US Bank N.A. v Somoza
2016 NY Slip Op 31814(U)
March 16, 2016
Supreme Court, Suffolk County
Docket Number: 5819/10
Judge: Thomas F. Whelan
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[* 1]

SHORT FORM ORDER

INDEX No. 5819/10

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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: 1/5/15
SUBMIT DATE: 3/8/16
Mot. Seq. # 005 - MotD
Conference Sched: 3/29/16
CDISP: NO

----------X

US BANK NATIONAL ASSOCIATION, as Trustee for Credit Suisse First Boston ARMT 2005-10,

Plaintiff,

-against-

PAUL SOMOZA and JOHN DOE (said name being fictitious, it being the intention of plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises),

Defendants.

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Atty. For Defendant Somoza
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Upon the following papers numbered 1 to 8 read on this motion for summary and default judgments, party deletion and an order appointing a referee to compute; Notice of Motion/Order to Show Cause and supporting papers 1-5; Notice of Cross Motion and supporting papers ; Opposing papers: 6-8; Reply papers: ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that those portions of this motion (#005) by the plaintiff for an order awarding it summary judgment against the answering defendants, default judgments against the remaining

defendants, for the substitution of and replacing of "John Doe" with Ames Parker and Denise Uettwiller, for the appointment of a referee to compute, and the amendment of the caption is considered under CPLR 3212, 3215, 1003, 1024 and RPAPL § 1321 and is granted only to the extent that partial summary judgment in favor of the plaintiff dismissing all of the affirmative defenses set forth in the verified answer of defendant, Paul Somoza ("answering defendant"), except the First and Tenth affirmative defenses; and it is further

ORDERED that those portions of this motion wherein the plaintiff seeks default judgments against the remaining known defendants served with process, and an order deleting the unknown defendants is considered under CPLR 1003, 1024 and is granted; and it is further

ORDERED that those portions of this motion wherein the plaintiff seeks an order appointing a referee to compute amounts due under the consolidated note and mortgage is denied without prejudice as premature; and it is further

ORDERED that pursuant to CPLR 3212(g), the court hereby finds that the sole remaining issues are (1) whether the plaintiff was either the holder of, or the assignee of, the underlying note when the action was commenced and therefore possessed of the requisite standing to prosecute its claims for foreclosure and sale and (2) whether the plaintiff complied with the pre-action ninety day notice requirement imposed upon it by the provisions of RPAPL § 1304; and that the trial of this action shall be limited to those issue; and it is further

ORDERED that a pre-trial conference shall be held in this action on **March 29, 2016**, at 9:30 a.m. in Part 33, at the courthouse located at 1 Court Street - Annex, Riverhead, New York at which counsel are directed to appear.

The plaintiff commenced this action in February of 2010 to foreclose the lien of a mortgage given by the answering defendant on July 25, 2005 in favor of First West Mortgage Bankers, Ltd, plaintiff's predecessor to secure a $190,000.00 mortgage note of the same date likewise given to First West Mortgage Bankers, Ltd. According to the complaint, the answering defendant defaulted in his payment obligations on August 1, 2009, without cure notwithstanding the issuance of contractual and statutory notices of such default and demands for cure.

The answering defendant appeared in response to the plaintiff's service of the summons and complaint by a verified answer with affirmative defenses dated March 10, 2010. The remaining John Doe defendants served with process defaulted in appearing herein by answer.

By the instant motion (#005), the plaintiff seeks summary judgment dismissing the affirmative defenses and an award of summary judgment on its complaint against the answering defendant. The plaintiff also seeks default judgments against the known defendants and the deletion of the unknown defendants together with a caption amendment to reflect these party deletions. The

motion is opposed by the answering defendant by an attorney's affirmation that only addresses the issue of plaintiff's standing and RPAPL § 1304 compliance. No other opposition is offered to the summary judgment motion.

For the reasons stated below, the motion is granted only to the extent set forth herein.

Entitlement to summary judgment in favor of the 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 Erobobo***, 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, 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 it 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, 998 NYS2d 668 [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Islar***, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; ***Plaza Equities, LLC v Lamberti***, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; ***Bank of New York v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; ***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]). However, since plaintiff's standing was challenged in the First affirmative defense in the answer of the mortgagor defendant, plaintiff's moving papers are insufficient to demonstrate plaintiff's possession of the mortgage note, which was indorsed in blank, before the commencement of this action. The moving papers fail to fully establish, prima facie, that the Fourth affirmative defense is without substantive merit.

While the affidavit of Shae Smith, dated January 29, 2014, satisfies the business records exception to the hearsay rule and is sufficiently detailed in all other respects, she never states that the plaintiff was the holder of note at the time the action was commence (*see* ***Deutsche Bank Natl. Trust Co. v Weiss***, 133 AD3d 704, – NYS3d – [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Idarecis***, 133 AD3d 702, – NYS3d – [2d Dept 2015]; ***Wells Fargo Bank NA v Burke***, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]).

It is to be noted that since the Court of Appeals holding in ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*, which was issued after the making of this motion, courts have sustained standing where the plaintiff demonstrates holder or assignee status before the commencement of the action (*see* ***Wells Fargo Bank, N.A. v Joseph***, –AD3d –, 2016 NY Slip Op 01663 [2d Dept 2016]; ***Wells Fargo Bank NA v Gallagher***, __ AD3d –, 2016 NY Slip Op 01661 [2d Dept 2016]; ***Bank of New York Mellon v Visconti***, __ AD3d __, 2016 WL 718277 [2d Dept 2016]).

