

Citimortgage, Inc. v Belz
2018 NY Slip Op 30269(U)
February 6, 2018
Supreme Court, Suffolk County
Docket Number: 02284/2014
Judge: Robert F. Quinlan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE: 04/14/2016
SUBMIT DATE: 11/04/2016
Mot. Seq.: # 001 - Mot D

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CITIMORTGAGE, INC.,

Plaintiff,

- against -

AMY J. BELZ, A/K/A AMY BELZ, A/K/A AMY J. VERYZER; AMERICAN EXPRESS CENTURION BANK; BANK OF AMERICA, N.A. SUCCESSOR BY MERGER TO LASALLE BANK, N.A.; "JOHN DOES" AND "JANE DOES", SAID NAMES BEING FICTITIOUS, PARTIES INTENDED BEING POSSIBLE TENANTS OR OCCUPANTS OF PREMISES AND CORPORATIONS, OTHER ENTITIES OR PERSON WHO HAVE, CLAIM, OR MAY CLAIM, A LIEN AGAINST, OR OTHER INTEREST IN, THE PREMISES,

Defendant(s).
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Upon the following papers numbered 1 to 26 on this motion for an order granting summary judgment, consolidation, and order of reference; Notice of Motion/Order to Show Cause and supporting papers 1-17; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 18-21; Replying Affidavits and supporting papers 22-26; ~~Other~~; it is

ORDERED that this motion by plaintiff for an order granting summary judgment against the answering defendants Amy J. Belz and Bank of America, to strike their answers, and for an order consolidating this action with

the action *Citimortgage, Inc. against General Surgery Associates, LLC; Orthopedic Associates of LI LLP*, Index No. 610017/2015, and for an order of reference appointing a referee to compute pursuant to RPAPL § 1321, and amending the caption by removing the "Doe" defendants is granted to the extent that plaintiff is granted partial summary judgment as to defendant Amy J. Belz, a/k/a Amy Belz a/k/a Amy J. Veryzer dismissing her First through Third, and Fifth through Eighth Affirmative Defenses; and it is further

ORDERED that upon the proof submitted plaintiff's application to dismiss defendant's fourth affirmative defense alleging plaintiff's failure to comply with the notice requirement of RPAPL §1304 is denied as is plaintiff's application to dismiss defendant's answer; and it is further

ORDERED that that part of plaintiff's motion seeking summary judgment as against defendant Bank of America, N.A. Successor by Merger to LaSalle Bank, N.A. is granted; and it is further

ORDERED that plaintiff's motion to consolidate this action with the action *Citimortgage, Inc. against General Surgery Associates, LLC; Orthopedic Associates of LI LLP*, Index No. 610017/2015 is granted;

ORDERED that portion of plaintiff's motion seeking to amend the caption to discontinue as to defendants "John Doe" and "Jane Doe" is granted and the caption shall now appear as follows:

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 CITIMORTGAGE, INC.,

Plaintiff,

- against -

AMY J. BELZ, A/K/A AMY BELZ, A/K/A
 AMY J. VERYZER; AMERICAN EXPRESS
 CENTURION BANK; BANK OF AMERICA, N.A.
 SUCCESSOR BY MERGER TO LASALLE
 BANK, N.A.; GENERAL SURGERY
 ASSOCIATES, LLC; ORTHOPEDIC ASSOCIATES
 OF LI, LLP

Index no. 02284/2014

Defendant(s).

-----X
 ;and it is further

ORDERED that plaintiff is to serve a copy of this order upon the calendar clerk of this part within thirty (30) days of this order, and all further proceedings are to be under the amended caption; and it is further

ORDERED that in all other respects, plaintiff's motion is denied; and it is further

ORDERED that plaintiff's application to appoint a referee pursuant to RPAPL § 1321 is denied and its proposed order submitted with this motion is marked "Not Signed"; and it is further

ORDERED that pursuant to CPLR 3212 (g) and §2218, the action is set for trial limited to proof of compliance with mailing of the notice pursuant to RPAPL §1304, defendant's fourth affirmative defense; and it is further

ORDERED that plaintiff is to file a note of issue within 90 days of the date of this order and is to attach a copy of this order to the note of issue; and it is further

ORDERED that upon filing the note of issue the court will entertain renewed summary judgment motions from the parties, but in no case will such a motion be entertained more than 60 days after the filing of the note of issue; and it is further

ORDERED that the action is scheduled for a certification conference on May 8, 2018 at 9:30 AM in Part 27 unless a successive summary judgment motion authorized by this order has been filed before the scheduled conference.

This is an action to foreclose a mortgage on residential real property known as 82 Upton Street, Sound Beach, Suffolk County, New York given by defendant Amy J. Belz a/k/a Amy Belz, a/k/a Amy J. Veryzer ("defendant") to G. & M. Wolkenberg, Inc., to secure a note given by defendant on the same date. Upon defendant's default in payment under the terms of the mortgage and note, plaintiff Citimortgage, Inc. ("plaintiff") commenced this action on January 31, 2014 by filing a summons, complaint and notice of pendency with the Suffolk County Clerk. Defendant interposed an answer dated March 10, 2014 consisting of general denials and eight affirmative defenses including plaintiff's lack of standing to commence the action (Second and Third Affirmative Defenses) and plaintiff's failure to comply with the notice provision of RPAPL §1304 (Fourth Affirmative Defense). Defendant Bank of America, N.A. successor by merger to LaSalle Bank, N.A. ("Bank of America") interposed an answer dated February 25, 2014 consisting of certain admissions and lacking information to confirm or deny the remaining allegations in the complaint.

A foreclosure settlement conference pursuant to CPLR 3408 was held on November 25, 2014, defendant defaulted in appearing and the matter was marked not settled and released to the IAS Part.

Plaintiff now moves for an order granting summary judgment against defendant, striking her answer and affirmative defenses, for summary judgment against Bank of America and striking their answer, consolidating this action with the action *Citimortgage, Inc. against General Surgery Associates, LLC; Orthopedic Associates of LI LLP*, Index No. 610017/2015, amending the caption, fixing the default as against the non-appearing defendants, and for an order of reference appointing a referee to compute pursuant to RPAPL § 1321. The submissions in support of its motion include its attorney's affirmations, the affidavit of merit of Lindsay Hodges, employed as Vice President - Document Control of plaintiff, the note, mortgage, assignment, merger agreement between plaintiff and ABN AMRO Mortgage Group, Inc., the HAMP agreement, pleadings, and the affidavits of service of process. Defendant opposes the motion by affidavit in which she refers to an alleged repayment agreement with plaintiff in 2011 pursuant to which she made certain repayments, and to a reinstatement plan which plaintiff offered but defendant could not afford due to injuries she sustained in 2011 and her husband's failure to pay child support. Plaintiff submits the affirmation of counsel in reply. No other party appears in opposition to the motion.

CONSOLIDATION

As an initial matter the Court will address plaintiff's motion to consolidate. Plaintiff seeks to consolidate the present case with the action *Citimortgage, Inc. against General Surgery Associates, LLC; Orthopedic Associates of LI LLP*, Index No. 610017/2015 which was commenced by plaintiff on September 21, 2015 to name additional defendants holding judgments against defendant. Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (*see Perini Corp. v WDF, Inc.*, 33 AD3d 605 [2d Dept 2006]).

The interests of justice and judicial economy are better served by consolidation in those cases where the actions share material questions of law or fact (*see Hanover Ins. Grp. v Mezansky*, 105 AD3d 1000 [2d Dept 2013]). Here, both actions involve common questions of law and fact and consolidation will avoid unnecessary duplication of proceedings, save unnecessary costs and expenses and prevent the injustice which would result from divergent decisions based on the same facts (*see Mas-Edwards v Ultimate Servs., Inc.*, 45 AD3d 540, 540 [2d Dept 2007]). Moreover, defendant has failed to show a substantial right will be prejudiced by consolidation and Bank of America does not oppose the motion. Consolidation is granted.

SUMMARY JUDGMENT

Entitlement to summary judgment in favor of a foreclosing plaintiff is established, *prima facie*, by plaintiff's production of the mortgage, the unpaid note, and evidence of default in payment (*see Wells Fargo Bank, N.A. v. DeSouza*, 126 AD3d 965 [2d Dept 2015]; *Wells Fargo, NA v Eroboho*, 127 AD3d 1176 [2d Dept 2015]; *Wells Fargo Bank, NA v Morgan*, 139 AD3d 1046 [2d Dept 2016]). If established by proof submitted in evidentiary form, plaintiff has demonstrated its entitlement to summary judgment (CPLR 3212; RPAPL § 1321; *see Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558 [2d Dept 1997]). The burden then shifts to defendant to demonstrate the existence of a triable issue of fact as to a bona fide defense (*see Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882 [2d Dept 2010], *Zanfina v Chandler*, 79 AD3d 1031 [2d Dept 2010]; *Citibank, NA v Van Brunt Properties, LLC*, 95 AD3d 1158 [2d Dept 2012]). Defendant must then produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact (*see Washington Mut. Bank v Valencia*, 92 AD3d 774 [2d Dept 2012]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Defendant's answer and affirmative defenses alone are insufficient to defeat plaintiff's motion (*see, Flagstar Bank v Bellafigliore*, 94 AD3d 1044 [2d Dept 2012]). In deciding the motion the court is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Corp.*, 18 NY3d 499 [2012]).

Where plaintiff's standing has been placed in issue by defendant's answer, plaintiff also must establish its standing as part of its *prima facie* showing (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015]; *Loancare v. Firshing*, 130 AD3d 787 [2d Dept 2015]; *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77 [2d Dept 2015]; *US Bank, NA v Richard*, 151 AD3d 1001 [2d Dept 2017]; *Citimortgage v Rockefeller*, 155 AD3d 998 [2d Dept 2017]; *US Bank, N. A. v Cohen*, 156 AD3d 844 [2d Dept 2017]). Plaintiff establishes its standing by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note (*see Aurora Loan Servs., LLC v Taylor, supra*; *Wells Fargo Bank, NA v Rooney*, 132 AD3d 980 [2d Dept 2015]). A written assignment or physical delivery prior to the commencement of the action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident thereto (*see U.S. Bank, NA v Collymore*, 68 AD3d 752 [2d Dept 2009]; *Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2d Dept 2014]). In addition, where defendant has properly asserted non-compliance with the notice requirements of RPAPL §1304 as a defense, or raised it in opposition to plaintiff's motion, or when plaintiff has pled it in the complaint and defendant has denied the allegation, plaintiff must adduce due proof that the pre-action foreclosure 90 day notice requirements have been satisfied (*see PHH Mtge. Corp. v. Celestin*, 130 AD3d 703 [2d Dept 2015]; *Cenlar v Weisz*, 136 AD3d 855 [2d Dept 2016]; *Zarabi v. Movahedian*, 136 AD3d 895 [2d Dept 2016]; *JPMorgan Chase Bank v. Kutch*, 142 AD3 536 [2d Dept 2016]; *Aurora Loan Svcs, LLC v Baritz*, 144 AD3d 618 [2d Dept 2016]; *U.S. Bank, N. A. v Singh*, 147 AD3d 1007 [2d Dept 2017]).

PLAINTIFF ESTABLISHES STANDING

Plaintiff has standing if it establishes that it was the holder of the note at the time the action was commenced (*see Emigrant Bank v Larizza*, 129 AD3d 904 [2d Dept 2015]; *M&T Bank v Cliffside Prop. Mgt., LLC*, 137 AD3d 876 [2d Dept 2016]). Plaintiff has demonstrated its standing as holder of the note by establishing that it had been assigned to it prior to the commencement of the action by attaching a copy of the indorsed note, to the complaint at the time the action was commenced (*see Nationstar Mortg., LLC v Catizone*, 127 AD3d 1151 [2d Dept 2015];

JPMorgan Chase Bank, NA v Weinberger, 142 AD3d 643 [2d Dept 2016]; *Deutsche Bank National Trust Co. v. Logan*, 146 AD3d 861 [2d Dept 2017]; *US Bank, NA v Sabloff*, 153 AD3d 879 [2d Dept 2017]; *Wells Fargo Bank, NA v Soskil*, 155 AD3d 923 [2d Dept 2017]; *Bank of NY Mellon v Burke*, 155 AD3d 932 [2d Dept 2017]). Plaintiff has established its standing, defendant's second and third affirmative defenses are dismissed.

MAILING OF THE RPAPL §1304 NOTICES NOT ESTABLISHED

Due proof of the mailing of the RPAPL § 1304 notice is established by submission of an affidavit of service (see *JPMorgan Chase Bank, N.A. v Schott*, 130 AD3d 875 [2d Dept 2015]; *Wells Fargo v Moza*, 129 AD3d 946 [2d Dept 2015]) or through business records that describe its office practice and procedure for mailing (see *New York & Preshyt. Hosp. v Allstate Ins. Co.* (29 AD3d 547 [2d Dept 2006]; *Citibank, N.A. v Wood*, 150 AD3d 813 [2d Dept 2017]; *Citimortgage Inc. v Banks*, 155 AD3d 936 [2d Dept 2017]). Unsubstantiated and conclusory statements in the affidavit of plaintiff's representative, along with dated copies of the notice of default, are insufficient to prove that the notices required by RPAPL § 1304 were properly mailed (see *HSBC Mtge. Corp. v Gerber*, 100 AD3d 966 [2d Dept 2012]; *Citimortgage, Inc. v Espinal*, 134 AD3d 876 [2d Dept 2015]; *Cenlar, FSB v Weisz*, 136 AD3d 855 [2d Dept 2016]; *U. S. Bank, N.A. v Carey*, 137 AD3d 894 [2d Dept 2016]; *US Bank, NA v Sabloff*, 153 Ad3d 879 [2d Dept 2017]).

Here, although the affidavit of plaintiff's Vice President - Document Control establishes his ability to testify to plaintiff's business records pursuant to CPLR 4518, the affiant fails to establish mailing of the notices. The affiant merely states a review of the records establishes the notices were sent to defendant on a certain date "by registered or certified mail and by first class mail." These statements are unsubstantiated, conclusory and insufficient to establish the mailing required by RPAPL § 1304 (see *JPMorgan Chase Bank, N.A. v Kutch*, 142 AD3d 536 [2d Dept 2016]; *Cenlar FSB v Censor*, 139 AD3d 781 [2d Dept 2016]). The affiant must show a familiarity with office practices and procedures in order to establish proof of a standard office practice and procedures to ensure proper addressing and mailing (see *CitiMortgage, Inc v Pappas*, 147 AD3d 900 [2d Dept 2017]; *Citibank, N.A. v Wood*, 150 AD3d 813 [2d Dept 2017]; *Wells Fargo Bank, NA v Trupia*, 150 AD3d 1049 [2d Dept 2017]; *Investors Savings Bank v Salas*, 152 AD3d 752 [2d Dept 2017]). While the affidavit may have been sufficient to establish mailing of the notices pursuant to the Second Department's decision in *HSBC Bank USA, Nat. Ass'n v Ozcan*, 154 AD3d 822 [2d Dept 2017] which appeared to deviate from prior holdings, the court's holdings in recent cases (see *Bank of New York Mellon v Zavolunov*, __ AD3d __, 2018 Slip Op 00271 [2d Dept January 17, 2018]; *US Bank v Henry*, __ AD3d __, 2018 Slip Op 00326 [2d Dept January 17, 2018]; *JPMorgan Mortgage Acquisition Corp. v Kagan*, __ AD3d __, 2017 Slip Op 00416 [2d Dept January 24, 2018]) appear to re-affirm the holdings of the Second Department prior to *HSBC Bank USA, Nat. Ass'n v Ozcan, supra* and the standard of proof of mailing required. Applying this standard plaintiff's affiant fails to establish mailing of the notices pursuant to RPAPL §1304 requiring denial of full summary judgment.

As to defendant's remaining affirmative defenses, the failure to raise and support pleaded affirmative defenses in opposition to a motion for summary judgment renders them abandoned and subject to dismissal (see *Kuehne & Nagel Inc. v Baiden*, 36 NY2d 539 [1975]; *Kronick v L. P. Therault Co., Inc.*, 70 AD3d 648 [2d Dept 2010]; *New York Commercial Bank v. J. Realty F. Rockaway, Ltd.*, 108 AD3d 756 [2d Dept 2013]; *Starkman v. City of Long Beach*, 106 AD3d 1076 [2d Dept 2013]; *Katz v Miller*, 120 AD3d 768 [2d Dept 2014]).

SUCCESSIVE SUMMARY JUDGMENT MOTIONS ALLOWED

Although multiple summary judgment motions are discouraged without a showing of newly discovered evidence or other sufficient cause, a court may properly entertain a subsequent summary judgment motion when it is substantively valid and when granting the motion will further the ends of justice while eliminating an unnecessary burden on court resources (see *Detko v McDonald's Restaurants of New York, Inc.*, 198 Ad2d 208 [2d Dept 1993];

Valley National Bank v INI Holding, LLC, 95 AD3d 1108 [2d Dept 2012]; *Kolel Damsek Eliezer, Inc. v Schlesinger*, 139 AD3d 810 [2d Dept 2016]). It is clearly appropriate to consider a second summary judgment motion where the court has already granted a party partial summary judgment and limited the issues to a few, or where such a motion would correct a simple defect, eliminating the burden on judicial resources which would otherwise require a trial (see *Rose v Horton Med. Ctr.*, 29 AD3d 977 [2d Dept 2006]; *Landmark Capital Investments, Inc. v Li-Shan Wang*, 94 AD3d 418 [1st Dept 2012]). The denial of a subsequent summary judgment motion which could be dispositive for the sole reason of the prohibition against second summary judgment motions has been held to be an improvident exercise of the court's discretion (see *Burbige v Siben & Ferber*, 152 AD3d 641 [2d Dept 2017]).

Plaintiff's proposed order is marked "not signed."

If plaintiff fails to timely file a successive motion, as there is no need for discovery on this issue, a compliance/certification conference is set for May 8, 2018 at 9:30 AM in Part 27, at which time the parties will execute a compliance conference order, setting the timing for filing of a note of issue and a pre-trial conference setting the action for trial. No further motions will be entertained without permission of the court.

This constitutes the Order and decision of the Court.

Dated: February 6, 2018


Hon. Robert F. Quinlan, J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION