

Bank of Am., N.A. v Owens
2018 NY Slip Op 32435(U)
September 27, 2018
Supreme Court, Suffolk County
Docket Number: 26779/2012
Judge: Robert F. Quinlan
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SHORT FORM ORDER

INDEX No. 26779/2012

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: 03/28/2014
SUBMIT DATE: 02/25/2016
Mot. Seq.: #001-Mot D

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

Plaintiff,

- against -

JONATHAN OWENS, DENISE OWENS, LHR, INC.;
PEOPLE OF THE STATE OF NEW YORK; PEOPLE
OF THE STATE OF NEW YORK C/O CLERK OF
THE SUFFOLK COUNTY DISTRICT COURT; NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE TAX COMPLIANCE DIVISION CO-ATC;
ISLAND SURGICAL AND VASCULAR GROUP PC;
"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,

Defendant(s).
-----X

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Attorneys for Plaintiff
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Upon the following papers numbered 1-51 read on this motion for an order granting summary judgment and order of reference; Notice of Motion and supporting papers 1-29; Answering Affidavit and supporting papers 30-42; Replying Affidavit and supporting papers 43-51; it is,

ORDERED that this motion by plaintiff for an order striking the answer, defenses and counterclaims of the defendants, Jonathan Owens and Denise Owens, awarding it summary judgment, appointing a referee to compute, granting default judgment against the non-appearing and non-answering defendants, and amending the caption, is granted to the extent that plaintiff is granted partial summary judgment dismissing defendants First through Fourth, and Sixth through Sixteenth affirmative defenses; and it is further

ORDERED that upon the proof submitted plaintiff's application to dismiss defendant's Fifth affirmative defense alleging plaintiff's failure to establish mailing of the notices required by the mortgage and RPAPL § 1304 is denied as is plaintiff's application to dismiss defendants' answer; and it is further

ORDERED that upon the proof submitted plaintiff's application to dismiss defendant's First through Third counterclaims is granted; and it is further

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ORDERED that portion of plaintiff's motion seeking to amend the caption to discontinue as to defendants "John Doe #2 -5" and "Jane Doe #1 -5" and add Brandon Owens as "John Doe #1" is granted and the caption shall now appear as follows:

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 BANK OF AMERICA, N.A.,

Plaintiff,

- against -

JONATHAN OWENS, DENISE OWENS, LHR,
 INC.; PEOPLE OF THE STATE OF NEW YORK;
 PEOPLE OF THE STATE OF NEW YORK C/O
 CLERK OF THE SUFFOLK COUNTY
 DISTRICT COURT; NEW YORK STATE
 DEPARTMENT OF TAXATION AND
 FINANCE TAX COMPLIANCE DIVISION
 CO-ATC; ISLAND SURGICAL AND
 VASCULAR GROUP PC; BRANDON OWENS;

Defendant(s).

-----X

; and it is further

ORDERED that plaintiff is directed to serve an executed 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 upon the proof submitted the default of all non-appearing, non-answering defendants is fixed and set; 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 rather than set the issues surrounding defendants' Fifth affirmative defense for a trial pursuant to CPLR § 2218, R 3212 (e) and (g), the court grants plaintiff the right to file a successive motion for summary judgment as to that issue within 120 days of the date of this decision and order; and it is further

ORDERED that if such motion is not timely filed, the court will set the issue for trial at the conference scheduled for **Wednesday, February 6, 2019 at 9:30 AM** in Part 27 to monitor the progress of the action; 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 conference at which future compliance will be determined.

This is an action to foreclose a mortgage on residential real property known as 18 Manchester Blvd., Wheatley Heights, Suffolk County, New York. Plaintiff Bank of America, N.A. ("plaintiff") commenced this action by filing the summons, complaint and notice of pendency with the Suffolk County Clerk on August 29, 2012. On or about September 27, 2012 defendants Jonathan Owens and Denise Owens ("defendants") interposed an answer consisting of general denials, sixteen affirmative defenses including failure to establish standing to commence the action and failure to prove mailing of the notice required by the mortgage and RPAPL 1304, and three counterclaims.

According to court records four foreclosure settlement conference were held between February 7, 2013 and August 20, 2013 at which time the action was released to an IAS Part, thus there has been compliance with CPLR 3408.

Plaintiff now moves for an order striking the answer, affirmative defenses and counterclaims of defendants, granting summary judgment, 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, an affidavit in support of summary judgment, affidavit in support of application for order of reference, the note, mortgage, assignments, pleadings, and the affidavits of service of process. Defendants oppose the motion by submission of their attorney's affirmation arguing among other things, summary judgment is premature as there has been no discovery, and question of fact exists as to plaintiff's standing to commence the action. Plaintiff's submit their attorney's affirmation in reply with exhibits.

Plaintiff's motion, initially returnable March 28, 2014, was re-assigned to Justice Horowitz in June 2015 pursuant to the directive of the District Administrative Judge. In 2016 it was re-assigned to this part and the motion was scheduled for oral argument on June 23, 2016. After scheduling oral argument the court was notified of defendants' change of counsel and a Consent to Change Attorney dated June 22, 2016 was filed by defendants' new counsel, Archibong, Archibong, P.C.. Thereafter the action was conferenced on numerous occasions with counsel advising the court in November 2016 that the action was on loss mitigation hold as defendants had accepted a trial modification, only to be told in December of 2017 that the modification was unsuccessful, then to be told in January 2018 by plaintiff that the action was again on loss mitigation hold. In the interim defendants released their attorney and appear herein as self represented. Having been advised again that modification was unsuccessful, following is the court's decision on the motion.

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]). Defendants' answer and affirmative defenses alone are insufficient to defeat plaintiff's motion (*see, Flagstar Bank v Bellafiore*, 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 defendants' answer, as here by defendants' Second affirmative defense, 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]; *US Bank, NA v Richard*, 151 AD3d 1001 [2d Dept 2017]; *Nationstar Mtge., LLC v Laporte*, 162 AD3d 784 [2d Dept 2018]; *Bank of New York Mellon v. Suhku*, 163 AD3d 748 [2d Dept 2018]; *Wells Fargo Bank, N.A. v Inigo*, _AD3d_, 2018 NY Slip Op 05621 [2d Dept 2018]).

In addition, where defendant has properly asserted non-compliance with the notice requirements of the mortgage and RPAPL §1304 as a defense (Fifth affirmative defense), plaintiff must adduce due proof that the pre-action notice requirements have been satisfied to establish its prima facie entitlement to summary judgment (*see PHH Mtge. Corp. v. Celestin*, 130 AD3d 703 [2d Dept 2015]; *Bank of New York v Aquino*, 131 AD3d 1186 [2d Dept 2015]; *Cenlar FSB v Weisz*, 136 AD3d 855 [2d Dept 2016]; *Zarabi v. Movahedian*, 136 AD3d 895 [2d Dept 2016]; *JPMorgan Chase Bank v. Kutch*, 142 AD3d 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]).

STANDING ESTABLISHED

Plaintiff in a residential foreclosure action 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]). Here, plaintiff demonstrates 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]; *Nationstar Mortg., LLC v Weisblum*, 143 AD3d 866 [2d Dept 2016]; *Deutsche Bank National Trust Co. v. Logan*, 146 AD3d 861 [2d Dept 2017]; *CitiMortgage, Inc. v McKenzie*, 161 AD3d 1197 [2d Dept 2018]; *Nationstar Mtge, LLC v LaPorte*, 162 AD3d 784 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v Homar*, 163 AD3d 522 [2d Dept 2018])). Defendants' Second affirmative defense addressing plaintiff's lack of standing is dismissed.

MAILING OF THE NOTICES REQUIRED BY THE MORTGAGE AND RPAPL §1304 NOT ESTABLISHED

In addition where defendant has properly asserted non-compliance with the notice requirements of RPAPL § 1304 as a defense, plaintiff must adduce proof that the pre-action foreclosure 90 day notice requirements have been satisfied (*see Zarabi v Movahedian*, 136 AD3d 895 [2d Dept 2016]; *Cenlar FSB v Weisz*, 136 AD3d 855 [2d Dept 2016]; *Citimortgage v Espinal*, 134 AD3d 876 [2d Dept 2016]; *Bank of New York v Aquino*, 131 AD3d 1186 [2d Dept 2015]). Similarly, where defendants have properly asserted non-compliance with the condition precedent in the mortgage as a defense plaintiff must adduce due proof that the requirement has been satisfied (*see U.S. Bank, N.A. v Singh*, 147 AD3d 1007 [2d Dept 2017]).

Here, the affidavit of plaintiff's representative establishes the affiant's ability to testify to plaintiff's business records pursuant to CPLR 4518, but fails to establish mailing of the notices. Although plaintiff provided a copy of the certified mail postcard purportedly signed by one of the defendants, there is no proof in evidentiary form that the letter 90-day letter was, in fact, the letter indicated on the postcard and signed for by the defendant. Although there is an "article number" on the postcard, there is no corresponding number on the 90-day notice. Besides not providing

the nexus between the postcard and the 90-day letter, the affiant fails to provide the actual date of mailing for either the certified mailing or the regular mailing. The affiant merely states a review of the records establishes the 90-day notices “was served via certified mail and also 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]; *Bank of America, National Association v Wheatley*, 158 AD3d 736 [2d Dept 2018]). In the same way the evidence submitted in support of the motion failed to establish, prima facie, that the required notice of default was in fact mailed to defendants as required by the terms of the mortgage as a condition precedent to foreclosure (see *U.S. Bank Nat. Ass’n v. Sabloff*, 153 A.D.3d 879 [2d Dept 2017]). Applying this standard, that part of plaintiff’s application to dismiss defendants’ Fifth affirmative defense is denied.

REMAINING AFFIRMATIVE DEFENSES DEEMED ABANDONED

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]). Defendant’s First, Third, Fourth, and Sixth through Sixteenth affirmative defenses and counterclaims are dismissed.

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]).

Here, rather than setting this action for a trial pursuant to CPLR § 2218, R 3212 (e) and (g) of the remaining issue raised by defendant’s fifth affirmative defense, the court exercises its discretion and authorizes plaintiff to file a successive motion for summary judgment as to that affirmative defense within 120 days of the date of this decision and order. In doing so the court is mindful of the reasons for allowing such a successive motion set forth in the proceeding paragraph, and recognizes that the interests of all parties, as well as the court, are better served by resolving that issue by a motion rather than a trial; but if plaintiff is unsuccessful on that motion or fails to timely submit the motion, no further summary judgment motions will be authorized, and the issues remaining as to defendants’ fifth affirmative defense will be set for trial pursuant to CPLR § 2218, R 3212(e) and (g) at the conference

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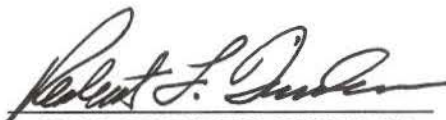
scheduled for **Wednesday, February 6, 2019 at 9:30 AM.**

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

This constitutes the Order and decision of the Court.

ENTER

Dated: September 27, 2018


HON. ROBERT F. QUINLAN
J.S.C.

☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION