SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** 32
Justice

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SHARESTATES INVESTMENTS DACL, LLC,

Plaintiff,

- v -

158AT128TH LLC,MICKEY BERLIANSHIK, BAP VENTURES LLC,NYC ENVIRONMENTAL CONTROL BOARD, NYS DEPARTMENT OF TAXATION & FINANCE, JOHN DOE 1-10 TENANTS

Defendant.

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INDEX NO. 850178/2021

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27

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

Upon the foregoing documents, the motion is determined as follows:

The within action is to foreclose on a commercial mortgage encumbering a parcel of real property located at 156 West 128th Street, New York, New York. The mortgage, given by Defendant 158AT128TH, LLC ("158AT128"), secures a loan with an original principal amount of $2,395,000.00 which is memorialized by a consolidated note dated March 6, 2020. The note and mortgage were executed by Defendant Mickey Berlianshik ("Berlianshik"). Concomitantly therewith, Berlianshik executed an unconditional guaranty of the indebtedness. Plaintiff commenced this action alleging Defendants defaulted in making installment payments under the note. Defendants 158AT128 and Berlianshik answered jointly and pled twenty affirmative defenses, including lack of standing and failure to comply with RPAPL §§1303, 1304 and 1306.

Now, Plaintiff moves for summary judgment against Defendants 158AT128 and Berlianshik, 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. Defendants 158AT128 and Berlianshik oppose the 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]). 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]). As Defendants raised lack of standing in their answer, Plaintiff was required to demonstrate same (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). Plaintiff was also obliged to prove it substantially complied with the condition precedent in the mortgage requiring the lender to send a

notice of default prior to acceleration of the indebtedness (*see HSBC Mtge. Corp. (USA) v Gerber,* 100 AD3d 966, 966-967 [2d Dept 2012]; *see also Deutsche Bank Natl. Trust Co. v Pariser,* 207 AD3d 518 [2d Dept 2022]; *Wells Fargo Bank, N.A. v McKenzie,* 186 AD3d 1582, 1584 [2d Dept 2020]).

On the issue of standing, it is undisputed that Plaintiff, as the original lender, was in direct privity with the Defendant Alta when the action was commenced and, therefore, unquestionably had standing (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]).

In support of a motion for summary judgment on 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 an affidavit from Allen Shayanfekr ("Shayanfekr"), a principal of Plaintiff. Although Shayanfekr's knowledge was not entirely based upon personal knowledge of the facts, to the extent it was not, it was sufficiently founded in the business records of Plaintiff (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]; *Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). Shayanfekr laid a proper foundation for the admission of his employer's own records by demonstrating the requisites of CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Annexed to Casella's affidavit were the records which the affiant relied upon (*see eg Ciras, Inc. v Katz,* 202 AD3d 590 [1st Dept 2022]). The affidavit established the mortgage, note, and evidence of mortgagor's default and was sufficiently supported by appropriate documentary evidence (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

However, Plaintiff failed to proffer any admissible evidence that it complied with the pre-acceleration notice requirement contained in section 2.01 of the mortgage (*see Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). That provision states that "[d]uring the continuance of any such Event of Default, Mortgagee, by notice given to Mortgagor, may declare the entire principal of the Note then outstanding (if not then due and payable), and all accrued and unpaid interest thereon, to be due and payable immediately, and upon any such declaration the principal of the Note and said accrued and unpaid interest shall become and be immediately due and payable . . . ". Section 3.03 of the mortgage provides that "[a]ll notices to Borrower shall be in writing and shall be deemed to have been sufficiently given or served for all purposes when presented via electronic delivery to the email address provided by Borrower to Lender at closing, or such other email address which Borrower shall have notified Lender of in writing and presented personally or sent by registered or certified mail, at Lender's address above stated, or at such other address which Lender shall have notified the borrower in writing".

Here, Shayanfekr states in paragraph 12 of his affidavit that notice of default was sent on September 8, 2020 "through counsel". But Shayanfekr failed to demonstrate he had personal knowledge of this claim, familiarity with the record keeping practices and procedures of its counsel or proffer a copy of the notice in admissible form and proof of mailing (*see HSBC Mtge. Corp. (USA) v Gerber*, supra; *Emigrant Bank v Myers*, supra). "The plaintiff's failure to make a prima facie showing in this regard required the denial of those branches of its motion, regardless of the sufficiency of the opposition papers." (*Wells Fargo Bank, N.A. v Sakizada*, 168 AD3d 789, 791 [2d Dept 2019]).

As to the branch of Plaintiff's motion to dismiss all Defendants' affirmative defenses, CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov,* 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

The first affirmative defense, which is directed to the legal sufficiency of Plaintiff's complaint, is unnecessary as a general matter since dismissal cannot be effectuated without a motion pursuant to CPLR 3211[a][7] (*see Riland v Frederick S. Todman & Co.*, 56 AD2d 350 [1st Dept 1977]). Normally, this defense is nothing more than "'harmless surplusage,' and . . . a motion by the plaintiff to strike the same should be denied" (*Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]). However, where all other affirmative defenses fail as a matter of law, it may be dismissed (*Raine v. Allied Artists Productions, Inc.*, 63 AD2d 914, 915 [1st Dept 1978]).

The second, sixth seventh, eighth, tenth, eleventh, twelfth, thirteenth and nineteenth affirmative defenses claiming waiver, estoppel, damages caused by a third-party, missing indispensable party, unclean hands, breach of good faith and fair dealing, laches, consent, mitigation and separation of the note and mortgage 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]).

The third affirmative defense alleging the action is barred by the statute of limitations is conclusory and meritless. Defendants failed to offer any facts, or simply allegations, to support that the indebtedness under the note was accelerated more than six-years before this action was commenced.

The fourth affirmative defense that Plaintiff caused or contributed to its own damages is without merit. Where, as here, no tortious act has been pled by Plaintiff, this concept, which can best be described as "culpable conduct", has no application herein. Indeed, where the damages arise out of express or implied contractual relations, "[m]erely charging a breach of a 'duty of due care', employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim" (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 390 [1987]).

The fifth and fourteenth affirmative defenses relate, in one form or another, to Plaintiff's standing. As Plaintiff was the originator of the disputed loans, these defenses are meritless.

The portion of the eighth affirmative defense, alleging fraud in the inducement, in addition to not being pled with particularity (CPLR §3016[b]), fails as the Defendants cannot claim to have reasonably relied on representations that are plainly at odds with the terms contained in the loan documents (*see Aurora Loan Servs., LLC v Enaw*, 126 AD3d 830 [2d Dept 2015]).

The ninth affirmative defense claiming lack of personal jurisdiction was waived when Defendants failed to move to dismiss pursuant to CPLR §3211[a][8] within sixty [60] days of pleading this affirmative defense (*see* CPLR §3211[e]).

The fifteenth affirmative defense remains viable based upon the Court's findings supra.

The sixteenth, seventeenth and eighteenth affirmative defenses based upon sections 1303, 1304 and 1306 of the Real Property Actions and Proceedings Law are inapplicable to this case. Compliance with RPAPL §1304 is limited to "home loans" where, inter alia, the borrower is a "natural person" and the where, *inter alia*, the "debt is incurred by the borrower primarily for personal, family, or household purposes" and "[t]he loan is secured by a mortgage [on] . . . a one to four family dwelling . . . which is or will be occupied by the borrower as the borrower's principal dwelling" (*see* RPAPL § 1304[6][a][1][ii] and [iii]; *HSBC Bank USA, N.A. v Tigani*, 185 AD3d 796, 799 [2d Dept 2020]). The undisputed facts of this case demonstrate that the borrower was a limited liability company, and the debt was incurred for commercial purposes (*see Bernstein v Dubrovsky,* 169 AD3d 410 [1st Dept 2019]; *Independence Bank v Valentine,* 113 AD3d 62 [2d Dept 2013]). Since RPAPL §1304 is inapplicable, compliance with RPAPL §1306 was not required (*see* RPAPL §1306[1]). RPAPL §1303 is also inapplicable as the subject property was under construction and, therefore, neither "owner-occupied" nor leased to tenants.

The twentieth affirmative defense based on GBL §349 fails as that section is limited to "consumer-oriented" transactions and the loan here was commercial in nature (*see generally Lum v New Century Mortg. Corp.*, 19 AD3d 558 [2d Dept 2005]).

Overall, Defendants' opposition to dismissal of the affirmative defenses was entirely conclusory and, by failing to raise specific legal arguments in rebuttal, those affirmative defenses found insufficient 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]).

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 the branch of Plaintiff's motion for summary judgment on its cause of action for foreclosure is denied, and it is

ORDERED that the branch of the motion for a default judgment against the non-appearing parties is granted, and it is

ORDERED that all the affirmative defenses in Defendants' answer, except the fifteenth, are dismissed, and it is

ORDERED that the names "JOHN DOE#1-#10" are stricken from the caption, and it is

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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SHARESTATES INVESTMENTS DACL, LLC,

Plaintiff, Index No. 850178/2021

-against-

158AT128TH LLC; MICKEY BERLIANSHIK; BAP VENTURES LLC; NYC ENVIRONMENTAL CONTROL BOARD; NYS DEPARTMENT OF TAXATION AND FINANCE,

Defendants.

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This matter is set down for a status conference on **October 6, 2022 @ 12:00 pm** via Microsoft Teams.

9/9/2022
DATE

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

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