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| <b>BK 38th Lender LLC v 1351 Dekalb Condo Dev. LLC</b>   |
| 2021 NY Slip Op 30639(U)   |
| February 26, 2021  |
| Supreme Court, Kings County  |
| Docket Number: 505069/20   |
| Judge: Lawrence S. Knipel  |
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At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26<sup>th</sup> day of February, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X  
BK 38<sup>TH</sup> LENDER LLC,

Plaintiff,

- against -

Index No. 505069/20

1351 DEKALB CONDO DEVELOPMENT LLC, IGOR AKOPOV, VIBRANALYSIS INC., P.C.I. CONTRACTING, INC., LEVERAGE BUILDERS GROUP INC., Z ARCHITECTURE PLLC, TITAN FORMWORK SYSTEMS, LLC, LAGE INDUSTRIES CORP., HD SUPPLY CONSTRUCTION SUPPLY, LTD., AHERN RENTALS, INC., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD and JOHN DOE #1 THROUGH JOHN DOE #20 (said John Doe defendants being fictitious, it being intended to name all other parties who may have some interest in or lien upon the premises sought to be foreclosed),

Defendants.

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) \_\_\_\_\_

40, 42-49

Opposing Affidavits (Affirmations) \_\_\_\_\_

53-54

Reply Affidavits (Affirmations) \_\_\_\_\_

57-59

Upon the foregoing papers in this action to foreclose mortgages on three parcels of commercial property in Brooklyn (Properties), plaintiff BK 38<sup>th</sup> Lender LLC (BK)

moves (in motion sequence [mot. seq.] two) for an order: (1) awarding it a default judgment against non-appearing defendants, 1351 Dekalb Condo Development LLC (1351 Dekalb or borrower), Igor Akopov (Akopov or guarantor), Vibranalysis Inc., P.C.I. Contracting Inc., Leverage Builders Group Inc., Z Architecture PLLC, Lage Industries Corp., Ahern Rentals, Inc. and the New York City Environmental Control Board (NYCECB), pursuant to CPLR 3215 (a) and RPAPL 1321; (2) granting it summary judgment against defendants Titan Formwork Systems, LLC (Titan) and HD Supply Construction Supply, Ltd. (HD Supply), pursuant to CPLR 3212; (3) appointing a referee to ascertain and compute the amount due under the notes and mortgages and to determine whether the Properties should be sold in one or more parcels, pursuant to RPAPL 1321; and (4) amending the caption to delete the John Doe defendants.

### ***Background***

On February 28, 2020, BK commenced this commercial foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Properties. The complaint alleges that on or about June 8, 2017, the borrower, 1351 Dekalb, executed and delivered to S3 RE Funding II LLC (S3): (1) a Land Note in the principal amount of \$1,800,000.00, which was secured by a Mortgage and Assignment of Leases and Rents, and (2) a Building Loan Note in the principal amount of \$4,200,000.00, which was secured by a Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement (collectively, the Notes and Mortgages) (*see* complaint at ¶¶ 14-17). The complaint further alleges that:

“Pursuant to the Mortgages, the Borrower pledged and assigned to the mortgagee all of its estate, right, title and interest in and to the following real properties, and the improvements and chattel located thereon, in the County of Kings, State of New York: Parcel I: 1357 Dekalb Avenue, Brooklyn, New York (Block 3234, Lot 50); Parcel II: 1355 Dekalb Avenue, Brooklyn, New York (Block 3234, Lot 51); and Parcel III: 1351 Dekalb Avenue, Brooklyn, New York (Block 3234, Lot 52) . . .” (*id.* at ¶ 18).

The complaint alleges that the guarantor (Akopov) executed a guaranty of payment under the Notes and Mortgages on June 8, 2017 (*id.* at ¶ 22).

The complaint alleges that the original lender, S3, “assigned all of its right, title and interest in and to the Notes and Mortgages to BK . . .” pursuant to two separate assignments of mortgage each dated January 16, 2020 and “also executed and delivered to BK . . . an allonge with respect to each of the Notes” (*id.* at ¶¶ 19-20). The complaint alleges that “BK . . . is the sole, true, and lawful owner and holder of the Notes and the Mortgages . . .” (*id.* at ¶ 21). The complaint annexes copies of the Notes with the corresponding allonges, the Mortgages and the assignments.

The complaint alleges that the borrowers defaulted under the terms of the loan agreements and the Mortgages by failing to make the monthly interest payment due on July 1, 2019 (*id.* at ¶ 25). The complaint alleges that:

“[o]n or about August 1, 2019, the Borrower and Plaintiff’s predecessor-in-interest entered into a Forbearance Agreement (the ‘Forbearance Agreement’) pursuant to which the Borrower acknowledged the foregoing event of default and the mortgagee agreed to forbear from exercising its rights and remedies so long as the Borrower, *inter alia*, continued to make monthly interest payments due under the Notes and repaid the Loan in full by December 31, 2019” (*id.* at ¶ 26).

The complaint further alleges that the borrower “failed to make the monthly interest payment due under the Notes on December 1, 2019” (*id.* at ¶ 27).

On May 6, 2020, Titan answered the complaint and asserted affirmative defenses, including that “[p]laintiff’s rights sought to be enforced in the Complaint are not superior to, nor do they have priority over, the lien rights sought to be enforced by Titan” (Titan answer at 8). Titan asserts a cross claim against its codefendants and a counterclaim against BK to foreclose a \$36,057.38 mechanic’s lien.

On June 24, 2020, HD Supply answered the complaint, admitted that it filed a \$28,206.33 mechanic’s lien against the Properties but “denies that such lien is subject and subordinate to the lien of the Mortgages” (HD Supply answer at ¶ 2). HD Supply asserted affirmative defenses, including that “[p]laintiff’s alleged rights sought to be enforced in its Complaint are not superior to the lien of HD Supply” and “[s]hould HD Supply’s lien be found to be subject and subordinate to Plaintiff’s lien, HD Supply is entitled to any surplus monies which may exist” (*id.* at ¶¶ 7-8).

All of the other defendants, including the borrower (1351 Dekalb) and the guarantor (Akopov), failed to answer or otherwise respond to the complaint.

### ***BK’s Summary Judgment Motion***

BK now moves for summary judgment against Titan and HD Supply, an order of reference, a default judgment against all of the non-appearing defendants, including the borrower and guarantor, and other relief.

BK submits an affidavit from Ralph Dweck (Dweck), who vaguely attests that “I am authorized to submit this affidavit on behalf of the Plaintiff BK . . .” and that “[t]he facts and matters set forth in this affidavit are based upon my personal knowledge and/or my review of BK 38th Lender LLC’s business records [and] the business records of BK 38th Lender LLC’s predecessors-in-interest . . .” Dweck further attests that “[i]n the regular performance of my job functions, I am familiar with the business records maintained by BK . . . in its loan portfolio” which “includes all of the loan documents purchased from its predecessors-in-interest and all file documents that were formally in the possession of said predecessors-in-interest.” Notably, Dweck’s affidavit does not annex any of the business records upon which his affidavit testimony is based.

Dweck attests that BK seeks to foreclose the Mortgages against the Properties under which \$3,369,645.00 in principal is due and owing. Dweck describes the January 16, 2020 assignments of the Notes and Mortgages from S3 to BK. Dweck attests that “S3 . . . also executed and delivered to BK . . . an allonge with respect to each of the Notes [which] are annexed to the Complaint . . .” and “BK . . . is the sole, true, and lawful owner and holder of the Notes and the Mortgages . . .” Dweck attests that the guaranty was also assigned to BK. Dweck reiterates the events of default alleged in the complaint, including the borrower’s failure to comply with the terms of the forbearance agreement between S3 and the borrower. Copies of the loan documents, including the Notes with the attached allonges, the Mortgages, the guaranty and the forbearance agreement, are submitted with BK’s summary judgment motion.

### ***HD Supply's Opposition***

HD Supply, in opposition, submits an attorney affirmation arguing that “HD Supply’s mechanic’s lien is entitled to priority over Plaintiff’s building loan mortgage based on Plaintiff’s apparent failure to comply with Section 22 of the New York State Lien Law.”

### ***BK's Reply***

BK, in reply, argues that its moving papers conclusively established its right to summary judgment against the borrower and guarantor, since those parties failed to oppose BK’s summary judgment motion. In response to HD Supply’s opposition, BK submits another affidavit from Dweck and documentation regarding BK’s compliance with the Lien Law.

### ***Discussion***

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853



[1985]]. If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and *admissible evidence* of the borrower’s default (*see Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2017]). Where a plaintiff establishes prima facie entitlement to judgment, the burden then shifts to the defendant to raise a triable issue of fact as to a bona fide defense to the action (*CitiMortgage, Inc. v Guillermo*, 143 AD3d 852, 853 [2016]; *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467 [1997]).

Here, although BK submitted copies of the Notes, Mortgages, guaranty and the forbearance agreement between S3 and the borrower, it has not established its prima facie entitlement to summary judgment and an order of reference because it has failed to submit admissible proof of the borrowers’ default, as a matter of law. The Second Department has held that affidavit testimony regarding a borrower’s default based on a review of business records is inadmissible hearsay and lacks probative value if the business records themselves are not produced (*see Deutsche Bank National Trust*



*Company v Elshiekh*, 179 AD3d 1017, 1021 [2020]; *Bank of New York Mellon v Gordon*, 171 AD3d 197, 208-209 [2019]; *JPMorgan Chase Bank National Assoc. v Grennan*, 175 AD3d 1513, 1516-1517 [2019]). Dweck's affidavit testimony regarding the borrowers' default based on his review of unidentified business records is inadmissible because BK failed to produce the business records upon which Dweck's knowledge is based. In addition, Dweck relies on business records created by BK's predecessor, S3, including the forbearance agreement between S3 and the borrower, yet Dweck does not allege that he is personally familiar with S3's record-keeping practices and procedures, or that S3's records were incorporated into BK's records and routinely relied upon by BK in its business (see *Bank of New York Mellon v Gordon*, 171 AD3d at 209-210). Consequently, BK's motion for summary judgment, an order of reference and a default judgment are denied with leave to renew based on papers that provide a proper foundation. Accordingly, it is hereby

**ORDERED** that BK's motion (in mot. seq. two) is only granted to the extent that the caption is amended to delete the John Doe defendants, and the motion is otherwise denied with leave to renew.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE