

<b>VGM, LLC v ISY Realty, LLC</b>
2021 NY Slip Op 30749(U)
March 12, 2021
Supreme Court, Kings County
Docket Number: 504380/20
Judge: Lawrence S. Knipel
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At an IAS Term, Commercial Part 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 12<sup>th</sup> day of March, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

VGM, LLC,

Plaintiff,

- against -

ISY REALTY, LLC,  
SENYA'S FAMILY TRUST,  
BOARD OF MANAGERS OF 2752-2756 OCEAN AVENUE CONDOMINIUM,  
WL OCCUPATIONAL THERAPY SERVICES, P.C.,  
AYM PHYSICAL THERAPY, P.C., and  
"JOHN DOE NO. 1" through "JOHN DOE NO. 10" inclusive, the name  
of the last 10 defendants being fictitious, the true names of  
said defendants being unknown to the Plaintiff, it being intended to  
designate fee owners, tenants or occupants of the premises and/or  
persons or parties having or claiming an interest in or a lien upon  
the premises described in complaint,

Defendants.

DECISION AND ORDER

Index No. 504380/20

Mot. Seq. No. 2-4

The following e-filed papers read herein:

NYSCEF No.:

Notice of Motion/Cross Motion, Affirmation (Affidavit),  
and Exhibits Annexed \_\_\_\_\_

46-71; 37-45; 73; 74-76

Affirmation (Affidavit) in Opposition and Exhibits Annexed \_\_\_\_\_

82-92

Reply Affirmation (Affidavit) and Exhibits Annexed \_\_\_\_\_

94-95; 77-78

In this action to foreclose a purchase-money mortgage on a commercial condominium unit, the following motions and cross motion have been consolidated for disposition:

In Seq. No. 2, plaintiff VGM, LLC (VGM) moves for an order: (1) granting summary judgment on all causes of action in its complaint as against defendants ISY Realty, LLC and Senya's Family Trust (collectively, defendants); (2) striking defendants' affirmative defenses and dismissing their counterclaims; (3) entering a default judgment as against all non-appearing defendants; and (4) appointing a referee to compute the sums due to it.

In Seq. No. 3, defendants move for an order: (1) pursuant to CPLR 3126 (3), striking VGM's complaint for failure to comply with their Demand for Discovery and Inspection, dated Oct. 12, 2020 (the D&I demand); or, in the alternative (2) precluding VGM from

offering evidence at trial and/or on dispositive motions; and, in addition (3) sanctioning VGM for its failure to comply with the D&I demand.

In Seq. No. 4, VGM cross-moves for a protective order and sanctions.

### *Background*

On Nov. 7, 2008, defendant ISY Realty, LLC (ISY), purchased from VGM a commercial condominium unit (known as Unit No. 1) located at 2752 Ocean Avenue in Brooklyn (the condo unit).<sup>1</sup> As part of the purchase, ISY executed and delivered to VGM a promissory note in the principal amount of \$330,000 (the note) secured by the purchase-money mortgage on the condo unit (the mortgage). The note provided for monthly interest payments and matured in five years on Nov. 7, 2013 when the entire principal amount became due and owing. The terms of the note were expressly made subordinate to the terms of the mortgage which, in turn, exempted ISY from paying interest to VGM in the fourth and fifth year of the loan if, as happened to be the case here, VGM failed, by that time, to obtain a final certificate of occupancy (the CO) for the condo unit (*see* Mortgage Rider, § 3).

When the note matured on Nov. 7, 2013, VGM made no demand on ISY to pay the outstanding balance. As the final CO had not been obtained at the time of the maturity of the note, VGM continued taking steps toward obtaining the final CO.

On Nov. 14, 2014, ISY commenced an action in this court, under Index No. 510781/14, against VGM alleging, among other things, causes of action sounding in breach of contract and the ensuing loss of income to ISY resulting from VGM's failure to

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<sup>1</sup> The condo unit is and has always been used exclusively for commercial purposes. Codefendants WL Occupational Therapy Services, P.C., and AYM Physical Therapy, P.C. are the current tenants of the condo unit (*see* Affidavit of Olga Galkina, VGM's managing member, dated Dec. 23, 2020 [NYSCEF #49], ¶¶ 9, 19).

obtain the final CO (the 2014 action). After VGM joined issue, it moved for – and was granted – summary judgment dismissing the 2014 action (*see* Order, dated Apr. 6, 2017 [Bailey-Schiffman, J.], entered in the 2014 action). ISY's appeal from that order was dismissed by the Second Judicial Department for failure to perfect it (Appeal No. 2017-04056).

In August 2016, VGM obtained the final CO for the unit. At that time, the note indebtedness – at least in part – remained outstanding.

On Mar. 9, 2017, ISY conveyed the condo unit to codefendant Senya's Family Trust (the Trust) for no consideration (NYSCEF #55).

On Oct. 23, 2017, VGM commenced the first of what would eventually be three successive foreclosure actions. The first foreclosure action bearing Index No. 520513/17 (the 2017 action) was dismissed on defendants' motion for summary judgment. The order, dated Oct. 24, 2018 (Vaughan, J.), dismissing the 2017 action was expressly made "without prejudice."

On Dec. 6, 2018, VGM commenced the second foreclosure action under Index No. 524578/18 (the 2018 action). Initially, the Court (Vaughan, J.) denied VGM's and defendants' respective motions for summary judgment by order, dated June 5, 2019. Thereafter, VGM discontinued the 2018 action with court approval. The order, dated Jan. 24, 2020 (Knipel, J.), granting VGM's unopposed motion to discontinue the 2018 action was expressly made "without prejudice."

On Feb. 21, 2020, VGM commenced the instant (and by now the third) foreclosure action. After defendants' preanswer motion to dismiss was denied by decision and order, dated Sept. 28, 2020 (Knipel, J.), they interposed a joint answer with counterclaims to which

VGM subsequently replied. Following document discovery, the motions and cross motion sub judice were served.

### *Discussion*

#### *VGM's Motion For Summary Judgment And Other Relief (Seq. No. 2)*

Turning first to the consideration of VGM's motion for summary judgment and other relief, the Court notes that the crux of the parties' dispute is the amount of the outstanding indebtedness due and owing to VGM under the note. Regardless of how much VGM alleges it is owed under the note, ISY concedes in its opposition papers that it owes VGM at least \$66,138.88 under the note.<sup>2</sup> Further, the parties do not dispute that the note has matured. Nothing in the record indicates that the terms of the note and mortgage have been modified or extended in writing.

"[I]n moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" (*Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d 1001, 1002 [2d Dept 2015] [internal quotation marks omitted], *lv denied* 26 NY3d 917 [2016]). Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by the defendant, "it is incumbent upon the plaintiff to prove its standing to be entitled to relief" (*Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973, 973-974 [2d Dept 2014] [internal quotation marks omitted]).

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<sup>2</sup> See Defense Counsel's Affirmation in Opposition to Plaintiff's Motion for Summary Judgment, dated Jan. 22, 2021 (NYSCEF #82), ¶ 35 ("a true current balance of \$66,138.88" is owed under the note) (emphasis omitted); see also Affidavit in Opposition to Plaintiff's Motion for Summary Judgment, by Inna Yakhnis, a member of ISY and the trustee of the Trust, dated Jan. 22, 2021 (NYSCEF #83), ¶ 8 ("The [aforementioned] calculations contained in my attorney's [a]ffirmation are accurate and outline the true status of the mortgage payments and [the note] balance.").

Here, VGM has established its prima facie entitlement to judgment as a matter of law by producing copies of the unpaid note, the mortgage, and evidence of default (*see e.g. Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d at 1002). In addition, VGM has established, prima facie, that it had standing to commence this action by demonstrating that it was in physical possession of the note, which is annexed to the complaint, at the time the action was commenced (*see U.S. Bank N.A. v Seeley*, 177 AD3d 933, 935 [2d Dept 2019]). Likewise, the affidavit of VGM's managing member has established that VGM had physical possession of the note when it commenced this action<sup>3</sup> (*see Wells Fargo Bank, N.A. v Charlaff*, 134 AD3d 1099, 1100 [2d Dept 2015]; *see also HSBC Bank USA, N.A. v Nelson*, 190 AD3d 842, 843 [2d Dept 2021] ["the affidavit submitted in support of the plaintiff's motion for summary judgment, together with, inter alia, a copy of the note . . . , demonstrated, prima facie, that the plaintiff had physical possession of the note prior to the commencement of the action"]). Under the circumstances, production of the original note is not required (*see Deutsche Bank Natl. Tr. Co. v Auguste*, 185 AD3d 657, 658-659 [2d Dept 2020]).<sup>4</sup>

In opposition, defendants have failed to raise a triable issue of fact. "A dispute as to the exact amount owed by the mortgagor to the mortgagee may be resolved after a reference pursuant to RPAPL 1321, and the existence of such a dispute does not preclude the issuance

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<sup>3</sup> See Affidavit of Olga Galkina, VGM's managing member, dated Dec. 23, 2020 (NYSCEF #49), ¶ 18 ("Plaintiff [*i.e.*, VGM] has had physical possession of the original Note at all relevant times, including the date it commenced this action.").

<sup>4</sup> Cf. *Bayview Loan Servicing, LLC v Charleston*, 175 AD3d 1229, 1232 (2d Dept 2019) ("Supreme Court should have granted that branch of the defendant's motion which was pursuant to CPLR 3124 to compel the plaintiff to produce the original note" because "it cannot be ascertained from the copy of the note [annexed] by the plaintiff [to the complaint] whether the separate page that bears the endorsement in blank was stamped on the back of the note, as alleged by the plaintiff, or on an allonge, and if on an allonge, whether the allonge was 'so firmly affixed as to become a part thereof,' as required under UCC 3-202 [2]").

of summary judgment directing the sale of the mortgaged property” (*Crest/Good Mfg. Co., Inc. v Baumann*, 160 AD2d 831, 831-832 [2d Dept 1990]). Pursuant to CPLR 4311, “[a]n order of reference shall direct the referee to determine . . . specific issues, to report issues, to perform particular acts, or to receive and report evidence only.” In addition, an order of reference “may specify . . . the powers of the referee and the time for the filing of his [or her] report and may fix a time and place for the hearing.” Consequently, defendants’ fifth and seventh affirmative defenses, together with their second and third counterclaims, asserting that the note indebtedness is subject to various offsets in their favor, are preserved and will be considered in the first instance by the referee at a hearing.

Further, the dismissal of the 2017 action and the discontinuance of the 2018 action, which, in each instance, was “without prejudice,” lacked a necessary element of *res judicata* or collateral estoppel, in that such dismissal or discontinuance was not a final determination on the merits (see *Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 [2008]; *Brandenberg v Primus Assoc.*, 304 AD2d 694, 695 [2d Dept 2003]). Nor was Justice Vaughan’s order, dated June 5, 2019, a determination on the merits; to the contrary, this Court subsequently granted VGM’s unopposed motion to discontinue the 2018 action without prejudice. In contrast, defendants’ third affirmative defense (claiming breach of contract by VGM) was decided adversely against them in the 2014 action by final order, and their third affirmative defense is barred by the doctrines of *res judicata* and collateral estoppel. The Court has considered defendants’ remaining affirmative defenses, as well as their remaining counterclaims, and finds them to be without merit.

Accordingly, plaintiffs’ motion for summary judgment and other relief is granted to the extent set forth in the decretal paragraphs below.



*Defendants' Motion To Strike VGM's Complaint For Failure  
To Comply With Their D&I Demand And For Related Relief (Seq. No. 3)*

In opposition to plaintiff's motion and in support of their own motion, defendants urge the Court to strike VGM's complaint for failure to comply with their D&I demand and to award them related relief. In particular, defendants take issue with VGM's failure to produce: (1) the original note; (2) VGM's income-tax returns as well as those of its members from Nov. 7, 2008 through Nov. 1, 2018; and (3) VGM's bank statements reflecting its deposits of all mortgage and other payments made by ISY to VGM on account of the note indebtedness from Nov. 7, 2008 through Nov. 1, 2018. As stated above, the Court has ruled, in connection with defendants' opposition to VGM's summary judgment motion, that VGM need not produce the original note for inspection. With respect to the remaining items of requested discovery, defendants are not entitled to the production of VGM's and its members' respective income-tax returns; nor are they entitled to an examination of VGM's bank statements. The lender-borrower relationship between VGM and ISY (and, separately, between VGM and the Trust as ISY's transferee of the condo unit) does not entitle defendants to explore the inner workings of VGM's and its members' business operations. It is up to VGM, which bears the burden of proof on the issue of defendants' failure to make payments in accordance with the terms of the note and mortgage,<sup>5</sup> to determine which documents it may use at a hearing before the referee to prove the amounts it alleges defendants owe it under the note. Accordingly, defendants' motion to strike and for related relief is denied in its entirety.

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<sup>5</sup> See e.g. *Moezinia v Baroukhian*, 247 AD2d 452, 453 (2d Dept 1998).



*VGM's Cross Motion For A Protective Order And Sanctions (Seq. No. 4)*

To the extent that VGM's cross motion for a protective order and sanctions is not rendered moot by the Court's denial of defendants' motion to strike and for other relief, it is denied in the Court's discretion.

***Conclusion***

Accordingly, it is

ORDERED that VGM's motion in Seq. No. 2 for summary judgment and other relief is *granted to the extent, and as provided for*, in the long-form order to be issued in accordance with this decision and order; and it is further

ORDERED that defendants' motion in Seq. No. 3 to strike VGM's complaint and for other relief is denied in its entirety; and it is further

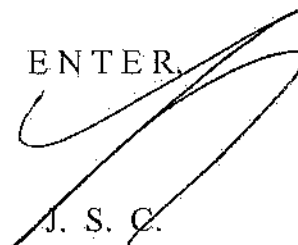
ORDERED that VGM's cross motion in Seq. No. 4 for a protective order and sanctions is denied in its entirety; and it is further

ORDERED that VGM's counsel shall electronically serve a copy of this decision and order with notice of entry on defendants' counsel and shall electronically file an affidavit of service thereof with the Kings County Clerk.

Settle long-form order on notice, fully and accurately reflecting the rulings made herein.

This constitutes the decision and order of the Court.

ENTER,



J. S. C.