One West Bank, FSB v Chapilliquen
2016 NY Slip Op 30536(U)
April 1, 2016
Supreme Court, Queens County
Docket Number: 16868/2012
Judge: David Elliot

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

ONE WEST BANK, FSB,
Plaintiff(s),

- against -

PEDRO CHAPILLIQUEN, et al.,
Defendant(s).

Index
No. 16868 2012

Motion
Date March 24, 2016

Motion
Cal No. 104

Motion
Seq. No. 1

The following papers numbered 1 to 7 read on this motion by plaintiff for an order, *inter alia*, awarding it summary judgment against defendants Pedro and Toya Chapilliquen (defendants).

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4
Answering Affirmation - Exhibits.....	5-7
Reply[1]	

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

Plaintiff commenced this action to foreclose a mortgage against real property known as 104-44 43rd Avenue, Corona, New York. Per the complaint, filed with the County Clerk on August 13, 2012, defendant Toya Chapilliquen executed and delivered to Indymac Bank,

1. The Reply Affirmation together with exhibits were not considered as there was no affidavit of service of same annexed thereto.

F.S.B., a note in the principal amount of $500,000.00. On the same date, defendants executed and delivered a mortgage in the same amount, securing the premises as collateral security for the note. Plaintiff alleges that it is in possession of the original note with proper endorsement and is, therefore, the holder of the note and mortgage, that defendants failed to comply with the conditions of the note and mortgage by failing to make the payment that became due on February 1, 2009, and that, as a result, plaintiff elected to accelerate the debt by commencing this action.

Plaintiff has demonstrated that all defendants have been served with process and have failed to answer or otherwise appear herein, with the exception of the Chapilliquen defendants. Plaintiff has also established that defendants "John Doe #1" through "John Doe #12" were not served with process as they are not necessary parties to this action. As such, that branch of the motion for an order amending the caption to delete reference to defendants "John Doe #1" through "John Doe #12" is granted.[2]

Defendants interposed an answer together with ten affirmative defenses, including lack of standing and noncompliance with RPAPL § 1304, and two counterclaims. The matter remained in the Foreclosure Conference Part for approximately one-and-a-half years until it was released on September 9, 2014, due to defendants' default in appearance on that date. Plaintiff was directed to file an application for an order of reference by May 25, 2015, which time was extended to February 16, 2016. Accordingly, plaintiff now moves for summary judgment and related relief. Defendants oppose the motion.

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 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). In a residential mortgage foreclosure action, a plaintiff establishes its *prima facie* entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default (*see Midfirst Bank v Agho*, 121 AD3d 343 [2014]). Where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also submit evidence that it received both the mortgage and note by a proper assignment, which can be established by the production of a written assignment of the note (*see Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2014], *affd* 25 NY3d 355 [2015]; *see Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2013]), or by physical delivery to the plaintiff of the note (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649 [2014]; *Aurora Loan Servs., LLC v*

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2. Though plaintiff provides affidavits of service with respect to certain individuals, alleged to have been sued herein as the respective "John Does," plaintiff does not, by this motion, seek to have them substituted as party defendants.

Weisblum, 85 AD3d 95 [2011]). In addition, the plaintiff must make a *prima facie* showing of strict compliance with RPAPL § 1304, which is a condition precedent to the commencement of the foreclosure action (*see Aurora Loan Services, LLC v Weisblum*, 85 AD3d at 107). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Plaintiff has failed to meet its *prima facie* burden of establishing its entitlement to judgment as a matter of law. Notably, plaintiff has failed to submit a complete copy of the mortgage upon it wishes to foreclose. Also absent from plaintiff's application is proof of compliance with Administrative Order 431/11 or, in the alternative, CPLR § 3012-b.[3]

Neither has plaintiff met its *prima facie* burden with respect to its standing to commence this action. The affidavit of fact of Sandra Lyew, Senior Loan Analyst for Ocwen Financial Corporation, whose indirect subsidiary is Ocwen Loan Servicing LLC, the loan servicer and attorney-in fact for plaintiff,[4] states, *inter alia*, that "[t]he note and mortgage were subsequently delivered to Plaintiff or its custodian on or before October 22, 2007, and Plaintiff was the only party in possession at the time of filing this action." First, Ms. Lyew does not identify who the custodian of the loan documents is. Second, while she provides a precise date of delivery, to whom the delivery was made is unclear; either it was made to plaintiff or it was made to its custodian. Third, Ms. Lyew does not provide details of a physical delivery to plaintiff such that she could substantiate her ultimate conclusion that plaintiff was the only party in possession at the time of the filing of the foreclosure complaint. The fact that the indorsement is blank and undated, renders the court unable to ascertain when plaintiff indeed came into possession of the subject note (*see generally Deutsche Bank Nat. Trust Co. v Weiss*, 133 AD3d 704 [2015]; *Homecomings Fin., LLC v Guldi*, 108 AD3d 506 [2013]).

