

JPMorgan Chase Bank, N.A. v Beauvoir
2016 NY Slip Op 31820(U)
March 25, 2016
Supreme Court, Suffolk County
Docket Number: 13/26592
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: 12/4/14
SUBMIT DATE: 3/8/16
Mot. Seq. # 001 - MG
ORDER SIGNED
CDISP: No

-----X
JPMORGAN CHASE BANK, NATIONAL :
ASSOCIATION, :
 :
 :
 :
 Plaintiff, :
 :
 :
 -against- :
 :
 :
 RONALD H. BEAUVOIR a/k/a RONALD :
BEAUVOIR, and JOHN DOE and JANE DOE :
#1 through #7, the seven (7) 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

McGOVERN & AMODIO, ESQS.
Attys. For Plaintiff
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White Plains, NY 10601

MICHAEL KENNEDY KARLSON
Atty. For Defendant Beauvoir
5030 Broadway - Ste. 813
New York, NY 10034

Upon the following papers numbered 1 to 7 read on this motion by plaintiff for an order of reference on default; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers _____; Answering papers 5-6; Replying Affidavits and supporting papers _____; Other 7 (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, the striking of the letter-answer, the awarding of a default judgment against the remaining

defendants, including the substituted defendant, Shakiera “Smith,” the appointment of a referee to compute, the deletion of certain party defendants and the amending of the caption 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 letter-answering defendant; (2) striking the answer of the answering defendant; (3) a default judgment against the non-appearing defendants; and (4) 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.

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]). Here, the defendant’s letter-answer failed to place in issue the plaintiff’s standing, therefore, the plaintiff need not establish its standing as part of its prima facie showing (see eg., *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 review of defense counsel’s submission reveals that the only defenses offered in the opposition papers were a challenge to plaintiff’s standing and the claimed non-compliance with RPAPL § 1304. However, standing, which as noted is not set forth in the letter-answer as an affirmative defense, has been waived (see *HSCB Bank USA v Halls*, ___ AD3d ___, 24 NYS3d 752 [2d Dept 2016]). Once waived, a standing defense may not be resurrected by its assertion in support of an untimely motion to dismiss brought pursuant to CPLR 3211(a) by a defendant in default (see *EMC Mtge. Corp. v Gass*, 114 AD3d 1074, 981 NYS2d 814 [3d Dept 2014]; *JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821, 979 NYS3d 620 [2d Dept 2014]; *U.S. Bank N.A. v Gonzalez*, 99 AD3d 694, 694–695, 952 NYS2d 59 [2d Dept 2012]; *U.S. Bank Natl. Ass’n v Denaro*, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; *Deutsche Bank Trust Co. v Stathakis*, 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011]; *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]). Nor may it be asserted in support of an application to vacate a default under CPLR 5015(a)(1) or 3012(d) (see *Wells Fargo Bank, Natl. Ass’n v Laviolette*, 128 AD3d 1054, 109 NYS3d 538 [2d 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]). The answering defendant thereby waived any standing defense he may have possessed and he may not offer opposition to this motion, upon that waived standing defense.

Defense counsel's conclusory assertion that the plaintiff failed to serve the RPAPL § 1304 ninety day notice is rejected as unmeritorious. No affidavits is offered by the answering defendant denying receipt of said notice (*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]). Such notice has been referred to by more recent appellate case authorities as a "defense" (*see Citimortgage, Inc. v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015], *citing Pritchard v Curtis*, 101 AD3d 1502, 1504, 957 NYS2d 440 [3d Dept 2012]; *PHH Mtge. Corp. v Celestin*, 130 AD3d 703, 11 NYS3d 871 [2d Dept 2015]; *see also* RPAPL § 1302[2]). Unlike the affirmative defense of standing, which is waived for all purposes if not asserted in an answer or pre-answer motion to dismiss, a defense premised upon a lack of compliance with the notice provisions of RPAPL § 1304 may be raised by an answering defendant even if such defense was not asserted in his or her answer (*see Citimortgage, Inc. v Espinal*, 134 AD3d 876, *supra*; *Pritchard v Curtis*, 101 AD3d 1502, *supra*; *Citimortgage v Pemberton*, 39 Misc3d 454, 960 NYS2d 867 [Sup. Court Suffolk County 2013]).

While the defendant's letter-answer fails to raise non-compliance with RPAPL § 1304 as an affirmative defense, for the reasons stated below, however, the court finds these contentions to be without merit.

That a foreclosing plaintiff or its loan servicer may testify in support of the plaintiff's foreclosure 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, 977 NYS2d 446 [3d Dept 2013]; *Aames Capital Corp. v Ford*, 294 AD2d 134, 740 NYS2d 880 [2d Dept 2002]). Moreover, 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 AD3d 418, 941 NYS2d 144 [1st Dept 2012]).

Here, the plaintiff submitted an affidavit of an employee, Remar T. Panganiban, which clearly demonstrates the date of the issuance of the RPAPL § 1304 notices together with a copy of the notice bearing certified tracking numbers on April; 30, 2013. The affiant testified as to his personal knowledge of his 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

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dictates of the statute on April 30, 2013. 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 Natl. Assn. v Carey*, __ AD3d __, 2016 WL 885966 [2d Dept 2016]; *Wells Fargo Bank, NA v Gallagher*, __ AD3d __, 2016 WL 885921 [2d Dept 2016]; *Citimortgage v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]).

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]; *Nassau Ins. Co. v Murray*, 46 NY2d 828, 414 NYS2d 117 [1978]; *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 contention of defense counsel which is premised upon claims of insufficient proof of service of the RPAPL § 1304 ninety day notice.

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; *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 the defaults in answering of the defendant served with process as unknown defendant. Accordingly, the default in answering of such defendant is hereby fixed and determined as is the plaintiff's entitlement to a default judgment against said defendant. Since the plaintiff has been awarded summary judgment against the answering defendant and has

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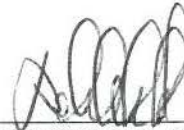
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established a default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see* RPAPL § 1321; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 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]).

In view of the foregoing, the 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: 3/25/16



THOMAS F. WHELAN, J.S.C.