
ASSOCIATION, AS TRUSTEE ON BEHALF OF
THE REGISTERED HOLDERS OF CITIGROUP
COMMERCIAL MORTGAGE SECURITIES, INC.,
COMMERCIAL MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2016-P3,

Plaintiff,

-against-

NYACK 2 WASHINGTON LLC, NYACK
COLLEGE n/k/a ALLIANCE UNIVERSITY,
THE 17 BATTERY PLACE CONDOMINIUM,

850020/2024 WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE ON BEHALF OF
THE REGISTERED HOLDERS OF CITIGROUP COMMERCIAL MORTGAGE SECURITIES, INC.,
COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2016-P3 vs. NYACK 2
WASHINGTON LLC ET AL
Motion No. 001 002

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NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, OCEAN PRIME LLC, LINK RENOVATION, INC.,

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

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 February 18, 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.

10/10/2025
DATE

Francis Kahn III

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

HON. FRANCIS A. KAHN III

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER S.C.

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE