

U.S. Bank N.A. v 1515 Church Ave. Realty, LLC

2022 NY Slip Op 32372(U)

June 28, 2022

Supreme Court, Kings County

Docket Number: Index No. 525842/20

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Part COMM6, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 28th day of June, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR VELOCITY COMMERCIAL CAPITAL LOAN
TRUST 2018-2,

Plaintiff,

- against -

Index No. 525842/20

1515 CHURCH AVENUE REALTY, LLC, ISAAC SHOUELA, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, HSBC BANK USA NATIONAL ASSOCIATION, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, and "JOHN DOE NO. 1" to "JANE DOE NO. 10," inclusive, the last ten names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.

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

21-22, 24-43
48

Upon the foregoing papers in this action to foreclose a commercial mortgage on the property at 1515 Church Avenue in Brooklyn (Block 5076, Lot 31) (Property), plaintiff,

U.S. Bank National Association, as Trustee for Velocity Commercial Capital Loan Trust 2018-2 (U.S. Bank or Plaintiff) moves (in motion sequence [mot. seq.] two) for orders: (1) pursuant to CPLR 3212, granting summary judgment in its favor and against defendants 1515 Church Avenue Realty, LLC (Borrower) and Isaac Shouela (Guarantor); (2) pursuant to CPLR 3215, granting it a default judgment against defendants New York City Department of Transportation (DOT), HSBC Bank National Association (HSBC), New York State Department of Taxation and Finance (DTF), and New York City Environmental Control Board (ECB), (collectively, defaulting defendants); (3) amending the caption to delete defendants "John Doe No. 1" to "Jane Doe No. 10" and; (4) pursuant to RPAPL 1321, appointing a referee to compute the amounts due.

Background

On December 23, 2020, U.S. Bank commenced this commercial foreclosure action by filing a summons, a verified complaint and, a notice of pendency against the Property. The complaint alleges that, on August 10, 2018, Borrower executed and delivered a semi-annual adjustable term note (Note) in the principal sum of \$500,000 in favor of Velocity Commercial Capital LLC (Velocity), which was secured by a mortgage (Mortgage) on the Property, and that Guarantor -- the managing member of the Borrower -- unconditionally guaranteed payment under the loan (Unlimited Guaranty).

The complaint further alleges that the Borrower defaulted under the terms of the Note and Mortgage by failing to make monthly payments from June 1, 2020 to date and that "[a]s a result of Borrower's Default under the Note and Mortgage, Borrower is

indebted to U.S. Bank on the Note and Mortgage in the aggregate principal sum of \$500,000.00 together with accrued and unpaid interest, default interest, late charges, prepayment consideration and such other costs and expenses as set forth in the Note and Mortgage, including without limitation reasonable attorneys' fees" (NY St Cts Elec Filing [NYSCEF] Doc No. 38, Complaint at 19 and 21).

Regarding standing, the complaint alleges that "U.S. Bank became the holder of the [Note and Mortgage] by virtue of the following: (a) Velocity physically delivered the original [Note and Mortgage] to U.S. Bank on August 15, 2018; and (b) Velocity assigned the [Note and Mortgage] to U.S. Bank pursuant to that certain Assignment of Mortgage dated December 1, 2020 (Assignment of Mortgage), which was recorded on December 4, 2020 at CRFN: 2020000344028" (*id* at 11).

Borrower and Guarantor's Prior Motion to Dismiss the Complaint

On January 8, 2021, Borrower and Guarantor moved to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (a) (7), arguing that the action was barred by Executive Order 202.8 and the subsequent executive orders that extended the directive therein, which, they argued, prohibited all foreclosure proceedings for the nonpayment of commercial mortgages from March 20, 2020 through January 1, 2021. They thus averred that since the action was commenced during this pause period it should be dismissed. In support of the motion, Guarantor submitted a COVID-19 hardship declaration on behalf of the Borrower,

pursuant to the COVID-19 Emergency Protect Our Small Business Act of 2021¹ (CEPOSBA), alleging financial hardship resulting from the pandemic. The motion was subsequently withdrawn on March 26, 2021.

Borrower and Guarantor's Answer

On March 18, 2021, Borrower and Guarantor collectively answered the complaint and, thereafter, filed an amended verified answer on March 19, 2021, admitting paragraphs 2, 3 and 9. They agreed that the Borrower is a New York limited liability company and is the maker of the Note and grantor of the Mortgage. They further agreed that Guarantor is "named as a defendant as a result of his obligations to U.S. Bank arising out of a certain Unlimited Guaranty dated August 10, 2018." In addition, they admitted that "[a]s security for payment of Borrower's obligations under the Note, Borrower executed and delivered to Velocity, a Commercial Mortgage... securing the principal amount of \$500,000.00, dated August 10, 2018, [and] encumbering the Premises..." (NYSCEF Doc No. 41 at 2, 5).

Borrower and Guarantor also asserted nine affirmative defenses, including that "the action is barred by Executive Order 202.28 as the subject premises was adversely affected by COVID-19" (*id* at 18).

¹ CEPOSBA was passed by the N.Y.S. Legislature on January 6, 2021 (S471A/A3207) and subsequently signed into law by the N.Y.S. Governor on March 9, 2021 (L. 2021, Ch. 73).

DTF's Notice of Appearance

On July 16, 2021, DTF filed a Notice of Appearance, claiming entitlement to surplus monies. However, DTF has not filed an answer to the complaint, to date. No other defendant has appeared or answered the complaint.

U.S. Bank's Instant Motion

On June 4, 2021, U.S. Bank filed the instant motion seeking summary judgment in its favor, a default judgment against the defaulting defendants, an amendment of the caption to delete defendants "John Doe No. 1" to "Jane Doe No. 10" and, an order of reference. In support of the motion, U.S. Bank submitted the affidavit of Rick Favela (Favela Affidavit), Director of Special Assets of Velocity (special servicer for U.S. Bank), its attorney's affirmation, and a Statement of Material Facts pursuant to Rule 19-a of the Rules of the Commercial Division [22 NYCRR 202.8-g] (Statement of Material Facts).

In the Favela Affidavit, Rick Favela (Favela) describes the Note and Mortgage executed by Borrower and the Unlimited Guaranty executed by Guarantor. As to standing, Favela reiterates the allegations in ¶ 11 of the complaint and adds that VCC Mortgage Securities, LLC (VCC Mortgage) purchased the Note and Mortgage, along with a pool of commercial mortgage loans, on October 15, 2018. Pursuant to the Pooling and Servicing Agreement, dated October 15, 2018, which names VCC Mortgage as depositor, Velocity as special servicer, and U.S. Bank as trustee, VCC Mortgage transferred all commercial mortgage loans, including the Mortgage, to a trust fund. The trust fund then issued VCC Mortgage certificates known as Velocity Commercial Capital Loan Trust 2018-2,

Mortgage-Backed Certificates, Series 2018-2. In his affidavit, Favela also attests that “I have reviewed the records kept in the normal course of Velocity’s business, in its Capacity as special servicer for U.S. Bank, and determined that the original Note was in U.S. Bank’s possession from August 15, 2018 and is currently in U.S. Bank’s possession” (NYSCEF Doc No. 24 at 10, 11).

Regarding the Borrower and Guarantor’s default, Favela states that “Borrower defaulted on its obligations under the terms of the Note by failing to make monthly payments due on June 1, 2020 and each month thereafter. A copy of the Payment History, which evidences the Default, is attached hereto as Exhibit 1... [a]s a result of Borrower’s Default under the Note and Mortgage, Borrower and Guarantor are indebted to U.S. Bank on the Note and Mortgage in the aggregate principal sum of \$500,000.00 together with accrued and unpaid interest, default interest, late charges, prepayment consideration and such other costs and expenses as set forth in the Note and Mortgage, including without limitation reasonably attorneys’ fees” (*id* at 12, 15).

Copies of the Note, Mortgage, Assignment of Mortgage and Unlimited Guaranty are annexed to the Favela Affidavit. The “Unlimited Guaranty” states that Guarantor “absolutely, unconditionally and irrevocably guarantees the full and punctual payment to the Lender of all sums which may be presently due and owing and of all sums which shall in the future become due and owing to the Lender from the Borrower... including, without limitation, interest, attorneys’ fees... Guarantor also agrees ...that the liability of the Guarantor hereunder is direct and unconditional and due immediately upon default of the

Borrower without demand or notice and without requiring the Lender first to resort to any other right, remedy or security” (NYSCEF Doc No. 29).

Also annexed to the Favela Affidavit is a six-page loan payment history, which was generated on April 22, 2021 and covers the time period of August 29, 2018 through April 5, 2021. The payment history depicts a “Mr. Cooper”² logo and specifies the Borrower’s name and the Property address. In addition, it indicates the default date as June 1, 2020 and an outstanding principal balance of \$494,406.82 (NYSCEF Doc No. 33).

Additionally, a demand letter dated November 6, 2020 is annexed to the Favela Affidavit, by which Favela avers that U.S. Bank gave notice of default and notice of intent to accelerate the Mortgage to the Borrower and Guarantor (NYSCEF Doc No. 35).

In the attorney affirmation, Borrower and Guarantor’s counsel affirms that the summons and complaint, as well as a RPAPL 1303 notice, were served on all parties between December 31, 2020 and January 7, 2021 and annexes copies of the affidavits of service (NYSCEF Doc No. 40). Counsel concludes that U.S. Bank has demonstrated its prima facie right to a judgment and an order of reference through the Favela Affidavit, which establishes the validity of the Note, Mortgage and Unlimited Guaranty, the payment

² The Favela Affidavit states that “Nationstar Mortgage LLC, d/b/a Mr. Cooper (‘Mr. Cooper’) serves as the primary servicer for the Loan, and specifically provides payment tracking services and maintains the Payment History for the Loan... Mr. Cooper’s Loan Records, including the Payment History, have been integrated and boarded into Velocity’s business record keeping system, such that Mr. Cooper’s Records concerning the Payment History are now part of Velocity’s business records and database. I have acquired personal knowledge of the Payment History by personally examining the Payment History” (NYSCEF Doc No. 24 at 3).

default by the Borrower and Guarantor, and U.S. Bank's possession of the Note when the action was commenced.

Borrower and Guarantor's Opposition

In opposing the motion, Borrower and Guarantor, by their attorney's affirmation, admit their default under the Mortgage in June 2020 but allege that it resulted from financial hardship stemming from the COVID-19 pandemic. They re-assert the argument stated in their prior motion to dismiss, that this action is barred by Executive Order 202.8, and the subsequent executive orders that extended the directive therein, as the basis for denial of U.S. Bank's motion. No affidavits were submitted by Borrower or Guarantor in opposition to the motion.

U.S. Bank's Reply

In Reply, U.S. Bank, by its attorney's memorandum of law, argues that, the executive orders did not bar commencement of a commercial foreclosure action during the COVID-19 pandemic but only effectuated a stay on all applicable foreclosure actions. Furthermore, U.S. Bank argues that CEPOSBA also only stayed actions that qualify for such relief. Nevertheless, it contends that, as CEPOSBA only applies to business owners that own 10 or fewer commercial units, Guarantor does not qualify for relief thereunder, since he owns more than 10 units as stated in the Favela Affidavit and the Statement of Material Facts (NYSCEF Doc No. 24 at 16 and NYSCEF Doc No. 22 at 17). U.S. Bank further contends that since Borrower and Guarantor did not file a Counter-Statement of Material Facts in accordance with Rule 19-a (b) of the Rules of the Commercial Division

of the Supreme Court (22 NYCRR 202.8-g [b]), all material facts stated in U.S. Bank's Statement of Material Facts should be deemed admitted by them pursuant to Rule 19-a (c) of the Rules of the Commercial Division of the Supreme Court (22 NYCRR 202.8-g [c]).

Discussion

To obtain a default judgment and an order of reference, a plaintiff must submit proof of service of the summons and complaint and demonstrate entitlement to a judgment (*see JPMorgan Chase Bank, Nat'l Ass'n v Grinkorn*, 172 AD3d 1183 [2d Dept 2019]; *Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2d Dept 2011]). "That entitlement may be shown ... by the plaintiff showing entitlement to summary judgment..." (*U.S. Bank N.A. v Miller*, 49 Misc 3d 1205 (A), * 5 [Sup Ct, Kings County 2015] [citing RPAPL 1321; 1-2 Bruce J. Bergman, *Bergman on New York Mortgage Foreclosures* 2.01 (4) (k) (Note: online edition)]).

A party moving for summary judgment must demonstrate its cause of action sufficiently to warrant the court directing judgment in its favor as a matter of law. In doing so, the movant must submit "admissible evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). If the movant meets its burden, the burden shifts to the non-moving party to produce admissible evidence showing the existence of a material issue of fact that requires

a trial (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]).

Generally, to establish prima facie entitlement to a 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 [2d Dept 2020]; *Christiana Trust v Moneta*, 186 AD3d 1604 [2d Dept 2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725 [2d Dept 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 [2d Dept 2016]; *LGF Holdings, LLC v Skydel*, 139 AD3d 814 [2d Dept 2016]).

Where “a creditor seeks summary judgment upon a written guaranty, the creditor need prove no more than an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guarantee” (*City Natl. Bank v 424 Lafayette Ave. LLC*, 30 Misc 3d 1236[A] [Sup Ct, Kings County 2011] [internal quotation marks omitted], *appeal withdrawn* 2012 NY Slip Op 61086[U] [2d Dept 2012]).

