

BAC Home Loans Servicing, LP v Mostafa
2013 NY Slip Op 33199(U)
December 18, 2013
Supreme Court, Queens County
Docket Number: 13365/10
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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BAC HOME LOANS SERVICING, LP FKA Index No.:13365/10
COUNTRYWIDE HOME LOANS SERVICING LP,

Plaintiff(s), Motion Date:6/27/13

Motion Cal. No.:10

Motion Seq. No: 2

- against -

GOLAM MOSTAFA, CITIBANK (SOUTH DAKOTA), N.A.
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY PARKING VIOLATIONS BUREAU,
NEW YORK CITY TRANSIT ADJUDICATION BUREAU,
NEW YORK STATE DEPARTMENT OF TAXATION AND
FINANCE, UNITED STATES OF AMERICA ACTING
THROUGH THE IRS, "JOHN DOE #1" through
"JOHN DOE # 12", the last twelve names
being fictitious and unknown to the
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,

Defendant(s).

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The following numbered papers 1 to 14 read on this motion by plaintiff for summary judgment, pursuant to CPLR §3212, and to strike the answer of defendant, Golam Mostafa ("Mostafa"). Plaintiff further requests an order granting a default judgment, pursuant to CPLR §3215(a), against all non-appearing parties and non-appearing defendants and to discontinue the action against defendants "John Doe #1" through "John Doe #12." Additionally, plaintiff seeks leave to amend the caption, *nunc pro tunc*, as of May 26, 2010 to reflect that plaintiff is Bank of America, N.A., appoint a referee and for an award of costs of the motion. Defendant, Golam Mostafa, submits a cross-motion requesting that the court finds plaintiff to have acted frivolously with the

intention to delay, and in bad faith, to toll the accrual of interest on the mortgage debt from the beginning of the action, and for an award of costs, fees and disbursements.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Notice of Cross-Motion-Affirmation-Exhibits-Service...	5 - 8
Reply Affirmation in Support of Summary Judgment and in	
Opposition to Cross-Motion-Exhibits-Service.....	9 - 11
Reply Affirmation-Exhibits-Service.....	12- 14

Upon the foregoing papers it is **ORDERED** that the motion and cross-motion are determined as follows:

Plaintiff commenced this action on May 26, 2010 to foreclose a mortgage encumbering the real property known as 211-39 91st Avenue, Queens Village, New York given by defendant, Golam Mostafa, as security for the payment of a note, evidencing an obligation in the principal amount of \$420,000.00 plus interest. The mortgage names Countrywide Bank, FSB as the lender and Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee for the lender and the lender's successors and assigns, and as the mortgagee of record for the purpose of recording the mortgage. Plaintiff alleged in its complaint that the mortgage was assigned pursuant to a recorded assignment to it. Plaintiff also alleged that defendant, Mostafa, defaulted under the terms of the mortgage and note by failing to make the monthly installment payment of interest due on October 1, 2009, and as a consequence, it elected to accelerate the entire mortgage debt.

Defendant, Mostafa, by his then counsel Todd Arbesfell, Esq., served an answer, denying the material allegations of the complaint and asserting various affirmative defenses. Defendant, United States of America, served a notice of appearance and waiver of the instant application. The remaining defendants have not appeared or answered the complaint.

A prior motion made by the Petroff Law Firm, P.C. (Petroff Law Firm) on behalf of defendant, Mostafa, to dismiss the complaint was denied by order dated December 1, 2011. The court determined that Peter F. Anderson, Esq. had filed a notice of appearance on behalf of defendant, Mostafa, but no consent to change attorney form had been filed by Mr. Anderson or by the Petroff Law Firm and as a consequence, the Petroff Law Firm failed to demonstrate it had the proper authority to appear on behalf of defendant, Mostafa.

