

<b>HSBC Bank USA, N.A. v Paci</b>
2015 NY Slip Op 30921(U)
January 20, 2015
Supreme Court, Suffolk County
Docket Number: 28399-11
Judge: Emily Pines
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**COPY**

**SUPREME COURT - STATE OF NEW YORK**  
**I.A.S. TERM, PART 23, SUFFOLK COUNTY**

**Present:** **Hon. EMILY PINES**  
 J. S. C.

Original Motion Date: 11-26-13  
 Motion Submit Date: 1.20.15  
 Motion Sequence No.: 001 - MG

[ ] FINAL  
 [x] NON FINAL

\_\_\_\_\_  
 HSBC Bank USA, National Association as Indenture  
 Trustee for First NLC Trust 2005-3, Mortgage-  
 Backed Notes, 2005-3,  
 Plaintiff,

Attorney for Plaintiff

SHAPIRO, DICARO & BARAK, LLC  
 250 Mile Crossing Blvd.  
 Suite One  
 Rochester, N. Y. 14624

- against -

Charles Paci, and "JOHN DOE #1" through  
 "JOHN DOE #10, the last ten names being  
 fictitious and unknown to the Plaintiff, the person  
 or parties intended being the person or parties, if any,  
 having or claiming an interest in or lien upon  
 the Mortgaged premises described in the Complaint,

Attorney for Defendant

JOHN R. McENTEE, ESQ.  
 Charles Paci  
 33-21 Francis Lewis Blvd.  
 Flushing, N. Y. 11358

JOE PACI  
 480 West Drive  
 Copiague, N. Y. 11726

Defendants.

Upon the following papers numbered 1 to 23, read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; ~~Notice of Cross Motion and supporting papers \_\_\_\_\_~~; Answering Affidavits and supporting papers 14 - 20; Replying Affidavits and supporting papers 21 -23; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by plaintiff, HSBC Bank USA, National Association as Indenture Trustee for First NLC Trust 2005-3, Mortgage- Backed Notes, 2005-3 (HSBC), for an order pursuant to CPLR 3212 granting summary judgment in its favor against defendant Charles Paci (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 caption is hereby amended by substituting Joe Paci in place of “John Doe #1” and by striking therefrom defendants “John Doe #2” through “John Doe #10”; and it is further

**ORDERED** that plaintiff is directed to serve a copy of this order amending the caption of this action 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

\_\_\_\_\_X  
HSBC Bank USA, National Association as Indenture  
Trustee for First NLC Trust 2005-3, Mortgage-  
Backed Notes, 2005-3,

Plaintiff,

- against -

Charles Paci, Joe Paci

Defendants.

\_\_\_\_\_X

This is an action to foreclose a mortgage on premises known as 480 West Drive, Copiague, New York. On April 26, 2005, defendant executed an adjustable rate note in favor of First Continental Mortgage and Investment Corp. (First Continental) agreeing to pay the sum of \$441,000.00 at the starting yearly rate of 7.990 percent. On the same date, defendant also executed a mortgage in the principal sum of \$441,000.00 on his home. The mortgage indicated First Continental to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of First Continental as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on June 3, 2005 with the Suffolk County Clerk’s Office. Thereafter, on March 27, 2008, the mortgage was transferred by assignment of mortgage from MERS, as nominee for First Continental, to plaintiff HSBC. The assignment of mortgage was recorded on April 10, 2008 with the Suffolk County Clerk’s Office. By agreement executed July 20, 2009, defendant and Wells Fargo Bank, N.A. d/b/a America’s Servicing Company agreed to amend and supplement the mortgage loan by executing a loan modification agreement which created, *inter alia*, a single lien in the principal amount of \$519,237.09. Plaintiff, through its servicer, asserts that it is the current legal and beneficial owner of the note and mortgage and has been in physical possession of such instruments prior to the commencement of the instant action.

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America's Servicing Company sent a notice of default dated May 22, 2011 to defendant stating that he had defaulted on his mortgage loan and that the amount past due was \$9,420.64. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on September 6, 2011. In its complaint, plaintiff alleges in pertinent part, that defendant breached his obligations under the terms of the note and mortgage by failing to make his monthly payments. Defendant interposed an answer with one affirmative defense.

The Court's computerized records indicate that a foreclosure settlement conference was held on April 17, 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 sworn affidavit of Melvin Dee Boothe, vice president loan documentation of Wells Fargo Bank, N.A., the servicer for plaintiff; the affirmation of Austin T. Schufelf, Esq. in support of the instant motion; the affirmation of Bridget M. Dehmler, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage, an assignment of mortgage and a loan modification agreement; notices pursuant to RPAPL 1320, 1304 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendant; and a proposed order appointing a referee to compute.

"[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 Mentasana*, 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

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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]).

Addressing defendant's opposition which raises an allegation of lack of standing, it is well established that "where a defendant does not challenge a plaintiff's standing, the plaintiff may be relieved of its obligation to prove that it is the proper party to seek the requested relief." (*Wells Fargo Bank Minnesota Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). "...[A]n argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e)" [citations omitted] (*see Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239). Based upon the foregoing, defendant's assertion of a standing defense is unavailing since the defendant waived such defense by failing to assert it in a timely pre-answer motion to dismiss or as an affirmative defense in his answer (*see Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819, 886 NYS2d 617 [2d Dept 2009]).

Also unavailing is defendant's defense to the motion based upon the plaintiff's purported failure to comply with the requirements of RPAPL 1304, a condition precedent to the commencement of a foreclosure action. The Court initially notes that defendant does not deny in his affidavit that he is in default on his mortgage loan payments. Instead, he relies on his attorney's nebulous and unsupported affirmation challenging plaintiff's compliance with RPAPL 1304.

RPAPL1304 provides that in a residential foreclosure action, at least 90 days before the lender commences an action against the borrower, the lender must send a notice to the borrower including certain language and the notice must be in 14-point type. The notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage (*see* RPAPL 1304). The statute further provides that the notice shall contain a list of at least five housing counseling agencies that serve the region where the borrower resides.

It is well settled that proper service of the notices required by RPAPL 1304 is a condition precedent to the commencement of a residential foreclosure action, and is the plaintiff's burden to establish (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Here, plaintiff established, through the affidavit of Melvin Dee Boothe, that a 90-day foreclosure notice was sent to defendant by certified mail and also by first-class mail to his last known address. While defendant, who does not deny having received a 90 day notice pursuant to

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RPAPL 1304, asserts that the RPAPL 1304 notice did not comply with the statutory requirements. such has not been supported by any admissible evidence.

In any event, any alleged failure of plaintiff to satisfy the RPAPL 1304 notice requirements, even if true, merely constitutes a defense to the action and did not deprive the Court of subject matter jurisdiction to render an order of reference (see *Deutsche Bank Trust Co. Americas v Shields*, 116 AD3d 653, 983 NYS2d 286 [2d Dept 2014]; *Pritchard v Curtis*, 101 AD3d 1502, 957 NYS2d 440 [3d Dept 2012]; *Signature Bank v Epstein*, 95 AD3d 1199, 945 NYS2d 347 [2d Dept 2012]).

With respect to any remaining defenses, defendant has failed to raise any triable issues of fact. Based upon the foregoing, the motion for summary judgment is granted against defendant Charles Paci. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also 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 proposed order appointing a referee to compute pursuant to RPAPL 1321 is signed simultaneously herewith as modified by the court.

Dated: 1-20-15  
Riverhead, New York

  
\_\_\_\_\_  
Hon. EMILY PINES  
J. S. C.