

Wells Fargo Bank, N.A. v Lafayette 199, LLC

2023 NY Slip Op 31085(U)

April 4, 2023

Supreme Court, New York County

Docket Number: Index No. 850100/2022

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

INDEX NO. 850100/2022
MOTION DATE
MOTION SEQ. NO. 002
WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR MORGAN STANLEY CAPITAL I TRUST 2019-L2 FOR THE BENEFIT OF THE COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2019-L2 CERTIFICATEHOLDERS AND THE VRR INTEREST OWNERS,

Plaintiff,

- v -

LAFAYETTE 199, LLC, EDMOND LI, BOARD OF MANAGERS OF THE LAFAYETTE COMMERCIAL CONDO A/K/A BOARD OF MANAGERS OF THE LAFAYETTE COMMERCIAL CONDOMINIUM, CITY OF NEW YORK, NEW YORK CITY OFFICE OF ADMINISTRATIVE AND TRIAL HEARINGS, NEW YORK CITY DEPARTMENT OF FINANCE, DEMAR PLUMBING CORP., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN DOE NO. 1 THROUGH JOHN DOE NO. 100,

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 94, 95, 96

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 consolidated and modified mortgage given by Defendant Lafayette 199 LLC ("Lafayette") which encumbers a parcel of real property located at 199 Lafayette Street, Unit C-A and Unit I-A New York, New York (Block 482, Lots 1001 and 1002). The mortgage, given to Argentic Real Estate Finance, LLC ("AREF"), secures a consolidated note which evidences a loan with an original principal amount of \$21,000,000.00. The note and mortgage, both dated February 6, 2019, were executed by Defendant Edmond Li ("Li") as Manager of Lafayette. Concomitantly with these documents, Defendant Li executed a guarantee of recourse obligations. Plaintiff commenced this action wherein it is alleged Defendants defaulted in repayment of the subject note. Defendants Lafayette and Ortiz and answered and pled three affirmative defenses, including Plaintiff's lack of standing.

Now, Plaintiff moves for summary judgment against Lafayette and Ortiz, a default judgment against all other Defendants, an order of reference and to amend the caption. Defendants Lafayette and Ortiz 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 eg 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]). Based upon Defendants' affirmative defense, Plaintiff was also required to demonstrate it had standing when this action was commenced (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]).

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]). 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 affirmation from Joao Gauer ("Gauer"), an Asset Manager of Rialto Capital Advisors, LLC ("Rialto"), the alleged special servicer of the subject loan for Plaintiff. Gauer claims his affidavit was made upon "personal knowledge" as well as the books and records of Rialto and Plaintiff. However, he does not indicate what information is based on personal observation or derived from records (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019])["a witness may always testify as to matters which are within his or her personal knowledge through personal observation"]. To the extent Gauer's knowledge was based upon a review of books and records, the affiant failed to lay an appropriate foundation for the admission of any of the proffered documents as business records under CPLR §4518 (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]). Gauer failed to state, in relation to either Rialto or Plaintiff, that he was familiar with their record keeping practices (*see IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]; *Bank of N.Y. Mellon v Gordon*, *supra*). Further, Gauer did not attest any records from prior makers were received from same, incorporated into the records his employers kept and that Rialto routinely relied on such records in its business (*see U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780, 782-783 [2d Dept 2019]; *cf. Bank of Am., N.A. v Brannon*, 156 AD3d 1, 10 [1st Dept 2017]). At most, Gauer's affidavit demonstrates a naked "review of records maintained in the normal course of business [which] does not vest an affiant with personal knowledge" (*JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1517 [2d Dept 2019]).

Accordingly, since none of the documentary evidence proffered to demonstrate the note, mortgage, Defendants' default and Plaintiff's standing is in admissible form, Movant failed to establish any of the *prima facie* elements of the cause of action for foreclosure (*see Federal Natl. Mtge. Assn. v Allannah*, 200 AD3d 947 [2d Dept 2021]).

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 to the first affirmative defense of lack of standing, in a foreclosure action is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] holder status via physical possession of the note prior to commencement of the action which contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). As to the latter two circumstances, the note is the dispositive instrument (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). “Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff” (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2d Dept 2015] [citations omitted]). The indorsement must be made either on the face of the note or on an allonge “so firmly affixed thereto as to become a part thereof” (UCC §3-202[2]).

In support of the motion, Plaintiff attempts to proffer proof in support of the second and third circumstance. Plaintiff claims standing via three assignments of the note. The first from AREF to non-party SPREF WH III LLC (“SPREF”) by an endorsement of the note contained in an allonge dated February 6, 2019. The second assignment was purportedly from SPREF to AREF by an endorsement of the note contained in an allonge dated March 12, 2019, and by a separate document of the same date titled “General Assignment”. Similarly, the third assignment allegedly from AREF to Plaintiff, was also via an endorsement of the note contained in an allonge dated March 12, 2019, and via a separate document of the same date titled “General Assignment”.

