

M&T Bank v Golding

2015 NY Slip Op 31769(U)

June 12, 2015

Supreme Court, Suffolk County

Docket Number: 12-10447

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 3/19/14
SUBMIT DATE: 5/29/15
Mot. Seq. #001 - MG
CDISP Y N X

-----X
M&T BANK, :
 :
 :
 Plaintiff, :
 :
 :
 -against- :
 :
 VALERIE GOLDING, and "JOHN DOE #1" to :
 "JOHN DOE #10", the last 10 names being :
 fictitious and unknown to plaintiff, the persons or :
 parties intended being the persons or parties, if any, :
 having or claiming an interest in or lien upon the :
 mortgaged premises described in the verified :
 complaint, :
 :
 Defendants. :
-----X

McCABE, WEISBERG et a;
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New Rochelle, NY 10801

SIMON & MILNER, ESQS.
Attys. For Defendant Golding
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Upon the following papers numbered 1 to 9 read on this motion by plaintiff for accelerated judgments, party identification and deletion and the appointment of referee to compute; Notice of Motion/Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers _____; Answering papers 8-9; Reply papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for accelerated judgments on its complaint, substitution and/or deletion of certain party defendants and an order of reference is considered under CPLR 3212, 3215 and RPAPL § 1321 and is granted.

In this mortgage foreclosure action, the plaintiff moves for an order: (1) awarding it summary judgment against the answering defendant; (2) deleting as party defendants the unknown defendants; and (3) appointing a referee to compute amounts due under the subject mortgage. The motion is considered under CPLR 3215, 3212 and RPAPL § 1321 and is granted.

The plaintiff commenced this action in March of 2012 to foreclose the lien of an April 24, 2009 mortgage given by defendant Golding to a predecessor-in-interest of the plaintiff. In response

M&T Bank v Golding et al
Index No. 12-10447
Page 2

to the plaintiff's service of process upon defendant Golding, she appeared herein by answer dated April 13, 2012. Therein, defendant Golding asserted but one affirmative defense that is premised upon alleged violations on the part of the plaintiff of certain banking laws which purportedly render the mortgage loan documents unenforceable.

By the instant motion, the plaintiff seeks summary judgment dismissing the affirmative defense asserted in the answer of defendant Golding and summary judgment in favor of the plaintiff on its complaint against her. The plaintiff also seeks an order identifying the true names of two persons served with process as unknown defendants John Doe #1 and John Doe #2 and the deletion of the remaining unknown defendants together with adjudication of their defaults in answering the summons and complaint served upon them. The plaintiff further seeks an order appointing a referee to compute amount due under the note and mortgage. Defendant Golding opposes the motion by submission of an affirmation of her counsel who therein challenges the standing of the plaintiff to prosecute its claims for foreclosure and sale.

For the reasons stated, the motion (#001) is granted.

Entitlement to a judgment of foreclosure is established, as a matter of law, where the plaintiff produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which raises a question of fact (*see Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602, 970 NYS2d 804 [2d Dept 2013]; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; *Zanfini v Chandler*, 79 AD3d 1031, 1031–1032, 912 NYS2d 911 [2d Dept 2010]). This standard is, however, enlarged to include a demonstration that the plaintiff is possessed of the requisite standing to pursue its claims where, and only where, the defense of standing is due and timely asserted by a defendant possessed of such defense (*see HSBC Bank USA, Natl. Ass'n v Baptiste*, 128 AD3d 773, 2015 WL 2215884 [2d Dept 2015]; *Deutsche Bank Natl. Trust Co. v Islar*, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; *Midfirst Bank v Agho*, 121 AD3d 343, 991 NYS2d 623 [2d Dept 2014]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; *Kondaaur Capital Corp. v McCary*, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012]; *Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888, 934 NYS2d 182 [2d Dept 2011]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]).

The last stated rule is discernible from the general precept that the standing of a plaintiff is not an element of his or her claim (*see id.*, at 42 AD3d 250; *see also JP Morgan Chase Bank, Natl. Ass'n v Butler*, ___ AD3d ___, 2015 WL 3605382 [2d Dept 2015]; *Deutsche Bank Natl. Trust Co., v Islar* 122 AD3d 566, *supra*; *Midfirst Bank v Agho*, 121 AD3d 343, *supra* *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, *supra*). This is particularly evident in the mortgage foreclosure arena wherein recent appellate case authorities have repeatedly held that a lack of standing is merely an affirmative defense which must be timely raised by a defendant possessed of such defense or it is

M&T Bank v Golding et al

Index No. 12-10447

Page 3

waived (*see* CPLR 3018[b]; CPLR 3211[e]; *Wells Fargo Bank, N.A. v Erobo*, 127 AD3d 1176, 2015 WL 1915161 [2d Dept 2015]; *HSBC Bank USA, N.A. v Forde*, 124 AD3d 840, 2 NYS3d 561 [2d Dept 2015]; *JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821, 979 NYS2d 620 [2d Dept 2014]; *Deutsche Bank Trust Co. Americas v Cox*, 110 AD3d 760, 973 NYS2d 662 [2d Dept 2013]). A foreclosing plaintiff is thus under no obligation to establish its standing in order to demonstrate its prima facie entitlement to judgment as a matter of law where its standing has not been challenged by an answer in which that defense is properly asserted by one possessed of it (*see JP Morgan Chase Bank, Natl. Ass'n v Butler*, ___ AD3d ___, 2015 WL 3605382, *supra*; *Deutsche Bank Natl. Trust Co. v Islar*, 122 AD3d 566, *supra*).

The defense of standing is thus not jurisdictional in nature (*see US Bank v Peters*, 127 AD3d 742, 2015 WL 1445426 [2d Dept 2015]; *Citimortgage, Inc. v Chow Ming Tung*, 126 AD3d 841, 7 NYS3d 147 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Gioia*, 114 AD3d 766, 980 NYS2d 535 [2d Dept 2014]; *Citimortgage, Inc. v Friedman*, 109 AD3d 573, 970 NYS2d 706 [2d Dept 2013]; *HSBC Bank USA, N.A. v Taher*, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; *US Bank Natl. Ass'n v Tate*, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Hunter*, 100 AD3d 810, 954 NYS2d 181 [2d Dept 2012]; *Bank of New York v Alderazi*, 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]; *U.S. Bank Natl. Ass'n. v Denaro*, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; *U.S. Bank v Emmanuel*, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242-244, *supra*). Moreover, the prosecution of a claim for foreclosure and sale by one without standing is not a jurisdictional defect nor an actionable wrong, as the claimant may prevail even in the absence of standing (*see Deutsche Bank Natl. Trust Co. v Islar*, 122 AD3d 566, *supra*; *Bank of New York v Cepeda*, 120 AD3d 451, 989 NYS2d 910 [2d Dept 2014]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242, *supra*; *see also US Bank, NA v Reed*, 38 Misc3d 1206, 967 NYS2d 870 [Sup. Ct. Suffolk County 2013]). Nor does the prosecution of a claim for foreclosure and sale by one without standing vitiate or otherwise affect, adversely, the validity of the mortgage (*see Homar v American Home Mtge. Acceptance, Inc.*, 119 AD3d 900, 989 NYS2d 856 [2d Dept 2014]).

Once waived, a standing defense may not be resurrected by its assertion in opposition to a motion for summary judgment (*see Wells Fargo Bank, N.A. v Erobo*, 127 AD3d 1176, 2015 WL 1915161, *supra*; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; *Capital One, N.A. v Knollwood Prop. II, LLC*, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]; *JPMorgan Chase Bank, N.A. v Bauer*, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]; *US Bank Natl. Ass'n. v Denaro*, 98 AD3d 964, *supra*; *HSBC Bank, USA v Schwartz*, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; *U.S. Bank Natl. Ass'n v Eaddy*, 79 AD3d 1022, *supra*). Additionally, a waived standing defense may not be used to support of an untimely motion to dismiss pursuant to CPLR 3211 (*see Southstar III, LLC v Enttienne*, 120 AD3d 1332, 992 NYS2d 548 [2d Dept 2014]; *JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821, *supra*; *EMC Mtge. Corp. v Gass*, 114 AD3d 1074, 981 NYS2d 814 [3d Dept 2014]; *U.S. Bank Natl. Ass'n. v Denaro*, 98 AD3d 964, *supra*; *U.S. Bank N.A. v Gonzalez*, 99 AD3d 694, 694-695, 952 NYS2d 59 [2d Dept

M&T Bank v Golding et al

Index No. 12-10447

Page 4

2012]; *McGee v Dunn*, 75 AD3d 624, 625, 906 NYS2d 74 [2d Dept 2010]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]), or an application to vacate a default under CPLR 5015(a)(1) (see *Wells Fargo Bank, Natl. Ass'n v Laviolette*, ___ AD3d ___, 2015 WL 2457936 [2d Dept 2015]; *U.S. Bank, N.A. v Bernabel*, 125 AD3d 541, 5 NYS3d 372 [1st Dept 2015]; *JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821 *supra*; *Citibank, N.A. v Swiatkowski*, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; *HSBC Bank, USA v Dammond*, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009]).

Here, the moving papers established the plaintiff's entitlement to summary judgment on its complaint to the extent it asserts claims against the answering defendant as they included copies of the mortgage, the unpaid note and due evidence of a default under the terms thereof (see CPLR 3212; RPAPL § 1321; *One West Bank, FSB v DiPilato*, 124 AD3d 735, *supra*; *Deutsche Bank Natl. Trust Co. v Islar*, 122 AD3d 566, *supra*; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, *supra*; *Bank of New York v McCall*, 116 AD3d 993, *supra*; *Jessabell Realty Corp. v Gonzalez* 117 AD3d 908, 985 NYS2d 897 [2d Dept 2014]; *Fairmont Capital, LLC v Laniado*, 116 AD3d 998, 985 NYS2d 254 [2d Dept 2014]; *W & H Equities LLC v. Odums*, 113 AD3d 840, 978 NYS2d 910 [2d Dept 2014]). The moving papers further provided due and sufficient proof as to the lack of merit in the single affirmative defense asserted in defendant Golding's answer, which defense was conclusory and not raised in the opposing papers submitted by defendant Golding in response to the plaintiff's motion (see *New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; *Starkman v City of Long Beach*, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]).

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 her answer or otherwise available to her (see *Nationstar Mtge., LLC v Silveri*, 126 AD3d 864, 2015 WL 1212321 [2d Dept 2015]; *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]). A review of the opposing papers reveals that defendant Golding failed to satisfy this burden since the only defense asserted was a purported lack of standing on the part of the plaintiff to prosecute its claims. However, as detailed above, this defense was waived by the defendant's failure to assert it in her answer and the attempt to assert it in opposition to the plaintiff's motion for summary judgment is wholly unavailing (see *Wells Fargo Bank, N.A. v Eroboho*, 127 AD3d 117, *supra*; *Bank of New York Mellon Trust Co. v McCall*, 116 AD3d 993, *supra*).

The court thus finds that the plaintiff is entitled to summary judgment on its complaint and dismissing the affirmative defenses and counterclaims set forth in the answer of defendant, Valerie Golding. Those portions of this motion wherein the plaintiff seeks such relief are thus granted.

Those portions of the instant motion wherein the plaintiff seeks an order substituting Ezekiel Reid and Mike Reid, as John Doe in the caption and dropping as party defendants the remaining

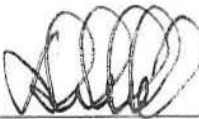
M&T Bank v Golding et al
Index No. 12-10447
Page 5

unknown defendants listed in the caption and an amendment of the caption to reflect same are granted.

The moving papers further established the default in answering on the part of the newly identified defendants none whom served answers to the plaintiff's complaint. Accordingly, the defaults of all such defendants are hereby fixed and determined. Since the plaintiff has been awarded summary judgment against the sole answering defendant and has established a default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see* RPAPL § 1321; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *LaSalle Bank, NA v Pace*, 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd*, 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]).

The proposed order of reference, as modified by the court to reflect the terms of this memo decision and order has been marked signed.

DATED: 6/12/15



THOMAS F. WHELAN, J.S.C.