

Onewest Bank, FSB v Demers
2018 NY Slip Op 30823(U)
May 2, 2018
Supreme Court, Suffolk County
Docket Number: 39220/09
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
JAS PART 33 - SUFFOLK COUNTY

P R E S E N T:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2/22/18
SUBMIT DATE 4/6/18
Mot. Seq. # 003 - MotD
Mot. Seq. # 004 - XMD
Mot. Seq. # 005 - MG
Pre-Trial Conference: May 25, 2018
CDISP Y N X

ONEWEST BANK, FSB,

Plaintiff,

-against-

ELSIE H. DEMERS, WASHINGTON MUTUAL
BANK, FA, "JEO DOE" said name being
fictitious, it being the intention of plaintiff to
designate any and all occupants of the premisses
being foreclosed herein and any corporations or
entities, if any, having or claiming an interest or lien
upon the mortgaged premises,

Defendants.

GREENBERG TRAURIG, LLP
Attys. For Plaintiff
200 Park Ave.
New York, NY 10166

MILLER, ROSADO & ALGIOS, LLP
Attys. For Defendant Demers
320 Old Country Rd. - Ste. 103
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Upon the following papers numbered 1 to 21 read on this motion to appoint a referee to compute among other things, motion for summary judgment and cross motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1- 4; 5-7; 12-14; Notice of Cross Motion and supporting papers: 8-11; Opposing papers: 15-16; Reply papers 17-18; Other 19-20 (memorandum); 21 (memorandum); (and after hearing counsel in support and opposed to the motion) it is.

ORDERED that those portions of this motion (#003) by the plaintiff for an order awarding it summary judgment dismissing the affirmative defenses asserted in the answer of defendant, Emily Demers, is granted to the extent that the plaintiff is awarded partial summary judgment dismissing the First, Third, Fifth and Sixth through Thirteenth affirmative defenses set forth in the answer; and it is further

ORDERED that those portions of this motion (#003) by the plaintiff for an order awarding it summary judgment dismissing the Second and Fourth affirmative defenses in Elsie Demers' answer challenging the plaintiff's standing is denied; and it is further

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ORDERED that the remaining portions of the plaintiff's motion (#003) wherein it seeks summary judgment on its complaint against the answering defendant, default judgments against the remaining defendants served with process, and a caption amendment together with an order appointing a referee to compute is denied without prejudice; and it is further

ORDERED that the cross motion (#004) by answering defendant, Elsie Demers, for an order denying the plaintiff's motion pursuant to CPLR 3212(f) is denied; and it is further

ORDERED that the motion (#005) by the plaintiff seeking to supplement its motion (#003) for summary judgment is granted, and that submission has been considered herein; and it is further

ORDERED that pursuant to CPLR 3212(g), the court hereby declares that the trial of this action, if any, shall be limited to the unresolved issue framed by the terms of this order, namely, the plaintiff's standing; and it is further

ORDERED that counsel for the respective parties shall appear for a pre-trial conference on May 25, 2018, at 9:30 a.m., in the courtroom of the undersigned located at 1 Court Street - Annex, Riverhead, New York, at which, the Court shall issue directives necessary to ready this matter for a trial on the limited, unresolved issue of the plaintiff's standing; and it is further

ORDERED that the portion of plaintiff's motion (#003) seeking vacatur of the Order of Reference dated June 24, 2010 is granted, and said Order is hereby vacated; 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 foreclosure action was commenced by filing on October 5, 2009. In essence, on June 23, 2006, defendant Elsie Demers borrowed \$568,000.00 from the plaintiff's predecessor-in-interest and executed a promissory note and a mortgage. Since April 1, 2009, the defendant has failed to pay the monthly installments due and owing. By Order dated June 24, 2010, the plaintiff was granted a default judgment as against all defendants and the appointment of a referee.

The plaintiff now seeks to vacate that Order, noting that the motion (#001) was procedurally improper as the defendant filed an Answer dated October 30, 2009 containing thirteen affirmative defenses. Upon vacatur, the plaintiff then seeks summary judgment dismissing the affirmative defenses asserted in the defendant's answer, a default judgment as against the remaining non-answering defendants, the appointment of a referee to compute, and the amendment of the caption.

The defendant consents to the vacatur of the prior order, opposes the remainder of the motion, and cross moves (#004) for dismissal challenging plaintiff's standing to commence the action. The plaintiff opposes the cross motion in papers that further serve as a reply to the defendant's opposition to the plaintiff's motion-in-chief. Additionally, the plaintiff filed an additional motion (#005) seeking to supplement its original motion (#003) and judicial notice. The defendant has opposed same.

First, as plaintiff was not entitled to a default judgment against the answering defendant (*see* CPLR 5015[a][3] and [4]), the Court grants those branches of the parties' motions seeking to vacate the prior Order.

With respect to plaintiff's summary judgment motion (#003), the Court finds that the plaintiff has refuted the First, Third, Fifth, and Seventh through Thirteenth Affirmative Defenses of the answer and, thus, satisfied its prima facie burden on those allegations (*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 defendant (*see 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 defendant (*see Flagstar Bank v Bellafigliore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *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]; *Ames 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]; *Becher v Feller*, 64 AD3d 672, 677, 884 NYS2d 83 [2d Dept 2009]; *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 Madeline D'Anthony Enter., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Additionally, 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 and cross motion challenge plaintiff's standing and plaintiff's mailing of the notice of default as required by the terms of the mortgage. The Court addresses each of these allegations herein, however, in accordance with the above, the claims raised in the answer and not addressed in the opposition and cross motion, specifically the First, Third, Fifth, and Seventh through Thirteenth affirmative defenses, are dismissed as abandoned.

Where the plaintiff's standing has been placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]; *US Bank NA v Ballin*, 158 AD3d 786, 787, 2018 WL 988836 [2d Dept 2018] *citing Deutsche Bank Natl. Trust Co. v Idarecis*, 133 AD3d 702, 703, 21 NYS3d 261 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973, 995 NYS2d 118 [2d Dept 2014]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). "A plaintiff establishes its standing in a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced" (*US Bank NA v Ballin*, 158 AD3d at 788, *supra*, *citing LNV Corp. v Francois*, 134 AD3d 1071, 1072, 22 NYS3d 543 [2d Dept 2015]). "Either a written assignment of the underlying note or the physical delivery of the note is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*US Bank NA v Ballin*, 158 AD3d at 788, *supra*, *citing US Bank, N.A. v Collymore*, 68 AD3d 752, 754, 890 NYS2d

578 [2d Dept 2009]; *see also Wells Fargo Bank, NA v Frankson*, 157 AD3d 844, 66 NYS3d 529 [2d Dept 2018]; *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]).

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, *supra*; *Wells Fargo Bank, NA v Frankson*, 157 AD3d 844, *supra*; *U.S. Bank v Ehrenfeld*, 144 AD3d 893, *supra*; *JPMorgan Chase Bank, Natl. Assn. v Weinberger*, 142 AD3d 643, *supra*; *Citimortgage, Inc. v Klein*, 140 AD3d 913, *supra*; *U.S. Bank Natl. Assn. v Godwin*, 137 AD3d 1260, *supra*; *Wells Fargo Bank, N.A. v Joseph*, 137 AD3d 896, *supra*; *Emigrant Bank v Larizza*, 129 AD3d 904, *supra*; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, *supra*). A sworn affidavit of the plaintiff's loan servicer, based on a review of business records, is sufficient to show physical delivery or possession (*Tribeca Lending Corp. v Lawson*, 159 AD3d 936, 2018 WL 1403815 [2d Dept 2018]; *US Bank Natl. Assn. v Ehrenfeld*, 144 AD3d 893, *supra*).

The plaintiff has submitted the affidavit of Katherine Ortwerth, who is an employee of Ocwen, the loan servicer and attorney-in-fact for U.S. Bank National Association as Trustee for Lehman XS Trust Mortgage Pass-Through Certificates, Series 2006-12N (hereinafter, the "Trust"),¹ which is the successor in interest to plaintiff OneWest Bank, FSB. Ms. Ortwerth's averments were made based upon her review of Ocwen's business records, which are maintained in its regular course of business. She avers that she has personal knowledge of Ocwen's procedures for creating and maintaining these records. Ms. Ortwerth further notes that she was previously employed by the current plaintiff, OneWest Bank, FSB, and that she is familiar with the process by which OneWest Bank, FSB's business records are created and maintained. Additionally, she attests that the business records created by OneWest Bank, which include the records for the loan at issue, were integrated into Ocwen's business records and verified in accordance with Ocwen's policies and procedures. These records, she notes, are kept and relied upon as regular business records in Ocwen's ordinary course of business as loan servicer.

Ms Ortwerth's averments adequately set forth the basis of her knowledge and establish 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 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]), and satisfies the admissibility requirements of CPLR 4518(a) (*see Stewart Title Ins. Co. v Bank of New*

¹ Ms. Ortwerth improperly refers to the Trust throughout the affidavit as "plaintiff." While the motion seeks to amend the caption to reflect the Trust as the plaintiff, OneWest Bank, FSB, remains the current plaintiff until further ordered by this Court.

Mellon, 154 AD3d 656, 61 NYS3d 634 [2d Dept 2017]; *Citigroup v Kopelowitz*, 147 AD3d 1014, 1015, 48 NYS3d 223 [2d Dept 2017]; *see generally Citimortgage, Inc. v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]).

