Wells Fargo Bank, NA v Shea
2018 NY Slip Op 30220(U)
January 22, 2018
Supreme Court, Suffolk County
Docket Number: 14214/12
Judge: Thomas F. Whelan

[* 1]

COPY

MEMO DECISION & ORDER

INDEX No. 14214/12

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/2/17
SUBMIT DATE 1/5/18
Mot. Seq. # 002 - MG
Mot. Seq. # 003 - XMD
CDISP Y____ N X

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WELLS FARGO BANK, NA,

Plaintiff,

-against-

JOHN SHEA, LISA MILLER, SUNRISE CREDIT CORP., CLERK OF THE SUFFOLK COUNTY DISTRICT COURT, CAPITAL ONE BANK USA NA, FIRST FINANCIAL INVESTMENT FUND III, LLC, BARRISTER REPORTING SERVICE, INC., CLERK OF THE RIVERHEAD TOWN JUSTICE COURT, FFPM CARMEL HOLDING, LLC, HUNTINGTON HOSPITAL ASSOC., TEACHERS FEDERAL CREDIT UNION, BRYAN L. SALAMONE, PC, BROOKHAVEN MEMORIAL HOSPITAL, UNITED STATES OF AMERICA, ROBERT F. CASOLA, NEW YORK STATE AFFORDABLE HOUSING CORPORATION, subsidiary of the new York State Housing Finance Agency, PEOPLE OF THE STATE OF NEW YORK o/b/o UNIVERSITY HOSPITAL I/P SUNY AT STONYBROOK, "JOHN DOE #1" to "JOHN DOE #10", the last 10 names being fictitious and unknown to plaintiff, the person or

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parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

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Upon the following papers numbered 1 to 14 read on this motion to appoint a referee to compute, among other things and cross motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers: 4-8; Opposing papers: ; Reply papers ; Other 9-10 (memorandum); 11-12 (affirmation); 13-14 (memorandum); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (#002) by the plaintiff for, among other things, summary judgment, amendment of the caption and the appointment of a referee to compute, is granted in its entirety; and it is further

ORDERED that the cross motion (#003) by defendant, John Shea, for dismissal or alternatively discovery, is denied in its entirety; and it is further

ORDERED that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith; and it is further

ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(3).

This is an action to foreclose a mortgage on real property located in Nesconset, NY. In essence, on August 6, 2003, defendant, John Shea, borrowed $174,500.00 from the plaintiff's predecessor-in-interest and executed a promissory note and a mortgage with defendant, Lisa Miller. The defendant defaulted on January 1, 2010 by failing to pay the monthly installments due and owing. This foreclosure action was commenced by filing on May 7, 2012. The defendant submitted an answer to the complaint, alleging thirty affirmative defenses and six counterclaims. Defendant, Lisa Miller, has failed to appear and is in default. Foreclosure settlement conferences were held with court personnel until September 19, 2014. Once released from the settlement part, plaintiff moved (#002) for summary judgment. Defendant, after various adjournments, cross moved to dismiss or for additional discovery. [1]

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[1] The Court notes that the defendant submitted a letter to the Court seeking permission to submit a Reply to his cross motion, which is not permitted pursuant to CPLR 2214 and 2215. The Court denied the request.

In the moving papers, plaintiff addresses its burden of proof on this summary judgment motion and refutes the affirmative defenses of the answer. Therefore, plaintiff has satisfied its prima facie burden on this summary judgment motion (*see* ***HSBC Bank USA, Natl. Assn. v Espinal***, 137 AD3d 1079, 28 NYS3d 107 [2d Dept 2016]; ***U.S. Bank Natl. Assn. v Cox***, 148 AD3d 692, 49 NYS3d 527 [2d Dept 2017]).

The burden then shifts to the defendant (*see* ***Bank of America, N.A. v Cudjoe***, __AD3d__, 2018 WL 343849 [2d Dept 2018]; ***Bank of America, N.A. v DeNardo***, 151 AD3d 1008, 58 NYS3d 469 [2d Dept 2017]) and it was incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing or in support of the affirmative defenses asserted in the answer or otherwise available to him (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, NA v Agnello***, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Notably, affirmative defenses predicated upon legal conclusions that are not substantiated with allegations of fact are subject to dismissal (*see* CPLR 3013, 3018[b]; ***Katz v Miller***, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; ***Cohen Fashion Opt., Inc. v V & M Opt., Inc.***, 51 AD3d 619, 858 NYS2d 260 [2d Dept 2008]). 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* ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591[2d Dept 2010]). In addition, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy (*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]).

