

<b>Onewest Bank, FSB v Fardig</b>
2015 NY Slip Op 30321(U)
March 4, 2015
Supreme Court, Suffolk County
Docket Number: 10-2651
Judge: Denise F. Molia
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**SUPREME COURT - STATE OF NEW YORK  
IAS PART 39 - SUFFOLK COUNTY**

**PRESENT: Hon. DENISE F. MOLIA**  
Acting Supreme Court Justice

\_\_\_\_\_  
ONEWEST BANK, FSB AS SUCCESSOR IN  
INTEREST TO INDYMAC BANK, FSB  
  
Plaintiff,

MOTION DATE: 1-14-14  
ADJ. DATE: \_\_\_\_\_  
Mot. Seq. #: 001 - MG  
002 - XMD

**McCABE, WEISBERG & CONWAY, P.C.**  
Attorneys for Plaintiff  
145 Huguenot Street, Suite 499  
New Rochelle, N. Y. 10801

-against-

**CARL G. FARDIG**  
and "JOHN DOE #1" to "JOHN DOE #10", the last  
10 names being fictitious and unknown to plaintiff,  
the persons or parties, if any, having or claiming an  
interest in or lien upon the mortgaged premises  
described in the verified complaint,

**FRED M. SCHWARTZ, ESQ.**  
317 Middle Country Road, Suite 5  
Smithtown, N. Y. 11787

Defendants.  
\_\_\_\_\_ x

Upon the following papers numbered 1 to 23 read on this motion for summary judgment and an order of reference and cross motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 19; Answering Affidavits and supporting papers 20 - 21; Replying Affidavits and supporting papers 22 - 23; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (001) by plaintiff, OneWest Bank, FSB as successor in interest to Indymac Bank, FSB (OneWest), for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendant Carl G. Fardig (defendant), fixing the defaults as against the non-appearing, non-answering defendants, for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

**ORDERED** that the cross motion (002) by defendant for, *inter alia*, an order pursuant to CPLR 3211 dismissing plaintiff's complaint upon the grounds that the complaint fails to state a cause of action and/or that plaintiff lacks standing, for an order denying plaintiff's application for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321 and, declaring plaintiff in violation of CPLR 3408(f) for its failure to negotiate in good faith, is denied; and it is further

**ORDERED** that the caption is hereby amended by striking therefrom defendants "John Doe #1" through "John Doe #10"; and it is further

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OneWest v Fardig  
 Index No. 10-2651  
 Page No. 2

**ORDERED** that plaintiff is directed to serve a copy of this order upon the Calendar Clerk of this Court; and it is further

**ORDERED** that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF SUFFOLK

\_\_\_\_\_  
 ONEWEST BANK, FSB AS SUCCESSOR IN  
 INTEREST TO INDYMAC BANK, FSB

Plaintiff,

-against-

CARL G. FARDIG,

Defendant.

\_\_\_\_\_  
 X

This is an action to foreclose a mortgage on property known as 9 Standish Place, Smithtown, New York. On May 25, 2007, defendant executed a fixed rate note in favor of IndyMac Bank, F.S.B. (IndyMac) agreeing to pay the sum of \$315,000.00 at the yearly interest rate of 6.375 percent. On said date, defendant also executed a mortgage in the principal sum of \$315,000.00 on the subject property. The mortgage indicated IndyMac to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of IndyMac as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on June 25, 2007 in the Suffolk County Clerk's Office. Thereafter, on September 30, 2013, the mortgage was transferred by assignment of mortgage from MERS, as nominee for IndyMac, to plaintiff OneWest.

Home Loan Servicing sent a notice of default dated December 3, 2009 to defendant stating that he had defaulted on his note and mortgage and that the amount past due was \$13,192.80. As a result of his continuing default, plaintiff commenced this foreclosure action on January 20, 2010. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to pay the installment due on October 1, 2009. Defendant interposed an answer with affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on January 23, 2012 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint. In support of its motion, plaintiff

submits among other things, the affirmation of Matthew Russell, Esq. in support of the motion; the affirmation of Jonathan Pollock, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the affidavit of Nicole Washington, assistant secretary of OneWest; the pleadings; the note, mortgage and an assignment of mortgage; proof of notices pursuant to RPAPL 1320, 1303 and 1304; affidavits of service of the summons and complaint; an affidavit of service of the instant summary judgment motion upon the defendant's counsel; and, a proposed order appointing a referee to compute. Defendant has submitted a cross motion opposing plaintiff's motion and seeking an order dismissing the complaint on the grounds that plaintiff does not have standing and that the complaint fails to state a cause of action.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 877 NYS2d 200 [2d Dept 2009]). “The burden then 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’ ” (*U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998–2] v Alvarez*, 49 AD3d 711, 711, 854 NYS2d 171 [2d Dept 2008], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997], *lv to appeal dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]; see also *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895, 964 NYS2d 548 [2d Dept 2013]).

Here, plaintiff has established its *prima facie* entitlement to summary judgment against the answering defendant as such papers included a copy of the mortgage and the unpaid note together with due evidence of defendant's default in payment under the terms of the loan documents (see *Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]).

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (see *U.S. Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]). Because “a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation” (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013] [internal citations omitted]), a mortgage passes as an incident of the note upon its physical delivery to the plaintiff. Holder status is established where the plaintiff is the special indorsee of the note or takes possession of a mortgage note that contains an indorsement in blank on the face thereof as the mortgage follows as incident thereto (see UCC § 3–202; § 3–204; § 9–203[g]). Here, Nicole Washington avers that OneWest is the holder and servicer of the note. Furthermore, the plaintiff established that it took possession of the note containing an allonge with a special indorsement prior to the commencement of the action (see *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]). The plaintiff thus has established, *prima facie*, it has standing to prosecute this action.

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of the affirmative defenses asserted in their answer or otherwise available to them (*see Flagstar Bank v Bellafigliore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

In his opposing papers, defendant re-asserted his pleaded affirmative defense that the plaintiff lacks standing to prosecute its claims for foreclosure and sale. The defendant contends, in pertinent part, that a question of fact exists with respect to the plaintiff's standing as plaintiff failed to submit specific admissible evidence of the assignment of the note; that the allonge was neither annexed to the summons and complaint at the time the action was commenced nor was it made part of defendant's discovery demands; and, that the allonge is undated.

The court finds that none of defendant's allegations give rise to questions of fact that implicate a lack of standing on the part of the plaintiff. Here, the uncontroverted facts establish that plaintiff physically possessed the promissory note, which contains a special indorsement, prior to the commencement of the action. Here, neither the defenses raised in his answer nor, those asserted on this motion rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment.

Defendant also cross-moves for summary judgment dismissing the complaint on the grounds that plaintiff failed to comply with the default notice requirements contained in the mortgage and the notice requirements pursuant to RPAPL 1304, conditions precedent to the commencement of this foreclosure action. Specifically, defendant asserts by affidavit that "[he] did not receive notice, either by regular or certified mail that the mortgage loan was in default".

Here, the plaintiff satisfied its burden that service of the RPAPL 1304 notice and notice of default were properly made. The affidavit of Nicole Washington and attached exhibits sufficiently evidence that at least 90 days prior to the commencement of the instant action, plaintiff sent the 90 day pre-foreclosure RPAPL 1304 notice to defendant by first class and certified mail to his last known address. Washington further avers that on December 3, 2009 a 30-day demand letter was sent to defendant. Defendant's bald and unsupported assertion that he "verily believes" that he was not provided a proper notice of default or an opportunity to cure is without merit. The affidavit of plaintiff's servicer along with the annexed documentary evidence sufficiently established to this Court's satisfaction proper service of the foregoing documents. The Court further notes that defendant does not deny having received the loan proceeds or having defaulted on his mortgage loan payments in his affidavit (*see Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]). Instead, he relies on the alleged failure of plaintiff to provide the requisite notices pursuant to RPAPL 1304 and the 30-day notice of default.

The moving defendant's claim of bad faith on the part of the plaintiff is also unavailing. CPLR 3408(f) provides that "[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually

agreeable resolution, including a loan modification, if possible” (see *U.S. Bank N.A. v. Sarmiento*, 121 AD3d 187, 991 NYS2d 68 [2d Dept 2014]). There is, however, no requirement that a foreclosing plaintiff modify its mortgage loan prior to or after a default in payment (see *Wells Fargo Bank, NA v Meyers*, 108 AD3d 9, 966 NYS2d 108 [2d Dept 2013]; *Wells Fargo Bank, NA v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]; *Key Intern. Mfg. Inc. v Stillman*, 103 AD2d 475, 480 NYS2d 528 [2d Dept 1984]). Similarly, the absence of agreement does not itself establish the lack of good faith (see *Brookfield Indus. v. Goldman*, 87 AD2d 752, 448 NYS2d 694 [1st Dept 1982]). The record before this Court does not support the defendant’s contention that the plaintiff failed to make a good faith determination on defendant’s loan modification application. The uncontroverted facts establish that the instant matter appeared in the foreclosure settlement conference part on at least twelve occasions over a two year period, that defendant was ultimately found ineligible for a loan modification and, that there was no finding of bad faith by the referee supervising the discussions. As such, plaintiff satisfied its obligation pursuant to CPLR 3408(f).

Likewise unavailing is defendant’s contention that plaintiff’s summary judgment motion should be denied in order to afford defendant an opportunity to obtain discovery. CPLR 3212(f) provides that “should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just”. Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must “offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff” (*Martinez v Kreychmar*, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; see *Garcia v Lenox Hill Florist III, Inc.*, 120 AD3d 1296, 993 NYS2d 86 [2d Dept 2104]; *Seaway Capital Corp. v 500 Sterling Realty Corp.*, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on matters material to those at issue (see *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). The opposing papers submitted by defendant were insufficient to satisfy the aforementioned statutory burden. Thus, defendant failed to sufficiently demonstrate that he made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (see CPLR 3212 [f]; *Anzel v Pisotino*, 105 AD3d 784, 962 NYS2d 700 [2d Dept 2013]; *Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; *Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 810 NYS2d 500 [2d Dept 2006]). Defendant’s claim is thus rejected as unmeritorious.

With respect any of his remaining affirmative defenses, defendant has failed to raise any triable issues 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 *Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 664 NYS2d 345 [2d Dept 1997]). Here, answering defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (see *Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]). “Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion” (*Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]).

OneWest v Fardig  
Index No. 10-2651  
Page No. 6

Accordingly, the motion for summary judgment is granted against the answering defendant. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). The defendant's cross-motion is denied in its entirety.

The proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

Dated: \_\_\_\_\_

3-4-15

Hon. Denise F. Molis

\_\_\_\_\_  
A.J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION