

<b>Bank of N.Y. Mellon v Chin</b>
2017 NY Slip Op 30683(U)
February 15, 2017
Supreme Court, Suffolk County
Docket Number: 39413/2011
Judge: Howard H. Heckman, Jr.
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 18 - SUFFOLK COUNTY

**PRESENT:**  
**HON. HOWARD H. HECKMAN JR., J.S.C.**

INDEX NO.: 39413/2011  
MOTION DATE: 08/17/2015  
MOTION SEQ. NO.: 001 MG  
002 MD

-----X  
THE BANK OF NEW YORK MELLON,

Plaintiffs,

-against-

CLAUDETTE P. CHIN A/K/A CLAUDETTE CHIN,

Defendants.  
-----X

**PLAINTIFFS' ATTORNEY:**  
BRYAN CAVE, LLP  
1290 AVENUE OF AMERICAS  
NEW YORK, NY 10104

**DEFENDANT PRO SE:**  
CLAUDETTE CHIN  
391 N. PUTNAM AVENUE  
LINDENHURST, NY 11757

Upon the following papers numbered 1 to 56 read on this motion \_\_\_\_\_; Notice of Motion/ Order to Show Cause and supporting papers 1-34 Mot #001 ; Notice of Cross Motion and supporting papers 35-54 #002 ; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers 55-56 \_\_\_\_\_; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of the CWALT, Inc., Alternative Loan Trust 2006-45T1, Mortgage Pass-Through Certificates, Series 2006-45T1 seeking an order: 1) granting summary judgment striking the answer of defendant Claudette Chin; 2) substituting Justin Mackliss, Martha Byers and Tracy Chin as named party defendants in place and stead of defendants identified as "John Doe #1" through "John Doe #3" and discontinuing the action against defendants identified as "John Doe # 4" through "John Doe #10"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

**ORDERED** that the cross motion by defendant Claudette Chin for an order pursuant to CPLR 3212 & 3124 denying plaintiff's motion, compelling plaintiff to provide adequate responses to the defendant's discovery demands and imposing sanctions in the form of reasonable attorneys fees, costs and disbursements is denied; and it is further

**ORDERED** that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

**ORDERED** that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court;

**ORDERED** that plaintiff shall submit a proposed order of reference within twenty days of the date of this order.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$449,440.00 executed by defendant Claudette P. Chin on December 7, 2006 in favor of America's Wholesale Lender. On the same date the defendant also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated May 27, 2011 Mortgage Electronic Registration Systems, Inc. as nominee for America's Wholesale Lender assigned the mortgage to plaintiff The Bank of New York Mellon Trust. Plaintiff claims that the defendant has defaulted in making timely monthly mortgage payments since October 1, 2010. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In opposition and in support of her cross motion, defendant submits three attorney affirmations and claims that the plaintiff lacks standing to prosecute this foreclosure action since there is insufficient proof submitted to prove the bank's standing to prosecute this action. Defendant contends that there is insufficient proof to show that the bank was the lawful owner or holder of the promissory note since the plaintiff failed to prove delivery and possession of the note, with all indorsements, prior to the time the action was commenced. Defendant claims that the hearsay affidavit submitted by the mortgage servicing employee is insufficient to establish plaintiff's standing since proof of ownership and possession of the note is required by submission of authenticated business records or an affidavit from an individual who has firsthand, personal knowledge of the underlying transaction. Defendant contends that the best evidence rule requires production of all original documents allegedly signed by the borrower and the lender's representatives and claims that substantial issues of fact exist concerning whether the defendant's loan was conveyed under the terms the Pooling and Servicing Agreement into the plaintiff's Trust. Defendant also contends that she is entitled to obtain documents and records demanded in two discovery demands served upon plaintiff's counsel and that absent production of the items demanded by the defendant, the plaintiff's motion for summary judgment is premature.

In reply, the plaintiff submits an attorney's affirmation and argues that the affidavits submitted by representatives of the former mortgage loan servicer (Bank of America), and the current mortgage loan servicer (Bayview Loan Servicing, LLC), in support of the summary judgment motion, which are based upon documentary evidence maintained by the mortgage lender, provide sufficient proof to establish the bank's entitlement to summary judgment. Plaintiff asserts that the admissible evidence submitted proves that The Bank of New York Mellon Trust had standing to maintain this action as the holder of the promissory note by demonstrating that the duly indorsed in blank note was in the Trust's possession prior to the date this action was commenced on December 30, 2011. Plaintiff argues that no further details are required once proof has been submitted that CitiMortgage was in physical possession of the duly indorsed note in blank since December 18, 2006. Plaintiff claims that the defendant does not contest the fact that she has been in default in making any payments in compliance with the underlying agreement since November 1, 2010 and therefore the mortgage holder is entitled to an award of summary judgment and for the appointment of a referee to compute the sums due and owing to the bank. Plaintiff also claims that defendant is not entitled to discovery since the evidence submitted establishes the bank's entitlement to foreclose as a matter of law and since the defendant delayed in seeking to compel discovery for a period of approximately 18 months and only now raises the issue in opposition to the Trust's summary judgment application. Finally, plaintiff argues that defendant's remaining affirmative defenses and

eleven counterclaims are without legal merit and must therefore be dismissed.

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 eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

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 default in payment (see *Wells Fargo Bank N.A. v. Eraboba*, 127 AD3d 1176, 9 NYS3d 312 (2<sup>nd</sup> Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2<sup>nd</sup> Dept., 2014)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2<sup>nd</sup> Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2<sup>nd</sup> Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor*, *supra.*; *Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2<sup>nd</sup> Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to commencement of the action is sufficient to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2<sup>nd</sup> Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2<sup>nd</sup> Dept., 2015)).

Plaintiff's proof of standing consists of: 1) copies of the mortgage and promissory note signed by the defendant and indorsed in blank by America's Wholesale Lender 2) a copy of the June 28, 2011 Certificate of Merger merging BAC Home Loans Servicing, LP into Bank of New York, N.A.; 3) a copy of the December 1, 2006 Bank of New York Pooling and Servicing Agreement; 4) an affidavit from a Bank of America, N.A., AVP, operations team manager detailing the business records maintained by the original mortgage servicer confirming the defendant's default in making payments due pursuant to the parties' agreement; the transfer of the duly indorsed note to the Trust on December 18, 2006; plaintiff's continuous ownership and holder of the note since December 18, 2006; and the transfer of servicing to Bayview Loan Servicing, LLC, on October 16, 2012; 4) an affidavit from a Bayview Loan Servicing, LLC, document coordinator detailing the business records maintained by the current mortgage servicer confirming the defendant's continuing default in making payments to the mortgage lender in accordance with the parties' agreement and plaintiff's continuing ownership and holder status of the loan.

With respect to the issue of the business records exception to the hearsay rule, the three foundational CPLR 4518(a) requirements are: 1) the record must be made in the regular course of business – reflecting a routine, regularly conducted business activity, needed and relied upon in the

performance of business functions; 2) it must be the regular course of business to make the records- (i.e. the record is made in accordance with established procedures for the routine, systematic making of the record); and 3) the records must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made (*People v. Kennedy*, 68 NY2d 569, 579-580, 510 NYS2d 853 (1986)). An additional requirement for admissibility requires that the loan servicer's representative allege that he/she was personally familiar with the plaintiff's record keeping practices and procedures (see *Aurora Loan Services, LLC v. Baritz*, 2016 NY Slip Op 07154 (2<sup>nd</sup> Dept., 2016); *Deutsche Bank National Trust Co. v. Brewton*, 140 AD3d 948, 34 NYS3d 463 (2<sup>nd</sup> Dept., 2016); *U.S. Bank, NA v. Handler*, 140 AD3d 948, 34 NYS3d 463 (2<sup>nd</sup> Dept., 2016)).

Relevant portions of paragraphs 2, 3, 7, 8, 9, 11, 12 & 13 from the affidavit of the Bank of New York, N.A. .AVP, operations team manager states:

2. "In my capacity as an Operations Team Manager, I have access to the business records for and relating to the loan at issue herein. The loan records are maintained by BANA in the course of its regularly conducted business activities and are made at or near the time of the event, by or from information transmitted by a person with knowledge. It is the regular practice to keep such records in the ordinary course of a regularly conducted business activity. Except where otherwise stated, I make this Affidavit based upon my personal review of BANA's books, records and files for and relating to the loan at issue and from my personal knowledge regarding how those records are kept and maintained".

3. "BANA serviced the loan through October 15, 2012". (footnote \*1)

[(footnote \*1 states that: "Countrywide Home Loans Servicing, LP was the servicer at the inception of this loan. Countrywide Home Loans Servicing, LP changed its name to BAC Home Loans Servicing, LP effective April 27, 2009. Effective July 1, 2011, BAC Home Loans Servicing, LP merged into BANA and since then has been known as Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP.)].

7. "The Note, having been endorsed in blank, was transferred to Plaintiff on December 18, 2006....."

8. "The Note was transferred to the Trust prior to the Trust's closing on December 28, 2006. A copy of the Pooling and Servicing Agreement is attached as Exhibit 5."

9. " Plaintiff has been the owner of the Note and Mortgage since December 18, 2006, and Plaintiff continues to be the owner and holder of the Note and Mortgage."

11. "The servicing of the Loan was transferred to Bayview Loan Servicing, LLC effective October 16, 2012...."

12. "Borrower defaulted on the Loan by failing to make the payment due for October 1, 2010 for principal and interest of \$2,434.47, plus amounts due for taxes and insurance."

13. "The default under the Loan was not cured at least through the date servicing of the Loan was transferred to Bayview effective October 16, 2012."

Paragraphs 3, 4, 5, 6 & 7 from the affidavit of Bayview Loan Servicing, LLC's document coordinator states:

3. "In my capacity as Document Coordinator, I have access to the business records for and relating to the loan at issue herein ("the Loan"). The payment history is maintained by Bayview in the course of its regularly conducted business activities and is made at or near the time of the event, by or from information transmitted by a person with knowledge. It is the regular practice to keep such records in the ordinary course of a regularly conducted business activity."

4. "Except where otherwise stated, I make this Affidavit based upon my personal review of Bayview's books, records and files for and relating to the Loan and from my personal knowledge regarding how those records are kept and maintained."

5. "The servicing responsibility for the Loan was transferred from Bank of New York, N.A. to Bayview effective October 16, 2012. No payments have been received on this account since that time."

6. "Pursuant to Bayview's records, Plaintiff remains the owner and holder of the Loan."

7. "To date, Borrower Claudette Chin has not cured her default in payment on the Loan. The principal balance of \$448,859.39 remains outstanding."

Plaintiff has submitted sufficient evidence in the form of affidavits from both mortgage servicing representatives (satisfying the business records exception to the hearsay rule) to prove it had standing, as the holder of the note by confirming that the promissory note indorsed in blank by a representative of America's Wholesale Lender has been in the Trust's continuous possession prior to the commencement of this action. (*Aurora Loan Services v. Taylor, supra.*; *Wells Fargo Bank v. Parker, supra.*; *US Bank N.A. v. Ehrenfeld*, 144 AD3d 893, 2016 NY Slip Op 07639 (2<sup>nd</sup> Dept., 2016); *GMAC Mortgage, LLC v. Sidberry*, 144 AD3d 863, 2016 NY Slip Op 07623 (2<sup>nd</sup> Dept., 2016)). Plaintiff The Bank of New York Mellon Trust has also submitted sufficient documentary proof to establish its standing to maintain this action by submission of copies of the December 1, 2006 Pooling and Servicing Agreement and the June 28, 2011 Certificate of Merger between BAC Home Loan Servicing, LP and the Bank of New York, N.A. and by submission of a copy of the promissory note indorsed in blank by a Countrywide Home Loans, Inc. Doing Business As America's Wholesale Lender representative. The mortgage servicers' representatives establish the fact that BANA and Bayview serviced the mortgage loan, maintained continuous possession of the indorsed in blank note prior to the filing of the complaint and document the defendant's default in making payments due under the terms of the parties' agreement since October, 2010.

With respect to the defendant's remaining claim that she is entitled to additional discovery, the defendant has not made a satisfactory showing of the evidence sought which would create an issue of fact. Mere hope and speculation that additional discovery might yield evidence sufficient to raise a triable issue of fact is not a basis for denying summary judgment (*Lee v. T.F. DeMilo Corp.*, 29 AD3d 867, 815 NYS2d 700 (2<sup>nd</sup> Dept., 2006); *Sasson v. Setina Mfg. Co., Inc.*, 26 AD3d 487, 810 NYS2d 500 (2<sup>nd</sup> Dept., 2006)). Moreover, the proof submitted shows that the defendant delayed seeking to compel responses to the defendant's second discovery demand and only made such application in response to plaintiff's motion seeking summary judgment, eighteen months after service of the demand. Finally, the defendant has failed to raise any further evidence to address her numerous remaining pleaded affirmative defenses and eleven counterclaims set forth in her answer in opposition to this motion. Those remaining defenses and counterclaims must therefore be deemed abandoned and subject to dismissal (*Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2<sup>nd</sup> Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2<sup>nd</sup> Dept., 2007)).

In conclusion the bank has shown, and the defendant does not dispute, that she has defaulted under the terms of the mortgage by failing to make timely monthly mortgage payments since October 1, 2010. The bank, having proven entitlement to summary judgment, it is incumbent upon the defendant to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendant has wholly failed to do so. Accordingly, the defendant's cross motion is denied and the plaintiff's motion seeking an order granting summary judgment and for the appointment of a referee must be granted. The plaintiff is directed to submit a proposed order for the appointment of a referee.

Dated: February 15, 2017

  
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J.S.C.