New York Community Bank v Jennings
2015 NY Slip Op 31591(U)
August 5, 2015
Supreme Court, Queens County
Docket Number: 19753/2013
Judge: David Elliot
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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

NEW YORK COMMUNITY BANK,
Plaintiff(s),

- against -

EDGAR JENNINGS, et al.,
Defendant(s).

Index
No. 19753 2013

Motion
Date June 24, 2015

Motion
Cal. No. 108

Motion
Seq. No. 1

The following papers numbered 1 to 14 read on this motion by plaintiff for an order, *inter alia*, granting it summary judgment against defendant Leslie Antoinette Jennings, as Administratrix of the Estate of Fay Jennings a/k/a Fay M. Jennings a/k/a Fay Michelle Jennings, (Leslie Jennings), striking her answer, affirmative defenses, and counterclaims, awarding judgment by default against the remaining defendants herein, amending the caption, discontinuing the action against defendant Edgar Jennings, and appointing a referee to compute.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-5
Answering Affirmation - Exhibits.....	6-9
Reply.....	10-14

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action on October 24, 2013, to foreclose a home equity mortgage given by Edgar and Fay Jennings as security for the payment of a note evidencing a loan in the amount not to exceed $100,000.00 plus interest from Queens County Savings

Bank (QCSB) on the real property known as 23-25 101st Street, East Elmhurst, New York. In the complaint, plaintiff alleged that it is the holder of the note, that defendant(s) have defaulted in payment of the mortgage installment due on July 10, 2012, pursuant to the note and mortgage, and, as a consequence, has elected to declare the entire unpaid balance immediately due and owing.

Defendant Leslie Jennings, who is an attorney, served and filed a *pro se* verified answer. Plaintiff submitted affidavits of service of process with respect to this defendant, as well as defendants Criminal Court of the City of New York, New York City Parking Violations Bureau, New York State Department of Taxation and Finance, United States of America, Sandra Russell as heir and distributee to the estate of Fay Jennings a/k/a Fay M. Jennings a/k/a Fay Michelle Jennings s/h/a "John Doe #1," Miriam Lovett as heir and distributee to the estate of Fay Jennings a/k/a Fay M. Jennings a/k/a Fay Michelle Jennings s/h/a "John Doe #2," and Edgar Jennings, Jr., as heir and distributee to the estate of Fay Jennings a/k/a Fay M. Jennings a/k/a Fay Michelle Jennings s/h/a "John Doe #3." Those defendants have not answered or otherwise appeared herein, with the exception of "Estate of Fay Jennings and Sandra Russell" (Sandra Russell) who appeared by counsel by opposing the instant motion.

A residential foreclosure conference was held on May 15, 2014. By order dated the same date, the Court Attorney-Referee noted that Sandra Russell, who appeared therefor, indicated that both her parents, Edgar and Fay Jennings, were deceased, that she was in the process of being substituted as administrator, and that "[t]he intention is to sell the property – it has equity." Plaintiff was directed to file an application seeking an order of reference by November 25, 2014. By status conference order dated that date, plaintiff was again directed to file an application seeking an order of reference by August 25, 2015. This motion was filed within that time period, on March 4, 2015. As noted, *supra*, both Sandra Russell and Leslie Jennings oppose the motion.

That branch of the motion for an order discontinuing the action against Edgar Jennings is granted, said defendant having predeceased both the commencement of this action as well as his wife Fay Jennings; his interest, thus, passed to her, by operation of law (*see* discussion, *infra*). To the extent Sandra Russell argues that plaintiff should have named the Estate of Edgar Jennings in the complaint, same was unnecessary, considering the fact that: (1) all of Edgar Jennings' interest in the premises passed to his wife – with whom he held the property, together as tenants by the entirety – upon his death and; (2) by virtue of plaintiff's desire to discontinue the action against Edgar Jennings, it is clear that plaintiff is not seeking a deficiency judgment against his estate (*see HSBC Bank USA v Ungar Family Realty Corp.*, 111 AD3d 673 [2013]; *Bank of New York Mellon Trust Co. v Ungar Family*

Realty Corp., 111 AD3d 657 [2013]; *Financial Freedom Sr. Funding Corp. v Rose*, 64 AD3d 539 [2009]).

That branch of the motion for an order substituting the above-noted individuals, sued herein as "John Doe #1-3," is granted. However, plaintiff is not entitled to an order holding them in default in answering the complaint since it has not demonstrated that it properly served these defendants within 120 days after filing the complaint, as required by CPLR § 306-b, all of them having been served beyond such period. Moreover, the affidavits of service are insufficient to demonstrate that service was properly effected on them pursuant to CPLR § 308 (2), as it cannot be discerned therefrom where the mailings were made, indicating only that the envelopes which were mailed were "properly addressed" (*see e.g. HSBC Bank USA, N.A. v Hamilton*, 116 AD3d 663 [2014]).[1]

Turning to that branch of plaintiff's motion which seeks summary judgment, 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]).

In support of its motion, plaintiff offers, among other things, a copy of the pleadings, the note and home equity mortgage, a copy of the order of Surrogate's Court, Queens County decreeing Leslie Jennings be issued letters of administration for the Estate of Fay Jennings, the affirmation of its counsel, the affidavit of Donna Wilson, Senior Vice President for plaintiff, dated January 9, 2015, and the affidavit of Christine Ackley, Assistant Vice President of NYCB Mortgage Company, LLC, a wholly owned subsidiary of plaintiff, successor in interest to QCSB, dated December 17, 2014. The copy of the note indicates that QCSB was the originator of the loan, and bears what appear to be the signatures of Edgar and Fay Jennings.

"Generally, a plaintiff in a mortgage foreclosure action is entitled to summary judgment if it establishes the existence of a mortgage, an unpaid note, and the defendant's default, and the defendant fails to raise a triable issue of fact in opposition" (*PNC Bank, N.A.*

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1. Though the Notice of Motion seeks to substitute Sandra Russell, Miriam Lovett, and Edgar Jennings, Jr., for the respective "John Does," it is not until ¶ 21 of his affirmation, that plaintiff's counsel requests that they actually be added as additional party-defendants and that "the affidavits of service upon them be deemed timely filed, nunc pro tunc." This relief was not requested in plaintiff's Notice of Motion. If plaintiff seeks additional relief with respect to an extension of time to serve these defendants, it may separately move for that particular relief by proper Notice of Motion.

v Klein, 125 AD3d 953 [2015]; *see NationStar Mtge., LLC v Silveri*, 126 AD3d 864 [2015]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724 [2013]; *Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC*, 89 AD3d 922 [2011], *lv to appeal dismissed* 19 NY3d 940 [2012]). Plaintiff asserts the original note no longer exists, having been lost, but that prior to the loss, the note had been held by it, and by QCSB before it.

UCC 3-804 makes manifest that a suit may be brought by the "owner" of a lost instrument, upon due proof of its ownership, facts which prevent the production of the instrument, and its terms. Furthermore, a court is authorized to require security indemnifying the obligor.[2]

The copy of the note submitted by plaintiff provides sufficient evidence of its terms. To the extent plaintiff relies upon the affidavit of Ms. Wilson and Ms. Ackley to demonstrate proof of its ownership of the note and an accounting for the absence of the note, Ms. Wilson states in her affidavit: that, on December 6, 2000, QCSB changed its name to New York Community Bank, plaintiff herein; that since the origination of the loan, same has never been sold, transferred, or otherwise assigned by either QCSB or plaintiff, as evidenced by what she refers to as a "revised Affidavit of Lost Note" of Ms. Ackley; and that plaintiff services the loan and it is the owner and holder of the note and mortgage. Ms. Wilson also indicates that Richmond County Savings Bank (RCSB) has never owned, held or otherwise been assigned the note or mortgage. Presumably she refers to an affidavit of Cono R. Mea, Vice President of plaintiff, dated September 4, 2013, which was annexed to the complaint but not provided on the motion, discussed, *infra*.

The affidavit of lost note of Ms. Ackley states that the lender, QCSB, is the lawful owner of the note and it has not canceled, altered, assigned or hypothecated the note, that a thorough and diligent search was undertaken and the original note could not be located, but that, based on her personal knowledge, that the photocopy of the note attached is a true copy of the missing note evidencing the obligation of the borrowers, and that the note is secured by a mortgage from said borrowers "which has been assigned to Assignee in connection with the sale of the Mortgage or Deed of Trust." No assignee is specifically named in her affidavit.

