

<b>Downey Sav. &amp; Loan Assoc., F.A. v Francis</b>
2013 NY Slip Op 30699(U)
April 2, 2013
Sup Ct, New York County
Docket Number: 107118/08
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN  
Justice

PART 11

DOWNEY SAVINGS AND LOAN  
Plaintiff, ASS'N,

- v -

FRANCIS  
Defendants.

INDEX NO.: 107118/08

MOTION DATE:

MOTION CAL. NO.

MOTION SEQ. NO. 003

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

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

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

PAPERS NUMBERED

Cross-Motion: [ ] Yes  No

Upon the foregoing papers, it is ordered that the motion is determined in accordance with the annexed decision and order.

**FILED**

APR 09 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: April 2, 2013

[Signature]  
U.S.C.

Check one:  FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
DOWNEY SAVINGS AND LOAN ASSOCIATION, F.A.,

Plaintiff,

INDEX NO. 107118/08

-against-

NEAMYAH FRANCIS A/K/A NEAMAYAH FRANCIS;  
NEW YORK CITY ENVIRONMENTAL CONTROL  
BOARD, SYLVESTER WILLIAMS, ALICE WILLIAMS,  
JOHN BATTLE, JAMMIE HARRIS, MELVIN GUESS,  
and SHAWON MOLONEY,

Defendants.  
-----X

JOAN A. MADDEN, J.:

**FILED**

APR 09 2013

NEW YORK  
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In this mortgage foreclosure action, defendant mortgagor Neamayah Francis moves to dismiss and/or vacate the Judgment of Foreclosure and Sale dated June 17, 2010, dismiss the complaint and discharge the lis pendens. Plaintiff Downey Savings and Loan Association, F.A. (hereinafter "Downey" or "Downey Savings") opposes the motion.

The following facts are not disputed unless otherwise noted. On May 4, 2004, defendant Francis borrowed the sum of \$686,000; the loan was secured with a mortgage against the premises known as 437 West 147<sup>th</sup> Street, New York, New York, delivered to plaintiff Downey Savings. It is not disputed that defendant Francis defaulted on the mortgage loan by not making the January 1, 2008 payment, and each month thereafter.

On May 21, 2008, Downey Savings commenced the instant action to foreclose on the mortgage. On October 31, 2008, an attorney for defendant Francis served a Verified Answer on plaintiff's counsel, which asserted six affirmative defenses, including improper service of

[\* 3]

process. On November 26, 2008, Downey's counsel sent defendant's counsel a Notice of Return of Late Verified Answer, stating that Francis' October 28, 2008 answer "is returned to you herewith as a nullity upon the ground that the time within which to serve such pleading as of right has elapsed and no extension of time for such service has been granted." On February 17, 2009, defendant Francis filed the October 28, 2008 Verified Answer and an affidavit of service, in the New York County Clerk's Office.

In or about October 2008, Downey Savings moved ex parte for an Order of Reference appointing a Referee to Compute. On June 12, 2009, this court granted the motion. On July 7, 2009, the Referee issued a Report and Oath finding that as of June 26, 2009, the total sum due was \$860,692.73, and that the mortgaged premises should be sold in one parcel.

On July 20, 2009, Downey Savings moved by notice of motion for a judgment of foreclosure and sale, and for an order confirming the Referee's Report. Defendant Francis appeared by counsel in opposition to the motion, and cross-moved pursuant to CPLR 3211(a)(8) to dismiss the complaint for lack of personal jurisdiction based on improper service. By a decision and order dated June 17, 2010, this court granted Downey's motion and issued a Judgment of Foreclosure and Sale. This court denied defendant Francis's cross-motion to dismiss, concluding that he had waived his improper service defense, by serving an answer with a jurisdictional defense based on improper service and not seeking any relief from the court with respect to that defense for nearly a year after such service.

In November 2010, defendant Francis, by new counsel, secured the instant Order to Show Cause, seeking to dismiss the complaint, discharge the lis pendens, dismiss and/or vacate the Judgment of Foreclosure and Sale, enjoin/restrain plaintiff from taking any steps to enforce

[\* 4]

the Judgment of Foreclosure and Sale, and stay the foreclosure sale purportedly scheduled for December 1, 2010. Plaintiff opposed the motion.

As a result of the parties' appearance on defendant's motion, this court stayed the enforcement of the judgment, restored the case to active status, held defendant's motion in abeyance and referred the parties to the Mortgage Foreclosure Part for settlement purposes. The court's records indicate that the parties appeared in the Mortgage Foreclosure Part for settlement conferences on March 7, 2011, May 11, 2011, August 18, 2011, November 3, 2011, January 18, 2012 and March 16, 2012. By stipulation, the parties adjourned the conferences scheduled for April 18, 2012 and May 29, 2012. At the conferences scheduled for June 24, 2012 and August 21, 2012, only plaintiff's counsel appeared. By order dated September 6, 2012, the matter was remanded from the Mortgage Foreclosure Part after defendant Francis's failed "to appear for two conferences despite written notice."

Upon remand, defendant's motion was restored to this court's calendar and on January 24, 2013, plaintiff's counsel was directed to submit a written decision denying defendant's request for loan modification. Plaintiff's counsel submitted a letter dated January 29, 2013, from "U.S. Bank Home Mortgage as servicer for the referenced loan" and addressed to defendant Francis, advising that his request for loan modification had been "declined for incompleteness."<sup>1</sup>

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<sup>1</sup>The court is not considering the parties' additional affirmations received while the motion was sub judice, i.e. defendant's February 18, 2013 Sur Reply Affirmation, plaintiff's March 20, 2013 Reply Affirmation and plaintiff's Further Reply Affirmation dated March 29, 2013. The court notes, however, that defendant's reliance on Downey Savings and Loan Association, F.A. v. Trujillo, 32 Misc3d 1231(A) (Sup Ct, Kings Co 2011) is not persuasive, as the result and rationale of that decision have been called into question by the Second Department Appellate Division's recent decision in HSBC Bank USA, N.A. v. Taher, \_\_\_ AD3d \_\_\_, 2013 WL 1136611 (2<sup>nd</sup> Dept 2013).

[\* 5]

In support of its original motion filed in November 2010, defendant argued that plaintiff Downey Savings lacked the legal capacity and standing to maintain this action, because the FDIC had “seized” Downey’s assets and “shut down” its operations on November 21, 2008, and Downey’s assets were ultimately sold to U.S. Bank National Association. Defendant also argued that in the absence of standing, the court lack subject matter jurisdiction over the action. In opposition to defendant’s motion, plaintiff acknowledged that Downey was placed into receivership by the FDIC on November 21, 2008, but asserted that the “actual transfer” of its assets to U.S. Bank took place pursuant to a “Bill of Sale” dated April 20, 2009.<sup>2</sup>

Defendant’s motion is denied in its entirety. In denying defendant’s prior cross-motion to dismiss for lack of personal jurisdiction, this court held that defendant waived the defense of improper service by serving an answer, albeit late, with the jurisdictional defense, and not moving promptly for appropriate affirmative relief by seeking an extension of time to answer,

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<sup>2</sup>The FDIC issued a notice dated July 27, 2010 and entitled “Determination of Insufficient Assets to Satisfy Claims Against Financial Institution in Receivership,” which states, in relevant part, as follows:

On November 21, 2008, Downey Savings and Loan Association, F.A. . . . was closed by the Office of Thrift Supervision and the Federal Deposit Insurance Corporation (“FDIC”) was appointed as its Receiver. In complying with its statutory duty to resolve the institution in the method that is least costly to the deposit insurance fund, . . . the FDIC facilitated a transaction with U.S. Bank National Association, . . . to acquire the deposits and most of the assets of the failed institution.

75 Fed Reg 45114-01 (Aug 2, 2010); see Bravo v. U.S. Bank National Association, 2013 WL 307824 (US Dist Ct, EDNY 2013) (citing the Federal Register); Downey Savings and Loan Association, F.A. v. 162 Grand Newburgh, LLC, 27 Misc3d 674 (Sup Ct, Kings Co 2010) (granting Downey’s request to change plaintiff’s name to U.S. Bank National Association, as successor by Assignment and Assumption Agreement from FDIC, as Receiver for Downey Savings and Loan Association, F.A.

[\* 6]

dismissal, or to compel plaintiff's acceptance of the late answer. Defendant now moves for the second time to dismiss the complaint on new grounds, and also to vacate the Judgment of Foreclosure and Sale. The court concludes that defendant likewise waived the defense of lack of standing, by not seeking leave to serve a late or an amended answer including such defense, and by not raising any issue as to the lack of standing in its prior cross-motion to dismiss. See HSBC Bank USA, N.A. v. Taher, \_\_\_ AD3d \_\_\_, 2013 WL 113661 (2<sup>nd</sup> Dept 2013); Downey Savings and Loan Association, F.A. v. 162 Grand Newburgh LLC, 27 Misc3d 674 (Sup Ct, Kings Co 2010). Furthermore, contrary to defendant's assertion, a party's lack of standing does not constitute a jurisdictional defense warranting dismissal. See HSBC Bank USA, N.A. v. Taher, *supra*; Downey Savings and Loan Association, F.A. v. 162 Grand Newburgh LLC, *supra*.

With respect to the additional grounds for vacating the judgment and dismissing the complaint, defendant originally objected that he did have an opportunity to participate in a mortgage foreclosure settlement conference. As explained above, the court responded to that objection by referring this matter to the mortgage foreclosure part. For more than a year, the parties attended settlement conferences and the matter was remanded back to this court when defendant's counsel failed to appear for conferences in June and August 2012. By letter dated January 29, 2013, defendant was notified that his request for loan modification as denied as incomplete.

The court has considered the balance of defendant's arguments in support of the motion, and concludes that they are without merit.

Notwithstanding the foregoing conclusions, the court finds it perplexing that at no time during the pendency of this action, has plaintiff sought to amend the caption to substitute as

plaintiff, the FDIC as Receiver for Downey Savings, or U.S. Bank National Association as Successor in Interest to FDIC as Receiver for Downey Savings, not even in August 2009, when plaintiff moved for a judgment of foreclosure and sale, which was after the April 20, 2009 transfer of Downey's assets to U.S. Bank.<sup>3</sup> Plaintiff asserts that substitution is not required and cites CPLR 1018 which states that “[u]pon any transfer of interest, the action *may* be continued by or against the original parties, unless the court directs the person to whom interest is transferred to be substituted or joined in the action” (emphasis added). Here, however, CPLR 1017 is applicable and mandates substitution by explicitly stating that when a “receiver is appointed for a party” the court “*shall* order substitution of the proper parties” (emphasis added).

Thus, since it is undisputed that the FDIC was appointed as receiver for Downey Savings, the court will provide plaintiff with an opportunity to make a motion for leave to amend the Judgment of Foreclosure and Sale to substitute the appropriate party plaintiff. Such motion shall be supported by an affidavit and documentary proof demonstrating that after the FDIC was appointed as Receiver, the subject mortgage was in fact transferred and/or sold to U.S. Bank. The court notes that under CPLR 1021, “[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate.”

Finally, the court notes that the person appointed as the Referee to conduct the sale is no

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<sup>3</sup>Notably, in Downey Savings and Loan Association, F.A. v. 162 Grand Newburgh LLC, *supra*, Downey's motion for summary judgment included a request to amend the caption to change the name of plaintiff to U.S. Bank National Association, as successor by Assignment and Assumption Agreement from FDIC, as Receiver for Downey Savings and Loan Association, F.A.

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longer accepting such appointments, so the Judgment of Foreclosure and Sale also needs to be amended to appoint a substitute Referee. The stay of the enforcement of the Judgment of Foreclosure and Sale shall continue until further order of this court.

Accordingly, it is

ORDERED that defendant's motion is denied in its entirety; and it is further

ORDERED that within 45 days of the date of this decision and order, plaintiff shall move by order to show cause to amend the caption to substitute the proper party plaintiff and shall submit a proposed Amended Judgment of Foreclosure and Sale; and it is further

ORDERED that the stay of the enforcement of the Judgment of Foreclosure and Sale shall continue until further order of this court.

The court is mailing copies of this decision and order.

DATED: April 2, 2013

ENTER:

  
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J.S.C.

**FILED**

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