DD Notes LLC v 126 W. 121st St., LLC
2026 NY Slip Op 31607(U)
April 15, 2026
Supreme Court, New York County
Docket Number: Index No. 850324/2025
Judge: Francis 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. 850324/2025

MOTION DATE ______

MOTION SEQ. NO. 002

DD NOTES LLC,

Plaintiff,

- v -

126 WEST 121ST STREET, LLC,YVONNE MITCHELL, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK TRANSIT AUTHORITY TRANSIT ADJUDICATION BUREAU, CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION PARKING VIOLATIONS BUREAU, CITY OF NEW YORK DEPARTMENT OF FINANCE, JOHN DOE 1-10 AND JANE DOE 1-10 SAID NAMES BEING FICTITIOUS PARTIES INTENDED BEING POSSIBLE TENANTS, OCCUPANTS, PERSONS OR CORPORATIONS, IF ANY, HAVING AN INTEREST IN OR LIEN UPON THE PREMISES, DESCRIBED IN THE COMPLAINT

Defendant.

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AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 106, 107, 108, 109, 110, 111, 112, 113, 114

were read on this motion to/for JUDGMENT - SUMMARY.

The court *sua sponte* vacates its decision and order, dated April 7, 2026, and substitutes the following in its place and stead:

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This is an action to foreclose on a mortgage encumbering commercial real property located at 126 West 121st Street, New York, New York, given by Defendants Yvonne Delaney Mitchell ("Mitchell") to non-party Axos Bank ("Axos"). The mortgage secures an indebtedness in the original principal amount of $550,000.00 evidenced by a promissory note. The note and mortgage, as well as a loan agreement, all dated October 8, 2019, were executed by Defendant Mitchell. The note provides, in section 2.5 concerning payments, that "Borrower is and shall be obligated to pay principal, interest and any and all other amounts which become payable hereunder or under the other Loan absolutely and unconditionally and without any abatement, postponement, diminution or deduction and without any reduction for counterclaim or setoff". Regarding enforceability, the loan agreement states that: "The Loan Documents are not subject to, and Borrower has not asserted, any right of rescission, set-off, counterclaim or defense, including the defense of usury". On November 16, 2023, Mitchell deeded her entire interest in the premises to Defendant 126 West 121st Street, LLC ("126 West").

Plaintiff commenced this action and pled causes of action for foreclosure based upon an alleged repayment default and a "due-on-transfer" default. Defendants answered jointly and pled thirty-four affirmative defenses including lack of standing. Now, Plaintiff moves for *inter alia* summary judgment against the appearing Defendants, for a default judgment against the non-appearing parties, appointing a referee to compute and to amend the caption. Defendants oppose the motion and cross-move to, *inter alia*, dismiss the complaint pursuant to CPLR §3211[a][1] and [7]. Plaintiff opposes the cross-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]). 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 by an affidavit from Ilene Stallman ("Stallman"), an Authorized Officer of for Plaintiff. Stallman avers that the affidavit is based on personal knowledge and a review of Plaintiff's records. Stallman's affidavit laid 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 of other entities, like Axos, were also admissible since Stallman established that those records were received from the makers and incorporated into the records Plaintiff 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])[1]. Further, the records referenced by Stallman were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Stallman's review of the attached records demonstrated the material facts underlying the claim for foreclosure, to wit the mortgage, note, 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). Plaintiff also demonstrated a "due-on-transfer" default event occurred when Mitchell transferred the property to 126 West without Plaintiff's prior approval

[1] A evidentiary foundation for Axos' records also exists based upon an affidavit submitted from Melina Turner, the VP, Special Assets Manager of Axos, who demonstrated knowledge of Axos' record keeping practices and the other requisites of CPLR 4518.

(*see Fortress Credit Corp. v Hudson Yards, LLC,* 78 AD3d 577 [1st Dept 2010]; *Beacon Federal Sav. & Loan Asso. v Marks,* 91 AD2d 1010 [2d Dept 1983]; *see also* 12 USCS § 1701j-3[b][2-3]).

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] holder status via 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] written assignment of the note to the 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, it is undisputed that Plaintiff was not the original lender. In support of its standing, Plaintiff submitted, among other documents, a written assignment of the mortgage. While often a nullity in this context (*see eg U.S. Bank N.A. v Dellarmo,* 94 AD3d 746, 748 [2d Dept 2012]), a mortgage assignment that includes transfer of the note, or similar language (eg. loan, indebtedness, the money due and owing, etc.), which can be sufficient to transmit the note (*see eg Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1st Dept 2023]; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307 [3d Dept 2012]). Here, the assignment dated June 24, 2025, before the action was commenced, evidences a transfer of the mortgage from Axos to Plaintiff "TOGETHER WITH: the note(s) described or referred to in the mortgage. Plaintiff also offered a written assignment of the loan documents with the same date. These documents established Plaintiff's standing and rendered any claims irregularity with the allonge to the note irrelevant (*see U.S. Bank N.A. v 1226 Evergreen Bapaz LLC,* 227 AD3d 429 [1st Dept 2024]).

Accordingly, Plaintiff established its *prima facie* case on its foreclosure cause of action, including its standing. Thus, the burden shifts 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' claim that Plaintiff failed to demonstrate all the elements of its foreclosure claim is without merit. The affidavit and proffered business documents were all in admissible form. Indeed, as the validity of the loan documents, Mitchell's transfer of the premises and the installment default were not contradicted, those facts "deemed to be admitted" (*Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1st Dept 2017]). Defendants also posit that sufficient facts exist to raise issues of fact concerning unclean hands, estoppel and/or bad faith by Plaintiff in resetting the interest rate on the note and by purportedly stymying their attempt at reinstatement. "A mortgagor may be relieved from his default under a mortgage upon a showing of waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct by the mortgagee" (*see Ebc Amro Asset Mgmt. v Kaiser*, 256 AD2d 161 [1st Dept 1998]).

Assuming, that the defense of unclean hands is applicable to a mortgage foreclosure action (*see Phh Mtge. Corp. v Davis*, 111 AD3d 1110, 1112 [3d Dept 2013]), that doctrine "is used only to bar the grant of equitable relief to a party who is 'guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct'" (*Wells Fargo Bank v Hodge*, 92 AD3d 775 [2d Dept 2012]). "[C]onclusory, self-serving, facially unpersuasive evidence" which is not supported by documentary proof is insufficient to defeat summary judgment where evidence of Defendants' acceptance of the disputed funds and failure to make repayment is proffered (*see Connecticut Nat'l Bank v Hack*, 186 AD2d 387, 388 [1st Dept 1992]; *see also Silver v Silver*, 17 AD3d 281 [1st Dept 2005]). Here, all the acts Defendant claims Plaintiff committed, setting an incorrect interest rate and escrow discrepancies, even if true, do not constitute conduct to support such a defense (*see Wells Fargo Bank, N.A. v Dara*, 180 AD3d 844 [2d Dept 2020]).

Defendant's assertion that Defendant waived its reliance on the due-on transfer clause in Article 6 of the mortgage is without merit. "[B]y the terms of the mortgage agreement, the 'due on sale' covenant was optional with [Mortgagee], not self-executing, and therefore, some manifestation on the part of [Mortgagee] was necessary to effectuate it" (*Roosevelt Sav. Bank v A.V.R. Realty Corp.*, 153 AD2d 616 [2d Dept 1989]). Further this defense is not viable based on the non-waiver clause in section 7.7 of the mortgage and section 10.7 of the loan agreement. Absent evidence that Plaintiff expressly agreed to excuse Defendants default based on transfer of the premises no defense is established (*see Apple Bank for Sav. v Ashkenazi Realty*, 232 AD2d 330 [1st Dept 1996]; *see also Heller Fin. v Apple Tree Realty Assocs.*, 238 AD2d 198, 199 [1st Dept 1997]).

Concerning equitable estoppel, this doctrine exists "to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another" (*American Bartenders School v 105 Madison Co.*, 59 NY2d 716, 718 [1983]; *see also Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]). "To establish an estoppel, a party must prove that it relied upon another's actions, its reliance was justifiable, and that, in consequence of such reliance, it prejudicially changed its position" (*Flushing Unique Homes, LLC v Brooklyn Fed. Sav. Bank*, 100 AD3d 956, 958 [2d Dept 2012]). Absence of any of these essential elements renders an estoppel defense deficient (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96, 106 [2006]). In this case, Defendants do not explain, much less plead, what actions by Plaintiff were relied on to its detriment (*see Bank of New York v Murphy*, 230 AD2d 607, 608 [1st Dept 1996]).

Defendants' argument that Plaintiff acted in bad faith or materially breached the loan documents by resetting the interest rate on the indebtedness fails to raise an issue of fact. Generally, a material breach by one party to a contract may excuse another party's performance (*see Grace v Nappa*, 46 NY2d 560, 567 [1979]). Moreover, "[a] promisee who prevents the promisor from being able to perform the promise can not maintain suit for nonperformance; he discharges the promisor from duty" (*Canterbury Realty & Equip. Corp. v Poughkeepsie Sav. Bank*, 135 AD2d 102, 107 [3d Dept 1988]). Here, Defendants' assertions concerning the interest rate are factually incorrect and, more importantly, if true, did not justify non-payment based on section 2.5 of the note (*see generally Flintkote Co. Bert Bar Holdings*, 114 AD2d 400 [2d Dept 1985]).

Any claim that the amount due and owing is incorrect is not a defense to summary judgment as it may be contested and resolved as part of the reference to compute (*see eg 1855 E. Tremont Corp. v Collado Holdings LLC*, 102 AD3d 567 [1st Dept 2013]). 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 to any affirmative defense not supported by specific legal arguments herein, those defenses were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

Turning to the cross-motion to dismiss, the documents submitted do not decisively refute Plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). Reading the sufficiency of the complaint, when considered in a most favorable light, the Court cannot

conclude no cause of action is stated (*see eg. Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (*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 without opposition (*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's motion for summary judgment against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that Defendants' cross-motion is denied in its entirety, and it is

ORDERED that the affirmative defenses pled by all the appearing Defendants are dismissed; and it is further

ORDERED that **Paul Sklar, Esq., 551 5th Avenue, Ste 2200, New York, New York 10176-0001- (212) 972-8845** 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 that all the "Doe" Defendants are stricken as the New York County Clerk will not accept a judgment for filing with a "Doe" or "Name Refused" defendant in the caption; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK
--X
DD NOTES LLC,

Plaintiff,

-against-

126 WEST 121st STREET, LLC; YVONNE DELANEY MITCHELL; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; CITY OF NEW YORK TRANSIT AUTHORITY TRANSIT ADJUDICATION BUREAU; CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION PARKING VIOLATIONS BUREAU; CITY OF NEW YORK DEPARTMENT OF FINANCE;

Defendants.
--X

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 **August 13, 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.

4/15/2026
DATE

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

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

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[X] FIDUCIARY APPOINTMENT	[ ] REFERENCE