

JPMorgan Chase Bank, N.A. v Alvarez
2016 NY Slip Op 31807(U)
March 18, 2016
Supreme Court, Suffolk County
Docket Number: 1246/13
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 6/25/14
ADJ. DATES 3/8/16
Mot. Seq. # 001 - MG
CDISP: No

-----X

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, :
 :
 :
 Plaintiff, :
 :
 -against- :
 :
 ERI HERNANDEZ ALVAREZ a/k/a ERI HERNANDEZ-ALVEREZ, and "JOHN DOE and JANE DOE #1 through #7", the last seven names being fictitious and unknown to the plaintiff, the persons or parties intended being the tenants, occupants, persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint, :
 :
 Defendants. :
 -----X

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Upon the following papers numbered 1 to 13 read on this motion by plaintiff for accelerated judgments, striking the answer of defendant, substitution of parties and the appointment of a referee to compute; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers _____; Answering papers 5-6; Reply papers 7-8; Other 9 (affirmation); 100-11 (Notice of Rejection); 12-13 (affirmation); (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, and, among other things, the appointment of a referee to compute 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) striking the answer of the answering defendant; (3) substituting defendant Ronald Lopez for the John Doe defendant and a default judgment against him; and (4) appointing a referee to compute amounts due under the subject mortgage. The motion is opposed by defendant Alvarez who appeared herein by answer containing eleven affirmative defenses. For the reasons stated below, the motion is granted.

Entitlement to summary in favor of a foreclosing plaintiff is established, prima facie, by the plaintiff's production of the mortgage and the unpaid note, and evidence of the default in payment (*see Wells Fargo Bank, N.A. v Erobo*, 127 AD3d 1176, 9 NYS2d 312 [2d Dept 2015]; *Wells Fargo Bank, N.A. v DeSouza*, 126 AD3d 965, 3 NYS2d 619 [2d Dept 2015]; *OneWest Bank, FSB v DiPilato*, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]). Where, as here, the plaintiff's standing has been placed in issue by the defendant's answer, the plaintiff also must establish its standing as part of its prima facie showing (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015] *Loancare v Firshing*, 130 AD3d 787, 2015 WL 4256095 [2d Dept 2015]; *HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 77, 10 NYS2d 255 [2d Dept 2015]).

A foreclosing plaintiff has standing if it is either the holder or the assignee of the underlying note at the time that the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, *supra*; *Loancare v Firshing*, 130 AD3d 787, *supra*; *Emigrant Bank v Larizza*, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]). "Either a written assignment of the underlying note or the physical delivery of it to the plaintiff prior to the commencement of the action is sufficient to transfer the obligation" (*see id.*, *Wells Fargo Bank, NA v Parker*, 125 AD3d 848, 5 NYS3d 130 [2d Dept 2015]; *U.S. Bank NA v Guy*, 125 AD3d 845, 5 NYS3d 116 [2d Dept 2015]).

Proof that the plaintiff was in possession of the note on a day certain or an "on or before" date (*see Wells Fargo Bank, N.A. v Joseph*, –AD3d –, 2016 NY Slip Op 01661 [2d Dept 2016]) prior to the commencement of the action is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, *supra*; *Loancare v Firshing*, 130 AD3d 787, *supra*; *Emigrant Bank v Larizza*, 129 AD3d 904, *supra*). Alternatively, standing may be established by due proof of the particulars of the note delivery to the plaintiff prior to the commencement of the action (*see Deutsche Bank Natl. Trust v Weiss*, 133 AD3d 704, 21 NYS3d 126 [2d Dept 2015]; *HSBC Bank. U.S.A., N.A. v Baptiste*, 128 AD3d 773, 10 NYS2d 255 [2d Dept 2015]; *cf.*, *Flagstar Bank v Anderson*, 129 AD3d 665, 12 NYS2d 118 [2d Dept 2015]; *Bank of Am., N.A. v Paulsen*, 125 AD3d 909, 6 NYS3d 68 [2d Dept 2015]). Delivery of the note to a custodial agent of the plaintiff on a date prior to the commencement of the action will suffice to establish the standing of a foreclosing plaintiff under the foregoing rule (*see Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; *HSBC Bank USA, Natl. Ass'n v Sage*, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]).

In addition, the plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit required by CPLR 3012-b, coupled with an affidavit in which it alleges that it had possession of the note prior to commencement of the action, has been held to constitute due proof of the plaintiff's standing to prosecute its claim for foreclosure and sale (*see Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151, 9 NYS3d 315 [2015]). Finally, the plaintiff may establish its standing by proof that it is the assignee of the subject note and mortgage under a written assignment of the note by the owner thereof at the time of the execution of the written assignment (*see Emigrant Bank v Larizza*, 129 AD3d 904, *supra*; *Peak Fin. Partners, Inc. v Brook*, 119 AD3d 539, 987 NYS2d 916 [2d Dept 2014]; *Chase Home Fin., LLC v Miciotta*, 101 AD3d 1307, 956 NYS2d 271 [3d Dept 2012]; *Wells Fargo Bank, N.A. v Wine*, 90 AD3d 1216, 1217, 935 NYS2d 664 [3d Dept 2011]).

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; *see also One West Bank, FSB v DiPilato*, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; *Midfirst Bank v Agho*, 121AD3d 343, 991 NYS2d 623 [2d Dept 2014]; *W & H Equities LLC v Odums*, 113 AD3d 840, 978 NYS2d 910 [2d Dept 2014]; *Washington Mut. Bank v Schenk*, 112 AD3d 615, 616, 975 NYS2d 902 [2d Dept 2013]; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]).

The moving papers further established, *prima facie*, that the plaintiff possessed the requisite standing to prosecute its claims for foreclosure and sale. The affidavit of Patricia Ward establishes possession of the note on or before November 16, 2012, prior to the commencement of the action (*see Wells Fargo Bank, N.A. v Joseph*, –AD3d –, 2016 NY Slip Op 01661 [2d Dept 2016]). The plaintiff's standing was also established by the plaintiff's attachment of the subject note indorsed to plaintiff and the mortgage to the complaint and other initiatory papers in the office of the Clerk of the Court and the affidavit of merit submitted in support of its motion (*see Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151, *supra*). Moreover, the defendant concedes this issue, by attaching a copy of the complaint to the answering papers.

It was incumbent upon answering defendant opposing the motion 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 and counter claims asserted in his answer or otherwise available to him (*see Jessabell Realty Corp. v Gonzalez* 117 AD3d 908, *supra*; *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]; *J.P. Morgan Chase Bank, NA v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). Notably, self-serving and conclusory allegations do not raise issues of fact and do not require plaintiff to respond to alleged affirmative defenses and counter claims which are based on such allegations (*see Charter One Bank, FSB v Leone*, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; *Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also Madeline D'Anthony Enter., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). In addition, the failure to raise pleaded affirmative defenses or counter claims in opposition to a motion for summary judgment renders those defenses and counter claims abandoned and thus subject to dismissal (*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]).

In any event, the only defenses offered in the opposition papers which merit any discussion are the challenges to standing, including to an assignment of the mortgage and claimed deficiencies with RPAPL § 1304 compliance. With respect to standing, the court notes that the caselaw cited above amply demonstrates that, it is the note, not the mortgage, which is the controlling document.

A foreclosing plaintiff's possession of the mortgage note alone prior to the commencement of the action confers standing (*see Aurora Loan Serv., LLC v Taylor*, 25 NY3d 355, *supra*), and renders an ineffective written assignment irrelevant (*see HSBC Bank USA, Natl. Ass'n v Sage*, 112 AD3d 1126, *supra*; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, *supra*; *see also Tuthill Fin. v Abundant Life Church, U.P.C.*, 122 AD3d 918, 998 NYS2d 387 [2d Dept 2014]).

As indicated above, the plaintiff's submissions included due proof that the plaintiff possessed the necessary standing before the commencement of this action (*see Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, *supra*; *HSBC Bank USA, Natl. Ass'n v Sage*, 112 AD3d 1126, *supra*).

Defense counsel's conclusory assertion that the plaintiff failed to serve the RPAPL § 1304 ninety day notice is rejected as unmeritorious. No affidavit was submitted by the answering defendant denying receipt of said notice and as such, the claim is without legal merit (*see Emigrant Mtge. Co., Inc. v Persad*, 117 AD3d 676, 985 NYS2d 608 [2d Dept 2014]; *Emigrant Mtge. Co., Inc. v Gosdin*, 119 AD3d 639, 989 NYS2d 609 [2d Dept 2014]). Moreover, the papers submitted by the plaintiff completely refute the allegation. For the reasons stated below, the court finds the claim of insufficient proof of service of the RPAPL § 1304 ninety day notice to be without merit.

The affidavit of Patricia Ward, an employee of the plaintiff, amply demonstrates compliance with RPAPL § 1304, by mailing on July 2, 2012, in keeping with the dictates of the statute.

That an employee of the plaintiff or of its loan servicer may testify as to the elements of a foreclosing plaintiff's claim is clear (*see Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d 1001, 16 NYS3d 459 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 73, 995 NYS2d 118 [2d Dept 2014]; *HSBC Bank USA, Natl. Ass'n v Sage*, 112 AD3d 1126, *supra*; *Aames Capital Corp. v Ford*, 294 AD2d 134, 740 NYS2d 880 [2d Dept 2002]). Such testimony may be based upon the personal knowledge of the affiant, his or her review the business records of the plaintiff, its servicer or assignee or both (*see Landmark Capital Inv., Inc. v Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 [1st Dept 2012]).

Here, the plaintiff submitted an affidavit of an employee, Patricia Ward, which clearly demonstrates the issuance of the RPAPL § 1304 notices. The affiant testified as to her personal knowledge of her employer's procedures for creating the records and detailed those procedures and averring that they are kept in the regular course of business and created as a regular practice. The affiant further averred that plaintiff caused to be mailed copies of the notice in accordance with the dictates of the statute on July 2, 2012. The factual allegations sufficiently established the admissibility of the affiant's statements under the business records exception to the hearsay rule (*see Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737, 15 NYS2d 863 [3d Dept 2015]; *Deutsche Bank Natl. Trust Co. v Quinn*, 120 AD3d 609, 990 NYS2d 885 [2d Dept 2014]; *Emigrant Mtge. Co., Inc. v Gosdin*, 119 AD3d 639, *supra*; *Emigrant Mtge. Co., Inc. v Persad*, 117 AD3d 676, *supra*; *see also Charter One Bank, F.S.B. v Leone*, 45 AD3d 958, *supra*).

Moreover, recent appellate decisions have sustained similar affidavits as appropriate business records (*see US Bank Nat. Assn. v Carey*, __ AD3d __, 2016 WL 885966 [2d Dept 2016]; *Wells Fargo Bank, NA v Gallagher*, __ AD3d __, 2016 WL 885921 [2d Dept 2016]).

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To the extent that defense counsel claims that the plaintiff's failure to establish receipt of the mailings warrants a denial of its motion, it is rejected. Due and sufficient proof of the mailing of a statutory form or notice, such as that presented by the plaintiff on this motion, gives rise to a presumption of receipt (*see* RPAPL §1304[2]; CPLR 2103; *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679, 729 NYS2d 766 [2d Dept 2001]; *U.S. Bank Natl. Assoc. v Weinman*, 2013 NY Slip Op. 31277, 2013 WL 3172455 [Sup. Ct. Suffolk County 2013]; *see also Vivane Etienne Med. Care, P.C. v Country Wide Ins. Co.*, 25 NY3d 498, 14 NYS3d 283 [2015]; *American Tr. Ins. Co. v Lucas*, 111 AD3d 423, 974 NYS2d 388 [1st Dept 2013]; *Triple Cities Constr. Co., Inc. v State of New York*, 161 AD3d 868, 555 NYS2d 916 [3d Dept 1990]).

The Court rejects the claim concerning the CPLR 3408 settlement conference, since the Court's computer records disclose that same was held and the answering defendant defaulted on the adjourned date thereof.

Accordingly, the court finds that the plaintiff's prima facie showing of its entitlement to summary judgment dismissing the plaintiff's answer and counterclaims was un rebutted. The plaintiff is thus awarded summary judgment dismissing the affirmative defenses asserted in the answer of the defendant Alvarez. The plaintiff is further awarded summary judgment on its complaint against the answering defendant.

The plaintiff further established a default in answering by the defendant served with process as an unknown, as he did not serve an answer to the plaintiff's complaint. Accordingly, the default of such defendant is hereby fixed and determined thereby entitling the plaintiff to a default judgment against such defendant. Since the plaintiff has been awarded summary judgment against the answering defendant and has established a default in answering by the remaining substituted defendant, 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]). All other relief requested by the plaintiff is granted.

The plaintiff's prima facie showing of its entitlement to summary judgment dismissing the plaintiff's answer thus remains unassailed.

In view of the foregoing, plaintiff's motion (#001) for an order of reference is granted and the proposed Order appointing a referee to compute, as modified by the court, has been marked signed.

DATED: 3/18/16



THOMAS F. WHELAN, J.S.C.