Plaintiff moves for summary judgment against and to strike the answer of defendant, Golam Mostafa. Additionally, plaintiff seeks to deem all non-appearing parties and non-appearing defendants in default pursuant to CPLR 3215(a), discontinue the action against defendants "John Doe #1" through "John Doe #12," amend the caption *nunc pro tunc* as of May 26, 2010 to reflect that plaintiff is Bank of America, N.A., appoint a referee and for an award of costs of the motion. Defendant Mostafa, by his counsel the Petroff Law Firm, opposes the motion and cross-moves to toll the accrual of interest on the mortgage debt from the beginning of the action, and for an award of costs, fees and disbursements.

According to the supplemental affirmation of Michael J.S. Pontone, Esq., of the Petroff Law Firm, he has not been able to secure the consent of Peter Anderson, Esq. to change attorney. Defendant Mostafa avers that he no longer wishes to be represented by Mr. Anderson, and does not owe Anderson any legal fees, and instead wishes the Petroff Law Firm to represent him. Under such circumstances, the Petroff Law Firm may appear on behalf of defendant Mostafa in this action, including in relation to the motion and cross-motion.

Plaintiff opposes the cross-motion of defendant Mostafa. The remaining defendants have not appeared in relation to the motion or cross-motion.

That branch of the motion by plaintiff to discontinue the action against defendants "John Doe #1" to "John Doe #12" is granted to the extent of granting plaintiff leave to amend the caption by deleting reference to defendants "John Doe #1" to "John Doe #12." Plaintiff did not cause defendants "John Doe #1" through "John Doe #12" to be served with process because plaintiff determined that they are unnecessary party defendants.

Plaintiff's counsel states plaintiff has undergone a merger since the commencement of the action, and therefore, the caption should reflect that the proper plaintiff is "Bank of America, N.A. as successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P." The branch of the motion by plaintiff for leave to amend the caption *nunc pro tunc* as of May 26, 2010 to reflect that plaintiff is Bank of America, N.A. is granted only to the extent of granting leave to amend the caption to reflect that plaintiff is "Bank of America, N.A. as successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P."

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

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BANK OF AMERICA, N.A. as successor by
merger to BAC HOME LOANS SERVICING, L.P. Index No. 13365/2010
f/k/a COUNTRYWIDE HOME LOANS SERVICING,
L.P.,

Plaintiff(s),

-against-

GOLAM MOSTAFA, CITIBANK (SOUTH DAKOTA),
N.A., CITIMORTGAGE INC.,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY PARKING VIOLATIONS
BUREAU, NEW YORK CITY TRANSITADJUDICATION
BUREAU, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, UNITED STATES OF
AMERICA ACTING THROUGH THE IRS,

Defendant(s).

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With respect to the cross-motion, defendant, Mostafa, asserts he attempted to negotiate a modification of the subject mortgage loan pursuant to the Home Affordable Modification Program (HAMP), a federal program established by the Department of Treasury in 2009 pursuant to the Emergency Economic Stabilization Act of 2008 (Pub. L. 110-343). According to defendant, Mostafa, plaintiff was on the verge of granting his modification application when it advised him there were outstanding liens against the property, and that he must provide it with a title search as a condition of any mortgage loan modification. Defendant, Mostafa, contends that the alleged judgments underlying the liens had been satisfied or were entered against persons who had the same name as Mostafa, and therefore, plaintiff's imposition of the condition was improper, and constituted frivolous and bad faith conduct.

Defendant, Mostafa, has failed to demonstrate the subject mortgage loan was eligible for a HAMP modification, or that plaintiff or its servicing agent ever agreed to modify the loan under HAMP, either on a trial or permanent basis. Plaintiff appeared at the conferences scheduled on September 30, 2010, January 12, 2011, April 6, 2011 and June 22, 2011 pursuant to CPLR §3408. Defendant Mostafa admits that he and his former counsel did not attend the June 22, 2011 conference, where the issue of

whether a payment modification pursuant to HAMP or some other program, or a workout option, could have been explored. Instead, because of the default in appearing by defendant, Mostafa, the case was released from the residential foreclosure part and, the Court Attorney/Referee, by order dated June 22, 2011, directed plaintiff to proceed by means of motion or order of reference.