The affidavit of lost note of Mr. Mea, referenced above, states that the lender, RCSB, is the lawful owner of the note and it has not canceled, altered, assigned or hypothecated the note, that a thorough and diligent search was undertaken and the original note could not be

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2.The requirement is not an absolute one, and the matter is left to the discretion of the court (*see* UCC 3-804, Official Comment; *Newbury Place Reo III, LLC v Sulton*, 48 Misc 3d 1206 [A] [Sup Ct, Kings County 2015]).

located, that a copy of the lost note is unavailable, but that, based on his personal knowledge, the information provided in his affidavit with respect to same is a true representation of the missing note evidencing the obligation of the borrowers, and that the note is secured by a mortgage from said borrowers "which lists the Lender or has been assigned to Assignee in connection with the sale of the Mortgage or Deed of Trust." No assignee is specifically named in his affidavit.

Plaintiff's submissions are insufficient to meet its prima facie burden in this case. Neither Mr. Mea nor Ms. Ackley demonstrates the basis for, respectively, his and her, personal knowledge. They both fail to discuss any procedures for the safekeeping and retrieval of original notes or lost note procedures for determining that an original note is lost. They do not include any indication as to where the original notes are likely to be kept, what efforts if any, were made to preserve them, whether notes were routinely or otherwise destroyed, who conducted the search in this instance and whether a search was conducted in every location where notes were likely to be found (*see Rivera-Irby v City of New York*, 71 AD3d 482 [2010]; *see also Marrazzo v Piccolo*, 163 AD2d 369 [1990]).

Further, there are material discrepancies between the lost note affidavit of Mr. Mea and that of Ms. Ackley, the latter of which was inexplicably referred to by Ms. Wilson as a revised affidavit, though Ms. Ackley's affidavit itself is not titled as such. Notably, the discrepancies include the designation of the entity alleged to be the original lender and the rate of interest per the note. Moreover, it is unclear why a copy of the lost note was unavailable per Mr. Mea, but then a true and correct copy of same was produced per Ms. Ackley.

Finally, Ms. Wilson's bare statement that QCSB's name was changed to plaintiff's name is not proof of said name change. She indicates that the name change became effective on December 6, 2000, and that plaintiff has held the note since that time; yet, Ms. Ackley, per her December 17, 2014 affidavit states that the "Lender" is the lawful owner of the note, naming the Lender as QCSB. Ms. Ackley also refers to plaintiff as the successor in interest to QCSB, which is has a different legal significance than a mere name change. There is also no explanation as to why both Ms. Ackley's and Mr. Mea's affidavits refer generally to an assignment/assignee and sale of the corresponding mortgage. The fact that Ms. Wilson states in a conclusory manner that RCSB has never been assigned the note does not eliminate questions of fact as to same.

Under such circumstances, plaintiff has failed to make a prima facie showing that it was the holder of the note prior to its loss and the facts which prevent the production of the note and, thus, plaintiff is not entitled to summary judgment as against Leslie Jennings.

Accordingly, that branch of the motion by plaintiff for summary judgment against her is denied.

With respect to that branch of the motion by plaintiff to strike the affirmative defenses raised by Leslie Jennings in her answer, plaintiff bears the burden of demonstrating that the affirmative defenses are 'without merit as a matter of law' " (*Greco v Christoffersen*, 70 AD3d 769 [2010], quoting *Vita v New York Waste Servs., LLC*, 34 AD3d 559 [2006]).

The first affirmative defense raised by this defendant is standing. For the reasons noted above, plaintiff has failed to affirmatively establish its standing herein (UCC 3-804; *see e.g. Sbc 2010-1, LLC v Al-Flamingo Realty LLC*, __ Misc 3d __, 2014 NY Slip Op 31661 [U] [Sup Ct, Bronx County [2014]) and, as such, is not entitled to dismissal of this defense.

As to her second affirmative defense that plaintiff failed to properly serve the summons and complaint on Edgar Jennings, as he was deceased, she lacks standing to make such assertion because that defense is a personal one which may be raised, if at all, only by the codefendant (*see Wells Fargo Bank, N.A. v Bowie*, 89 AD3d 931 [2011]; *Home Sav. of Am. v Gkanios*, 233 AD2d 422 [1996]). In any event, plaintiff acknowledges that Edgar Jennings was not served for the very reason noted and, as indicated, *supra*, the action against him may be properly discontinued.

To the extent she asserts lack of personal jurisdiction with respect to herself, she has failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of her answer, and has made no application to extend the period of time upon the ground of undue hardship (CPLR 3211 [e]). As a consequence, she is deemed to have waived such defense (*id.*; *see Dimond v Verdon*, 5 AD3d 718 [2004]). In any event, it is noted that, as to her contention that she was not the estate administratrix on the date she was served, she submits no evidentiary proof to that effect; further, her affirmation is without probative value inasmuch as, though she is an attorney, she is a party to this action and, as such, she must submit an affidavit (CPLR 2106; *see Wester v Sussman*, 304 AD2d 656 [2003]). As such, that branch of the motion by plaintiff to strike the second affirmative defense is granted.

As to her third affirmative defense that "all monies has [sic] been paid and verified by bank," plaintiff established, prima facie, that the last payment received was the one on June 12, 2012, and that no payments were made for the July 2012 installment nor any time thereafter. Defendant has not established that the loan was paid in full, acknowledging that the debt is outstanding (by virtue of her requests for payoff amounts). Any partial payments which have been made may be properly determined by a referee and do not constitute a defense to a foreclosure action (RPAPL § 1321). As such, that branch of the motion by plaintiff to strike the third affirmative defense is granted.

As to her fourth affirmative defense regarding her alleged non-receipt of the RPAPL § 1303 notice, the affidavit of service of Samuel L. Berg is prima facie evidence that said notice was served. Defendant fails to rebut this showing. As such, that branch of the motion by plaintiff to strike the fourth affirmative defense is granted.

As to her fifth affirmative defense, though plaintiff indeed affirmatively alleged its standing in the complaint, it did not, as a matter of law, establish same. The additional contention that Leslie Jennings "clearly was aware that Plaintiff owned, held and serviced the loan as indicated by the annexed checks payable to New York Community Bank," is without merit, as the checks provided by plaintiff indicate the drawer to be either Fay Jennings or Sandra Russell, not Leslie Jennings. As such, that branch of the motion by plaintiff to strike the fifth affirmative defense is granted only to the extent that same states that the complaint fails to affirmatively *allege* standing, and is otherwise denied.

As to her sixth affirmative defense for failure to comply with RPAPL § 1304, same is without merit inasmuch as both borrowers are deceased (*see US Bank N.A. v Pontecorvo*, __ Misc 3d __, 2014 NY Slip Op 33413 [U] [Sup Ct, Suffolk County]; *Bank of New York Mellon v Roman*, __ Misc 3d __, 2012 NY Slip Op 31687 [U] [Sup Ct, Queens County]).

As to Leslie Jennings' counterclaims, plaintiff has not established, as a matter of law, that these claims should be dismissed inasmuch as it cannot be determined on this record that it is the proper party entitled to collect monies alleged to be owed and, as such, whether its filing of the *lis pendens* on the subject premises was proper.

It is otherwise noted that Sandra Russell's opposition, to the extent not already discussed, need not be considered further, as moot, inasmuch as plaintiff has not established that it has obtained personal jurisdiction over her. Her substantive arguments need not be addressed, as Sandra Russell has not sought any affirmative relief from this court.

Accordingly, that branch of plaintiff's motion for an order granting it summary judgment against defendant Leslie Antoinette Jennings, as Administratrix of the Estate of Fay Jennings a/k/a Fay M. Jennings a/k/a Fay Michelle Jennings, and striking her answer, is denied. That branch of the motion for an order striking her affirmative defenses and counterclaims is granted only to the extent that the second, third, fourth, portion of the fifth alleging that standing was not affirmatively alleged in the complaint, and sixth affirmative defenses are stricken, and is otherwise denied. The branch of the motion for judgment by default as to the remaining defendants is granted only to the extent that defendants Criminal Court of the City of New York, New York City Parking Violations Bureau, New York State Department of Taxation and Finance, and United States of America, are in default in answering or otherwise appearing herein. The branch of the motion for an order amending

the caption by substituting Sandra Russell as heir and distributee to the estate of Fay Jennings a/k/a Fay M. Jennings a/k/a Fay Michelle Jennings s/h/a "John Doe #1," Miriam Lovett as heir and distributee to the estate of Fay Jennings a/k/a Fay M. Jennings a/k/a Fay Michelle Jennings s/h/a "John Doe #2," and Edgar Jennings, Jr., as heir and distributee to the estate of Fay Jennings a/k/a Fay M. Jennings a/k/a Fay Michelle Jennings s/h/a "John Doe #3," is granted. That branch of the motion for an order discontinuing the action against defendant Edgar Jennings is granted. The branch of the motion for an order appointing a referee to compute is denied. To the extent the motion seeks that certain affidavits of service be deemed timely filed, *nunc pro tunc*, same is denied inasmuch as that relief was not properly requested.

Dated: August 5, 2015

J.S.C.