The defendant's opposition is confusing and, aside from unsubstantiated and waived claims of forgery in the chain of mortgage assignments, really only challenges plaintiff's standing to commence the action. Moreover, the affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The cross motion (#003) seeks to delay the foreclosure by heavy reliance upon the contentious of a divorce action that was pending between the co-mortgagors. The Court will addresses each of these allegations, however, in accordance with the above, all other affirmative defenses and the counterclaims raised in the answer, not addressed in the opposition and cross motion, are dismissed as abandoned. Therefore, the Court will address the First, Seventeenth, Eighteenth, Twentieth and Twenty-First Affirmative Defenses and the First, Second and Fifth Counterclaims.

The standing defense has lost its significance and vitality with the advent of CPLR 3012-b. One of the various methods that standing may be established is by due proof that the plaintiff or its custodial agent was in possession of the note prior to the commencement of the action. The production of such proof 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, 12 NYS3d 612 [2015]; ***U.S. Bank v Ehrenfeld***, 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; ***Citimortgage, Inc. v Klein***, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; ***U.S. Bank Natl. Assn. v Godwin***, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Joseph***, 137 AD3d 896, 26 NYS3d 583 [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). The affidavit of Eric Chhan, a Vice President Loan Documents for plaintiff, the servicer and custodian for the mortgage loan at issue, satisfies that condition.

Additionally, as occurred in this action, the plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit required by CPLR 3012-b has been held to constitute due proof of the plaintiff's possession of the note prior to the commencement of the action and thus its standing to prosecute its claim for foreclosure and sale (*see* ***Bank of NY Mellon v Burke***, 155 AD3d 932, 64 NYS3d 114 [2d Dept 2017], *citing* ***Wells Fargo Bank, N.A. v Thomas***, 150 AD3d 1312, 52 NYS3d 894 [2d Dept 2017]; ***Deutsche Bank Trust Co. Ams. v Garrison***, 147 AD3d 725, 726, 46 NYS3d 185 [2d Dept 2017]; ***US Bank N.A. v Saravanan***, 146 AD3d 1010, 1011, 45 NYS3d 547 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Logan***, 146 AD3d 861, 862-863, 45 NYS3d 189 [2d Dept 2017]; ***Nationstar Mtge., LLC v Weisblum***, 143 AD3d 866, 39 NYS3d 491, 494 [2d Dept 2016]; *see also* ***HSBC Bank USA v Ozcan***, 154 AD3d 822, 64 NYS3d 38 [2d Dept 2017]). Here, the plaintiff alleged in its complaint that it was the current holder of the note and attached a copy of the endorsed note to the complaint.

Plaintiff has also demonstrated its standing by virtue of the merger with Wells Fargo Home Mortgage, Inc. (*see* Banking Law §602; *see also* ***Citimortgage, Inc. v Goldberg***, 134 AD3d 880, 20 NYS3d 906 [2d Dept 2015]; ***Capital One, N.A. v Brooklyn Flatiron, LLC***, 85 AD3d 837, 925 NYS2d 350 [2d Dept 2011]; ***Ladino v Bank of Am.***, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]).

Plaintiff, through its submissions, has thus demonstrated the requisite possession of the note prior to the commencement of the action (*see* ***US Bank Natl. Assn. v Coppola***, __ AD3d __, 2017 WL 6599133 [2d Dept 2017]; ***Bank of NY Mellon v Burke***, 155 AD3d 932, *supra*). Therefore, the affirmative defenses and counterclaims addressed to standing are dismissed (*see* ***US Bank Natl. Assn. v Richards***, 151 AD3d 1001, 57 NYS3d 509 [2d Dept 2017]; ***Silvergate Bank v Calkula Prop., Inc.***, 150 AD3d 1295, 56 NYS3d 189 [2d Dept 2017]; ***Central Mtge. Co. v Jahnsen***, 150 AD3d 661, 56 NYS3d 107 [2d Dept 2017]; ***Bank of America, N.A. v Barton***, 149 AD3d 676, 50 NYS3d 546 [2d Dept 2017]). Pursuant to CPLR 3212(g), the court hereby declares that the issue of the plaintiff's standing is hereby resolved in favor of the plaintiff for all purposes of this action.

Any claim that the affidavit of Eric Chhan is deficient is rejected (*see* ***US Bank N.A. v Louis***, 148 AD3d 758, 48 NYS3d 458 [2d Dept 2017]). He is employed by the plaintiff, the creator of the documents attached to his affidavit, who is also the custodian for the loan at issue. He swears that the business records were relied upon on a regular basis in the course of plaintiff's business activities with respect to this loan in default, and provides, as attachments, the records relied upon. These same records were previously attached to the complaint.

The affidavit adequately sets forth the basis of the affiant's knowledge and established the admissibility of the documents appended to the affidavit as business records and comports with the dictates of ***HSBC Bank USA v Ozcan***, 154 AD3d 822, 64 NYS3d 38 (2d Dept 2017) (*see* ***Bank of America, Natl. Assn v Brannon***,156 AD3d 1, 63 NYS3d 352 [1st Dept 2017]; *see also* ***Olympus America, Inc. v Beverly Hills Surgical Inst.***, 110 AD3d 1048, 974 NYS2d 89 [2d Dept 2013]; ***DeLeon v Port Auth. of N.Y. & N.J.***, 306 AD2d 146, 761 NYS2d 54 [2d Dept 2003]).

The affidavit is as detailed as the affidavit submitted in the recent appellate holding of ***HSBC Bank USA v Ozcan***, 154 AD3d 822, *supra*, which clarified the requirements for satisfaction of the business records rule.

Defendant's claim with regard to the notice of pendency is without merit (*see* CPLR 6516[a]; RPAPL §1331; *see also* ***Sears Mtge. Corp. v Yaghobi***, 19 AD3d 402, 796 NYS2d 392 [2d Dept 2005]; ***NYCTL 1998-2 Trust v Levin***, 13 AD3d 595, 786 NYS2d 351 [2d Dept 2004]). Defendant's reliance on overruled caselaw is rejected.

Defendant seeks to place most of the blame for his predicament upon his ex-wife, defendant, Lisa Miller. However, once the defendant was awarded the property in the divorce action, his loan modification application was reviewed and accepted by the plaintiff. Yet, the defendant refused to accept the trial period plan. Moreover, there is simply no showing of lack of good faith on the part of the plaintiff. If any thing, the defendant has benefitted for the past eight years by not making mortgage and escrow payments and has been able to afford to pay for his son's education at St Anthony's Catholic High School and to be involved with his extracurricular sports. Such does not constitute a hardship.

"Stability of contract obligations must not be undermined by judicial sympathy" (***Graf v Hope Building Corp.*** 254 NY 1[1930]).

Finally, defendant's request for discovery is denied. There is no showing as to how such discovery would have helped to defeat plaintiff's motion for summary judgment (*see* ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d at 645-6, *supra*; ***American Prescription Plan, Inc. v American Postal Workers Union***, 170 AD2d 471, 565 NYS2d 830 [2d Dept 1991]). Defendant's request for discovery has not been shown to alter the outcome of the above findings (*see* ***HSBC Bank USA, Natl. Assn. v Armijos***, 151 AD3d 943, 57 NYS3d 205 [2d Dept 2017]; ***Citimortgage, Inc. v Guillermo***, 143 AD3d 852, 39 NYS3d 86 [2d Dept 2016]).

The defendant's cross motion is denied.

In light of the above, the Court finds that the plaintiff has sufficiently demonstrated its entitlement to the relief requested on its motion (*see* CPLR 3212, 3215, 1003 and RPAPL §1321; ***Wells Fargo Bank, N.A. v Ali***, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; ***Central Mtge. Co. v McClelland***, 119 AD3d 885, 991 NYS2d NYS2d 87 [2d Dept 2014]; ***Peak Fin. Partners, Inc. v Brook***, 119 AD3d 916, 987 NYS2d 916 [2d Dept 2014]; ***Plaza Equities, LLC v Lamberti***, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]).

The Court, therefore, grants plaintiff's motion (#002) in its entirety, denies defendant's cross motion (#003) in its entirety and simultaneously signs the proposed Order, as modified.

DATED: 1/22/18

THOMAS F. WHELAN, J.S.C.