As to the second issue, due proof of the mailing of the RPAPL § 1304 notice is established by the submission of an affidavit of service (*see* ***JPMorgan Chase Bank, N.A. v Schott***, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; ***Wells Fargo v Moza***, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015]) or through business records that detail a standard of office practice or procedure designed to ensure that items are properly addressed and mailed (*see* ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 729 NYS2d 766 [2d Dept 2001]; ***Pardo v Centrol Co-op. Ins. Co.***, 223 AD3d 832, 636 NYS2d 184 [3d Dept 1996]). In either case, a presumption of receipt arises (*see* ***Vivane Etienne Med. Care, P.C. v Country Wide Ins. Co.***, 25 NY3d 498, 14 NYS3d 283 [2015]; ***Residential Holding Corp., v Scottsdale Ins. Co.***, 286 AD2d 679, 729 NYS2d 766 [2d Dept 2001], *supra*; ***U.S. Bank Natl. Assoc. v Weinman***, 2013 NY Slip Op. 31277, 2013 WL 3172455 [Sup. Ct. Suffolk County 2013]; *see also* ***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])

Here, the opposing papers of the answering defendant contain assertions that the pleaded RPAPL § 1304 defense, that is the Tenth affirmative defense set forth in the answer, which is premised upon alleged non-compliance with the pre-action ninety day notice of default and cure required by RPAPL § 1304, is not subject to dismissal because the plaintiff's proof did not establish that it is without merit as a matter of law. While a loan servicer may testify on behalf of a foreclosing plaintiff is clear (*see* ***Deutsche Bank Natl. Trust Co. v Abdan***, 131AD3d 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]) and an assignee of the original lender may rely upon the business records of the original lender to establish its claims for recovery of amounts due from the debtor so long as the plaintiff establishes that it relied upon those records in the regular course of its business (*see* ***Landmark Capital Inv., Inc. v Li-Shan Wang***, 94 ADd3d 418, 941 NYS2d 144 [1st Dept 2012]), here, plaintiff's servicer simply states that she "confirmed that the 90 day pre-foreclosure notice was mailed prior to February 13, 2010." A trial is required on this issue.

The Sixth and Seventh affirmative defenses, which are challenges to the contents of the plaintiff's contractual notice of default, are unavailing. Review of the notice mailed to the answering defendant, who only offers the conclusory statement that "I do not believe that such notice was even properly served upon me," discloses that the notice comply with the requirements of paragraph 22 of the mortgage. The notice sufficiently comports with requirements of such notice set forth in the ¶ 22 of the mortgage (*see* ***Wachovia Bank, Natl. Ass'n v Carcano***, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]; ***Indymac Bank, F.S.B. v Kamen***, 68 AD3d 931, 890 NYS2d 649 [2d Dept 2009]). The court thus finds that the answering defendant failed to establish the merits of its Sixth and Seventh affirmative defenses or that questions of fact with respect thereto exist. The Court rejects and dismisses the claims as lacking merit.

As for the remainder of the motion, it was incumbent upon the 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 asserted in the answer or otherwise available to them (*see* ***Jessabell Realty Corp. v Gonzalez*** 117 AD3d 908, *supra;* ***Flagstar Bank v Bellafiore***, 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 Mentesana***, 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]).

Here, the opposing papers of the answering defendant only contain assertions that the pleaded standing defenses that is, the First affirmative defense and the RPAPL § 1304 non-compliance defense, that is the Tenth affirmative defense, set forth in the answer, are not subject to dismissal because the plaintiff's proof did not establish that they are without merit as a matter of law.

Under these circumstances, the court awards the plaintiff partial summary judgment dismissing the affirmative defenses asserted in the answer of the answering defendant except the First and Tenth affirmative defenses, as limited by this decision. The plaintiff's demands for summary judgment on its complaint is thus granted to the limited extent set forth above and its request for an order appointing a referee to compute amounts due is denied without prejudice, as such request is now premature.

Those portions of the instant motion wherein the plaintiff seeks an order dropping as party defendants the 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 all defendants, including the substitution of and replacing of "John Doe" with Ames Parker and Denise Uettwiller, substituted defendants, except the answering defendant, as none the remaining known defendants submitted an answer to the plaintiff's complaint. Accordingly, the defaults of all such defendants are hereby fixed and determined (*see* ***U.S. Bank Natl. Ass'n v Wolnerman***, 135 AD3d 850, 2016 WL 229319 [2d Dept 2016]; ***U.S. Bank, N .A. v Razon***, 115 AD3d 739, 740, 981 NYS2d 571 [2d Dept 2014]).

In view of the foregoing, and pursuant to CPLR 3212(g), the court hereby finds that the sole remaining issues are (1) whether plaintiff was either the holder of, or the assignee of, the underlying note when the action was commenced and therefore possessed of the requisite standing to prosecute its claims for foreclosure and sale and (2) whether the plaintiff complied with the pre-action ninety day notice requirement imposed upon it by the provisions of RPAPL § 1304. The trial of this action shall be limited to those issues.

Counsel are directed to appear ready to confer with the court on the readiness of this matter for the trial on the limited issues framed above at the conference scheduled herein for **March 29, 2016.**

DATED: 3/16/16

THOMAS F. WHELAN, J.S.C.