

<b>Bank of Am., N.A. v Wulforst</b>
2018 NY Slip Op 30388(U)
February 14, 2018
Supreme Court, Suffolk County
Docket Number: 23569/2011
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: 05/08/2014  
SUBMIT DATE: 04/14/2016  
Mot. Seq.: # 001 - MG

-----X  
BANK OF AMERICA, N.A.,

Plaintiff,

- against -

LINDA WULFORST A/K/A LINDA M. WULFORST,  
DAVID WULFORST,  
"JOHN DOE #1" TO "JOHN DOE #10," the last 10  
names being fictitious and unknown to Plaintiff, the  
persons or 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,

Defendant(s).

-----X

MCCABE, WEISBERG & CONWAY, P.C.  
*Attorneys for Plaintiff*  
145 Huguenot Street, Suite 210  
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Linda Wulforst a/k/a Linda M. Wulforst  
15 Sunny Line Drive  
Calverton, NY 11933

David Wulforst  
15 Sunny Line Drive  
Calverton, NY 11933

Upon the following papers numbered 1-52 read on this motion for an order granting summary judgment and order of reference; Notice of Motion and supporting papers 1-49; Answering Affidavit and supporting papers 50-52; it is,

**ORDERED** that this motion by plaintiff for an order striking the answer of defendant Linda Wulforst, awarding it summary judgment against answering defendant, appointing a referee to compute, fixing the default as against the non-appearing, non-answering defendants, and amending the caption, is granted; and it is further

**ORDERED** that if a prior notice of pendency is outdated, plaintiff is directed to file a successive notice of pendency at least twenty (20) days prior to the submission of any proposed judgment of foreclosure and sale, submitting a copy thereof with proof of filing with any proposed judgment of foreclosure and sale; and it is further

**ORDERED** that plaintiff's proposed order submitted with this motion, as modified by the court, is signed contemporaneously with this order; and it is further

**ORDERED** that plaintiff's application to amend the caption to remove the "John Doe" defendants is granted, and the caption is amended to read:

-----X  
Bank of America, N.A.,  
Plaintiff,

- against -

Linda Wulforst a/k/a Linda M. Wulforst,  
David Wulforst  
Defendants.  
-----X

and it is further

**ORDERED** that plaintiff is directed to serve a copy of this order upon the Calendar Clerk of this Court within 30 days of the date of this order and all further proceedings are to proceed under that caption; and it is further;

**ORDERED** that plaintiff is to file an application for a judgment of foreclosure and sale within 120 days of the date of this order; and it is further

**ORDERED** that plaintiff is to include in any proposed order of judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Suffolk County Foreclosure Surplus Monies form contained in Suffolk County Administrative Order # 41-13; and it is further

**ORDERED**, that, if a prior notice of pendency is outdated, plaintiff is directed to file a successive notice of pendency at least twenty (20) days prior to the submission of any proposed judgment of foreclosure and sale, submitting a copy thereof with proof of filing with any proposed judgment of foreclosure and sale; and it is further.

**ORDERED** that within 30 days of the date of this order, plaintiff is to serve a copy of the order of reference upon all parties who have appeared in this action, as well as upon the referee and thereafter file the affidavits of service with the Clerk of the Court; and it is further

**ORDERED** that within 60 days of the date of this order, plaintiff is to provide the referee, and defendants who have appeared, all papers and documents necessary for the referee to perform the determinations required by this order (plaintiff's "submissions"); defendant(s) may submit written objections and proof in support thereof (defendant's "objections") to the referee within 14 days of the mailing of plaintiff's submissions; and it is further

**ORDERED** that the referee's report is to be prepared and submitted to plaintiff within 30 days of receipt of plaintiff's submissions, and the referee's report is to be submitted by plaintiff with its application for a judgement of foreclosure and sale; and it is further

**ORDERED** that the referee's duties are defined by this order of reference (CPLR 4311, RPAPL § 1321), and the referee has no power beyond that which is limited by this order of reference to the ministerial functions of computing amounts due and owing to plaintiff and determining whether the premises can be

sold in parcels; the referee shall hold no hearing, take no testimony or evidence other than by written submission, and make no ruling on admissibility of evidence; the referee's report is merely advisory and the court is the ultimate arbiter of the issues, if the objections by defendant(s) raise issues as to the proof of amounts due and owing the referee is to provide advisory findings within his/her report; and it is further

**ORDERED** that if defendant(s) has submitted objections and proof to the referee, defendant(s) shall also submit them to the court if opposing plaintiff's application for a judgment of foreclosure and sale; failure to submit objections to the referee will be deemed a waiver of objections before the court on an application for a judgment of foreclosure and sale; failure to raise and submit the objections made before the referee in opposition to plaintiff's application for a judgment of foreclosure and sale shall constitute a waiver of those objections on the motion; and it is further

**ORDERED** that this action shall be calendared for a status conference on **Tuesday, June 19, 2018** at 9:30 AM in Part 27 for the court to monitor the progress of this action. If a judgment of foreclosure and sale is filed with the court before that date, no appearance will be necessary; and it is further

**ORDERED** that failure to comply with any term of this order will not form the basis for a motion to dismiss the action, but will be the subject of the status conference at which future compliance will be determined.

This is an action to foreclose a mortgage on residential real property known as 15 Sunny Line Drive, Calverton, Suffolk County, New York given by Linda Wulforst a/k/a Linda M. Wulforst and David Wulforst ("borrowers") to plaintiff, Bank of America, N.A. ("plaintiff") on January 26, 2007 to secure a note given by borrowers on the same date. Plaintiff commenced this action by filing the summons and complaint with the Suffolk County Clerk on July 21, 2011. Defendant Linda Wulforst ("defendant") interposed her verified answer dated August 15, 2011 consisting of general denials, six affirmative defenses and 7 counterclaims. Defendant David Wulforst was personally served on July 26, 2011, he did not answer or appear in this action and is in default.

Nine foreclosure settlement conferences were calendared between September 8, 2015 and August 31, 2015 at which time the borrowers defaulted in appearing and the action was released to an IAS Part, thus there has been compliance with CPLR 3408. Plaintiff now moves for an order granting summary judgment against defendant, striking her answer, amending the caption, fixing the default as against the non-appearing defendant 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, an affidavit in support of application for order of reference of plaintiff's Assistant Vice President, the note, mortgage, pleadings, and the affidavits of service of process. Defendants submit the affirmation of her counsel in which counsel's only argument in opposition is that plaintiff failed to establish proof of standing to prosecute the action. Subsequent to filing the present motion defendants' counsel moved by order to show cause to be relieved as counsel (Seq. #002). By order dated September 18, 2015 (Horowitz, J.) that motion was granted, the action, and this motion, was stayed for 45 days, until November 2, 2015. The action was transferred to the general inventory of this part in 2016.

## 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 Erobo*, 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], *Zanfini v Chandler*, 79 AD3d 1031 [2d Dept 2010]; *Citibank, NA v Van Brunt Properties, LCC*, 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]).

## DEFENDANT WAIVED STANDING

In opposition to the motion defendant's only argument is that plaintiff lacked standing to commence the action. A defense of lack of standing to bring the action is not jurisdictional in nature (*see Deutsche Bank natl. Trust Co. V Hunter*, 100 AD3d 810 [2d Dept 2012]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007]; *HSBC Bank USA, N.A. v Dalessio*, 137 AD3d 860 [2d Dept 2016]). Instead the defense of standing is merely an affirmative defense that is waived if not raised in a timely pre-answer motion to dismiss or in an answer (*see HSBC Bank USA, N.A. v Taher*, 104 AD3d 815 [2d Dept 2013]; *U.S. Bank Natl. Assn. V Tate*, 102 AD3d 859 [2d Dept 2013]; *Bank of NY Trust Co., NA v Chiejina*, 142 AD3d 570 [2d Dept 2016]). As defendant did not raise plaintiff's standing as an affirmative defense, it has been waived. Notwithstanding the foregoing plaintiff established, prima facie, its standing at the commencement of the action by proof that it was the originator of the loan and was still the holder of the note and the mortgage when it commenced the action (*see Emigrant Mortg. Co. v Persad*, 117 AD3d 676 [2d Dept 2014]). In opposition defendant failed to raise an issue of fact.

As to defendant's remaining affirmative defenses, the failure to raise and support pleaded affirmative defenses and counterclaims 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]).

Accordingly, defendant's answer is stricken and plaintiff is awarded summary judgment as to the answering defendant.

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The proposed order of reference, as modified by the Court, has been signed simultaneously with this order.

This constitutes the Order and decision of the Court.

Dated: February 14, 2018



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

FINAL DISPOSITION  NON-FINAL DISPOSITION