

**U.S. Bank N.A. v Sacher**

2007 NY Slip Op 33505(U)

October 24, 2007

Supreme Court, New York County

Docket Number: 0108546/2007

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. PAUL G. FEINMAN

PART 52

P Index Number : 108546/2007

US BANK NATIONAL ASSOCIATION

vs  
SACHER, ROBERT P.

Sequence Number : 001

APPT/REF COMPUTE EXAMINE ACCT [AREA]

INDEX NO.

108546/2007

MOTION DATE

9-20-07

MOTION SEQ. NO.

001

MOTION CAL. NO.

139

The following papers, numbered 1 to \_\_\_\_\_ were read \_\_\_\_\_ motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ANNEXED DECISION AND ORDER.**

**FILED**  
OCT 29 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

Dated: 10-24-07

*SHF*

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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U.S. BANK NATIONAL ASSOCIATION, AS  
TRUSTEE ON BEHALF OF THE HOLDERS OF THE  
CSMC MORTGAGE BACKED PASS-THROUGH  
CERTIFICATES, SERIES 2007-1  
C/O Select Portfolio Servicing, Inc.  
3815 Southwest Temple  
Salt Lake City, UT 84115,  
Plaintiff,

Index Number 108546/2007  
Mot. Seq. No. 001  
Submission Date Sept. 20, 2007  
Cal. No. 139

**DECISION AND ORDER**

- against -

ROBERT P. SACHER A/K/A ROBERT SACHER,  
SUSAN SACHER, BOARD OF MANAGERS OF  
175 EAST SECOND STREET CONDOMINIUM,  
GREENPOINT MORTGAGE CORP., MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, INC.  
AS NOMINEE FOR WALL STREET MORTGAGE  
BANKERS LTD. D/B/A POWER EXPRESS, NEW  
YORK CITY ENVIRONMENTAL CONTROL  
BOARD, NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU, NORTH FORK BANK,

JOHN DOE (Said name being fictitious, it being the  
intention of Plaintiff to designate any and all  
occupants of premises being foreclosed herein, and  
any parties, corporations or entities, if any, having  
or claiming an interest or lien upon the mortgaged  
premises.),

Defendants.

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**For the Plaintiff:**  
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**For the Defendant:**  
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Gaffin & Mayo, P.C.  
225 Broadway, Suite 2510  
New York NY 10007  
212-962-5757

Papers considered in review of this motion for summary judgment and order of reference:

**Papers** **Numbered**  
Notice of Motion and Affidavits Annexed..... 1

**PAUL G. FEINMAN, J.:**

Plaintiff, the servicer for U.S. Bank National Association, moves for summary judgment pursuant to CPLR 3212, for dismissal of the answer pursuant to CPLR 3211, for permission to treat the answer as a limited notice of appearance in order to serve notices on defendants Robert Sacher and Susan Sacher's attorney, for appointment of a referee, to amend the caption to delete the "John Doe," and for a default judgment as against the non-answering parties pursuant to CPLR 3215 (a). For the reasons which follow, the motion is granted in part and denied in part.

This action was commenced to foreclose on a mortgage executed by defendants Robert Sacher and Susan Sacher ("Sacher defendants"), dated October 5, 2006, recorded in the office of the Clerk of the County of New York on November 2, 2006 (Not. of Mot. Ex. E). According to the Note executed on October 5, 2006, the Sacher defendants agreed to begin their monthly repayments as of December 1, 2006 and to make payments for a period of 30 years at an interest rate of 7.25 percent per year (Not. of Mot. Ex. C). The Lender was Wall Street Mortgage Bankers Ltd., d/b/a Power Express, which was given the power to transfer the Note to another holder. According to the Note, the Sacher defendants would be considered in default if they failed to timely pay the amount due each month, and if they were in default, they would be assessed a late charge of 2 percent of the overdue payment of principal and interest, and the Note Holder had the right to send a written notice demanding the overdue amount by a date at least 30 days from the date on which the notice was mailed, and upon failure to receive the requested amount on that date, then could require them to pay the full amount of the unpaid principal with interest (Not of Mot. Ex. C, Note at para. 6). Notice to the defendants was by delivery or

mailing by first class mail to the property address unless they provided another address. The Note Holder was given the right to seek costs and expenses incurred in enforcing the note, including attorneys' fees.

The mortgage agreement further included the covenants that if the lender properly demanded payment in full and defendants did not pay, the lender could bring a lawsuit to foreclose and sell, and could seek all costs and disbursements and reasonable attorneys' fees (Not. of Mot. Ex. E, Mortgage, para. 22).

By letter dated February 21, 2007, defendant Select Portfolio Servicing, Inc. contacted defendants at 361 Metropolitan Avenue, Brooklyn, New York, notifying them that their monthly payment due on February 1, 2007 was not received, that a late fee would be assessed, and asking them to contact the company as concerns the loan (Not. of Mot. Ex. D).<sup>1</sup>

On March 20, 2007, defendant issued a Demand Letter - Notice of Default to both defendants, at the Brooklyn address, stating that the February and March 2007 payments were not received, that late charges were being assessed and that the default could be cured upon payment of the amounts then due, within 30 days, and complying with any other agreements at issue (Not. of Mot. Ex. D). On April 17, 2007, a second Demand Letter - Notice of Default was mailed to both defendants, stating that the March and April 2007 payments were not received and setting forth the same information concerning curing the default (Not. of Mot. Ex. D).

Notice was filed in Supreme Court, on June 20, 2007 concerning the pendency of this

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<sup>1</sup>Defendants have included what appear to be copies of the mailing labels for this set of letters, and those subsequent, appearing to show that the two letters were contained in one envelope, and mailed to both defendants at the property's address in New York, New York. There are no easily identifiable dates of mailing (Not. of Mot. Ex. D).

action (Not. of Mot. Ex. G). Included was a description of the property as set forth by Prime Title Search, LLC (Schedule A).

On June 27, 2007, the Title Officer at Prime Title, a Title Search Company, signed an affidavit that she conducted a title search on the property in question and that Power Express had assigned the mortgage to US Bank National Association, as trustee, on behalf of the holders of the CSMC Mortgage-Back pass-Through Certificates, Series 2007-1 (Not. of Mot. Ex. F). Although the affidavit mentions an attached true copy of the original assignment, it is not included in plaintiff's papers.

Plaintiffs commenced this action by filing a summons and complaint on June 20, 2007 (Not. of Mot. Ex. H). The complaint contains two causes of action. The first concerns the outstanding balance due on the mortgage and seeks foreclosure and sale. The second alleges that Greenpoint Mortgage Corp., and North Fork Bank, have mortgages, recorded on April 14, 1999 and June 26, 2003, respectively, which are open and adverse to the plaintiffs' interest, and the complaint seeks to have them declared invalid and extinguished pursuant to RPAPL Article 15.

According to the affidavits of service, on June 25, 2007, the summons and complaint was served personally on Robert Sacher at 361 Metropolitan Avenue, in Brooklyn and copies were served upon Susan Sacher by service upon Robert Sacher, after which on June 27, 2007, copies were mailed to Susan Sacher by first class mail, at the Brooklyn address, along with a copy of the RPAPL 1303 Homeowner's Foreclosure Notice (Not. of Mot. Ex. I).<sup>2</sup>

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<sup>2</sup>Copies of the summons and complaint were also served upon the Board of Managers of the condominium by service upon the secretary authorized to accept service at the management office located on West 92<sup>nd</sup> Street, on Greenpoint Mortgage by service upon the Secretary of State of the State of New York, on Mortgage Electronic Registration Systems, Inc. As Nominee

The Sacher defendants through their attorney mailed a copy of their answer on August 15, 2007 (Not. of Mot. Ex. J [hereinafter "Answer"]). They admit executing the October 5, 2006 Note and delivering a mortgage, as well as the identity and address of the premises in question, but denied information as to the recording of the mortgage, and either deny or state that lack sufficient information or knowledge as concerns the other contents of the other paragraphs of the complaint (Answer paras. 1-6). They set forth four affirmative defenses: failure to state a valid cause of action; documentary evidence; lack of personal jurisdiction; and failure to properly commence the action.

Plaintiffs filed the instant motion for summary judgment and other relief on August 20, 2007. The Sacher defendants did not put in opposition papers. Accordingly, the motion is decided on default.

It is well settled that a default concedes liability but not damages (*Amusement Bus. Underwriters v American Intl Group*, 66 NY2d 878, 880 [1985]; *Rokina Op. Co. v Camera King*, 63 NY2d 728 [1984]). However, even where the motion is submitted on default, the court is not a rubber stamp and will examine whether the plaintiffs have established an entitlement to the relief sought (*Joosten v Gale*, 129 AD2d 531, 535 [1<sup>st</sup> Dept. 1987]). Here, plaintiffs have failed to include a copy of the original assignment from Wall Street Mortgage Bankers, d/b/a Power

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for Wall Street Mortgage Bankers Ltd. d/b/a Power Express by service upon the executive vice president; on the New York City Environmental Control Board by service upon a clerk authorized to accept service at 100 Church Street, New York, NY, on the New York City Transit Adjudication Bureau by delivery to an authorized clerk at 130 Livingston Street, Brooklyn, NY, and on North Fork Bank, on June 25, 2007, on an assistant vice president at 265 Broadhollow Road, Melville, NY (Not. of Mot. Ex. I). Service was attempted on the John Doe occupants on June 28, 2007, but the process server was informed that the Sacher defendants were the residents of the apartment in question (Not. of Mot. Ex. I).

Express, to plaintiffs, and thus have failed to establish their entitlement to the foreclosure. In addition, although the Note provides at paragraph 7 that notices to the mortgagor are made at the property unless the mortgagor gives a different address, there is no indication in the documents before the court that the Sacher defendants requested that notices be sent to the Brooklyn address rather than at the mortgaged property itself in Manhattan. Notably, they include as the affirmative defense the lack of personal jurisdiction due to improper service. Thus, plaintiffs have not established that service of the complaint, or indeed of the notices of default, were made in accordance with the terms of the mortgage itself. "When the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents." (*Raschel v Rish*, 69 NY2d 694, 697 [1986]; see also, *Laino v Cuprum S.A. de C.V.*, 235 AD2d 25, 32 [2<sup>nd</sup> Dept. 1997]).

Accordingly, the motion for summary judgment and dismissal of the complaint as against the Sacher defendants, made on default, as well as for the appointment of a referee, is denied. The branch of the motion for judgments based on the default of the other defendants is denied without prejudice to renew as having been prematurely made. The branch of the motion seeking to amend the caption to delete the "John Doe," there being no tenant found at the mortgaged premises, is granted. It is

ORDERED that the plaintiff's motion for summary judgment and the striking of the Sacher defendants' answer and for appointment of a referee, is denied; and it is further

ORDERED that branch of the motion seeking to amend the caption to delete "John Doe," is granted and upon service of a copy of this order the Clerk of Court is directed to amend the papers and records to reflect the deletion of John Doe from the caption which shall read as

follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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U.S. BANK NATIONAL ASSOCIATION, AS  
TRUSTEE ON BEHALF OF THE HOLDERS OF THE  
CSMC MORTGAGE BACKED PASS-THROUGH  
CERTIFICATES, SERIES 2007-1

Index Number 108546/2007

C/O Select Portfolio Servicing, Inc.  
3815 Southwest Temple  
Salt Lake City, UT 84115,

Plaintiff,

- against -

ROBERT P. SACHER A/K/A ROBERT SACHER,  
SUSAN SACHER, BOARD OF MANAGERS OF  
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YORK CITY ENVIRONMENTAL CONTROL  
BOARD, NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU, NORTH FORK BANK,  
Defendants.

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This constitutes the decision and order of the court.

Dated: October 24, 2007  
New York, New York

*JSZ*  
\_\_\_\_\_  
J.S.C.  
**FILED**  
OCT 29 2007  
NEW YORK  
COUNTY CLERK'S OFFICE