Notwithstanding the admissibility of the affidavit, Ms. Ortwerth's affidavit fails to demonstrate plaintiff's prima facie standing. Ms. Ortwerth avers that Deutsche Bank, as custodian for the Trust, was in possession of the note at the time the action was commenced, however OneWest Bank, FSB was the plaintiff at commencement and attested to its status as owner and holder of the note in the complaint. Ms. Ortwerth's reply affidavit attempts to clarify the issue by noting that OneWest Bank, FSB was the loan servicer at the time the action was commenced, however, the servicing agreement provided notes that Aurora Loan Services, LLC is the servicer and master servicer of the Trust, with no mention of OneWest Bank, FSB.

Notably, plaintiff attempts to again clarify OneWest Bank, FSB's position as plaintiff in its motion for judicial notice and to supplement its papers. This submission also falls short. The power of attorney authorizing OneWest Bank, FSB to act on behalf of the Trustee is dated over one year after commencement of the instant action. Additionally, the power of attorney authorizing IndyMac Federal Bank, FSB (OneWest Bank, FSB's predecessor in interest) fails to demonstrate its application to the Trust or subject loan.

In this case, the plaintiff's submissions failed to demonstrate, prima facie, that the plaintiff has standing to prosecute its claims for foreclosure and sale (*see Arch Bay Holdings, LLC v Albanese*, 146 AD3d 853, 45 NYS3d 506 [2d Dept 2017]; *HSBC Mtge. Serv., Inc. v Royal*, 142 AD3d 952, 37 NYS3d 321 [2d Dept 2016]; *Deutsche Bank Natl. Trust Co. v Cunningham*, 142 AD3d 634, 36 NYS3d 726 [2d Dept 2016]; *Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 37 NYS3d 25 [2d Dept 2016]; *JPMorgan v Kutch*, 142 AD3d 536, 36 NYS3d 235 [2d Dept 2016]; *Cenlar, FSB v Censor*, 139 AD3d 781, 32 NYS3d 228 [2d Dept 2016]; *Cenlar, FSB v Weisz*, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]; *Citibank, NA v Cabrera*, 130 AD3d at 861, 14 NYS3d 420 [2d Dept 2016]). Plaintiff thus failed to demonstrate that the Second and Fourth Affirmative Defenses are without merit and thus subject to dismissal pursuant to CPLR 3212(b). Those portions of this motion wherein the plaintiff seeks such relief is denied. Likewise, as the defendant failed to make a prima facie showing that plaintiff lacked standing, defendant's cross motion is denied (*see OneWest Bank v Berino*, 158 AD3d 811, 2018 WL 1075715 [2d Dept 2018], *citing Filan v Dellaria*, 144 AD3d 967, 975, 43 NYS3d 353 [2d Dept 2016]; *Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59-60, 13 NYS3d 163 [2d Dept 2015]).

Defendant's remaining contentions regarding plaintiff's mailing of the default notice is without merit. As discussed above, Ms. Ortwerth's avers in her affidavit that Ocwen's business records incorporate those of OneWest Bank, FSB, including the loan at issue. She notes that the default notice was sent to the defendant on June 3, 2009, and attaches copies of the letters. In her reply affidavit, she describes the standing mailing practice of IndyMac Mortgage Services, a Division of OneWest Bank, FSB, which mailed the letters on behalf of OneWest Bank, FSB. That further evidence of the mailing was produced in a reply affidavit is of no consequence, as defendant was provided an opportunity to further respond to this issue (*see Zernitsky v Shurka*, 94 AD3d 875, 941 NYS2d 848 [2d Dept 2012]; *citing Turturro v City of New York*, 77 AD3d 732, 734-735, 908 NYS2d 738 [2d Dept 2010]; *Matter of Whittaker v New York City Bd. of Educ.*, 71 AD3d 776, 778, 896 NYS2d 171 [2d Dept 2010]; *Valure v Century 21 Grand*, 35 AD3d 591, 592, 826 NYS2d 418 [2d Dept 2006]; *Hoffman v Kessler*,

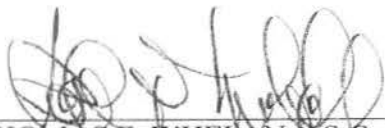
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28 AD3d 718, 718–719, 816 NYS2d 481 [2d Dept 2006]; *Guarneri v St. John*, 18 AD3d 813, 814, 795 NYS2d 462 [2d Dept 2005]).

The remaining portions of the plaintiff's motion wherein it seeks an award of summary judgment on its complaint against answering defendant, Elsie Demers, default judgments against the remaining defendants served with process and the appointment of a referee to compute, are premature in light of the existence of a potentially meritorious defense that is not subject to dismissal pursuant to CPLR 3212(b). Accordingly, those demands for relief are denied.

Accordingly, plaintiff's motion (#003) as indicated above, defendant's cross motion (#004) is denied and plaintiff's additional motion (#005) is granted. Counsel for the parties are directed to appear for a pre-trial conference on May 25, 2018 as noted above and the proposed order submitted by plaintiff has been marked "not signed."

DATED: 5/2/18


THOMAS F. WHELAN, J.S.C.