Here, U.S. Bank demonstrated its prima facie entitlement to summary judgment as a matter of law by the production of the Mortgage, the unpaid Note, the Unlimited Guaranty of Guarantor and evidence of the Borrower's default under the Mortgage and Guarantor's default under the Unlimited Guaranty (see *Rossrock Fund II, LP. v Osborne*, 82 AD3d 737 [2d Dept 2011]). In opposition, Borrower and Guarantor have failed to raise a material

issue of fact sufficient to require a trial on their defenses (*see Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882 [2d Dept 2010]). In fact, by their failure to file a Counter-Statement of Material Facts in accordance 22 NYCRR 202.8-g (b), they have admitted all material facts stated in U.S. Bank's Statement of Material Facts, including their default, pursuant to 22 NYCRR 202.8-g (c), which states that "[e]ach numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted unless specifically controverted by a corresponding numbered paragraph in the statement required to be served by the opposing party."

Furthermore, as U.S. Bank produced proof of timely service of the summons and complaint upon DOT, ECB and HSBC, who have neither appeared nor answered the complaint, and upon DTF, who filed a notice of appearance but has not answered the complaint, U.S. Bank is entitled to a default judgment against the defaulting defendants, pursuant to CPLR 3215.

Borrower and Guarantor's contention that U.S. Bank was barred from commencing this action pursuant to Executive Order 202.8, as extended through January 1, 2021 by Executive Orders 202.28, 202.48, 202.64 and 202.70, lacks merit. Executive Order 202.8, issued on March 20, 2020, provides, in pertinent part, that "there shall be no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days." Therefore, Executive Order 202.8 only provided a stay for all applicable foreclosure actions.

Executive Order 202.28, issued on May 7, 2020, provides, in pertinent part, that

“[t]here shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020.”

Executive Orders 202.48, 202.64 and 202.70, which were issued on July 6, 2020, September 18, 2020 and October 20, 2020, respectively, extended the pause period through January 1, 2021.

As relevant herein, by its plain terms, Executive Order 202.28 only applies to “someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic.” Thus, as the executive order solely applies to a natural person and the Borrower is a limited liability company, as admitted in its amended answer, Executive Order 202.28 is inapplicable (*see also Bridgecity Capital QOB LLC v 1717 E. 8 St. LLC*, 2021 NY Slip Op. 30406[U] [Sup. Ct. Kings 2021]).

Notwithstanding, it has been held that the executive orders do not provide a basis for dismissal of a commercial foreclosure action commenced during the COVID-19 pause period (*United States Bank N.A. v Middle Dam St.*, 2021 NY Slip Op 30686[U] [Sup. Ct. Kings 2021]). As such, any alleged hardship suffered by the Borrower or Guarantor during the COVID-19 pause period would not serve to defeat the instant motion.

Notably, after submission of the instant motion, U.S. Bank moved, by order to show cause, for an order invalidating the Borrower's hardship declaration and holding that there is no stay of this action. The motion was granted by Order of this Court dated January 22, 2022, on the grounds that Guarantor owns more than 10 commercial units; thus disqualifying it from relief under CEPOSBA [L. 2021, Ch. 73] and the subsequent L. 2021, Ch. 417³, which established protection to small businesses with 10 or less commercial units (*see*, Part B, Subpart A §1 of L. 2021, Ch. 73 and Part B, Subpart B §1 of L. 2021, Ch. 417).

In light of the foregoing, U.S. Bank is entitlement to a judgment in their favor and an order of reference, as a matter of law.

Accordingly, it is hereby

ORDERED that those branches of U.S. Bank's motion [mot. seq. two] seeking summary judgment as against Borrower and Guarantor, a default judgment against the default defendants and, the appointment of a referee to compute the amounts due, are granted. An order of reference shall be settled on notice within 30 days of service of this decision and order with notice of entry thereof; and it is further

ORDERED that the remaining branch of the motion, to voluntarily discontinue this action against defendants "John Doe No. 1" to "Jane Doe No. 10" and to amend the caption,

³ L. 2021, Ch. 417 became effective on September 2, 2021 and reinstated COVID-19 protections following the United States Supreme Court decision granting injunctive relief in *Chrysaftis v Marks*, 141 S. Ct. 2482 (2021). L. 2021, Ch. 417 expired on January 15, 2022.

are also granted. This action is hereby discontinued as against defendants "John Doe No. 1" to "Jane Doe No. 10" and the caption in this action shall hereinafter read as follows:

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR VELOCITY COMMERCIAL CAPITAL LOAN
TRUST 2018-2,

Plaintiff,

- against -

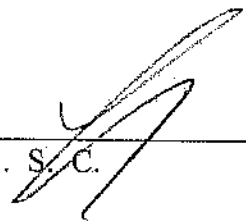
1515 CHURCH AVENUE REALTY, LLC, ISAAC
SHOUELA, NEW YORK CITY DEPARTMENT OF
TRANSPORTATION, HSBC BANK USA NATIONAL
ASSOCIATION, NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE, AND NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD,

Defendants.

-----X

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE