

<b>U.S. Bank N.A. v Del Rosario</b>
2022 NY Slip Op 33258(U)
September 27, 2022
Supreme Court, New York County
Docket Number: Index No. 850087/2020
Judge: Francis A. Kahn III
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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. 850087/2020

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

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

LUCELLE M. DEL ROSARIO, BOARD OF MANAGERS OF THE PARC VENDOME CONDOMINIUM, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE #1-#50 AND MARY ROE #1-#50,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for

JUDGMENT - SUMMARY

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

This is an action to foreclose on a mortgage encumbering real property located at 350 West 57th Street, Unit 6H, New York, New York. The note and mortgage were given by Defendant Lucelle M. Del Rosario ("Del Rosario") to evidence and secure a loan with a principal amount of \$495,000.00. Defendant Del Rosario answered and pled eighteen affirmative defenses, including RPAPL §1304 and §1306.

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 Padilhas' 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]).

Plaintiff's motion was supported with an affidavit of facts from Rich Favela ("Favela"), the Director of Special Assets for Velocity Commercial Capital, LLC ("Velocity"), the servicer for Plaintiff. The affidavits 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).

As to the branch of the motion to dismiss 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 [1<sup>st</sup> Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1<sup>st</sup> 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]).

In opposition, Del Rosario only posited arguments in support of the affirmative defenses based on RPAPL §1304 and §1306. Defendant’s reliance on these statutes is misplaced as neither are applicable here. Compliance with RPAPL §1304 is limited to “home loans” 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]). The undisputed facts of this case demonstrate that the debt was not strictly personal, family or household purposes (*see Bernstein v Dubrovsky*, 169 AD3d 410 [1<sup>st</sup> 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]).

As to Del Rosario’s other affirmative defenses, they were abandoned by failing to address same in the opposition (*see One W. Bank, FSB v Rosenberg*, 189 AD3d 1600 [2d Dept 2020]).

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 [1<sup>st</sup> 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 against the appearing Defendants, for a default judgment against the non-appearing parties as well as the other relief is granted; and it is further

ORDERED that **Christy M. Demelfi, Esq., 2280 Grand Avenue, Suite 202 Baldwin New York 11510, (516) 887-1975** 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 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 the names “JOHN DOE#1-#50” and “MARY ROE#1-#50” are stricken from the caption and replaced with the name “DANIELLA ODIAMAR,” as a party defendant, in her capacity as a tenant, occupant or person in possession of the mortgaged premises; and it is further

ORDERED that the amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE  
FOR VELOCITY COMMERCIAL CAPITAL LOAN TRUST  
2018-02,

Index No. 850087/2020

Plaintiff,  
-against-

LUCELLE M. DEL ROSARIO A/K/A LUCELLE M.  
ODIAMAR; BOARD OF MANAGERS OF THE PARC  
VENDOME CONDOMINIUM; NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU; DANIELLA ODIAMAR,

Defendants.

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and it is 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/supctmanh)); 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 12, 2023, at 10:40 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](mailto: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.

9/27/2022  
DATE

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

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER J.S.C.
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	