

Urbano Group LLC v 438 Herkimer Villa LLC

2021 NY Slip Op 30242(U)

January 21, 2021

Supreme Court, Kings County

Docket Number: 501377/19

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

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 21st day of January, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
URBANO GROUP LLC,

Plaintiff,

- against -

Index No. 501377/19

438 HERKIMER VILLA LLC, TRI STATE LUMBER, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, UNITED STATES OF AMERICA, RAFAEL MANOR

“JOHN DOE #1” through and including “JOHN DOE #25,” the defendants last named in quotation marks being intended to designate tenants or occupants in possession of the herein described premises or portions thereof, if any there be, said names being fictitious, their true name being unknown to plaintiff,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

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

75-92 94-96

Opposing Affidavits (Affirmations) _____

95-96 101-104

Reply Affidavits (Affirmations) _____

101-104 105

Upon the foregoing papers in this action to foreclose a commercial mortgage on the property at 438 Herkimer Street in Brooklyn (Block 1871, Lot 41) (Property), plaintiff

Urbano Group LLC (Urbano) moves (motion sequence [mot. seq.] three) for an order: (1) granting it summary judgment against defendants 438 Herkimer Villa LLC (438 Herkimer) and Rafael Manor (Manor), pursuant to CPLR 3212; (2) appointing a referee to compute the amount due, pursuant to RPAPL 1321; (3) striking and dismissing 438 Herkimer's and Manor's answers, affirmative defenses and counterclaims; (4) granting it a default judgment against the nonappearing defendants; and (5) amending the caption to delete the "John Doe" defendants.

438 Herkimer and Manor cross-move (mot. seq. four) for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint or for partial summary judgment dismissing the complaint as against Manor.

Background

This Foreclosure Action

On January 18, 2019, Urbano commenced this commercial foreclosure action by filing a summons, a verified complaint and a notice of pendency against the Property. Urbano subsequently amended the complaint twice.

On or about December 30, 2019, 438 Herkimer answered the second amended complaint, asserted affirmative defenses, including lack of standing, and a counterclaim alleging that "plaintiff's predecessor-in-interest wrongfully and in violation of the terms and conditions of the building loan agreement, failed to advance the funds 438 [Herkimer] duly applied for" resulting in a halt of the construction project at the Property (438 Herkimer answer at ¶ 48). 438 Herkimer's answer further alleges that "[p]laintiff's

predecessor-in-interest engineered 438 [Herkimer] into financial peril, making it impossible to complete construction and to pay off the mortgage by its due date, so that it could attempt to foreclose upon the subject premises” (*id.* at ¶ 53).

On or about February 24, 2020, Manor answered the second amended complaint and asserted affirmative defenses, including standing, and a counterclaim that is nearly identical to the breach of contract counterclaim asserted by 438 Herkimer alleging that Urbano’s predecessor failed to provide advance funding for the construction project. Manor also asserted a second counterclaim alleging that 438 Herkimer and/or its predecessor made misrepresentations to him “that it would provide funding for the construction of a building at the premises. . . .” (Manor answer at ¶ 82). Manor asserted a third counterclaim alleging that “[t]he guaranty and/or terms of the obligation the guaranty was intended for were materially altered” (*id.* at ¶ 87). All three of Manor’s counterclaims seek to nullify and void the guaranty.

All of the other defendants failed to answer or otherwise respond to the complaint.

Urbano’s Summary Judgment Motion

Urbano now moves for summary judgment, an order of reference, dismissal of defendants’ answers, affirmative defenses and counterclaims and other relief. Urbano submits an affidavit from Tony Yaghoubi (Yaghoubi), its Managing Partner, who attests that on or about March 31, 2015, BCRE Real Estate Funding LLC (BCRE) extended a \$1,180,000.00 commercial building loan to 438 Herkimer (Loan #1), which is evidenced by a Secured Building Loan Note executed by 438 Herkimer (Note #1) and secured by a

March 31, 2015 Building Loan Mortgage and Security Agreement against the Property (Mortgage #1). Yaghoubi attests that Manor, as Guarantor, executed and delivered a March 31, 2015 guaranty of Loan #1. According to Yaghoubi, Mortgage #1 “was converted to a term loan in the amount of \$383,950.00 by a Consolidated and Restated Note dated May 16, 2016.”

Yaghoubi attests that BCRE assigned modified Loan #1 to S III Capital Group LLC (S III) by a mortgage assignment “dated as of May 3, 2016, and recorded May 18, 2016 . . . and documents were delivered to S III, in connection therewith [and] S III became the owner and holder of the converted and modified Loan No. 1 Loan Documents.” Yaghoubi attests that Loan #1 was subsequently assigned from S III to Urbano and “[t]he Loan No. 1 Loan Documents, including Note No. 1, were physically delivered to Plaintiff on or about March 22, 2017.” Yaghoubi attests that Urbano “was in possession of all of the Loan No. 1 Loan Documents, including, but not limited to, Note No. 1, prior to the commencement of this action on January 18, 2019.”

Yaghoubi also attests that on or about May 3, 2016, S III extended a second loan to 438 Herkimer for \$216,050.00 (Loan #2), which is evidenced by a Secured Commercial Gap Note (Note #2) and secured by a May 3, 2016 mortgage against the Property (Mortgage #2). Yaghoubi attests that Note #1 and Note #2 were consolidated (Loan #3) by a \$600,000.00 Amended and Restated Mortgage Note (Note #3), which was secured by a May 3, 2016 Consolidation, Extension and Modification Agreement (CEMA), a Security Agreement and an Assignment of Leases (Mortgage #3).

Yaghoubi attests that S III assigned Loan #3 to Grande Prezzo LLC (Prezzo) by a March 23, 2017 assignment, the loan documents were delivered to Prezzo and Prezzo “became the owner and the holder of Consolidated Loan No. 3.” Yaghoubi further attests that Prezzo assigned Loan #3 to Urbano by a December 13, 2018 assignment, “loan documents were delivered to Urbano in connection therewith, and Urbano became the owner and holder of Consolidated Loan No. 3.”

Yaghoubi attests that on or about May 3, 2016, S III and 438 Herkimer “entered into a separate Building Loan and Project Loan Agreement in connection with an additional loan to [438 Herkimer] in the principal amount of \$1,050,000.00 (Loan #4), which is evidenced by a Building Loan Mortgage Note (Note #4) and secured by a Building Loan Mortgage, Security Agreement and Assignment of Rents and Leases (Mortgage #4). Yaghoubi further attests that “[a]s an acknowledgement of the principal indebtedness owing by Borrower of \$1,050,000.00, and to secure the payment of the Note No. 4 . . .” Manor executed a guaranty of Loan #4. Yaghoubi attests that S III assigned Loan #4 to Prezzo by a March 23, 2017 assignment and delivery of the Loan #4 documents. Yaghoubi further attests that Prezzo assigned Loan #4 to Urbano by a December 13, 2018 assignment and delivery of the Loan #4 documents to Urbano and “Urbano became the owner and holder of the Building Loan Mortgage ‘Loan No. 4.’”

Yaghoubi attests that “[a]s of October 1, 2018, Note No. 1, Note No. 2, Note No. 3 and the Building Loan Note, Note No. 4 . . . together totaled up to \$1,650,000.00 in principal indebtedness owing from Borrower to Plaintiff.” Copies of the loan documents,

the guaranties and assignments are all submitted with Urbano's summary judgment motion. Yaghoubi attests that Urbano "was as of the commencement of this action and remains the owner and holder of the Loan Documents" and Urbano "was in possession of the originals of all of the Loan Documents, including, but not limited to, the Notes, prior to the commencement of this action on January 18, 2019."

According to Yaghoubi, 438 Herkimer and Manor "defaulted under the Loan Documents as a result of, among other things, their failure and/or refusal to make required payment of principal and interest due on the loans which matured on October 31, 2018, despite due demand." In addition, Yaghoubi attests that 438 Herkimer defaulted under the loan documents on or about August 4, 2018 by allowing stop work orders to be issued by the New York City Department of Buildings (NYCDOB) for all work at the Property. Yaghoubi attests that 438 Herkimer also defaulted under paragraph 12 (c) of the Building Loan Agreement because the improvement to the Property was not substantially completed on August 31, 2018, 60 days prior to the October 31, 2018 maturity date of the Building Loan. Yaghoubi attests that 438 Herkimer also defaulted under paragraph 2 of the Building Loan and Project Agreement, which required it to obtain a temporary or permanent certificate of occupancy for the improvement to the Property on or before the August 31, 2018 completion date.

Yaghoubi attests that "[b]y letter dated November 26, 2018, Borrower and Guarantor were notified that they were in default as a result of, among other things, their failure and/or refusal to pay the principal and interest due on the extended maturity date

under the Loan Documents due on October 31, 2018.” The November 26, 2018 default notice advised defendants that the loan would be accelerated. Urbano annexes a copy of the November 26, 2018 default letter and acceleration notice to its summary judgment motion.

Yaghoubi also attests that 438 Herkimer made several advance requests after the loans were originated, and that the lender honored 438 Herkimer’s advance requests by advancing a total of seven advance requests in the total amount of \$433,000.00. Copies of 438 Herkimer’s advance requests and transaction account summaries evidencing the advances made to 438 Herkimer are annexed to Urbano’s summary judgment motion.

Urbano argues that defendants’ counterclaim alleging that Urbano’s predecessor, Prezzo, failed to advance funds should be dismissed because it “is barred in numerous material respects by the express terms of the Loan Documents.” Yaghoubi attests that 438 Herkimer’s October 1, 2018 advance request was not honored because the loan was due to mature on October 31, 2018, 438 Herkimer failed to provide a temporary or permanent certificate of occupancy on or before the August 31, 2018 construction completion date and the NYCDOB had issued a stop work order. Urbano argues that “[a]s the Record establishes, it was because of the Borrower’s willful default that the October [2018] advance was not funded . . .”

Defendants’ Opposition and Summary Judgment Cross Motion

438 Herkimer and Manor, in opposition and in support of their summary judgment cross motion, assert that there are material issues of fact that require a trial. Defendants

contend that Urbano has not shown that it was in possession of the notes when the action was commenced. Defense counsel asserts that the allonges to the notes in the record appear to be on “orphan pages” and “[o]ne cannot tell whether these allonges were affixed to the Note[,]” as required under the Uniform Commercial Code (UCC). Defendants also argue that Urbano is not entitled to summary judgment because it failed to submit proof of service of the November 26, 2018 default notice.

Manor, the guarantor, submits an affirmation affirming that Urbano’s predecessor, Prezzo, “took no action to process the October 1, 2018 [advance] request” and “depriv[ed] Defendant of the opportunity to try to get alternative financing before Plaintiff elected to declare a default and jack up the interest rate.” Notably, however, Manor affirms that that the construction work at the Premises was delayed “due to a Stop Work Order being issued by the Department of Buildings which was the result of numerous complaints filed by the adjacent owner.” Manor further explains that “[t]he adjacent owner then commenced his own action in this Court seeking injunctive relief, which further delayed and hampered Defendants’ ability to complete the project.” Manor also claims that the November 26, 2018 default letter and notice of acceleration “was not sent by certified mail, registered mail or by overnight courier.”

Urbano’s Opposition to the Cross Motion and Reply

Urbano, in opposition to defendants’ cross motion and in reply, submits an affidavit from Yaghoubi, who attests that the default letter and notice of acceleration was

sent to defendants via certified mail return receipt requested, by email and by regular mail. Urbano submits copies of the certified mailing receipts. In addition, Yaghoubi attests that:

“At the date of commencement of this action, Urbano . . . was the holder of the Building Loan Promissory Note and the Consolidated, Amended and Restated Promissory Note . . .

“The Notes respectively had the Allonges fixed to same, which Allonges were only separated from the Notes for purposes of copying and providing copies of same in this action.”

Defendants' Reply

Defendants, in reply, submit an attorney affirmation asserting that Yaghoubi's affidavit “states that the allonges were detached from the notes ‘for the purposes of copying’ but fails to state when that occurred, i.e., whether before or after Plaintiff came into possession of the notes, or by whom such separation was done.” Defense counsel further argues that “any attempt to obtain a money judgment against [Manor], prior to the resolution of a foreclosure sale and motion for a deficiency judgment, is premature.”

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, Urbano has demonstrated its prima facie entitlement to judgment as a matter of law by submitting copies of the loan documents (for Loan #1 through Loan #4), the guaranties and an affidavit attesting to 438 Herkimer's defaults (*see Bank of New York Mellon v Genova*, 159 AD3d 1009, 1010 [2018]). Urbano also has demonstrated, prima facie, that it was in possession of the original endorsed notes before this foreclosure 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]).

Here, 438 Herkimer and Mano have failed to raise an issue of fact to preclude summary judgment against defendants 438 Herkimer, as borrower, and Manor, as guarantor. While defendants challenged Urbano's standing by claiming that the allonges may not have been affixed to the notes because they appear to be on "orphan pages" in the record, Yaghoubi attests that "[a]t the date of commencement of this action . . . [t]he Notes respectively had the Allonges fixed to same, which Allonges were only separated from the Notes for purposes of copying and providing copies of same in this action." Thus, Urbano has demonstrated that the allonges were affixed to the notes on the date of commencement, as required under the UCC, and were only separated from the notes when the documents were copied for use in this action. Defendants' remaining arguments have been considered and do not preclude the relief Urbano seeks.

In addition to summary judgment and an order of reference, Urbano is entitled to an order dismissing defendants' counterclaims. Defendants' first counterclaims, both of

which assert an identical breach of contract claim against Urbano for its predecessor's alleged failure to fund 438 Herkimer's October 1, 2018 advance request, is subject to dismissal. Urbano established that its predecessor, Prezzo, declined to fund the 438 Herkimer's October 1, 2018 advance request because 438 Herkimer had already defaulted under the terms of the Building Loan by failing to complete the construction of the building by August 31, 2018, the completion date. Indeed, Manor *explicitly* admits that construction was delayed and defendants' ability to complete the construction project was hampered due to a dispute with the adjacent property owner.

Manor's second counterclaim, which alleges that 438 Herkimer and/or its predecessor made misrepresentations to him "that it would provide funding for the construction of a building at the premises . . ." is dismissed as duplicative of Manor's first counterclaim for breach of contract (*see Ross v DeLorenzo*, 28 AD3d 631, 636 [2006] [holding that a cause of action for fraud cannot be sustained when the only fraud charged relates to a breach of contract or where the fraud claim is duplicative of a breach of contract claim]). In addition, Manor's second counterclaim for fraud fails to plead the elements of fraud with specificity, as required under CPLR 3016.

Finally, Manor's third counterclaim, which seeks to void the guaranty based on the conclusory and unsupported allegation that it was "materially altered," is equally subject to dismissal for failure to provide specificity. In addition, Manor, who submitted an affirmation in opposition to Urbano's summary judgment motion, failed to address or even mention his third counterclaim, and has seemingly abandoned it. Accordingly, it is

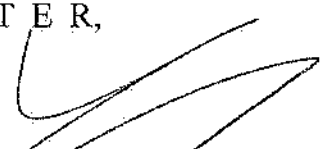
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ORDERED that Urbano's motion (mot. seq. three) is only granted to the extent that: (1) Urbano is entitled to summary judgment against 438 Herkimer (as borrower) and Manor (as Guarantor); (2) the appointment of a referee is warranted, and an order of reference shall be settled on notice; (3) Urbano is entitled to a default judgment against the nonappearing defendants, Tri State Lumber, City of New York Environmental Control Board, New York State Department of Taxation and Finance and the United States of America; (4) defendants' counterclaims are dismissed; and (5) the caption is amended to delete the "John Doe" defendants. The motion is otherwise denied; and it is further

ORDERED that 438 Herkimer and Manor's cross motion (mot. seq. four) for summary judgment dismissing the complaint is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.
HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE