

Majestic Crown NY LLC v Archstone Acquisition Partners LLC
2021 NY Slip Op 31627(U)
May 7, 2021
Supreme Court, Kings County
Docket Number: 501233/20
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 7th day of May, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

MAJESTIC CROWN NY LLC,

Plaintiff,

- against -

Index No. 501233/20

ARCHSTONE ACQUISITION PARTNERS LLC,
VIRA LYNN JONES, CAROL WONG, NEW YORK
CITY PARKING VIOLATIONS BUREAU, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY TRANSIT ADJUDICATION
BUREAU,

“JOHN DOE #1” through “JOHN DOE #12,”
The last twelve names being fictitious and
unknown to plaintiff, the persons or parties
intended being the tenants, occupants, persons
or corporations, if any, having or claiming an
interest in or lien upon the premises, described
in the complaint,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

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Upon the foregoing papers in this action to foreclose a mortgage on the commercial property at 130 Greene Avenue in Brooklyn (Block 196, Lot 38), a four-

family residential building (Property), defendants Archstone Acquisition Partners LLC (Archstone or borrower) and Vira Lynn Jones (Vira Jones or guarantor) (collectively, defendants) move (in motion sequence [mot. seq.] one) for an order: (1) granting an injunction enjoining plaintiff Majestic Crowns NY LLC (Majestic) or its agents from sending any notices pertaining to defendants' tenants regarding rent collection and from collecting any and all rents from the tenants or making any new lease at the Property; (2) staying the enforcement of the assignment of lease and rents in the mortgage until this action is determined; (3) directing that Majestic immediately vacate and rescind the rent notices served upon the tenants; and (4) directing Majestic to prepare and transmit to defendants a full and complete accounting of rents and profits, including, but not limited to, copies of all leases, rent rolls, status of payments, security deposits and other income remitted to Majestic, if any, as of October 8, 2020.

Majestic cross-moves (in mot. seq. two) for an order installing it as mortgagee in possession of the Property, pursuant to the terms of the mortgage. Majestic also moves (in mot. seq. three) for an order: (1) granting it summary judgment, pursuant to CPLR 3212; (2) striking Archstone and Vira Jones' answer with affirmative defenses and counterclaims; (3) striking the answer and affirmative defenses of defendant Carol Wong (Wong); (4) amending the caption to substitute Steven Heskett, "John" Wong, Phillip Jones, Donna Charging, Priyanka Katumuluma, Olivia Solomon and Ruma Lyce for the "John Doe" defendants and deleting the "John Doe" defendants from the caption; (5)

granting it a default judgment against all non-appearing and non-answering defendants, pursuant to CPLR 3215 (a); (6) appointing a referee to ascertain and compute the amount due to Majestic on the note and mortgage and to report whether the Property can be sold in one or more parcels; and (7) awarding Majestic the costs of this motion.

Background

On January 16, 2020, Majestic commenced this commercial foreclosure action by filing a summons, a verified complaint and a notice of pendency against the Property. The complaint alleges that on August 21, 2019, Archstone executed a \$2,100,000.00 note in favor of Majestic, which was secured by a mortgage on the Property. The complaint alleges that Archstone defaulted under the terms of the note and mortgage by failing to make the initial interest payment due on October 1, 2019, and each month thereafter. The complaint also alleges that Vira Jones executed a guaranty of the loan. The complaint further alleges that:

“The following amount is now due and owing on said Note, Mortgage and Guaranty, no part of any of which has been paid:

Principal Balance: \$2,100,000.00

Interest thereon from September 1, 2019”
(complaint at ¶ 13).

According to the note and mortgage annexed to the complaint, monthly payments of interest only were initially due on October 1, 2019 and were to continue monthly until August 20, 2020, the maturity date of the loan, at which time the principal and all accrued

interest was due and payable. Notably, the mortgage included: (1) an assignment of lease and rents in Article II, Section 2.14 (a), as additional security for the loan, and (2) a provision in Article III, Section 3.05, granting the Mortgagee possession of the Property.

On February 27, 2020, defendants Archstone and Vira Jones collectively answered the complaint and asserted 21 affirmative defenses, including lack of standing, usury and failure to meet conditions precedent. Archstone and Vira Jones also asserted a counterclaim alleging that “Plaintiff committed fraud by intentionally obviating the usury law in an attempt to be unjustly enriched at the expense of Defendant” (answer at ¶ 121).

Defendants’ Motion for Injunctive Relief

Archstone and Vira Jones now move for an injunction preventing Majestic from collecting rents from their tenants at the Property, pursuant to the assignment of lease and rents in Article II, Section 2.14 (a) of the mortgage. Defense counsel asserts that on October 8, 2020, Majestic’s counsel “served a notice advising the Defendants’ tenants to remit any and all rents directly to [Majestic]” and that this “notice is highly prejudicial to their efforts to collect rents and maintain control over the premises should a settlement be reached.” Defense counsel further asserts that Majestic’s collection of rents “will remove Defendant Vira Lynn Jones’ only source of income and irreparably injure the Defendant[s] who have suffered greatly from the COVID-19 pandemic.” Essentially, defendants argue that the court should issue “a stay of the enforcement of the Assignment of Lease[s] and Rents . . .” to preserve the status quo until this foreclosure action is

determined on the merits.

***Majestic's Opposition, Cross Motion and Motion
for Summary Judgment and an Order of Reference***

Majestic opposes defendants' motion for injunctive relief and cross-moves for an order installing it as mortgagee in possession of the Property, pursuant to Sections 2.14 (a) and 3.05 of the mortgage. Majestic argues that:

"The Mortgage explicitly grants the lender authority to enter upon and take possession of the Premises and to manage and operate the Premises upon an event of default thereunder. **See Exhibit C** at Section 2.14 (a) and 3.05. The Defendant failed to pay the monthly installments of principal and interest due and owing on October 1, 2019, and each and every subsequent month thereafter, together with unpaid late charges, property taxes, and other fees and charges.

"The Mortgage explicitly grants the lender authority to enter upon and take possession of the Premises and to manage and operate the Premises upon an event of default thereunder. **See Exhibit C** at Section 2.14 (a).

"The principals of Plaintiff have twenty five years experience managing real property and have the contractual right to manage the subject Premises pursuant to the terms of the Mortgage. **See Exhibits C** at Sections 2.14 (a) and 3.05. As such, Plaintiff respectfully requests that this Court install Plaintiff as mortgagee in possession of the Premises."

Majestic notes that defendants' motion for an injunction "fails to cite a single reason why the terms of the contract entered into between the parties should not be enforced as agreed upon."

Majestic also moves for summary judgment, an order of reference, a default

judgment against the non-appearing defendants and other relief. Majestic submits an affidavit from Yehuda Cohen (Cohen), a member of Majestic, who attests that Majestic seeks to foreclose on the \$2.1 million commercial mortgage against the Property, which secures payment under an August 21, 2019 note executed in favor of Majestic. Cohen attests that Majestic “is currently the holder of the Note and Mortgage, has always been the holder and owner of the Note and Mortgage, and therefore, [Majestic] had standing when it commenced this foreclosure action and [Majestic] has standing to proceed with this foreclosure action.” Regarding Majestic, Cohen attests that:

“Plaintiff is a New York limited liability company having been formed on February 21, 2018 as set forth in the NYS Department of State, Division of Corporation printout annexed hereto as **Exhibit K**. Plaintiff is an active domestic limited liability company in the State of New York and is authorized to use the Courts of this State.”

Notably, however, the printout from the NYS Department of State annexed to Majestic’s moving papers as Exhibit K is for “Majestic Crown Inc.” and not “Majestic Crown NY LLC,” the plaintiff herein.

Cohen further attests that “Borrower defaulted under the terms of the Note and Mortgage by failing and omitting to pay the interest payment due on October 1, 2019 and each month thereafter” and “[t]here is now due and payable the unpaid principal balance of \$2,100,000.00 with interest thereon from September 1, 2019.” Regarding Vira Jones, the guarantor, Cohen attests that:

“On or about August 21, 2019, Vira Lynn Jones (‘Jones’), on

behalf of the Borrower duly executed and delivered to Plaintiff an Affidavit of Confession of Judgment (the 'Judgment') whereby Jones admitted to the terms of the Note given to Plaintiff and consent[ed] to the entry of the Judgment in the event of a default on the Note and Mortgage."

Cohen attests that "Plaintiff has complied with all conditions precedent contained in the Mortgage, if any." Majestic submits copies of the loan documents and the guaranty. Notably, however, Cohen does not annex any of the business records upon which his affidavit testimony is based.

Defendants' Opposition

Defendants, in opposition, submit an affidavit from Vira Jones, who attests that she is the owner of Archstone, the limited liability company that owns the Property. Vira Jones attests that "[o]n January 16, 2020, the . . . Plaintiff commenced a foreclosure action against the subject property, without serving me with any default notice, in person or via mail[.]" as required by Sections 3.01 (a) (iii), 3.01 (c) (i) and 4.02 of the mortgage.

Regarding the default notice, Vira Jones asserts that:

"I also did not receive any default notice ('notice') from the Plaintiff or its agents. I have made a diligent search throughout all my records and was unable to find any notice from the servicer or the Plaintiff. It is my testimony that Plaintiff did not serve the notice in person or by first class mail or certified mail. I have received other mail[] pertaining to other matter[s], but none for the above issues. I have reviewed the Plaintiff's papers and no proof of mailing nor certified mail receipt accompanied its motion papers. It is also my testimony that I did not sign any return receipt."

Defense counsel notes that Majestic's summary judgment motion does not include any

legal proof that a default notice was mailed and argues that this presents an issue of fact that precludes summary judgment.

Vira Jones further claims that “Plaintiff lacks the legal capacity to institute this action as Plaintiff is not registered to conduct business in the State of New York or paid the applicable taxes, nor did Plaintiff receive a license duly issued by the superintendent.” Defense counsel notes that “Cohen submitted a purported document that appears to be from the New York Department of State pertaining to a Majestic Crown, Inc., which is a different entity than the Plaintiff (Majestic Cown NY LLC) in this action (*see* NYSCEF Doc. 65)” and also asserts that “the statements being offered by Cohen’s Affidavit itself, cannot be viewed as legitimate absent any POA to establish that Yehuda Cohen has the authority to act on behalf of the Plaintiff.”

Vira Jones claims that “Plaintiff also did not make an affirmative statement that it elected to accelerate the entire amount allegedly owed [in the complaint]. Therefore, the loan is not accelerated.” Defense counsel argues that other than Cohen’s affidavit testimony, “the record is barren of any evidence that the Defendants were in default pursuant to the Note and Mortgage.” In addition, defense counsel contends that Majestic filed its summary judgment motion prior to any discovery, and thus, Majestic’s summary judgment motion should be denied pursuant to CPLR 3212 (f).

Majestic’s Reply

Majestic’s counsel, in reply, explains that he “mistakenly annexed the coversheet

for a similar entity” to Majestic’s moving papers, and submits a NYS Department of State printout reflecting that Majestic Crown NY LLC is an active and authorized New York limited liability company.

Majestic also contends that it was not required to send Archstone or Vira Jones a notice of default under the express terms of the mortgage. Majestic relies upon Section 3.01 (I), which explicitly provides that:

“I. During the continuance of any such Event of Default the Mortgagee, *without giving notice to the Mortgagor*, may declare the entire principal of the Note then outstanding (if not then due and payable), and all accrued and unpaid interest thereon together with all other Indebtedness, to be due and payable immediately, and upon any such declaration the principal of the Note, such accrued and unpaid interest thereon and all other Indebtedness shall become and be immediately due and payable, anything in the Note, in this Mortgage or in any of the other Loan Documents to the contrary notwithstanding” (emphasis added).

Majestic’s counsel asserts that “the Mortgage, clearly sets forth that upon a payment default . . . no notice requirement is necessary to accelerate the loan.” Majestic’s counsel also asserts that Majestic specifically declared the loan to be due in paragraph 13 of the complaint, which alleges that “[t]he following amount is now due and owing on said Note, Mortgage and Guaranty, no part of any of which has been paid: \$2,100,000.00 and interest thereon from September 1, 2019.”

Finally, Majestic’s counsel explains that there is no issue regarding Majestic’s standing since “Plaintiff has been and continues to be the originator and holder of the

Note and Mortgage” and “[t]here have been no assignments of the Note and Mortgage as Plaintiff is the only party that has held the Note and Mortgage.”

Discussion

(I)

Defendants’ Motion for Injunctive Relief

Defendants seek to stay the enforcement of the assignment of leases and rents in the mortgage and enjoin Majestic from sending notices to defendants’ tenants at the Property or collecting rent from the tenants at the Property. However, Article II, Section 2.14 (a), of the mortgage, entitled “Leases; Assignments of Rents,” explicitly provides, in relevant part, that:

“(a) Mortgagor . . . hereby assigns to Mortgagee the rents, issues and profits, now or hereafter accruing or becoming due of the Mortgaged Property as further security for the payment of the Indebtedness, and Mortgagor grants to Mortgagee the right to enter upon the Mortgaged Property for the purpose of collecting the same and to let the Mortgaged Property or any part thereof and, at Mortgagee’s option, to apply the rents, issues and profits, after payment of all necessary charges and expenses, on account of the Indebtedness. *This assignment and grant shall continue in effect until this Mortgage is paid.* Mortgagee, by accepting this Mortgage, hereby waives and grants to Mortgagor, the right to enter upon the Mortgaged Property for the purposes of collecting said rents, issue and profits until the occurrence of an Event of Default under this Mortgage or in any of the other Loan Documents. Mortgagor agrees to use such rents, issues and profits in payment of insurance premiums, taxes, assessments, sewer rents, water rates and carrying charges due and to become due against the Mortgaged Property and in payment of the Indebtedness. *The right of Mortgagor to enter upon the Mortgaged Property for*

the purposes of collecting said rents, issues and profits may be revoked by Mortgagee at any time after the occurrence of any Event of Default. Mortgagor will not, without the written consent of Mortgagee, receive or collect rent from any tenant or subtenant of the Mortgaged Property or any part thereof for a period of more than one (1) month in advance and no payment of rent by any tenant or subtenant of the Mortgaged Property or any part thereof for a period of more than one (1) month in advance shall discharge such tenant or subtenant unless Mortgagee has given such written consent to such payment. Mortgagor shall not enter into any non-residential Lease without the express written consent of Mortgagee, which consent shall not be unreasonably withheld or delayed” (emphasis added).

Majestic correctly argues that the assignment of rents in the recorded mortgage is an enforceable contract right entitling it to the rental income as additional security for the \$2.1 million loan. Defendants have failed to establish that there are any extraordinary circumstances warranting a stay of the assignment of leases of rents, which is contrary to the express terms of the mortgage. However, as a matter of equity, defendants are entitled to an accounting of the rental income that Majestic has collected from the tenants at the Property, including copies of leases, rent rolls, status of payments and security deposits, if any, as of October 8, 2020.

(2)

Majestic’s Cross Motion and Summary Judgment Motion

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 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 the issue of standing is raised by a defendant, a plaintiff must also establish its standing as part of its prima facie case (see *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d at 726; *Security Lending, Ltd. v New Realty Corp.*, 142 AD3d 986, 987 [2016]; *LGF Holdings, LLC v Skydel*, 139 AD3d 814, 814 [2016]). When 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]).

Although Majestic submitted copies of the note, mortgage and the guaranty, it has not established its prima facie entitlement to summary judgment and an order of reference because it failed to submit admissible proof of Archstone's payment 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]). Cohen's affidavit testimony regarding Archstone's payment default based on his review of unidentified business records is inadmissible because Majestic failed to produce the business records upon which Cohen's knowledge is based. Consequently, Majestic'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.

However, Majestic's cross motion for possession of the Property is granted without opposition. Article III, Section 3.05, of the mortgage, entitled "Mortgagee's Right to Retain Possession of Mortgaged Property," expressly provides that:

“Notwithstanding the appointment of any receiver, liquidator or trustee of the Mortgagor, or of any of its property, or of the Mortgaged Property or any part thereof, the Mortgagee shall be entitled to retain possession and control of all property now or hereafter held by the Mortgagee under this Mortgage.

Under the express terms of Sections 2.14 (a) and 3.05 of the mortgage, Majestic, as mortgagee, is entitled to possession of the Property. Accordingly, it is hereby

ORDERED that defendants’ motion (mot. seq. one) is only granted to the extent that Majestic shall provide defendants with an accounting of the rental income that it has collected from the tenants at the Property, including copies of all leases, rent rolls, status of payments and security deposits, if any, as of October 8, 2020, and the motion is otherwise denied; and it is further

ORDERED that Majestic’s cross motion (mot. seq. two) is granted, pursuant to Article II, Section 2.14 (a) and Article III, Section 3.05 of the mortgage; and it is further

ORDERED that Majestic’s motion (mot. seq. three) is only granted to the extent that Steven Heskett, “John” Wong, Phillip Jones, Donna Charging, Priyanka Katumuluma, Olivia Solomon and Ruma Lyce are substituted for the “John Doe” defendants and the caption is amended to delete the “John Doe” defendants; Majestic’s motion is otherwise denied with leave to renew based on papers that provide a proper foundation; and it is further

ORDERED that the caption shall hereinafter read:

-----X.
MAJESTIC CROWN NY LLC,

Plaintiff,

- against -

ARCHSTONE ACQUISITION PARTNERS LLC,
VIRA LYNN JONES, CAROL WONG, NEW YORK
CITY PARKING VIOLATIONS BUREAU, NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY TRANSIT ADJUDICATION
BUREAU, STEVEN HESKETT, "JOHN" WONG,
PHILLIP JONES, DONNA CHARGING, PRIYANKA
KATUMULUMA, OLIVIA SOLOMON and RUMA
LYCE,

Defendants.

-----X.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.
HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE