

HSBC Bank USA v Forde
2016 NY Slip Op 32084(U)
August 3, 2016
Supreme Court, Queens County
Docket Number: 11421/2013
Judge: David Elliot
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

HSBC BANK USA, etc.,
Plaintiff(s),

Index
No. 11421 2013

- against -

Motion
Date June 6, 2016

DARLENE FORDE, et al.,
Defendant(s).

Motion
Cal No. 85

Motion
Seq. No. 1

Conference
Date July 12, 2016

The following papers read on this motion by plaintiff for an order, inter alia, granting summary judgment in its favor and against defendant Darlene Forde (defendant), dismissing her defenses and counterclaims, and appointing a referee to compute.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	1-5
Answering Affirmation - Exhibits.....	6-7
Reply.....	8-10
Post-Conference Submissions.....	11-13

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action on June 13, 2013 to foreclose a modified mortgage on the real property known as 130-45 226th Street, Laurelton, New York, given by defendant as security for the payment of a note in favor of plaintiff's predecessor, First National Bank of Arizona, evidencing an indebtedness in the principal amount of \$360,800.00, plus interest. The loan was modified on June 29, 2009. In the complaint, plaintiff alleges that it is the owner and holder of the note and mortgage, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the note and mortgage. It also alleges that defendant defaulted under the mortgage by failing to pay the monthly payments due thereunder and, accordingly, plaintiff elected to accelerate the mortgage debt.

Defendant served an answer with affirmative defenses and one counterclaim. The remaining defendants, including Ms. Forde, s/h/a defendant "John Doe," have failed to answer or otherwise appear herein.

The court initially set down the motion for conference to be held on July 12, 2016, as there were issues with the execution of both defendant's and plaintiff's opposition to the motion and reply thereto, respectively. The court received plaintiff's properly executed reply, and defendant, by order dated July 25, 2016, was given one final opportunity to submit her opposition in admissible form. The court received defendant's properly executed reply. As such, the motion shall be considered as fully submitted with both opposition and reply.

Defendant opposes the motion on several grounds, including on the ground that plaintiff failed to meet its prima facie burden of establishing its compliance with RPAPL § 1304.

It is well established that the proponent of a summary judgment motion "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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). In a residential mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see Midfirst Bank v Agho*, 121 AD3d 343 [2014]). In addition, plaintiff must make a prima facie showing of strict compliance with RPAPL § 1304, which is a condition precedent to the commencement of the foreclosure action (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Initially, it is noted that, while defendant does not specifically raise non-compliance with RPAPL § 1304 as an affirmative defense in her answer, she raises the issue in

opposition to the motion. It is noted that defendant is entitled to raise this defense, albeit in opposition to the motion, since it may be raised at any time prior to judgment (*see e.g. First Natl. Bank of Chicago v Silver*, 73 AD3d 162 [2010]; *Citimortgage, Inc. v Pemberton*, 39 Misc 3d 454 [Sup Ct., Suffolk Co 2013] [failure to comply with statutory conditions precedent may be raised at any time during the action by a non-defaulting defendant provided no judgment has been entered]; *cf. PHH Mortg. Corp. v Celestin*, 130 AD3d 703 [2015] [defendant precluded from raising RPAPL § 1304 defense since he was not entitled to an order vacating his default pursuant to CPLR 5015 [a]).

Though, on its motion, plaintiff has produced the note, mortgage, modification agreement, and evidence of defendant's default, plaintiff has failed to meet its burden of establishing that it strictly complied with RPAPL § 1304. Plaintiff submits an affidavit dated April 8, 2016 of Michael Ward, Second Assistant Vice President of Specialized Loan Servicing LLC, the servicing agent to plaintiff, wherein which he certifies and affirms that, in accordance with RPAPL § 1304, a 90-day pre-foreclosure notice was sent to defendant via first class and certified mail to the property address on August 15, 2012. Mr. Ward also states that a copy of the notice and the affiliated certified mailing receipt is attached.¹

As plaintiff has failed to submit an affidavit of service evincing that it properly served defendant with the requisite notice, it is not entitled to summary judgment on its complaint (*see Bank of New York Mellon v Aquino*, 131 AD3d 1186 [2015]; *Wells Fargo Bank, N.A. v Moza*, 129 AD3d 946 [2015]; *Flagstar Bank, FSB v Anderson*, 129 AD3d 65 [2015]; *Deutsche Bank Natl. Trust Co.*, 102 AD3d at 910). Further, Mr. Ward's affidavit does not constitute proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see Citimortgage v Espinal*, 134 AD3d 876 [2015]; *Frankel v Citicorp Ins. Services, Inc.*, 80 AD3d 280 [2010]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2001]; *Smith v Palmeri*, 103 AD2d 739 [1984]; *see also Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP*, 129 AD3d 790 [2015]; *Wells Fargo Bank, N.A. v Tessler*, 2016 NY Misc LEXIS 636 [Sup Ct, Kings County 2016]). It is also noted that, though Mr. Ward states that a certified mailing receipt was attached, none was provided to the court. Finally, plaintiff does not attempt to cure these deficiencies by submitting another affidavit in reply to defendant's opposition. In light of the above, plaintiff is not entitled to summary judgment on its complaint.

1. To the extent defendant challenges the form of Mr. Ward's affidavit, his affidavit is sufficient to demonstrate that the affiant knew he was making a declaration to tell the truth, for purposes of CPLR 2309 (b).

As far as the remaining branch of the motion seeking dismissal of defendant's affirmative defenses and counterclaim, plaintiff has established, without opposition specifically with regard to same, that those defenses and counterclaim are without merit as a matter of law.

With respect to that branch of the motion for an order deeming non-answering defendants in default and granting an amendment of the caption, same is granted. The caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

HSBC BANK USA, NATIONAL ASSOCIATION AS
TRUSTEE FOR MERRILL LYNCH MORTGAGE
INVESTORS, INC., MORTGAGE PASS-THROUGH
CERTIFICATES, MANA SERIES 2007-AI,
Plaintiff,

-against-

DARLENE FORDE, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. AS NOMINEE
FOR ALLIANCE MORTGAGE BANKING CORP.,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY TRANSIT
ADJUDICATION BUREAU, MS. FORDE,
Defendants.

As far as the remaining points raised in opposition to the motion, they need not be addressed, as academic, in light of the above finding. However, it should be noted that, to the extent defendant challenges plaintiff's standing in her opposition papers, she is not entitled to do so inasmuch as she waived this defense by failing to raise it in her answer or in a timely motion to dismiss on that ground (*see South Point, Inc. v Rana*, 139 AD3d 935[2016]; *One West Bank, FSB v Vanderhorst*, 131 AD3d 1028 [2015]).

Accordingly, those branches of plaintiff's motion for an order granting it summary judgment against defendant Darlene Forde for the relief demanded in the complaint, treating her answer as a Notice of Appearance, and appointing a referee to compute are denied. The branch of the motion for judgment by default against the remaining defendants is granted to

the extent that those defendants are deemed in default in answering or otherwise appearing herein. The branch of the motion for an order amending the caption is granted as noted above.

Dated: August 3, 2016

J.S.C.