

Newbank v 43 Mott Realty Owner LLC

2023 NY Slip Op 31568(U)

May 5, 2023

Supreme Court, New York County

Docket Number: Index No. 850034/2022

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. 850034/2022

MOTION DATE _____

MOTION SEQ. NO. 002

NEWBANK,

Plaintiff,

- v -

43 MOTT REALTY OWNER LLC, TAI CHEUNG REALTY,
INC., SEOUL GARDEN BOWERY INC., PETER PARK,
JONG MEE PARK, KEVIN YE, BISTRO MARKETPLACE 17
INC., 52 JP PARK CORP., NEW YORK STATE
DEPARTMENT OF TAXATION & FINANCE, CITY OF NEW
YORK DEPARTMENT OF FINANCE, JOHN DOE

**DECISION + ORDER ON
MOTION**

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

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

The within action is to foreclose on a mortgage encumbering a parcel of commercial real property located at 43 Mott Street, New York, New York given by Defendants 43 Mott Realty Owner LLC (“Owner”) and Tai Cheung Realty, Inc. (“Realty”). The mortgage secures a loan made by Plaintiff, apparently in conjunction with the US Small Business Administration, to Defendant Seoul Garden Bowery Inc. (“Seoul”). The loan is memorialized by a note, dated June 1, 2017, with an original principal amount of \$1,200,000.00. The note was given to Plaintiff and was executed by Defendant Peter Park (“Peter”) as President of Seoul. The mortgage, also dated June 1, 2017, was executed by Defendants Kevin Ye (“Ye”), as Managing Member of Owner, and Ping Cheung (“Cheung”), as President of Realty. Concomitantly with these documents, Defendants Peter, Ye, Jong Mee Pary (“Jong”), Bistro Marketplace 17 Inc. (“Bistro”) and 52 JP Park Corp. (“52 JP”) each executed a document titled “Unconditional Guaranty” securing the indebtedness. Defendants Owner and Cheung executed documents titled “Unconditional Limited Guaranty”.

Plaintiff commenced this action alleging Defendants defaulted in repayment under the note and guarantees. All Defendants initially defaulted in appearing and by order of this Court dated June 22, 2022, Plaintiff was granted a default judgment and an order of reference was issued. By stipulation, so ordered on October 6, 2022, Plaintiff and Defendants Owner, Realty and Ye agreed to vacate the default against these Defendants only. Further, Plaintiff assented to accept these Defendants’ joint answer which, after amendment, contains eight [8] affirmative defenses. Also included in the amended answer was a section titled “VERIFIED THIRD-PARTY COMPLAINT” against existing Defendants Peter, Jong, Bistro and 52 JP. No third-party complaint was filed.

Now, Plaintiff moves for, *inter alia*, summary judgment against Owner, Realty and Ye, striking the affirmative defenses, appointing a referee to compute and to amend the caption. Defendants Owner, Realty and Ye 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]). 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 by an affidavits from Sang Min Ahn ("Ahn"), a Senior Vice President and Head of Loan Portfolio Management for Plaintiff. Ahn claims the affidavit was made "based upon personal knowledge and business records of Avatar". However, Ahn 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 Ahn's knowledge is based upon a review of the books and records of Plaintiff Avatar, no foundation for the admission of any of the proffered documents as business records under CPLR §4518 was established (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]). Further, Ahn did not demonstrate the records evidencing the note and guarantees were created by Plaintiff. Indeed, all have a header of the US Small Business Administration, not Plaintiff. To the extent these documents were created by a party other than Plaintiff, Ahn failed to show knowledge of that entity's record keeping practices (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). Ahn also failed to attest that any records received from prior makers were incorporated into the records Plaintiff kept and were routinely relied on 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, Ahn's affidavit demonstrates a naked "review of records maintained in the normal course of business [was conducted which] does not vest an affiant with personal knowledge" (*JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1517 [2d Dept 2019]).

As to Defendants' default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). As Ahn's knowledge of Defendants' default was based solely upon a review of documents, the records evidencing the default were required to be proffered (*see US Bank v Rowe*, 194 AD3d 978 [2d Dept 2021]). The default notices annexed to Ahn's affidavit, even if admissibly, were insufficient to establish the default in payment (*see Bank of N.Y. Mellon v Mannino*, 209 AD3d 707 [2d Dept 2022]). To the extent Plaintiff attempted to cure these defects with a further affidavit submitted in reply is inappropriate and may not be considered by the Court (*see Deutsche Bank Natl. Trust Co. v Adlerstein*, 171 AD3d 868, 870 [2d Dept 2019]; *see also Ditech Fin., LLC v Cummings*, 208 AD3d 634, 636 [2d Dept 2022]).

Accordingly, since none of the evidence proffered to demonstrate the note, mortgage and Defendants' default 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 Allanah*, 200 AD3d 947 [2d Dept 2021]).

As to the guarantors' liability, typically, "[o]n a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Based upon the foregoing absence of admissible evidence, neither the guarantees nor the underlying debt has been proven.

As to the branch of Plaintiff's 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]).

The first affirmative defense which relates 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 affirmative defense of mitigation is unavailing in a foreclosure action (*see Marine Midland Bank, N. A. v Virginia Woods Ltd.*, 201 AD2d 625 [2d Dept 1994]; *HSBC Bank USA v Rodriguez*, ___ Misc 3d ___, 2016 NY Slip Op 32123[U][Sup Ct Queens Cty 2016]). Moreover, as this defense relates to the amount due and owing, it is not a viable defense to summary judgment (*see eg 1855 E. Tremont Corp. v Collado Holdings LLC*, supra).

The third affirmative defense titled "Void Guarantees" claims the guarantees are unenforceable based upon "the doctrine of strict construance [sic] of guarantees and material expansion of guarantor's risk". As pled, and even considering Defendants' opposition papers, this defense is incomprehensible and inadequately pled. The Court is unaware of any such cognizable "doctrines" under New York State law which render a guaranty void.

The fourth affirmative defense titled "Pre-payment" and the papers in opposition fail to demonstrate how an alleged partial re-payment of the loan absolves the guarantors entirely. To the extent it is a claim concerning the amount the guarantors may ultimately owe, it is, for the present, a cognizable defense on a cause of action to enforce a guaranty (*see Moon 170 Mercer, Inc. v Vella*, 122 AD3d 544 [1st Dept 2014]; *see also Jones v Madison Plaza Commercial Owners LLC*, 173 AD3d 599 [1st Dept 2019]; *City of New York v Clarose Cinema Corp.*, 256 AD2d 69 [1st Dept 1998]).

The fifth affirmative defense claiming failure of consideration is conclusory and unsupported by any facts in the answer or by the papers submitted in opposition. As such, this affirmative defense is nothing more than an unsubstantiated legal conclusion which is 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 sixth affirmative defense of illegality fails as a matter of law. Based upon a reading of the defense and the opposition papers, the alleged illegality here is premised on a violation of SBA regulations. Even if true, "violation was malum prohibitum due to Federal law, which does not provide for borrowers to interpose illegality as a defense to repayment of their [SBA] loans" (see Lloyd Capital Corp. v Pat Henchar, Inc., 80 NY2d 124, 128 [1992]).

The seventh affirmative defense asserting force majeure vitiates Plaintiff's claims is, in addition to being entirely conclusory, unavailing. None of the loan documents "contain a force majeure clause, and this Court may not add or imply such a clause" (see Fives 160th, LLC v Zhao, 204 AD3d 439, 440 [1st Dept 2022]). Business disruptions occasioned by the Covid-19 pandemic have been found not to excuse non-payment of contractual obligations (see eg 558 Seventh Ave. Corp. v Times Sq. Photo, 194 AD3d 561 [1st Dept 2021]). Also, the guarantees expressly state under Section 6[C][10] that the any defense based upon an adverse change in the Borrower's financial condition is waived (cf. Bremen House, Inc. v Lobosco, ___AD3d___, 2023 NY Slip Op 01584 [1st Dept 2023]).

The eighth affirmative defense of duress is also not viable. Generally, "[w]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement" (see Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 [1st Dept 2012]). However, duress is not an available defense in a mortgage foreclosure action under the facts presented (see Feinstein v Levy, 121 AD2d 499 [1st Dept 1986]). Indeed, absent proof of anything other than an exercise of legal rights under the loan documents a claim of duress fails (see Marine Midland Bank, N.A. v Mitchell, 100 AD2d 733 [4th Dept 1984]).

Accordingly, it is

ORDERED that the branches of Plaintiff's motion for summary judgment and an order of reference are denied, and it is

ORDERED that the branch of Plaintiff's motion to dismiss Defendants' affirmative defenses is granted and all are dismissed except the fourth affirmative defense for the limited purpose note supra, and it is

ORDERED that all parties shall appear for a virtual status conference on June 7, 2023, at 10:00am via Microsoft Teams.

5/5/2023
DATE

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

HON. FRANCIS A. KAHN III

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

J.S.C. OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE