

<b>Investors Bank v J&amp;M Prospect Place Enters. LLC</b>
2021 NY Slip Op 30204(U)
January 8, 2021
Supreme Court, Kings County
Docket Number: 524919/19
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8<sup>th</sup> day of January, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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INVESTORS BANK,

Plaintiff,

- against -

Index No. 524919/19

J&M PROSPECT PLACE ENTERPRISES LLC;  
MENDEL DEUTSCH; NEW YORK CITY BUREAU  
OF HIGHWAY OPERATIONS; NEW YORK CITY  
DEPARTMENT OF HOUSING PRESERVATION AND  
DEVELOPMENT;

- and -

JOHN DOES "1" – "10" and XYZ CORPORATION  
"1" – "10", said names being fictitious, parties  
intended being possible tenants or occupants  
of premises,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

20-28

Opposing Affidavits (Affirmations) \_\_\_\_\_

34-35

Upon the foregoing papers in this action to foreclose a commercial mortgage on the property at 1097 Prospect Place in Brooklyn (Property), plaintiff Investors Bank (Investors) moves (in motion sequence [mot. seq.] two) for an order: (1) granting it summary judgment against defendants J&M Prospect Place Enterprises LLC (J&M) and Mendel Deutsch (Deutsch), pursuant to CPLR 3212; (2) appointing a referee to compute the amount due for principal and interest; (3) striking J&M and Deutsch's affirmative

defenses, pursuant to CPLR 3211 (a) (7); and (4) amending the caption to delete the "John Doe" and "XYZ Corporation" defendants.

**Background**

On November 14, 2019, Investors commenced this commercial foreclosure action by filing a summons, a verified complaint and a notice of pendency against the Property. On February 21, 2020, defendants J&M and Deutsch collectively answered the complaint and asserted 25 affirmative defenses, including that plaintiff refused tender of payment, unclean hands and lack of standing.

Investors now moves for summary judgment against J&M and Deutsch, an order of reference and dismissal of defendants' affirmative defenses. Investors' motion is supported by an affidavit from Joseph Sicinski (Sicinski), an Assistant Vice President and Senior Commercial Workout Officer of Investors, who attests that Investors seeks to foreclose on an October 21, 2014 Amended, Restated and Consolidated Mortgage against the Property in the amount of \$2,287,500.00, which secures payment under an October 12, 2014 Amended, Restated and Consolidated Promissory Note in favor of Investors. Sicinski attests that Investors "is the current holder" of the consolidated mortgage, the consolidated note and "all of the other underlying instruments, documents or agreements otherwise evidencing or securing the amounts due . . ." Investors submits copies of these loan documents. Sicinski attests that "[t]he Mortgagor defaulted under the terms and conditions of the . . . Loan Documents by, *inter alia*, failing or omitting to pay the

installment of principal and interest which became due and payable on August 1, 2019” and “has remained delinquent in its payments.”<sup>1</sup>

J&M and Deutsch, in opposition, submit an attorney affirmation arguing that defendants should have an opportunity “to learn more about the defenses through discovery and/or discovery-related motions.” Defense counsel argues that “[t]he Court should deny Plaintiff’s motion for summary judgment because, *inter alia*, Defendants’ affirmative defenses *will raise* triable issues of fact . . .” and “the Court should deny Plaintiff’s motion as premature because questions of fact remain in this matter due to the affirmative defenses” (emphasis added). In addition, Deutsch submits an affidavit noting that defendants asserted “various” affirmative defenses, including “that payments were tendered under the agreement but that Plaintiff refused to accept said payments, that Plaintiff’s claim is barred because of the doctrine of unclean hands, and that Plaintiff violated the duty of good faith and fair dealing.” Deutsch argues that Investors prematurely moved for summary judgment before it sought discovery regarding defendants’ affirmative defenses. Notably, Deutsch provides no testimonial or documentary evidence to support any of defendants’ affirmative defenses.

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<sup>1</sup> Sicinski, however, also attestst that “[s]ince the acceleration of the loan, Plaintiff has received three (3) post acceleration payments . . . from the Mortgagor[.]” which were applied to principal, accrued interest and a real estate escrow.

### *Discussion*

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and evidence of default (see *Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2017]). Where the issue of standing is raised by a defendant, a plaintiff must also establish its standing as part of its prima facie case (see *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d at 726; *Security Lending*,

*Ltd. v New Realty Corp.*, 142 AD3d 986, 987 [2016]; *LGF Holdings, LLC v Skydel*, 139 AD3d 814, 814 [2016]). Where a plaintiff establishes prima facie entitlement to judgment, the burden then shifts to the defendant to raise a triable issue of fact as to a bona fide defense to the action (*CitiMortgage, Inc. v Guillermo*, 143 AD3d 852, 853 [2016]; *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467 [1997]).

In support of its motion for summary judgment and an order of reference, Investors has demonstrated its prima facie entitlement to judgment as a matter of law by submitting copies of the loan documents and an affidavit attesting to the payment default under the terms of the loan (*see Bank of New York Mellon v Genova*, 159 AD3d 1009, 1010 [2018]). Investors also has demonstrated, prima facie, that it was the holder and owner of the consolidated note before the action was commenced (*see Castle Peak 2012-1 Loan Trust Mtge. Backed Notes, Series 2012-1 v Sottile*, 147 AD3d 720, 722 [2017]; *JP Morgan Chase Bank v Schott*, 130 AD3d 875, 876 [2015]). Defendants have failed to raise an issue of fact to preclude summary judgment. The mere fact that defendants have asserted 25 affirmative defenses in their answer is insufficient to raise an issue of fact or render Investors' summary judgment motion premature. The burden shifted to defendants to produce admissible evidence supporting their affirmative defenses, and they failed to submit any evidence. Accordingly, it is hereby

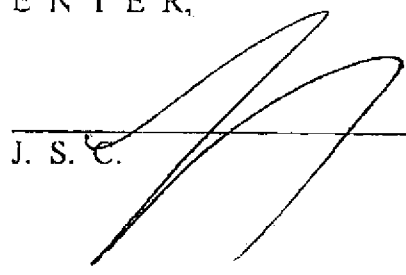
**ORDERED** that Investors' motion (mot. seq. two) is only granted to the extent that: (1) Investors is entitled to summary judgment against J&M and Deutsch; (2) the appointment of a referee is warranted, and an order of reference shall be settled on notice;

and (3) the caption is amended to delete the "John Doe" and "XYZ Corporation" defendants.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke, positioned to the right of the text "J. S. C." and partially overlapping a horizontal line.