

**Bank of Am., N.A. v Cordova**

2014 NY Slip Op 30400(U)

February 18, 2014

Supreme Court, Queens County

Docket Number: 22020/12

Judge: Allan B. Weiss

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**M E M O R A N D U M**

SUPREME COURT QUEENS COUNTY  
CIVIL TERM PART 2

**ALLAN B. WEISS**

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BANK OF AMERICA, N.A.,

Plaintiff,

-against-

JORGE R. CORDOVA, HILDA A. CORDOVA  
a/k/a HYLDA A. CORDOVA, WASHINGTON MUTUAL  
BANK, FA, et al.,

Defendants.

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Index No.: 22020/12

Motion Date: 11/19/13

Motion Seq. No.: 1

In this action to foreclose a mortgage the plaintiff moves for an Order striking the defendant's answer and counterclaims, granting summary judgment in its favor, appointing a referee to ascertain and compute the amount due to the plaintiff and amending the caption. Defendant, HILDA A. CORDOVA, cross-moves for summary judgment dismissing the complaint.

To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the note and mortgage, and the defendant's default in payment (see HSBC Bank USA v. Hernandez, 92 AD3d 843, 843 [2012]; Capstone Bus. Credit, LLC v Imperia Family Realty, LLC, 70 AD3d 882 [2010]; U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez, 49 AD3d 711, 712 [2008]).

When the defendant raises the defense of lack of standing in the answer, the plaintiff must establish standing in order to

succeed on a motion for summary judgment (see Deutsche Bank Natl. Trust Co v.. Haller, 100 AD3d 680, 682 [2012]; GRP Loan, LLC v. Taylor, 95 AD3d 1172, 1173 [2012]; US Bank N.A. v. Collymore, 68 AD3d 752, 753 [2009]).

A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the note (see Deutsche Bank National Trust Company v. Rivas, 95 AD3d 1061 [2012]; Bank of New York v. Silverberg, 86 AD3d 274, 279 [2011]; Aurora Loan Servs., LLC v. Weisblum, 85 AD3d 95, 108 [2011]) either by a written assignment or physical delivery of the note prior to the commencement of the action (see US Bank N.A. v. Cange, 96 AD3d 825, 947 [2012]; Aurora Loan Servs., LLC v. Weisblum, supra; U.S. Bank, N.A. v. Adrian Collymore, supra 754; Mortgage Elec. Registration Sys., Inc. v. Coakley, 41 AD3d 674 [2007]).

The plaintiff established its entitlement to summary judgment submitting competent evidence including a copy of the note endorsed in blank and certified pursuant to CPLR 2105 on January 18, 2012 prior to commencing this action on October 24, 2012, a copy of the mortgage, the written Assignment of Mortgage acknowledged on June 8, 2012 (see Mortgage Electronic Registration Systems, Inc. v. Coakley, supra; Federal Natl. Mtge. Assn. v. Youkelsone, 303 AD2d 546 [2003]). Plaintiff also submitted the affidavit of Ashley Azure, Assistant Secretary of

Nationstar Mortgage, attorney-in-fact for Bank of America, N.A., the plaintiff, asserting that she has actual knowledge of the facts in this case including the defendant's default, based upon her review of the books and business records kept and maintained by the plaintiff in the ordinary course of business, and that based upon those records, the note was delivered to the plaintiff prior to the commencement of this action, that plaintiff complied with of all of the pre-foreclosure notices to wit, the Letter of Default required including the RPAPL § 1304 90-day notice, copies of which were annexed as exhibits and contained, inter alia, the number of the certified mailing, as well as the filing requirements with the superintendent of banks. She further avers that based upon defendant's default and failure to cure, the plaintiff elected to accelerate the entire debt.

Plaintiff also demonstrated the lack of merit of the defendant's remaining affirmative defenses (see State Bank of Albany v. Fioravanti, 51 NY2d 638 [1980]; Jo-Ann Homes v. Dworetz, 25 NY2d 112 [1969]; Signature Bank v. Epstein, 95 AD3d 1199 [2012]).

Where, as here, the plaintiff establishes its entitlement to summary judgment and that total lack of merit of the defendant's affirmative defenses, the burden shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad

faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (see Mahopac Natl. Bank v. Baisley, 244 AD2d 466, 467 [1997]); Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 NY2d 175, 183 [1982]).

In opposition to the plaintiff's well documented motion, and in support of her cross-motion to dismiss, the defendant does not deny being in default of her obligations under the Note and Mortgage, since September 1, 2009 nor assert a personal jurisdictional defense. The defendant merely submitted her attorney's affirmation containing conclusory allegations that the plaintiff has failed to establish its prima facie entitlement to judgment by failing to establish its standing, compliance with CPLR 1304 and objecting to consideration of the affidavit of Ashley Azure in support of the motion since it lacks a certificate of conformity.

The defendant's claims are without merit and insufficient to raise a triable issue of fact sufficient to require a trial of her defenses and counterclaims (see Neighborhood Housing Services of New York City, Inc. v. Meltzer, 67 AD3d 872, 873 [2009]; Washington Mut. Bank, F.A. v O'Connor, 63 AD3d 832 [2009]; US Bank Trust N.A. Trustee v Butti, 16 AD3d 408 [2005]).

In particular, defendant has failed to submit her own affidavit denying, inter alia, receipt of the CPLR 1304 pre-foreclosure notice to refute the presumption of receipt raised by

the proof of proper mailing (see C & H Import & Export, Inc. v. MNA Global, Inc., 79 AD3d 784, 786 [2010]).

With respect to her claim of lack of proof as to the date of delivery of the note to the plaintiff, it is totally without merit. The copy of the note endorsed in blank and certified by plaintiff's attorney pursuant to CPLR 2105 on January 18, 2012 prior to commencing this action on October 24, 2012, is sufficient to demonstrate that the note was delivered to the plaintiff prior the commencement of this action.

In addition, the absence of a certificate of conformity in compliance with CPLR 2309(C), does not warrant disregarding the affidavit or denial of summary judgment inasmuch as the absence of a certificate of conformity for an out-of-state affidavit does not constitute a fatal defect and may be provided nunc pro tunc (see CPLR 2001; Fredette v. Town of Southhampton, 95 AD3d 940, 942 [2012]; US Bank Natl. Assn. v. Dellarmo, 94 AD3d 746, 748 [2012]; Betz v Daniel Conti, Inc., 69 AD3d 545 [2nd Dept 2010]; Matapos Tech. Ltd. v. Compania Andina de Comercio Ltda, 68 AD3d 672 [2009]).

Accordingly, the plaintiff's motion is granted and the defendant's cross-motion is denied.

Settle Judgment.

Dated: February 18, 2014  
D# 49

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J. S. C.