Plaintiff did not immediately so proceed, but rather reviewed defendant Mostafa's HAMP application. It ultimately found him ineligible for a loan modification pursuant to HAMP. That plaintiff found defendant, Mostafa's, proof regarding existing liens insufficient to demonstrate clear title, and suggested he supply a title search, does not establish plaintiff acted in bad faith in negotiating with him (CPLR §3408[f]). In addition, defendant, Mostafa, has failed to demonstrate that plaintiff engaged in wrongful conduct entitling him to cancellation of interest or arrears as of the time of the first scheduled settlement conference (see *South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978 [2d Dept 2008]; *Dayan v York*, 51 AD3d 964 [2d Dept 2008]; *Danielowich v PBL Dev.*, 292 AD2d 414 [2d Dept 2002]; *Sloane v Gape*, 216 AD2d 285, 286 [2d Dept 1995]). Defendant, Mostafa, has failed to produce any evidence that, under the terms of the subject mortgage, plaintiff is obligated, post-acceleration, to enter into a modification or workout agreement with him, or to reinstate the loan. Accordingly, the cross-motion by defendant, Mostafa, is denied.

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]).

Where, as here, standing is put into issue by the defendant, the plaintiff must prove its standing in order to be entitled to relief (see *Deutsche Bank Nat. Trust Co. v Haller*, 100 AD3d 680 [2d Dept 2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2d Dept 2007]). "In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]; see *Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2d Dept 2013]; *US Bank N.A. v Cange*, 96 AD3d 825, 826 [2d Dept 2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 753-754 [2009]; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709 [2d Dept 2009]). "Either a written assignment of the

underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank, N.A. v Collymore*, 68 AD3d at 754; see *HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]; see *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011]).

In addition, where, as here, satisfaction with the condition precedent of providing notice pursuant to RPAPL §1304 is put into issue by the defendant, the plaintiff must demonstrate satisfaction with this condition (see *Deutsche Bank Nat. Trust Co. v Spanos*, 102 AD3d 909 [2d Dept 2013]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 106).

In support of its motion, plaintiff offers, *inter alia*, a copy of the pleadings, affidavits of service, an affirmation of regularity by its counsel, a copy of the subject mortgage, underlying note and an assignment dated May 21, 2010, and an affidavit of Jay Robert Karnes, an assistant vice president of plaintiff sworn to on September 12, 2012. Mr. Karnes attests to transfer and assignment of the mortgage and note to plaintiff prior to the commencement of the action, and the default in payment of the monthly mortgage installment due under the mortgage on October 1, 2009 and thereafter.

The affidavit of Mr. Karnes, however, does not indicate whether the note was endorsed in blank at the time plaintiff came into physical possession of the note or by the time of the commencement of the action (see *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680 [2d Dept 2012]; *Mortgage Electronic Registration Systems, Inc. v Coakley*, 41 AD3d 674 [2007]; cf. *First Trust Nat. Assn. v Meisels*, 234 AD2d 414 [2d Dept 1996]; see generally *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208 [2d Dept 1989]). To the extent plaintiff contends it is the assignee of the note, plaintiff has failed to show that MERS had been given an interest in the underlying note by the lender (see *Bank of N.Y. v Silverberg*, 86 AD3d at 283).

Plaintiff, additionally, has failed to submit an affidavit of service evincing that it properly served defendant, Mostafa, pursuant to RPAPL §1304 (see *Deutsche Bank Nat. Trust Co. v Spanos*, 102 AD3d at 910; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 106). To the extent Mr. Karnes states a 90-day notice was sent by registered "or" certified mail and also by first-class mail "to the last known address of the borrower, and to the subject premises if different from the last known address," he does not aver that he personally mailed the notices (see CPLR §306) or describe office

mailing practices and procedures which would justify a presumption of mailing and receipt (see *Hospital for Joint Diseases v Nationwide Mutual Ins. Co.*, 284 AD2d 374, 375 [2d Dept 2001]).

Under such circumstances, plaintiff has failed to establish a *prima facie* showing of entitlement to summary judgment as against defendant, Mostafa, regardless of the opposing papers (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d at 684; *Aurora Loan Services, LLC v Weisblum*, 85 AD3d at 106). That branch of the motion by plaintiff for summary judgment against defendant, Mostafa, is denied.

With respect to that branch of the motion by plaintiff to strike the affirmative defenses raised by defendant, Mostafa, in his answer, plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law (see *Butler v Catinella*, 58 AD3d 145, 157-148 [2d Dept 2008]; *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]).

That branch of the motion by plaintiff to dismiss the first affirmative defense asserted by defendant, Mostafa, in his answer based upon failure to state a cause of action is denied (see *Butler v Catinella*, 58 AD3d 145).

The third and eleventh affirmative defenses asserted by defendant, Mostafa, in his answer are based upon his claim of fraudulent inducement and predatory lending. The elements of a claim for fraud are: (1) misrepresentation or a material omission of fact which was false and known to be false by the defendant; (2) that the misrepresentation was made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury (see *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Cash v Titan Financial Services, Inc.*, 58 AD3d 785, 788 [2d Dept 2009]). Defendant, Mostafa, has failed to allege or prove any facts supporting the defenses based upon fraudulent inducement and predatory lending (see *Moran Enterprises, Inc. v Hurst*, 96 AD3d 914 [2d Dept 2012]; *Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [1971], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145 [2008]; *MacIver v George Braziller, Inc.*, 32 Misc 2d 477 [1961]; CPLR 3018[b]). That branch of the motion by plaintiff to dismiss the third and eleventh affirmative defenses asserted by defendant, Mostafa, in his answer is granted.

That branch of the motion by plaintiff to dismiss the fourth affirmative defense asserted by defendant, Mostafa, in his answer based upon laches is granted. Laches is not a defense to a mortgage foreclosure proceeding where, as here, the action was commenced

within the statute of limitations (CPLR 213[4]; see *New York State Mtge. Loan Enforcement & Admin. Corp. v North Town Phase II Houses, Inc.*, 191 AD2d 151 [1st Dept 1993]; *Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc.*, 173 AD2d 1004 [3d Dept 1991]). Even if the defense was available here, defendant, Mostafa, has not alleged or shown that he changed his position, or failed to take some action to his prejudice as a result of the alleged delay.

To the extent defendant, Mostafa, asserts lack of personal jurisdiction due to improper service of process, he failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of their answer, and has made no application to extend the period of time upon the ground of undue hardship (CPLR §3211[e]). As a consequence, the fifth affirmative defense asserted by defendant, Mostafa, is deemed waived (CPLR §3211[e]; see *Dimond v Verdon*, 5 AD3d 718 [2d Dept 2004]). That branch of the motion by plaintiff to strike the fifth affirmative defense asserted by defendant, Mostafa, based upon improper service of process is granted.

That branch of the motion by plaintiff to strike the second and tenth affirmative defenses asserted by defendant, Mostafa, alleging lack of standing is denied. That branch of the motion by plaintiff to strike the ninth and twelfth affirmative defenses asserted by defendant, Mostafa, alleging that plaintiff failed to comply with RPAPL §1304 is denied. Plaintiff has failed to demonstrate the second, ninth, tenth and twelfth affirmative defenses are without merit.

The sixth affirmative defense asserted by defendant, Mostafa, is based upon his claim that plaintiff failed to serve a notice of default in accordance with the condition precedent set forth in the mortgage. Plaintiff has failed to show that it complied with a condition precedent contained in paragraph 22 of the mortgage agreement, which required that it give defendant, Mostafa, notice of default at least 30 days prior to demanding payment of the loan in full (see *HSBC Mortg. Corp. (USA) v Gerber*, 100 AD3d 966 [2d Dept 2012]; *Norwest Bank Minn. v Sabloff*, 297 AD2d 722 [2d Dept 2002]; *GE Capital Mtge. Servs. v Mittelman*, 238 AD2d 471 [2d Dept 1997]). The affidavit of Mr. Karnes that the business records of plaintiff reflect that a notice of default dated February 24, 2010 was mailed to "the borrower," combined with the copy of the notice of default, is insufficient to establish that the required notice was mailed to defendant, Mostafa, by first class mail or actually delivered to his notice address if sent by other means, as required by the mortgage agreement (see paragraphs 15 and 22 of the mortgage; *HSBC Mortg. Corp. (USA) v Gerber*, 100 AD3d at 967 [2d Dept 2012]). That branch of the motion by plaintiff to strike

the sixth affirmative defense asserted by defendant, Mostafa, is denied.

That branch of the motion by plaintiff to dismiss the seventh affirmative defense asserted by defendant, Mostafa, in his answer based upon violation of the Federal Truth in Lending Act (15 USC § 1601 *et seq.*) (TILA) is granted. Plaintiff presents a copy of TILA disclosure statement in relation to the subject mortgage loan, which includes an executed acknowledgment by defendant, Mostafa, of his receipt of the statement. Defendant, Mostafa, makes no claim that he was not provided any disclosure statement, and has failed to allege the manner in which the one provided to him was inaccurate (see *Moran Enterprises, Inc. v Hurst*, 96 AD3d 914 [2d Dept 2012]; *Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [2d Dept 1971], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]; *MacIver v George Braziller, Inc.*, 32 Misc 2d 477; CPLR 3016, 3018[b]).

Defendant, Mostafa, asserts as an eighth affirmative defense that the default under the mortgage was caused by plaintiff and its successors and assigns. Defendant, Mostafa, makes no allegation that plaintiff engaged in any act, or made any misrepresentation, which triggered his default in payment under the note and mortgage. Rather, defendant, Mostafa, admits he fell behind in making payments pursuant to the mortgage due to problems related to the operation of his grocery store business and the economic downturn. That branch of the motion by plaintiff to dismiss the eighth affirmative defense asserted by defendant, Mostafa, in his answer is granted.

The thirteenth affirmative defense asserted by defendant, Mostafa, in his answer is based upon his claim that under the Federal Housing and Economic Recovery Act of 2008 (Pub. L. No. 110-289, 122 Stat. 2654) (HERA), loan servicers are required to modify mortgages where the subject property would bring less money at auction than that which is currently owed by the borrower. HERA, however, does not place an affirmative duty on mortgagees and loan servicers to offer loan modifications to eligible borrowers using programs such as HAMP (see *Hart v Countrywide Home Loans, Inc.*, 735 F Supp 2d 741, 747-748 [ED Mich 2010]). Rather, HAMP only requires participating servicers to consider eligible loans for modification but does not require servicers to modify eligible loans (*id.* at 747-748). That branch of the motion by plaintiff to dismiss the thirteenth affirmative defense of defendant, Mostafa, is granted.

Accordingly, plaintiff's motion has been denied in part and granted in part. Specifically, those branches of the motion, by

plaintiff, seeking a summary judgment, deeming all non-appearing parties and non-answering defendants in default and for leave to appoint a referee are denied. Plaintiff has been granted leave to amend the caption. Additionally, defendant, Mostafa's, affirmative defenses numbered three, four, five, seven, eight, eleven and thirteen have been stricken. The request to strike the remaining affirmative defenses has been denied.

Dated: December 18, 2013

JANICE A. TAYLOR, J.S.C.

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