

Djurasevic v Boucher

2023 NY Slip Op 33133(U)

September 5, 2023

Supreme Court, New York County

Docket Number: Index No. 850186/2020

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. 850186/2020

MARY DJURASEVIC, as Trustee of the REVOCABLE TRUST OF STANLEY WALKER, dated June 12, 2015,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

MARCY ELLIN BOUCHER a/k/a MARCY ELLEN BOUCHER a/k/a MARCY E. BOUCHER a/k/a MARCY BOUCHER, IC BUSINESS MANAGEMENT, LLC, a/k/a I.C. BUSINESS MANAGEMENT LLC, CITY OF NEW YORK DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, JOHN DOE #1 THROUGH JOHN DOE #100

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 131, 132, 133, 134, 135

were read on this motion to/for JUDGMENT - SUMMARY

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

In this action, Plaintiff seeks to foreclose on a series of mortgages, the first of which was given in 1999, encumbering commercial real property located at 406 West 25th Street, New York, New York. The notes and mortgages at issue were created, extended and additional funds loaned in multiple transactions over the course of the next fourteen years.

An initial mortgage (Mortgage #1), dated September 3, 1999, was given by Defendant Marcy Ellin Boucher ("Boucher") to Stanley Walker ("Walker") to secure a loan of \$280,000.00. The indebtedness was memorialized by a mortgage note of the same date with annual interest only installments and a seven [7] year maturity. By a mortgage note dated August 31, 2006, repayment of this indebtedness was extended one year.

Another mortgage (Mortgage #2) on the property, dated April 16, 2009, was given to Walker to secure a loan of \$499,900.00. The mortgage was given by Defendant IC Business Management, LLC ("Business") and executed by Boucher as Member of Business. On the same date, Boucher deeded the property to Business. The new indebtedness was memorialized by a mortgage note of the same date with annual interest only installments and a three [3] year and one month maturity. This note was also executed by Boucher as Member of Business.

By loan agreement dated December 13, 2010, Walker and Business agreed *inter alia* that Walker would loan an additional \$400,100.00 to Business, that a note evidencing this indebtedness would be given by Business secured by another mortgage (Mortgage #3) and Business assumed liability for the \$280,000.00 indebtedness. Further, the parties agreed that maturity date of all the notes would be May 17, 2014, and mortgage notes evidencing same were executed by Business.

By loan agreement dated April 15, 2013, Walker and Business agreed *inter alia* that Walker would loan an additional \$499,900.00 to Business and that a note evidencing this indebtedness and accrued interest on the earlier loans of \$144,906.00 would be executed. A fourth mortgage (Mortgage #4), dated April 15, 2013, securing an indebtedness totaling \$644,800.00 was also given by Business to Walker. The agreement provided a maturity date of all the existing loans of May 16, 2016. Strangely, the notes provided for both a term of three [3] years and one month, and a maturity date of May 17, 2014, subject to extension.

With regards to maturity of the loan, the 2013 loan agreement provides, in paragraph 2, as follows:

in the event that, to the extent that he does not desire to grant any further extension of the term, as expressed in Paragraph "1)" immediately hereinbefore, or otherwise as expressed in this Paragraph "2)", beyond such date or dates, he will notify the Promisor of such desire, at least one year (365 days) prior to the expiration date of the original term or the extended term or terms. If Promisee has not indicated such desire, in the manner and time specified in this Paragraph "2)", the term and/or extensions thereof, shall be extended, automatically, for an additional period periods of twelve months (one year).

Concerning defaults under the loan documents, the 2013 mortgages all provide, in paragraph 13, as follows:

Mortgagee may declare the full amount of the Debt to be due and payable immediately for any default.

The following are defaults: (a) Mortgagor or fails to make any payment required by the Bond or Note or Mortgage amount of within 15 days of the date it is due; (b) Mortgagor fails to keep any other promise or agreement in this Mortgage due within the time stated, or if no time is stated, in a reasonable time after notice is given that Mortgagor is in Default.

In a rider to all the 2013 mortgages, the parties further agreed, in paragraph 30 thereto, as follows:

Notwithstanding the provisions of paragraph 13 of this Mortgage Deed, concerning events of default, heretofore, there shall be no event of default decided until 180 days subsequent to the date Mortgagee has given Mortgagor prior written notice of an event constituting an event of default under the provisions of this Mortgage Deed by registered or certified mail, return receipt requested, and Mortgagor has had a reasonable opportunity to cure such default.

After suffering a stroke, Walker, by document dated June 12, 2015, created an *inter vivos* trust and nominated Plaintiff, Mary Djurasevic (“Djurasevic”), as trustee and designated himself as beneficiary. Upon his death, after payment of estate liabilities, Walker designated Djurasevic as remainderman. On the same date, Walker assigned all his interest in the April 15, 2013, notes and mortgages to the trust and executed a will nominating Djurasevic as executor. Walker died on September 11, 2015, survived by a sister Janet Mecca (“Mecca”). Walker’s will was admitted to probate by Decree dated March 16, 2016 based upon the petition of Djurasevic and a waiver of citation executed by Mecca. The petition by Mecca to set aside Walker’s trust and rescind her waiver of citation was dismissed upon motion of Djurasevic.

Plaintiff commenced this action alleging *inter alia* that Boucher and Business defaulted in repayment of the loans and “by failing and neglecting to pay the full principal balance and all accrued interest on all four Loans on May 15, 2016, and by failing to pay all real estate taxes.” Defendants Boucher and Business answered jointly and pled seven affirmative defenses, including that Plaintiff lacks standing and failure to give contractual pre-foreclosure notices.

By order of this Court dated April 14, 2021, Plaintiff’s motion to amend its complaint was granted without opposition. In its amended pleading Plaintiff alleged that “Boucher and Management are also in default of the Subject Loans because they have failed to “pay all taxes, assessments, sewer rents or water rates” on the Premises as required by Section 8 of the Subject Mortgages and Section 26 of the Subject Mortgages’ Riders.” Further, Plaintiff alleged that a notice of default was served on Defendants on February 16, 2021. Defendants served an amended answer raising the same affirmative defenses.

Now, Plaintiff moves for summary judgment against the appearing Defendants, to strike their answers and affirmative defenses, for an order of reference and to amend the caption. Defendants oppose the motion.

In moving for summary judgment on its foreclosure cause of action, 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 Defendant’s 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]). Since Mortgagors raised lack of standing and failure to provide contractual pre-foreclosure notices in the answer, Plaintiff was required to demonstrate its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]) as well as its substantial compliance with the contractual requisites under the loan documents (*see eg Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [2d 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 by an affidavit from Djurasevic who claims that her affidavit was made based upon "personal knowledge and review of the Trust's business records relating to the loans that are relevant to this Affidavit". However, she 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 Djurasevic's knowledge is based upon a review of the books and records of the Trust, 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]). At most, Djurasevic'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]). Further, any contractual conditions precedent contained in the loan documents must be satisfied before a mortgagor can be defaulted and foreclosure pursued (*see eg U.S. Bank N.A. v Hazan*, 176 AD3d 637, 638 [1st Dept 2019]).

In this case, Plaintiff claims in support of its motion that Mortgagors defaulted in repayment of the indebtedness when the loans matured on May 15, 2016. Plaintiff also posits that a default occurred through Defendants' failure to "pay all taxes, assessments, sewer rents or water rates" and by failure to deliver receipts of payments of these items upon due demand. Plaintiff was required, but failed, to demonstrate that Mortgagors defaulted under the loan documents and that the required notices were sent (*see Federal Natl. Mtge. Assn. v Araka*, 217 AD3d 626 [1st Dept 2023]; *Wells Fargo Bank, N.A. v Osias*, 156 AD3d 942 [2d Dept 2017]).

Plaintiff's reliance on a February 26, 2013, notice to demonstrate an alleged maturity default on May 15, 2016, is unavailing. In addition to not being in evidentiary form, Plaintiff failed to establish *prima facie* how this notice was not invalidated by the execution of the subsequent April 13, 2013, loan documents. The February 4, 2021, notices are patently defective as they were issued over a year after this action was commenced. Termination of the automatic renewals of the loan terms is required to be given one-year in advance. A default based upon non-payment of real estate taxes and the like, has a 180-day cure provision and no admissible proof of satisfaction of same was proffered (*see Everhome Mtge. Co. v Aber*, 195 AD3d 682, 691 [2d Dept 2021]). Plaintiff's assertion that amendment of the complaint somehow cures these substantive defects is misplaced. Non-compliance with a contractual condition precedent is an affirmative defense that must be pleaded by a Defendant, whereupon Plaintiff is required to present evidentiary proof of faithful performance of same (*see 1014 Fifth Ave. Realty Corp. v Manhattan Realty Co.*, 67 NY2d 718, 720 [1986]; *Azriliant v Oppenheim*, 91 AD2d 586, 587 [1st Dept 1982]).

As to standing in a foreclosure action, the note is the dispositive instrument (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank N.A. v Carnivale*, 138 AD3d 1220, 1221 [2d Dept 2016], quoting *Onewest Bank, F.S.B. v Mazzone*, 130

AD3d 1399, 1400 [2d Dept 2015]). Here, the written assignment dated June 12, 2015, ostensibly demonstrates Plaintiff's standing. However, that document is presently not in admissible form.

Accordingly, Movant failed to establish any of the *prima facie* elements of the cause of action for foreclosure (*see generally Federal Natl. Mtge. Assn. v Allanah*, 200 AD3d 947 [2d Dept 2021]).

Parenthetically, the Court notes that Defendants' attempted attack on Plaintiff's authority to act is nothing more than an improper collateral attack on the Decree admitting Walker's will to probate. Any claim as to misconduct in obtaining same cannot be asserted in this action.

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, except those related to standing and failure to fulfil contractual conditions precedent, 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]). Further, by failing to raise specific legal arguments in support of those affirmative defenses found insufficient, these were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafigiore*, 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 2012-1 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 all the affirmative defenses in Defendants' answer, except those related to standing and failure to fulfil contractual conditions precedent, and all the counterclaims are stricken, and it is

ORDERED that the Defendants captioned as "JOHN DOE" are hereby stricken from the caption, 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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MARY DJURASEVIC, as Trustee of the REVOCABLE
TRUST OF STANLEY WALKER, dated June 12, 2015,

Plaintiff,

Index No. 850186/2020

-against-

MARCY ELLIN BOUCHER a/k/a MARCY ELLEN
BOUCHER a/k/a MARCY E. BOUCHER a/k/a
MARCY BOUCHER, IC BUSINESS MANAGEMENT,
LLC a/k/a I.C. BUSINESS MANAGEMENT LLC, CITY
OF NEW YORK DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, NEW YORK CITY
DEPARTMENT OF FINANCE

Defendants.
-----X

and it is

ORDERED that this matter is set down for a status conference on **October 12, 2023 @ 11:40 am** via Microsoft Teams.

9/5/2023
DATE

CHECK ONE: CASE DISPOSED DENIED NON FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

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