

Bank of Am., NA v Calandra
2018 NY Slip Op 32288(U)
September 7, 2018
Supreme Court, Suffolk County
Docket Number: 028186/2011
Judge: James Hudson
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COPY
SUPREME COURT - STATE OF NEW YORK
IAS PART 40 - SUFFOLK COUNTY

PRESENT: HON. JAMES HUDSON
Acting Supreme Court Justice

Bank of America, NA successor by merger to BAC Home
Loans Servicing, LP f/k/a Countrywide Home Loans
Servicing LP,

Plaintiff,

-against-

Patricia Calandra a/k/a Patricia Edwards, Mark Edwards,
Citibank, N.A., and "JOHN DOE #1" through "JOHN DOE
10", the last ten names being fictitious and unknown to the
plaintiff, the persons or parties, if any, having or claiming an
interest in or lien upon the Mortgage premises described in
the Complaint,

Defendants.

MOTION DATE: 4/5/17
ADJ. DATE: 5/10/17
MOT. SEQ. # 002 - MotD

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x

Upon the following papers numbered 1 to 7 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 4 - 5; Replying Affidavits and supporting papers 6 - 7; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by the plaintiff for, inter alia, leave to renew its prior motion for summary judgment, or, in the alternative, for leave to make another summary judgment motion, is granted in part, and denied in part; and it is further

ORDERED that so much of the plaintiff's motion seeking an order granting it leave to renew its prior summary judgment motion is denied; and it is further

ORDERED that so much of the plaintiff's motion seeking an order granting it leave to make another summary judgment motion is granted; and it is further

ORDERED that so much of the plaintiff's motion seeking an order: (1) pursuant to CPLR 3212, awarding summary judgment in its favor and against the answering defendant Patricia Calandra a/k/a Patricia Edwards, striking her answer and dismissing the affirmative defenses set forth therein; (2) pursuant CPLR 1018, substituting WILMINGTON SAVINGS FUNDS SOCIETY, FSB D/B/A

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CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST as the plaintiff in the place and stead of BANK OF AMERICA, NA SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP F/K/A COUNTRYWIDE HOME LOANS SERVICING LP; (3) striking the names "JOHN DOE #1" through "JOHN DOE #10," and amending the caption accordingly; (4) pursuant to CPLR 3215, fixing the defaults of the non-answering defendants; and (5) pursuant to RPAPL §1321, appointing a referee to (a) compute amounts due under the subject mortgage; (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels is granted; 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 plaintiff shall serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice within thirty (30) days of the date herein, and shall 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, commenced on September 1, 2011. On February 4, 2005, defendant Patricia Calandra a/k/a Patricia Edwards executed a note in favor of Global Home Loans and Finance, Inc. ("Global") in the amount of \$304,000.00. To secure the note, on the same date, defendant gave Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Global, a mortgage on the subject property. On August 12, 2011, MERS, as nominee for Global, executed an Assignment of Mortgage in favor of plaintiff. On June 29, 2015, after the commencement of the instant action, plaintiff executed an assignment of mortgage in favor of Federal National Mortgage Association ("Fannie Mae"). On April 8, 2016, Fannie Mae executed an Assignment of Mortgage in favor of Wilmington Savings Funds Society, FSB d/b/a Christiana Trust, not individually but as Trustee for Pretium Mortgage Acquisition Trust ("Wilmington Trust"). The subject note is indorsed by Global, by Independence Community Bank, its attorney in fact, to Countrywide Document Custody Services, a division of Treasury Bank, N.A. ("Countrywide"), then by Countrywide to Countrywide Home Loans, Inc. ("CHL"), then again by CHL in blank, though these indorsements are undated. By its complaint, plaintiff alleges that defendant defaulted on the note. By her answer, defendant generally denies the material allegations as set forth in the complaint, and she asserts six affirmative defenses. No other defendants have answered the complaint or appeared in this action.

By order dated March 25, 2016, this Court denied a motion by plaintiff for, inter alia, an order granting summary judgment in its favor, and an order of reference, finding that it failed to establish its prima facie entitlement to accelerated judgment, as its submissions failed to demonstrate its strict compliance with Real Property Actions and Proceedings Law (RPAPL) §1304, as alleged in the complaint.

Plaintiff now moves for leave to renew its prior summary judgment motion, or in the alternative, to make a second motion for summary judgment, arguing, among other things that, that sufficient cause exists to permit same. In support of its motion, plaintiff submits, among other things, copies of the note

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and mortgage, several duly executed affidavits of service, and affidavits of Lucy Babik, Contested Foreclosure Specialist for Selene Finance, LP (“Selene”), servicer for Wilmington Trust, plaintiff’s successor-in-interest, and Nicole Renee Williams, plaintiff’s Assistant Vice President. Defendant opposes the motion, arguing, inter alia, that plaintiff has not proffered a reasonable justification for its failure to present Ms. Williams’ affidavit in support of its prior motion for summary judgment, that it failed to negotiate with her in good faith, and that it has failed to comply with RPAPL §1304. In opposition, defendant submits several documents, including an affirmation of her attorney and her own affidavit.

A motion for leave to renew must be based on new or additional facts “not offered on the prior motion that would change the prior determination,” and “shall contain a reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e][2], [3]; see *Candlewood Holdings, Inc. v Valle*, 134 AD3d 872, 23 NYS3d 266 [2d Dept 2015]; *Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696, 934 NYS2d 467 [2d Dept 2011]; *Gonzalez v Vigo Constr. Corp.*, 69 AD3d 565, 892 NYS2d 194 [2d Dept 2010]; *Ramirez v Khan*, 60 AD3d 748, 874 NYS2d 257 [2d Dept 2009]).

In general, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause (see *Pittman v S.P. Lenox Realty, LLC*, 119 AD3d 846, 989 NYS2d 359 [2d Dept 2014]; *Vinar v Litman*, 110 AD3d 867, 972 NYS2d 704 [2d Dept 2013]; *Coccia v Liotti*, 101 AD3d 664, 666, 956 NYS2d 63, 64 [2d Dept 2012]). However, such a motion may be properly entertained where it is substantively valid, and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts, even in the absence of a showing of newly discovered evidence or other sufficient cause (see *Graham v City of New York*, 136 AD3d 747, 24 NYS3d 754 [2d Dept 2016]; *Fuller v Nesbitt*, 116 AD3d 999, 983 NYS2d 896 [2d Dept 2014]; *Valley Nat. Bank v INI Holding, LLC*, 95 AD3d 1108, 945 NYS2d 97 [2d Dept 2012]).

The portion of plaintiff’s motion that seeks leave to renew its motion for summary judgment is denied, as its submissions do not demonstrate that it had a reasonable justification for its failure to present these facts on the prior motion (see CPLR 2221 [e][2], [3]; see also *Candlewood Holdings, Inc. v Valle*, *supra*; *Doviak v Finkelstein & Partners, LLP*, *supra*; *Gonzalez v Vigo Constr. Corp.*, *supra*). Nevertheless, the Court finds that the instant motion is substantively valid, and that the granting of same will further the ends of justice and eliminate an unnecessary burden on the resources of the courts (see *Graham v City of New York*, *supra*; *Fuller v Nesbitt*, *supra*; *Valley Nat. Bank v INI Holding, LLC*, *supra*).

Plaintiff’s submissions establish its prima facie entitlement to summary judgment on its mortgage foreclosure action by producing the indorsed note, the mortgage, and evidence of nonpayment (see *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]; *Capital One, N.A. v Knollwood Props. II, LLC*, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]). By her affidavit of merit, Ms. Babik attests that, based on records kept during the regular course of Selene’s business, defendant failed to make a payment on the note scheduled for October 1, 2010, and that she failed to make

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subsequent payments to bring the loan current (*see* CPLR 4518[a]; *American Airlines Fed. Credit Union v Mohamed*, 117 AD3d 974, 986 NYS2d 530 [2d Dept 2014]; *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]). In addition, plaintiff's submissions also demonstrate its compliance with RPAPL §1304, as Ms. Williams provides proof of actual mailing of the requisite notices via certified and first-class mail on April 19, 2011 (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 103, 923 NYS2d 609, 614 [2d Dept 2011]; *see also Wells Fargo Bank, N.A. v Mandrin*, 160 AD3d 1014, 1016, 76 NYS3d 182, 185 [2d Dept 2018]; *HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822, 64 NYS3d 38 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Trupia*, 150 AD3d 1049, 1050, 55 NYS3d 134, 136 [2d Dept 2017]).

Further, plaintiff's submissions also demonstrate that amendment of the caption to substitute Wilmington Trust as plaintiff is warranted (*see* CPLR 1018; *Aurora Loans Services, LLC v Mandel*, 148 AD3d 965, 50 NYS3d 154 [2d Dept 2017]; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 17 NYS3d 137 [2d Dept 2015]; *Aurora Loan Serv., LLC v Lopa*, 130 AD3d 952, 15 NYS3d 105 [2d Dept 2015]).

Plaintiff having met its initial burden on the motion, the burden shifted to defendants to assert any defenses which could properly raise a triable issue of fact (*see Bank of Smithtown v 219 Sagg Main, LLC, supra*; *Valley Natl. Bank v Deutsch*, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; *Wells Fargo Bank v Cohen*, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2011]; *Grogg v South Rd. Assoc., L.P.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]). In opposition, defendant submits an affirmation of her attorney, alleging, among other things, that plaintiff has failed to negotiate a settlement in good faith, and that its submissions fail to establish its compliance with RPAPL §1304. However, 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]).


In addition, defendant submits her own affidavit by which she contends, inter alia, that she does not recognize the 90-day notices plaintiff supposedly sent her, that she does not recall receiving same, and that plaintiff failed to negotiate with her in good faith. Nevertheless, defendant's affidavit fails to raise any triable issues of fact as to plaintiff's compliance with RPAPL §1304, as a simple denial of receipt is insufficient to rebut the presumption of proper mailing (*see Flagstar Bank, FSB v Mendoza*, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]; *Emigrant Mtge. Co., Inc. v Persad*, 117 AD3d 676, 985 NYS2d 608 [2d Dept 2014]; *Grogg v South Rd. Assoc., L.P., supra*). Further, to conclude that a party failed to negotiate in good faith during mandatory foreclosure settlement conferences, the court must determine that the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution (*see* CPLR 3408[f]; *Wells Fargo Bank, N.A. v Miller*, 136 AD3d 1024, 26 NYS3d 176 [2d Dept 2016]; *U.S. Bank, N.A. v Sarmiento*, 121 AD3d 187, 203, 991 NYS2d 68, 79 [2d Dept 2014]). However, the parties cannot be forced to reach an agreement, and the courts may not endeavor to force an agreement upon them (*see PNC Bank, N.A. v Campbell*, 142 AD3d 1147, 38 NYS3d 234 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 20, 966 NYS2d 108, 116 [2d Dept 2013]). Here, the totality of the circumstances supports a determination that the plaintiff's actions, namely its attendance at seven settlement conferences over 14 months, and its

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consideration of a loan modification package after the matter was released from the foreclosure settlement conference part, constituted a meaningful effort at reaching a resolution, and defendant's submissions fail to demonstrate otherwise (*see Hudson City Savings Bank v Genuth*, 148 AD3d 687, 48 NYS3d 706 [2d Dept 2017]; *PNC Bank, N.A. v Campbell, supra*; *Wells Fargo Bank, N.A. v Miller, supra*). As defendant's submissions fail to raise any issues of fact, she fails to rebut plaintiff's prima facie entitlement to summary judgment (*see Zuckerman v City of New York, supra*; *Bank of Smithtown v 219 Sagg Main, LLC, supra*; *Valley Natl. Bank v Deutsch, supra*).

Accordingly, plaintiff's motion is granted, and its proposed order of reference, as modified by the Court, is being signed contemporaneously with this order.

Dated: September 7th, 2018



A.S.C.J.
HON. JAMES C. HUDSON

 FINAL DISPOSITION X NON-FINAL DISPOSITION