

Hadjispyro v Kalló

2025 NY Slip Op 35221(U)

November 1, 2025

Supreme Court, Kings County

Docket Number: Index No. 501218/2025

Judge: Menachem M. Mirocznik

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At IAS Part FRP5 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 1st of November 2025

PRESENT: HON. MENACHEM M. MIROCZNIK
JUSTICE OF THE SUPREME COURT

PETROS HADJISPYRO,

Plaintiff,

-against-

DIONISIE KALLO, MARIE KALLO, ERIN CAPITAL MANAGEMENT, YI CHEUNG CHAN, CITY OF NEW YORK DEPARTMENT OF FINANCE, JOHN DOE and JANE DOE

Defendants.

Index No. 501218/2025

Decision and Order
(Motion Seq. 1)

Papers	Numbered
Notice of Motion	NYSCEF Doc. 20-31
Opposition	NYSCEF Doc. 35-40
Reply	NYSCEF Doc. 41

Upon the foregoing papers, the motion is determined in accordance with this Decision and Order as follows:

Procedural and Factual History

This action was commenced on January 13, 2025, seeking to foreclose a mortgage (the "mortgage") executed by defendants Dionisie Kallo and Marie Kallo ("defendants") encumbering the property known as 527 84th Street, Brooklyn, New York 11236 (the "property"). On March 3, 2025, defendants served an answer asserting various affirmative defenses.

Plaintiff now moves for summary judgment and to strike defendants answer, to appoint a referee for default judgment against the non-answering defendants and to amend the caption to substitute certain occupants of the property as John Doe defendants. Plaintiff argues that he is entitled to summary judgment because he has produced the note, mortgage, and proof of the defendants' default. Plaintiff asserts that the verified answer contains only general denials and boilerplate affirmative defenses that raise no triable issue of fact and are insufficiently pled pursuant to CPLR §3013. Plaintiff maintains that standing, capacity, and service are all properly established; RPAPL §§1304 and 1306 do not apply since the loan was expressly for non-personal and household purposes; and the defendants' defenses are unsupported by any facts.

Defendants oppose summary judgment, asserting that defendants purchased the subject property from plaintiff pursuant to a contract of sale¹ which plaintiff breached by failing to deliver the property vacant, leaving personal property behind. Defendants further claim that, as consideration for proceeding with closing under those circumstances, the parties agreed that no mortgage payments would be due until plaintiff removed his belongings—a condition that remains unfulfilled. While defendants acknowledge the principal amounts owed under the note and mortgage, Defendants dispute the same is due and whether plaintiff is entitled to interest, fees, and other relief, arguing that summary judgment should be denied or, at minimum, deferred pending a hearing to determine whether Plaintiff's failure to clear his property precludes recovery of interest and associated charges.

In reply plaintiff argues that defendants' opposition fails to raise any genuine issue of fact and instead concedes the key elements of foreclosure-execution of the note and mortgage, and default on the payment of the principal. Plaintiff contends that defendants' alleged oral agreement excusing payment until personal property was removed is baseless. Plaintiff argues that he had no authority to alter repayment terms at the time of the closing, as he was only assigned the note and mortgage months later, and any such claim was neither pleaded in defendants answer nor supported by evidence and any such conditions to closing of the contract were waived and merged into the deed when defendants accepted same from defendant. Plaintiff further asserts that all thirteen affirmative defenses have been abandoned since defendants offered no proof to support them, and that disputes over interest or charges relate only to computation, not liability.

Discussion

"As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact... Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers... Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hmp*,... 68 NY2d 320, 324 [1986][citations omitted]; See also *Zuckerman v. New York*, 49 NY2d 557 [1980]; *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft, LLP*, 26 NY3d 40 [2015].

"Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" *Hudson City Sav. Bank v Genuth*, 148 AD3d 687 [2nd Dept. 2017]. This showing shifts the burden to the non-movant to present evidence in admissible form sufficient to raise a material issue of fact requiring a trial. See *Gesuale v. Campanelli & Assocs., P.C.*, 126 AD3d 936 [2d Dept 2015]; See also *First Intern. Bank of Israel, Ltd. v L. Blankstein & Son, Inc.*, 59 NY2d 436 [1983] ["Where, as here, plaintiff moves for summary judgment on a debt instrument, the non-movant can only defeat the motion by raising material issues of fact which are "genuine and based on proof, not shadowy and conclusory statements."]

¹ Although defendants reference the contract of sale as an exhibit, the same was not annexed to defendants' papers.

Here, plaintiff established prima facie entitlement to judgment as a matter of law, with production of the note, mortgage and evidence of the default. This showing shifted the burden to defendants to raise an issue of fact requiring a trial. Defendants failed to meet their burden.

Defendants' bare allegation of the existence of an oral agreement or modification is without merit and insufficient to raise an issue of fact.

As plaintiff correctly contends, the existence of an obligation to remove plaintiffs' personal property is barred by the merger doctrine. "Generally, the obligations and provisions of a contract for the sale of land are merged in the deed and, as a result, are extinguished upon the closing of title. However, this rule does not apply where there is a clear intent evidenced by the parties that a particular provision [of the contract of sale] shall survive delivery of the deed, or where there exists a collateral undertaking... An undertaking that is collateral to the conveyance is not extinguished by the acceptance of the deed, regardless of the terms of the contract... because it is not a part of the main purpose of the transaction, that is, the conveyance of real estate, [and therefore] by [its] very nature may show an intent that [it] should not be merged in the deed... The term "collateral undertaking" has been defined as a contractual commitment that is not connected with the title, possession or quantity of land... The right to possession upon closing necessarily includes the right to exclude the seller from continued occupancy of the premises. It is, in fact, of the essence of the contract, if only for the practical reason that a purchaser will not likely bargain for a building full of the seller's personality. The right to exclude others, as well as their property ... is one of the most essential sticks in the bundle of rights that are commonly characterized as property ... Because possession of the premises thus goes to the essence of the transaction, the obligation to deliver the premises vacant and clean cannot be collateral to the transfer of title." *Novelty Crystal Corp. v PSA Inst. Partners, L.P.*, 49 AD3d 113 [2d Dept 2008] [internal citations and quotation marks omitted]

Here, defendant did not produce the written contract of sale to establish the existence of the condition that the property be delivered vacant and broom clean. Nor did defendants demonstrate that said condition would survive the closing and delivery of the deed other than defendants' bare allegation that there was an oral agreement for the survival of the condition. Therefore, defendants' contentions failed to raise an issue of fact.

Lastly, plaintiff is also correct that the failure to assert the alleged oral agreement as an affirmative defense in their answer constituted a waiver of the defense. "CPLR 3018, which governs responsive pleadings, draws a distinction between denials and affirmative defenses... Denials generally relate to allegations setting forth the essential elements that must be proved in order to sustain the particular cause of action and [t]hus, a mere denial of one or more elements of the cause of action will suffice to place them in issue... Conversely, a defendant must plead, as an affirmative defense, all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading... Accordingly, where a defendant seeks to inject into the litigation matters [that] are not the plaintiffs burden to prove as part of the cause of action, those matters must be affirmatively pleaded as defenses... Failure to plead a defense that must be pleaded affirmatively under CPLR 3018(b) is a waiver of that defense, unless it is raised by a motion under CPLR 321 l(a)." *GMAC Mte., LLC v Winsome Coombs*, 191 AD3d 37 [2d Dept 2020] [internal citations and quotation marks omitted]

The failure to plead the alleged oral agreement or modification as an affirmative defense in defendants' answer constituted a waiver of the alleged defense. See *Rooney v Slomowitz*, 11 AD3d 864 [3d Dept 2004][*"Furthermore, defendants failed to plead the alleged modification as an affirmative defense in their answer, thus waiving that defense absent leave to amend"*][internal quotation marks omitted]; *Counties of Warren & Washington Indus. Dev. Agency v Boychuck*, 109 AD2d 1024 [3d Dept 1985][*"In addition, defendants failed to plead the modification as an affirmative defense in their answer, thus waiving that defense absent leave to amend"*]

Therefore, plaintiffs' motion for summary judgment is granted. The parties' remaining contentions need not be reached in light of the Court's determination.

Accordingly, it is hereby

ORDERED, that plaintiff's motion is GRANTED; and it is further

ORDERED, that the Plaintiff is awarded summary judgment; and it is further

ORDERED, that the non-answering and non-appearing defendants are determined to be in default and Plaintiff is granted judgment upon the default of said defendant(s) pursuant to CPLR 3215; and it is further

ORDERED, that Jane Annabito Carbonaro, Esq. with an address of 3615 Avenue S, Brooklyn, New York 11234 Telephone No. (718) 676-4430 is hereby appointed Referee, in accordance with RPAPL 1321, to compute the amount due to Plaintiff, and to examine whether the mortgaged property may be sold in parcels; and it is further

ORDERED, that the Referee make his/her computation and report with all convenient speed; and it is further

ORDERED that, if necessary, the Referee may take testimony pursuant to RPAPL 1321; and it is further

ORDERED, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to section 36.2(c) ("Disqualifications from appointment"), and section 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; it is further

ORDERED, that, pursuant to CPLR 8003(a), the statutory fee of \$350.00, ~~or in the discretion of the court, a fee of \$_____~~, shall be paid to the Referee for the computation of the amount due and upon the filing of his/her 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(a); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; 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; and it is further

ORDERED that the caption be amended by substituting "Ms. Ingrid [last name refused]" and "Anon Czimo" in place of defendant "John Doe" and "Jane Doe"; and it is further

ORDERED that the caption be amended to read as follows:

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

PETROS HADJISPYROU

Plaintiff,

-against-

DIONISIE KALLO, MARIE KALLO, ERIN CAPITAL
MANAGEMENT, YI CHEUNG CHAN, CITY OF NEW
YORK DEPARTMENT OF FINANCE, MS. INGRID [last
name refused] and ANON CZIMO,

Defendants.

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and it is further

ORDERED, that a copy of this Order with Notice of Entry shall be served upon all parties entitled to notice within twenty days of this order.

This constitutes the decision and order of the Court.

ENTER:



Hon. Menachem M. Mirocznik, JSC