

East Sixth St. Funding LLC v Cherny Props. Inc.

2022 NY Slip Op 33060(U)

September 9, 2022

Supreme Court, New York County

Docket Number: Index No. 850248/2021

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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INDEX NO. 850248/2021

EAST SIXTH STREET FUNDING LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

CHERNY PROPERTIES INC., CHERNY REALTY
INC., ZDZISLAW CZERNY, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, NEW YORK
CITY DEPARTMENT OF FINANCE, BUREAU OF
HIGHWAY OPERATIONS, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, JOHN DOE 1
THROUGH 100,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 191, 192, 193, 194, 195, 196, 197, 198, 199

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 mortgage encumbering two parcels of real property located at 421 East 12th Street, New York, New York and 511 East 6th Street, New York, New York. The mortgage was given by Defendants Cherny Properties, Inc. and Cherny Realty, Inc. and secures a loan with an original principal amount of \$6,000,000.00. The indebtedness is memorialized by a loan agreement as well as an amended, restated and consolidated note. The mortgage and loan documents were executed by Defendant Zdzislaw Czerny ("Czerny") as President of both corporations. Concomitantly therewith, Czerny executed a guaranty of the indebtedness. Plaintiff commenced this action alleging Defendants defaulted in making installment payments under the note. Defendants Cherny Properties, Inc., Cherny Realty, Inc. and Zdzislaw Czerny answered jointly and pled four affirmative defenses and a counterclaim.

Now, Plaintiff moves for summary judgment against Defendants Cherny Properties, Inc., Cherny Realty, Inc. and Zdzislaw Czerny, striking their answer, a default judgment against all non-appearing parties, to appoint a Referee to compute and to amend the caption. Defendants Cherny Properties, Inc., Cherny Realty, Inc. and Zdzislaw Czerny 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]). 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]). In a foreclosure action, a plaintiff is not required to rely on any particular set of business records, 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 Doris Shen ("Shen"), an asset manager and authorized signatory of Plaintiff, as well as Mark Bahiri ("Bahiri"), a Managing Partner of Emerald Creek Capital 3, LLC ("Emerald"), the original lender. Although Shen's knowledge was not based upon her personal knowledge, it was sufficiently founded by the business records of Plaintiff, her employer (*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]). Shen 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]). The records of Emerald were also admissible since Shen attested those records were received from the maker, incorporated into the records her employer kept and were routinely relied on by Plaintiff in its business (*see Bank of Am., N.A. v Brannon*, 156 AD3d 1, 10 [1st Dept 2017]; *see also U.S. Bank Trust, N.A. v Bank of Am., N.A.*, 201 AD3d 769, 772 [2d Dept 2022]). Moreover, the affidavit of Bahiri, as an employee of Emerald, evidenced the requisites of CPLR §4518 for the admission of Emerald's records as business records. Annexed to each affidavit were the records which the affiants relied upon (*see eg Ciras, Inc. v Katz*, 202 AD3d 590 [1st Dept 2022]). The affidavits established the mortgage, note, and evidence of mortgagor's default and were sufficiently supported by appropriate documentary evidence (*see eg Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*).

In opposition, Defendants' claim that Plaintiff or its predecessor hindered its performance in repayment of the loan fails to raise an issue of fact. The amendment to the loan agreement, executed by the parties on May 15, 2020, permitted Defendants to make three months of partial payments. There is no dispute that the term of that amendment expired. Contrary to Defendants' assertion, Plaintiff's unwillingness to further extend the period of partial payments does not *ipso facto* demonstrate the existence of bad faith. "The law is clear that when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene" (*Home Sav. of Am. v Isaacson*, 240 AD2d 633 [2d Dept 1997, *citing New York Guardian Mortgagee Corp. v Olexa*, 176 AD2d 399, 401 [3d Dept 1991]; *see also EMC Mortg. Corp. v Stewart*, 2 AD3d 772 [2d Dept 2003]). In addition, bare assertions of a lender's agreement to forebear foreclosure are also insufficient to defeat summary judgment (*see New York State Urban Dev. Corp. v Marcus Garvey Brownstone Houses, Inc.*, 98 AD2d 767, 771 [2d Dept 1983]).

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]).

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]). Also, as Defendants proffered no argument in support of its affirmative defenses, they were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

Likewise, Plaintiff demonstrated that the counterclaim is insufficiently pled (*see Countrywide Home Loans Servicing, L.P. v Vorobyov*, supra) and, in any event, it fails to state a cognizable claim under New York Law (*cf. Acres Loan Origination LLC v 170 E. 80th St. Mansion, LLC*, ___ Misc3d ___, 2021 NY Slip Op 32477[U][Sup Ct NY Cty 2021]).

Any assertion the motion must be denied because no discovery has been conducted is unavailing as Defendants have offered nothing to demonstrate Plaintiff is in exclusive possession of facts which would establish a viable defense to Defendants’ repayment default (*see Island Fed. Credit Union v I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]). Moreover, as “the affirmative defenses are precluded, no discovery could lead to facts that would warrant denial of plaintiff’s summary judgment motion” (*Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]).

The branch of Plaintiff’s motion for a default judgment against the non-appearing parties is granted (*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 (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Plaintiff’s motion for summary judgment against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that the affirmative defenses and counterclaim pled by the appearing Defendants are dismissed; and it is further

ORDERED that **Mark McKew, Esq., 1725 York Ave, Ste 29A, New York, New York, 212-876-6783** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the property identified in the notice of pendency 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, 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 that failure to submit objections to the referee may 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 Defendants served herein as John Doe, Samantha Simoneaux, Zachary Getz, Abinav Shah, Monica Clifford, Mason Dudas, Tirath Patel, Vinit Shah, Maise Jarrell, Tori Schoen, Puja Rotar, Dan Rotar, Julie Horton, Occupant-Apt.4 @421 East 12th St., Occupant-Apt. 3@ 421 East 12th St., Falcon Messenger Service Inc., Coty New York Inc., B&C Consular Service Inc., Jefron Messenger Service Inc., Jefron Consular Services Inc., Abbey Kellar, Natalie Partigiononi, Greta Bharathi, Kendall Brodie, Michael Bairdi, Michael Cohen, Elena Saviano, Adele Davis, Carly McCabe, Amanda Frame, Michael Ryan, Sam Caushaj, Occupant -Apt 5F@ 511 East 6th Street, Amer Al Jarrah be substituted in the place and stead of "John Doe #1 through "John Doe #34; and it is further

ORDERED that the caption be amended by discontinuing the action against Defendants sued herein as "John Doe #35" through "John Doe #100" and deleting the language appearing thereafter; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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EAST SIXTH STREET FUNDING LLC,

Plaintiff,

Index No. 850248/2021

-against-

CHERNY PROPERTIES INC., CHERNY REALTY INC., ZDZISLAW CZERNY, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, BUREAU OF HIGHWAY OPERATIONS, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, JOHN DOE, SAMANTHA SIMONEAUX, ZACHARY GETZ, ABINAY SHAH, MONICA CLIFFORD, MASON DUDAS, TIRATH PATEL, VINIT SHAH, MAISE JARRELL, TORI SCHOEN, PUJA ROTAR, DAN ROTAR, JULIE HORTON, OCCUPANT Apt.4, OCCUPANT-Apt. 3, FALCON MESSENGER SERVICE INC., COTY NEW YORK INC., B&C CONSULAR SERVICE INC., JEFRON MESSENGER SERVICE INC., JEFRON CONSULAR SERVICES INC., ABBEY KELLAR, NATALIE PARTIGIONONI, GREETA BHARATHI, KENDALL BRODIE, MICHAEL BAIRDI, MICHAEL COHEN, ELENA SAVIANO, ADELE DAVIS, CARLY MCCABE, AMANDA FRAME, MICHAEL RYAN, SAM CAUSHAJ, OCCUPANT-APT 5F@ 511 EAST 6th STREET, AMER AL JARRAH,

Defendants.

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and it is further,

ORDERED that Plaintiff must bring a motion for a judgment of foreclosure and sale within 45 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 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/suptctmanh)]; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **January 5, 2023 at 10:00 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.

9/9/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

F. A. Kahn III

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

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