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3. "For residential mortgage foreclosure actions commenced prior to August 30, 2013, Administrative Order 208-13 states that if no affirmation has been yet filed, the plaintiff has two options: 1) it can comply with the provisions in Administrative Order 431-11, or 2) it can file with the court at the time of the filing of the request for judicial intervention a certificate of merit containing the contents prescribed in CPLR 3012-b (a)" (Patrick M. Connors, 2013 Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3012-b; *see also* Status Conference Order, dated May 12, 2015, directing plaintiff to file the foreclosure affirmation by February 16, 2016 [Catapano-Fox, CA-R]).

4. No power of attorney is annexed.

Based on the above, nor would plaintiff be entitled to substitution of Ocwen Loan Servicing, LLC, for plaintiff herein. It is noted that: (1) Ms. Lyew does not indicate that her company's subsidiary is currently in possession of the note; and (2) the corporate assignment of mortgage into Ocwen purports only to assign the mortgage and not the corresponding note.

Moreover, plaintiff has not demonstrated "strict compliance" with RPAPL § 1304 since plaintiff has failed to produce an affidavit of service of the requisite 90-day notice (*see Bank of N.Y. Mellon v Aquino*, 131 AD3d 1186 [2015]; *Flagstar Bank, FSB v Anderson*, 129 AD3d 665 [2015]; *Wells Fargo Bank, N.A. v Burke*, 125 AD3d 765 [2015]; *Deutsche Bank Nat. Trust Co. v Spanos*, 102 AD3d 909 [2013]; *U.S. Bank N.A. v Tate*, 102 AD3d 859 [2013]). Ms. Lyew's affidavit is not based upon her personal knowledge of the actual mailings. To the extent it is based upon her knowledge obtained from business records, such affidavit, even when considered with the copies of the 90-day notices,[5] is insufficient to establish what manner of office practice or procedure was used by plaintiff to ensure that mailed items were always properly addressed and mailed by registered or certified and first class mail (*see Citimortgage, Inc. v Espinal*, 134 AD3d 876 [2015]; *Frankel v Citicorp Ins. Services, Inc.*, 80 AD3d 280 [2010]; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2001]; *Smith v Palmeri*, 103 AD2d 739 [1984]; *see also Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP*, 129 AD3d 790 [2015]; *Wells Fargo Bank, N.A. v Tessler*, 2016 NY Misc LEXIS 636 [Sup Ct, Kings County 2016]).

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

Plaintiff is entitled to dismissal of the first affirmative defense and counterclaim alleging a violation of the Truth in Lending Act, as plaintiff submitted proof that defendants executed a TILA statement and, in any event, the counterclaim alleging such a violation is time-barred (15USC § 1640 [e]).

As to the second affirmative defense and counterclaim alleging a violation of Banking Law § 349, defendants have not established that plaintiff was the originator of the loan and thus, engaged in the practices complained of. Further, the counterclaim is time-barred and, thus, is dismissed (CPLR 214 [2]; *see Corsello v Verizon New York, Inc.*, 18 NY3d 777 [2012]; *Pike v New York Life Ins. Co.*, 72 AD3d 1043 [2010]).

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5. Annexing a copy of the notice does not establish proof of proper mailing of same (*HSBC Mtge. Corp. (USA) v Gerber*, 100 AD3d 966 [2012]).

For the reasons noted above, plaintiff is not entitled to dismissal of defendants' third and fifth affirmative defenses alleging lack of standing and noncompliance with RPAPL § 1304, respectively. Neither is the ninth affirmative defense dismissed, which also sounds in lack of standing inasmuch as it challenges the written assignment. Further, for similar reasons stated for the denial of a dismissal of the RPAPL § 1304 defense, plaintiff is unable to establish, as a matter of law, that the notice of default was properly mailed. As such, it is not entitled to dismissal of the fourth affirmative defense. Moreover, since plaintiff cannot conclusively establish compliance with RPAPL § 1304, it is not entitled to dismissal of the sixth affirmative defense alleging noncompliance with RPAPL § 1306.

Plaintiff has established that defenses seven and eight, alleging misrepresentation and predatory lending are conclusory (CPLR 3013) and without merit.

Finally, plaintiff has established that the tenth affirmative defense should be dismissed, as defendants have waived any challenge to improper service of process (CPLR 3211 [e]).

Accordingly, the motion is granted only to the extent that: (1) the caption is amended by deleting "John Doe #1" through "John Doe #12"; (2) both counterclaims are dismissed; (3) the first, second, seventh, eighth, and tenth affirmative defenses are dismissed. The motion is otherwise denied.

Dated: April 1, 2016

J.S.C.