

BD Notes LLC v Garofalo Real Estate Holdings, LLC

2023 NY Slip Op 34350(U)

December 8, 2023

Supreme Court, New York County

Docket Number: 850162/2022

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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BD NOTES LLC,

Plaintiff,

- v -

GAROFALO REAL ESTATE HOLDINGS, LLC, LAURA
GAROFALO, CITY OF NEW YORK, DEPARTMENT OF
FINANCE, JOHN DOE 1-10 AND JANE DOE 1-10,

Defendant.

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INDEX NO. 850162/2022

MOTION DATE _____

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 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

were read on this motion to/for

JUDGMENT - SUMMARY

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

The within action is to foreclose on a mortgage encumbering a commercial parcel of real property located 330 West 86th Street, New York, New York. The mortgage, dated December 1, 2014, was given by Defendant Garofalo Real Estate Holdings LLC (“Holdings”) to non-party Signature Bank (“Signature”). The mortgage secures a loan with an original principal amount of \$4,300,000.00 which is evidenced by a restated mortgage note of the same date as the mortgage. The note and mortgage were executed by Defendant Laura Garofalo (“Garofalo”) as the managing and sole member of Holdings. Plaintiff claims that concomitantly with these documents, Defendant Garofalo also executed a continuing guaranty of the indebtedness which purportedly was “misplaced”. Garofalo denies ever executing a “personal guaranty”.

Plaintiff, BD Notes LLC, commenced this action and alleged that Defendants Holdings and Garofalo defaulted in repayment of the indebtedness. Holdings and Garofalo answered jointly and pled twenty-three [23] affirmative defenses, including lack of standing and failure to abide by a contractual condition precedent to foreclosure. Now, Plaintiff moves for summary judgment against Defendants Holdings and Garofalo, striking their answer and affirmative defenses, a default judgment against all non-appearing parties, to appoint a Referee to compute and to amend the caption. Holdings and Garofalo oppose the motion and cross-move pursuant to CPLR §3211[a][1] to dismiss the claims against Garofalo. 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]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Based on the affirmative defenses in the answer, Plaintiff was also required to demonstrate, *prima facie*,

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]). In support of such 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 particular set of 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 affidavits from Konstantinos Venetsanakos ("Venetsanakos"), a Senior Commercial Real Estate Lending Officer of Signature, as well as Steve Hackel ("Hackel"), an Authorized Officer of Plaintiff. Venetsanakos laid a proper foundation for the admission of Signature's records into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of Signature were also admissible since Hackel sufficiently established that those records were received from their maker and incorporated into the records Plaintiff kept and that it routinely relied upon such documents in its business (*see U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, the records referenced by Venetsanakos and Hackel were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). The affidavits and referenced documents sufficiently evidenced the note and mortgage. The indebtedness was also established based on the terms of the multiple forbearance agreements (*see Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602 [2d Dept 2013]; *EMC Mortg. Corp. v Stewart*, 2 AD3d 772 [2d Dept 2003]).

As to the Mortgagor's 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, Venetsanakos' 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]).

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]). Here, Plaintiff, demonstrated with the affidavit of Venetsanakos and the written assignment of the mortgage dated August 8, 2022, that it was the holder of the note when the action was commenced (*see PNC Bank, NA Salcedo*, 161 AD3d 571 [1st Dept 2018]). Although an assignment of a mortgage is ordinarily a nullity in this context, the within assignment expressly stated that the mortgage was assigned together with the underlying "Note of obligation described in said Mortgage". This evidence sufficiently established conveyance of the note (*see US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1st Dept 2018]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2d Dept 2012]).

Accordingly, Plaintiff demonstrated *prima facie* the note, mortgage, Defendant's default in repayment thereunder as well as its standing.

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]). Plaintiff admits that the guaranty is missing and only annexed a purported unsigned copy of same. “[T]he copy was not satisfactorily identified as a copy of the guaranty so as to be admissible as a reproduction pursuant to CPLR 4539” (*76-82 St. Marks, LLC v Gluck*, 147 AD3d 1011, 1013 [2d Dept 2017]). Indeed, neither affiant referred to the document at all in their affidavits. Further, no legal argument whatsoever was proffered to support how the proffered proof is sufficient to demonstrate a *prima facie* case on this claim (*see generally Penava Mech Corp v Afgo Mech Servs, Inc.*, 71 AD3d 493, 496 [1st Dept 2010]).

In opposition, Defendants’ claim that Plaintiff failed to demonstrate entitlement to summary judgment and its standing with admissible evidence is without merit. The argument that a contractual pre-foreclosure notice was required to served is belied by the express terms of the mortgage which does not contain such a necessity. Indeed, paragraph three of the note provides that upon occurrence of an event of default, Plaintiff may accelerate the indebtedness “without presentment, demand, protest or notice of any kind, all of which are hereby expressly waived by the Mortgagor”. In any event, proof of the service of a default notice was sufficiently established.

As pled, all the affirmative defenses are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are 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 specific legal arguments were not proffered in support of any affirmative defense, 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]).

Plaintiff has established that it is entitled to a default judgment against all non-appearing Defendants (*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 caption is granted without opposition (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Concerning the cross-motion, an application to dismiss pursuant to CPLR §3211[a][1] may only be granted where “documentary evidence” submitted decisively refutes 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]). The scope of evidence that is statutorily “documentary” is exceedingly narrow (*see Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]). Here, Defendants’ motion to dismiss the claims based upon a personal guaranty allegedly signed by Garofalo is based primarily on Garofalo’s affidavit wherein she denied executing any such document. An affidavit is not documentary evidence and Garofalo failed to proffer any other document conclusively showing a personal guaranty does not exist (*see Pineda v 525 SMA Owner LLC*, 216 AD3d 475 [1st Dept 2023]).

Accordingly, it is

ORDERED that Plaintiff is awarded summary judgment on its causes of action for foreclosure against the appearing parties and a default judgment against the non-appearing defendants; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment against Defendant Laura Garaofalo on the cause of action to enforce the guaranty is denied; and it is further

ORDERED that Defendants' cross-motion to dismiss the claim based upon the guaranty is denied; and it is further

ORDERED that 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 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 the caption of this action be amended by substituting "JOHN DOE 1-10" and "JANE DOE 1-10" as party defendants herein, said defendants with not being necessary to this action, all without prejudice to the prior proceedings replacing, and it is further

ORDERED that the caption shall read as follows:

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

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BD NOTES LLC,

Plaintiff,

-against-

GAROFALO REAL ESTATE HOLDINGS, LLC; LAURA GAROFALO; CITY OF NEW YORK, DEPARTMENT OF FINANCE; MATT PRICE; ABBEY DALLAS; ARIEL MOSCONI; MATTHEW KENNEDY; THERESA HEDGEPEETH; NICOLE SHI; ARI AXELROD; DILLAN CARTER,

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/suptcmah)); and it is further

All parties are to appear for a virtual conference via Microsoft Teams on **April 4, 2024, at 10:20 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk

Tamika Wright (tswright@nycourt.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.

12/8/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

F. A. Kahn III
FRANCIS A. KAHN III
HON. FRANCIS A. KAHN III
NON-FINAL DISPOSITION J.S.Q.

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE