

U.S. Bank N.A. v Clarke

2024 NY Slip Op 32198(U)

June 26, 2024

Supreme Court, Kings County

Docket Number: Index No. 505805/2016

Judge: Derefim B. Neckles

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.

At an IAS Term, Part FRP-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, 11201 on the 26th day of June, 2024.

P R E S E N T:

HON. DEREKIM B. NECKLES,
Acting Justice.

-----X
U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR THE LEHMAN BROTHERS
SMALL BALANCE COMMERCIAL
MORTGAGES PASS-THROUGH
CERTIFICATES, SERIES 2007-3.

Plaintiff,

- against -

Index No. 505805/2016

DONOVAN CLARKE; THE BROOKLYN
UNION GAS COMPANY; WINSTONE A.
MAYNARD; NEW YORK CITY PARKING
VIOLATIONS BUREAU; NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD;
NEW YORK CITY FIRE DEPARTMENT;
NEW YORK CITY DEPARTMENT OF
HOUSING PRESERVATION AND
DEVELOPMENT; NEW YORK CITY
DEPARTMENT OF FINANCE,

Defendants.

-----X

<u>The following e-filed papers read herein:</u>	<u>NYSCEF Doc Nos.</u>
Notice of Motion/Affidavits (Affirmations)	<u>156-164</u>
Affirmation in Opposition	<u>165-166</u>
Reply Affirmation	<u>167</u>

Upon the foregoing papers in this proceeding for an order confirming the Referee's Report, granting a Default Judgment, and issuing a Judgment of Foreclosure and Sale, plaintiff, moves (under mot. seq. 5) for the aforementioned relief.

Background

This is an action to foreclose a commercial mortgage on the property located at 228 Utica Avenue, Brooklyn, NY 11213. The action was commenced on April 13, 2016. All defendants were duly served, and most defaulted except Donovan Clarke and the NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT. Summary judgment was granted in favor of the plaintiff on June 12, 2017, and an Order of Reference was entered on December 26, 2017. The referee held a hearing on February 15, 2023, where the parties stipulated to the amounts due and owing.

Discussion

The law governing this matter is primarily found in RPAPL §§ 1321, 1351, and 1354, which cover the procedures for foreclosure and the distribution of sale proceeds. Additionally, CPLR §2001 allows courts to disregard minor procedural errors that do not prejudice the substantial rights of a party.

The plaintiff's motion was properly filed despite the inclusion of the words "Default Judgment" in the caption. This minor irregularity does not affect any substantial right of the defendant and is therefore disregarded under CPLR §2001. The core of the defendant's opposition is the assertion that there was no default judgment, and the motion should be dismissed. However, this contention is misplaced as the motion seeks to confirm the referee's report and proceed with the foreclosure matter, which is consistent with the previously granted summary judgment.

With respect to the attorneys' fees, the stipulation between the parties clearly stated that the agreed-upon amount was "exclusive of Plaintiff's attorney's fees" and that Plaintiff reserved the right to apply for these fees in the motion to confirm the Referee's Report. Plaintiff has exercised his right and provided detailed billing records and an affidavit supporting the request for attorneys' fees. Defendant's opposition lacks substantive arguments to contest plaintiff's motion, relying instead on unsupported and conclusory statements.

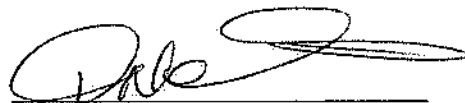
Moreover, the defendant's opposition relies on an attorney's affirmation without any affidavit from a person with firsthand knowledge of the facts. According to precedent, as illustrated in *United Specialty Insurance v. Columbia Casualty Company*, 186 A.D.3d 650 (2d Dept. 2020), attorney affirmations without direct knowledge of the facts lacks probative value and is insufficient to raise triable issues. Similarly, *OneWest Bank, FSB v. Yvette Michel*, 143 A.D.3d 869 (2d Dept. 2016), underscores that such affirmations, when not corroborated by factual affidavits, fail to meet the threshold necessary to oppose summary judgment or similar motions effectively. Consequently, the defendant's opposition, lacking affidavits from knowledgeable individuals, does not provide a substantive challenge to the plaintiff's claims and thus does not merit consideration for altering the outcome of this proceeding.

Accordingly, it is

ORDERED that Plaintiff's motion for judgment of foreclosure and sale is granted in its entirety.

This constitutes the decision and order of the court.

E N T E R,



HON. DEREFIM B. NECKLES
A. J. S. C.

HON. DEREFIM B. NECKLES
A.J.S.C.