

**Household Fin. Realty Corp. of N.Y. v Francis**

2018 NY Slip Op 31130(U)

May 29, 2018

Supreme Court, Suffolk County

Docket Number: 3355/2013

Judge: C. Randall Hinrichs

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS  
 Justice of the Supreme Court

Motion Date: 1-12-2018  
 Adjourned Date: 3-26-2018  
 Motion Sequence: 002:MotD

\_\_\_\_\_  
 HOUSEHOLD FINANCE REALTY  
 CORPORATION OF NEW YORK,

Plaintiff,

-against-

ATHI L. FRANCIS A/K/A ATHI FRANCIS;  
 "JOHN DOE # 1-5" AND "JANE DOE # 1-5"  
 said names being fictitious, it being the intention  
 of Plaintiff to designate any and all occupants,  
 tenants, persons or corporations, if any, having  
 or claiming an interest in or lien upon the  
 premises being foreclosed herein,

Defendants.

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STACEY LOUKAKOS, NICHOLAS  
 FRANCIS, PAUL FRANCIS and  
 THOMAS FRANCIS  
 265 Brookside Court  
 Copiague, NY 11726

Upon the following papers numbered 1 to 19 read on this motion for summary judgment and an order of reference; Notice of Motion and supporting papers 1 - 14; Answering Affidavits and supporting papers 15 - 16; Replying Affidavits and supporting papers 17 - 19; it is,

**ORDERED** that this motion (002) by the plaintiff for, *inter alia*, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the answering defendant Athi L. Francis, striking her answer and dismissing the affirmative defenses set forth therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels; (4) substituting plaintiff; and (5) amending the caption, is granted in part and denied in part; and it is further

**ORDERED** that so much of the plaintiff's motion that seeks an order striking the First through Fourth, Sixth and Seventh affirmative defenses is granted, and the motion for summary judgment dismissing the answer and an order of reference is otherwise denied; and it is further

**ORDERED** that so much of plaintiff's motion that seeks an order fixing the defaults of the non-answering defendants is granted; and it is further

**ORDERED** that so much of plaintiff's motion that seeks to substitute "U.S. BANK TRUST, N.A., AS TRUSTEE FPR LSF9 MASTER PARTICIPATION TRUST" as plaintiff herein, and to amend the caption accordingly, is granted; and it is further

**ORDERED** that so much of the plaintiff's motion that seeks to substitute Stacey Loukakos, Nicholas Francis, Paul Francis and Thomas Francis for defendants "JOHN DOE #1-3" and "JANE DOE #1," to delete remaining "DOE" defendants, and to amend the caption accordingly, is granted; and it is further

**ORDERED**, that the caption of this action shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

-----X

U.S. BANK TRUST, N.A., AS TRUSTEE FPR LSF9  
MASTER PARTICIPATION TRUST,

Plaintiff,

-against-

ATHI L. FRANCIS A/K/A ATHI FRANCIS;  
STACEY LOUKAKOS, NICHOLAS FRANCIS,  
PAUL FRANCIS and THOMAS FRANCIS,

Defendants.

-----X

and it is further,

**ORDERED** that the plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of this Court; and it is further

**ORDERED** that the attorneys for the parties shall appear for a pre-trial conference in Part 49 in the Cromarty Court Building, 4<sup>th</sup> Floor, Courtroom 16, on **June 26, 2018 at 9:30 a.m.** and it is further

**ORDERED** that the plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York. On April 11, 2008, defendant-mortgagors Jacqueline Deleva and David Valentine executed a note in favor of plaintiff's predecessor in the principal amount of \$276,587. To secure said note, on the same date, defendant-mortgagors gave the lender a mortgage on the property. Defendant-mortgagors allegedly

defaulted on the note and mortgage by failing to make monthly payments of principal and interest which had come due on March 1, 2009. By way of a special endorsement via allonge, with physical delivery, the note was transferred to plaintiff prior to commencement of this action. Thereafter, the transfer of the note to the plaintiff was memorialized by an assignment, duly recorded in the Office of the Suffolk County Clerk. Plaintiff commenced the instant action by the filing of a lis pendens, summons and complaint on February 10, 2014. Issue was joined by the interposition of defendant- mortgagors' answer dated May 1, 2014. Subsequently, the note and mortgage were assigned to the proposed substituted plaintiff "U.S. BANK TRUST, N.A., AS TRUSTEE FPR LSF9 MASTER PARTICIPATION TRUST."

By their answer, the defendant-mortgagors generally deny the material allegations set forth in the complaint, and assert seven affirmative defenses. The remaining defendants have not answered herein. By order of this Court, dated August 23, 2017, plaintiff's prior motion (001), seeking the same relief as that being sought here, was denied. Plaintiff's prior motion was denied for failure to provide an affidavit of merit comporting with the business records exception to the hearsay rule under CPLR 4518(a). The Court denied the prior motion with leave to renew. Accordingly, plaintiff now renews its motion for summary judgment and an order of reference. Defendant-mortgagors' opposition to the motion is limited to the alleged failure of plaintiff to demonstrate compliance with RPAPL 1303 and 1304.

A plaintiff seeking summary judgment in a foreclosure action is required to produce the mortgage, the unpaid note, and evidence of default (*see DLJ Mtg. Capital, Inc. v Sosa*, 153 AD3d 666, 60 NYS3d 278 [2d Dept 2017]; *Pennymac Holdings, LLC v Tomanelli*, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]). Further, when a defendant serves an answer which includes the affirmative defense of standing, the plaintiff must prove its standing so as to be entitled to relief (*see Bank of N.Y. Mellon v Visconti*, 136 AD3d 950, 25 NYS3d 630 [2d Dept 2016]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]). Here, plaintiff produced, *inter alia*, the note, the mortgage, and evidence of nonpayment. Plaintiff established its standing as the holder of the note by attaching it to the summons and complaint, demonstrating that the note was in its possession prior to the commencement of the action (*see Wells Fargo Bank v Thomas*, 150 AD3d 1312, 52 NYS3d 894 [2d Dept 2017]; *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 362, 12 NYS3d 612, 614 [2015]; *U.S. Bank, N.A. v Saravanan*, 146 AD3d 1010, 45 NYS3d 547 [2d Dept 2017]; *Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151, 1152, 9 NYS3d 315 [2d Dept 2015]).

With regard to defendant-mortgagors' default in payment, plaintiff provided an affidavit from Jennifer Scott, an officer of Caliber Home Loans, Inc. ("Caliber"), plaintiff's loan servicer, dated November 29, 2017. The Scott affidavit attests to the default in payment based upon personal knowledge acquired by a review of Caliber's business records kept in the ordinary course of business (*see Wells Fargo Bank, NA v. Thomas*, 150 AD3d 1312, 1313, 52 NYS3d 894, 895 [2d Dept 2017]; *U.S. Bank v. Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016]; *U.S. Bank v. Godwin*, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; *Deutsche Bank Nat. Trust Co. v. Abdan*, 131 AD3d 1001, 16 NYS2d 459 [2d Dept 2015], lv to appeal den, 26 NY3d 917 [2016]). Ms. Scott avers that Caliber's business records include records of prior loan servicers, which were fully incorporated and relied upon by Caliber in the routine course of business, and therefore the averments concerning payment default comport with CPLR 4518(a) (*see Carothers v GEICO Indemnity Co.*, 79 AD3d 864, 914 NYS2d 199

[2d Dept 2010]; *People of the State of New York v DiSalvo*, 284 AD2d 547, 727 NYS2d 146 [2d Dept 2001]; *Plymouth Rock Fuel Corp. v Leucadia*, 117 AD2d 727, 498 NYS2d 453 [2d Dept 1986]; *Johnson v Lutz*, 253 NY 124, 128 [1930]; see also *U.S. Bank N.A. v Noble*, 144 AD3d 788, 41 NYS3d 79 [2d Dept 2016]).

Contrary to defendant-mortgagors' argument, plaintiff demonstrated compliance with the notice provision of RPAPL 1303 by attaching affidavits of service of said notices, along with the summons and complaint, upon both Jacqueline Deleva and David Valentine. Those affidavits created a presumption that the notices were served. Defendant-mortgagors' bare and unsubstantiated denials of receipt of the notices were insufficient to rebut the presumption (see *Aurora Loan Servs. LLC v Weisblum*, 85 AD3d 95, 102, 923 NYS2d 609 [2d Dept 2011]).

However, on renewal, plaintiff has again failed to establish its prima facie entitlement to judgment as a matter of law because it did not supply adequate evidentiary proof of compliance with the pre-foreclosure notice provisions of RPAPL § 1304 (see *Aurora Loan Servs. LLC v Weisblum*, supra). The plaintiff submitted neither affidavits of service, nor an affidavit from one with personal knowledge of the practices and procedures customarily used in the ordinary course of business for mailing of statutory notices (see *Citimortgage v Papas*, 147 AD3d 900, 47 NYS3d 415 [2d Dept 2017]; *JPMorgan Chase Bank, Nat. Ass'n v. Kutch*, 142 A.D.3d 536, 537, 36 N.Y.S.3d 235, 236 [2d Dept 2016]). The Scott affidavit, referenced above, states in conclusory fashion that the requisite notices were mailed based upon copies of the notices which were incorporated into Caliber's Household Finance Realty Corp. v. business records from a prior servicer and attached to the affidavit. Simply attaching or referencing copies of the notices and averring in conclusory fashion that mailings were made is not sufficient (see *Citibank v Wood*, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017]; *Citimortgage v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]). While it is true that business records comporting with CPLR 4518(a) may be used in proving a prima facie case, such records, in order to raise a presumption of mailing, must enable an affiant to attest to familiarity with the mailing practices and procedures for mailing the notices, and to "establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed (citations omitted)" (see *Citimortgage v Papas*, supra, 147 AD3d at 901; *Wells Fargo Bank, N.A. v Trupia*, 150 AD3d 1049, 55 NYS3d 134 [2d Dept 2017]; *Bank of America N.A. v Wheatley*, 158 AD3d 736 [2d Dept 2018]). That standard has not been met here. Therefore, defendant's fifth affirmative defense remains viable.

Plaintiff submitted sufficient proof to establish, *prima facie*, that the remaining affirmative defenses are subject to dismissal due to their unmeritorious nature (see *Becher v Feller*, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]). 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 N.Y.2d 539, 369 N.Y.S.2d 667 [1975]; see also *Argent Mtge. Co., LLC v. Mentasana*, 79 A.D.3d 1079, 915 N.Y.S.2d 59 [2d Dept 2010]).

Transfer of the note and mortgage to "U.S. BANK TRUST, N.A., AS TRUSTEE FPR LSF9 MASTER PARTICIPATION TRUST" is demonstrated by a written assignment of the note and mortgage, duly recorded in the Office of the Suffolk County Clerk, as well as the Scott affidavit

referenced above, which attests to its possession of the note (see *Bethpage Federal Credit Union v Caserta*, 154 AD3d 691, 61 NYS3d 645 [2d Dept 2017]; *Hudson City Sav. Bank v Genuth*, 148 AD3d 687, 48 NYS3d 706 [2d Dept 2017]).

Accordingly, plaintiff's motion is granted in part and denied in part as set forth herein, and the parties are directed to appear for a pre-trial conference.

DATED: May 29, 2018

  
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C. RANDALL HINRICHS  
J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION