

<b>US Bank Natl. Assn. v Priftakis</b>
2017 NY Slip Op 31682(U)
August 2, 2017
Supreme Court, Suffolk County
Docket Number: 30510/2012
Judge: Thomas F. Whelan
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judgments against all other defendants served with process, including the two served as Jane Doe, and an order appointing a referee to compute, is considered under CPLR 3212, 3215, 1024, 1003 and RPAPL § 1321 and is denied; and it is further

**ORDERED** that those portions of the cross motion (#004) by the answering defendants, Leonid as Priftakis and Anna Priftakis, for an order dismissing the complaint served in this mortgage foreclosure action pursuant to CPLR 3211(a)(4) are considered thereunder and are denied; and it is further

**ORDERED** that those portions of the cross motion (#004) by the Priftakis defendants for an order consolidating this action with a prior action pending before another Justice of this court is considered under CPLR 602 and are denied; and it is further

**ORDERED** that those portions of the cross motion (#004) by the Priftakis defendants for an order permitting them to file an amended answer is considered under CPLR 3025(d) and are denied; and it is further

**ORDERED** that the remaining portions of the cross motion (#004) for an order finding that the plaintiff acted in bad faith in failing to accept settlement offers or to offer a modification agreement following the release of this action from the specialize mortgage foreclosure settlement conference part and referring the action back to said part are considered under CPLR 3408 and are denied; and it is further

**ORDERED** that a status conference shall to held herein on **August 22, 2017**, at 9:30 a.m., in the courtroom of the undersigned located in the Annex Building of the Supreme Court at One Court Street, Riverhead, New York, 11901, at which, the court shall inquire of counsel as to the readiness of this action for the upcoming trial.

The plaintiff commenced this action to foreclose the lien of a February 9, 2007 mortgage given by the Priftakis defendants to American Home Mortgage to secure a mortgage note in the principal amount of \$999,999.00 likewise given by defendant, Leonidas Priftakis, on that date. In response to the plaintiff's service of the summons and complaint and other initiatory papers, the Priftakis defendants appeared herein by answer. Therein, the Priftakis defendants admit that they defaulted in their payment obligations under the terms of the note and mortgage, while reserving a challenge to the exact amount of the delinquent debt. They also asserted three affirmative defenses, two of which challenge the standing of the plaintiff to maintain this action for foreclosure and sale and the other challenges the plaintiff's compliance with the ninety day notice provisions imposed by RPAPL § 1304.

After unsuccessfully moving to compel production of certain documents, the Priftakis defendants moved, by motion prepared by their current counsel bearing a return date in May of 2016, for summary judgment dismissing the plaintiff's complaint. The motion was premised on the following grounds: 1) that the plaintiff lacks standing because "the plaintiff has failed to establish its ownership of the note" and "failed to establish its ownership of the mortgage"; 2) that the plaintiff failed to establish compliance with the RPAPL § 1303 separate notice; 3) that the plaintiff failed to

establish compliance with RPAPL § 1304; and 4) the plaintiff failed to engage in good faith negotiations to resolve its claim by way of a loan modification or other resolution thereby warranting a court imposed loan modification or sanctions. That motion was denied by order of this court dated November 18, 2016 which order remains in effect.

In the instant cross motion (#004), the defendants move for much of the same relief they demanded in their prior motion for summary judgment together with the additional relief outlined above. For the reasons stated below, the defendants' cross motion (#004) is denied.

It is well established that successive motions for summary judgment should not generally be entertained, absent a showing of newly discovered evidence or other sufficient cause (*see Tingling v C.I.N.H.R., Inc.*, 120 AD3d 570, 992 NYS2d 43 [2d Dept 2014]; *Vinar v Litman*, 110 AD3d 867, 972 NYS2d 704 [2d Dept 2013]). Underlying this rule are long standing notions of judicial economy and finality which warrant the rejection of successive motions for summary judgment that are based upon facts or arguments which could have been submitted on the original motion for summary judgment (*see MLCFC 2007-9 ACR Master SPE, LLC v Camp Waubeeka, LLC*, 123 AD3d 1269, 999 NYS2d 202 [3d Dept 2014]; *Vinar v Litman*, 110 AD3d 867, *supra*; *Capuano v Platzner Intl. Group*, 5 AD3d 620 at 621, 774 NYS2d 780 [2d Dept 2004]).

Here, the defendants' current cross motion (#004), while not denominated as one for summary judgment, is one of that nature due to its interposition after service of the defendants' answer and prior motion for summary judgment (*see* CPLR 3212). A review of the contents of the instant cross motion (#004) reveals that it is premised, in large part, upon claims, arguments and contentions that were, or could have been, asserted in the defendants' prior motion for summary judgment and no showing of sufficient cause or newly discovered evidence is discernable from the cross moving papers or reply submissions of the defendants. The defendants' continued reliance on the plaintiff's purported failures to comply with statutory notice requirements is misplaced as these matters were rejected previously by the court and no sufficient cause nor newly discovered evidence was put before the court on this motion which would warrant a reconsideration of said issues.

Equally unavailing is the defendants' continued reliance upon purported acts of bad faith on the part of the plaintiff in its settlement talks with the defendants which are alleged to have been undertaken recently but well after the CPLR 3408 settlement processes were concluded. However, none of these communications or discussions constitute sufficient cause or newly discovered evidence for purposes of defeating the rule against successive motions for summary judgment. As stated in the court's prior order of November 18, 2016, "this court is unaware of any statutory or controlling appellate case authorities that continues the requirement to negotiate in good faith imposed by CPLR 3408 to extra-judicial, communications occurring after the CPLR 3408 conference processes are concluded and the defendants have pointed to none in their submissions" on their cross motion. The defendants' latest complaints about the plaintiff's purported wrongful conduct are thus rejected as lacking in merit.

Accordingly, the following portions of the defendants' cross motion (#004) are denied: dismissal of the complaint due to the failure to comply with RPAPL §1303 and §1304; dismissal of

the complaint due to a purported lack of standing on the part of the plaintiff; and a declaration that the plaintiff failed to negotiate a settlement in good faith thereby warranting the imposition of sanctions and a referral of this action back to the specialized mortgage foreclosure settlement conference part.

Also denied are those portions of the defendants' cross motion (#004) wherein they seek a dismissal of the complaint pursuant to CPLR 3211(a)(4) due to the purported pendency of a prior action to foreclose the subject mortgage. This application is untimely and as such effects a waiver of that ground for dismissal under the provisions of CPLR 3211(e) (*see Midfirst Bank v Ajala*, 146 AD3d 875, 44 NYS3d 771 [2d Dept 2017]). Moreover, the prior action, entitled *Citimortgage v Priftakis* bearing Index Number 036796/2010, has been discontinued (*see* Order dated July 28, 2017 [Rebolini, J.]). This circumstance, coupled with the dormancy of that action over its seven year existence that ended upon the plaintiff's filing of its motion to discontinue (#001), nullifies all grounds for dismissal of this action due to the dual pendency of this action and that prior action (*see Wells Fargo Bank v Irrizary*, 142 AD3d 610, 36 NYS3d 689 [2d Dept 2016]).

Nor is dismissal of this action warranted due to a purported lack of in personam jurisdiction over the defendants. That defense was waived by the defendants' failure to raise it in a pre-answer motion to dismiss and by their appearances herein by answers that did not include that jurisdictional defense (*see* CPLR 3211[e]; *American Home Mtge. Serv., Inc. v Arklis*, 150 AD3d 1180, 2017 WL 2347087 [2d Dept 2017]; *Midfirst Bank v Ajala*, 146 AD3d 875, *supra*; *Generation Mtge. Co. v Medina*, 138 AD3d 688, 27 NYS3d 881 [2d Dept 2016]).

Those portions of the defendants' cross motion (#004) wherein they seek an order consolidating this action with the prior action entitled *Citimortgage v Priftakis*, bearing Index Number 036796/2010, is denied. As indicated above, the plaintiff in that action recently moved (#001) to discontinue that long dormant case. Since that motion has now been granted (*see* Order dated July 28, 2017 [Rebolini, J.]), there is no pending action with which this action may be consolidated.

Finally, the court denies all remaining portions of the defendants' cross motion (#004), including their demand for an order granting them leave to amend their answers. Although defense counsel requests "the Court to accept the amended Answer annexed herein" (*see* ¶ 12 of the affirmation of defense counsel in support of the cross motion), no such amended answer was found to be annexed. The application for this relief is thus violative of the mandates of CPLR 3025(b) and is thus denied as lacking in merit.

Those portions of the plaintiff's motion (#003) wherein it seeks summary judgment dismissing the affirmative defenses set forth in the answers served by the defendants and for summary judgment on the plaintiff's complaint against them is considered under CPLR 3212 and 4518 and are denied. The affidavit of merit submitted by a vice president of the plaintiff's current loan servicer and attorney-in-fact under a limited power of attorney dated February 16, 2016, is insufficient to establish the plaintiff's entitlement to the summary judgment dismissing the defendants' pleaded standing and RPAPL § 1304 defenses (*see M&T Bank v Joseph*, \_\_\_ AD3d \_\_\_, 2017 WL 2961421 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Carlin*, \_\_\_ AD3d \_\_\_, 2017 WL 2855918 [2d Dept 2017]; *Citibank, N.A. v Wood*, 150 AD3d 813, 2017 WL 1903218 [2d Dept 2017]; *CitiMortgage, Inc. v*

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*Pappas*, 147 AD3d 900, 47 NYS3d 415 [2d Dept 2017]; *Arch Bay Holdings, LLC v Albanese*, 146 AD3d 849, 45 NYS3d 506 [2d Dept 2017]; *U.S. Bank, Natl. Ass'n v Noble*, 144 AD3d 788, 41 NYS3d 79 [2d Dept 2016]; *Aurora Loan Servs., LLC v Baritz*, 144 AD3d 618, 619-620, 41 NYS3d 55 [2d Dept 2016]; *HSBC Mortgage Servs., Inc. v Royal*, 142 AD3d 952, 37 NYS3d 321 [2d Dept 2016]; *Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 685, 37 NYS3d 25 [2d Dept 2016]).

The remaining portions of the plaintiff's motion for default judgments against the remaining defendants served with process is granted to the extent that the defaults in answering of all such defendants are hereby fixed and determined. All other relief demanded by the plaintiff is denied without prejudice.

To ready this matter for trial a status conference shall be held herein on **August 22, 2017**. Counsel for the respective parties are directed to appear thereat ready to confer with the court.

DATED: \_\_\_\_\_

8/2/17

  
THOMAS F. WHELAN, J.S.C.