The allegations regarding the transfer from AREF to SPREF in Gauer’s affidavit are entirely conclusory and insufficient. Since the endorsements are contained in an allonge on a separate page which reveals no discernable evidence of firm attachment from a visual inspection, Plaintiff was required, but failed, to establish the allonges were “firmly affixed” to the original note (*see Nationstar Mtge., LLC v Calomarde*, 201 AD3d 940, 942 [2d Dept 2022]; *JPMorgan Chase Bank, N.A. v Grennan*, supra at 1516). Gauer offered no evidence of the nature of the attachment which is necessary because not every appendment can satisfy the statutory requisite (*see One Westbank FSB v Rodriguez*, 161 AD3d 715 [1st Dept 2018]; *HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983 [2d Dept 2015][Paperclip not a firm annexation]). In addition, Gauer’s affidavit was also deficient as he demonstrated no knowledge concerning the physical transfer of the note from AREF to SPREF (*cf. Deutsche Bank Natl. Trust Co. v Webster*, 142 AD3d 636, 638 [2d Dept 2016]).

The second and third assignments could ostensibly be sustained based upon the “General Assignment” documents, if these documents were admissible as business records (*see US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1st Dept 2018]; *GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2d Dept 2012]). However, as to the first assignment from AREF to SPREF, Plaintiff only submitted an endorsement contained on an allonge. Thus, only the second circumstance of holder status is implicated.

Accordingly, Plaintiff failed to demonstrate *prima facie* that the first affirmative defense should be dismissed.

The second affirmative defense pleads that the Rialto “lacks the authority to bring this action on behalf of Plaintiff”. Where a foreclosure complaint pleads that an action is expressly maintained in the capacity as servicing agent, and the corroborating documentation of the authority to act with respect to the subject mortgages to Plaintiff is submitted, a servicer may prosecute the action (*see CWC Capital Asset Mgt. v Charney-FPG 114 41st St., LLC*, supra; *Fairbanks Capital Corp. v Nagel*, 289 AD2d 99, 100 [1st Dept 2001]; *see also CWC Capital Asset Mgt., LLC v Great Neck Towers, LLC*, 99 AD3d 850, 851 [2d Dept 2012]). Although that appears to be the case here, since the limited power of attorney annexed to Gauer’s affidavit is not in admissible form, dismissal of this affirmative defense is not presently established.

The third affirmative defense that Plaintiff’s fifth cause of action is barred by RPAPL §1301[3] is without merit. Defendant Li, as “[a] guarantor of the mortgage debt, while not a necessary party, is a permissible party in a mortgage foreclosure action” (2 Bergman, *New York Mortgage Foreclosures* §12:13[2]; *see also Trustco Bank, N.A. v Cannon Bldg. of Troy Assocs.*, 246 AD2d 797 [3d Dept 1998]; *Bank of E. Asia v Smith*, 201 AD2d 522, 523 [2d Dept 1994]; *Morrison v Slater*, 128 AD 467, 468 [1st Dept 1909]).

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 causes of action for foreclosure and appointment of a referee are 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 the third affirmative defense in Defendants’ answer is dismissed, and it is

ORDERED, that Falcon Engineering Co., LLC is substituted in place and instead of John Doe No. 1 and defendants “John Doe No. 2” through “John Doe No. 100” are hereby stricken and discontinued without costs to any party as against the other, all without prejudice to the proceedings heretofore had herein pursuant to CPLR § 1003, and it is

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

850100/2022 WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR MORGAN STANLEY CAPITAL I TRUST 2019-L2 FOR THE BENEFIT OF THE COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2019-L2 CERTIFICATEHOLDERS AND THE VRR INTEREST OWNERS, vs. LAFAYETTE 199, LLC ET AL
Motion No. 002

WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR MORGAN STANLEY CAPITAL I TRUST 2019-L2 FOR THE BENEFIT OF THE COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2019-L2 CERTIFICATE HOLDERS AND THE VRR INTEREST OWNERS, acting by and through Rialto Capital Advisors, LLC,

Plaintiff,

Index No. 850100/2022

-against-

LAFAYETTE 199, LLC, EDMOND LI, BOARD OF MANAGERS OF THE LAFAYETTE COMMERCIAL CONDO A/K/A BOARD OF MANAGERS OF THE LAFAYETTE COMMERCIAL CONDOMINIUM, THE CITY OF NEW YORK, NEW YORK CITY OFFICE OF ADMINISTRATIVE AND TRIAL HEARINGS, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, DEMAR PLUMBING CORP., FALCON ENGINEERING CO. LLC,

Defendants.

-----X

This matter is set down for a status conference on **May 11, 2023 @ 11:00 am** via Microsoft Teams.

4/4/2023
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

Francis Kahn III

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

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