

Flushing Bank v Cory Realty, Inc.

2023 NY Slip Op 34044(U)

November 13, 2023

Supreme Court, New York County

Docket Number: Index No. 850032/2022

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X

FLUSHING BANK, INDEX NO. 850032/2022

MOTION DATE _____

Plaintiff, MOTION SEQ. NO. 003

- v -

CORY REALTY, INC., NEW YORK STATE DEPARTMENT
OF TAXATION AND FINANCE, NEW YORK CITY
DEPARTMENT OF FINANCE, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, RUBOZ
CONTRACTING INC., ANTHONY ROBINSON, JOHN DOE
NO. 1 TO JOHN DOE NO. 30, INCLUSIVE, THE LAST
THIRTY NAMES BEING FICTITIOUS AND UNKNOWN TO
PLAINTIFF, THE PERSONS OR PARTIES INTENDED
BEING THE TENANTS, OCCUPANTS, PERSONS OR
CORPORATIONS,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 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

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 Cory Realty, Inc. ("Cory") which encumbers a parcel of real property located at 747 St. Nicholas Avenue, New York New York. The mortgage secures a note which evidences a loan with an original principal amount of \$1,275,000.00. The note and mortgage were executed by Defendant Anthony Robinson ("Robinson") as President of Cory. Concomitantly with these documents, Defendant Robinson executed a general guarantee of the indebtedness. Plaintiff commenced this action wherein it is alleged Defendants defaulted in repayment of the subject note. By order of this Court dated September 28, 2022, Plaintiff's motion for a default judgment and an order of reference was denied. Defendants' cross-motion thereto for an extension of time to answer was granted. Defendants answered and pled nineteen affirmative defenses, including lack of standing and failure to serve contractually required notices prior to foreclosure.

Now, Plaintiff moves for a summary judgment against the appearing defendants, a default judgment against the non-appearing parties, an order of reference and to amend the caption. Defendants Cory and Robinson 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]). In support of the motion, 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]). Based on the affirmative defenses pled, Plaintiff was required to demonstrate, *prima facie*, its substantial compliance with the pre-foreclosure notice requisites under the mortgage (*see eg Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [2d Dept 2020])

Plaintiff's motion was supported with an affidavit from Cono Mea ("Mea"), a Vice President of Plaintiff. Mea claims her affidavit was made based upon "my personal knowledge and my review of the business records of Plaintiff as described in paragraph 2 of this affidavit" (*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"]. Mea's affidavit laid a proper foundation for the admission of Plaintiff's the records into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Further, the records referenced by Mea were annexed to the motion (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Mea's affidavit and the referenced documents sufficiently evidenced the note and mortgage. As to the Mortgagor's 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]). Here, Mea's review of the attached account records demonstrated that the Mortgagor defaulted in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]).

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that 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]). Here, since Plaintiff was the original lender under when the mortgage and CEMA were given, it was in direct privity with the Defendant Cory when the action was commenced and, therefore, unquestionably had standing (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]).

In opposition, Defendants' claim that Plaintiff failed to demonstrate entitlement to summary judgment is without merit. Defendants' assertion that service of a written notice of default in the instance of an installment payment default is a condition precedent to acceleration and/or foreclosure is not supported by the loan documents. In any event, Plaintiff demonstrated with the affirmation of its attorney that a pre-foreclosure notice was served. The claim that no default occurred and that a valid

tender was made after its installment default is belied by the records submitted by Plaintiff. Defendants' account statements demonstrated that a payment of \$15,065.31 was due in November 2021, but the balance contained in the account with Plaintiff contained less than half that amount both before and after payment was due. The account statement submitted by Defendants in opposition covered a period after Plaintiff accelerated the debt, when Plaintiff was only required to accept full repayment of the debt (*see First Fed Sav v Midura*, 264 AD2d 407 [2d Dept 1999]).

However, Defendants raised an issue of fact as to whether Plaintiff frustrated Defendants' right to fully tender all mortgage arrears with the affidavit of Defendant Robinson (*see Cassara v Wynn*, 55 AD3d 1356 [4th Dept 2008]). This information is also sufficient to warrant discovery on Defendants' affirmative defenses of bad faith and unconscionability (*see New York Guardian Mortgage Corp. v Olexa*, 176 AD2d 399 [3d Dept 1991]).

With respect to the affirmative defenses not addressed in the moving papers, to the extent that specific legal arguments were not proffered, those defenses were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafigliore*, 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 (*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 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 the fifth, tenth and sixteenth are stricken, and it is

ORDERED, that the caption of this action be amended by replacing the defendants sued herein as "John Doe No. 1" with "Devin's Fish & Chips" and striking from the caption the remaining defendant sued herein as "John Doe No. 2" to "John Doe No. 30", all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

FLUSHING BANK,

Plaintiff,

-against-

CORY REALTY, INC.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE
NEW YORK CITY DEPARTMENT OF FINANCE
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD
RUBOZ CONTRACTING INC.
ANTHONY ROBINSON
DEVIN'S FISH & CHIPS

Defendants.

-----X
and it is

ORDERED that this matter is set down for a status conference on **December 14, 2023 @ 12:00 pm** via Microsoft Teams.

11/13/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

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

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