

<b>Green Tree Servicing LLC v Ferentinos</b>
2019 NY Slip Op 30114(U)
January 3, 2019
Supreme Court, Suffolk County
Docket Number: 18522/2013
Judge: Robert F. Quinlan
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SHORT FORM ORDER

INDEX No. 18522/2013

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: 04/20/2017  
SUBMIT DATE: 04/20/2017  
Mot. Seq.: #001-Mot D

-----X  
GREEN TREE SERVICING LLC,

Plaintiff,

-against-

THOMAS FERENTINOS, BANK OF AMERICA, N.A.,  
THE BOARD OF MANAGERS OF ARTIST LAKE  
CONDOMINIUM,

"John Doe #1" through "John Doe#12" the last twelve  
names being fictitious and unknown to plaintiff, the  
persons or parties intended being the tenants, occupants,  
persons or corporations, if any, having or claiming an  
interest in or lien upon the premises, described in the  
complaint,

Defendant(s).  
-----X

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Upon the following papers read on this motion for an order granting summary judgment and order of reference; Notice of Motion dated March 23, 2017 and supporting papers ; it is

**ORDERED** that this unopposed motion by plaintiff for an order striking the answer and affirmative defenses of the defendant Thomas Ferentinos, 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, second and fifth through twelfth affirmative defenses; and it is further

**ORDERED** that upon the proof submitted plaintiff's application to dismiss defendant's third and fourth affirmative defenses 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 defendant's answer; and it is further

**ORDERED** that plaintiff's application to amend the caption striking the fictitiously named defendants "JOHN DOE #1" through "JOHN DOE #12" is granted upon the proof submitted; and it is further

**ORDERED** that plaintiff's application to amend the caption to substitute U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust for Green Tree Servicing LLC as party plaintiff is granted and the caption is

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amended to read:

-----X  
U.S. BANK TRUST, N.A., AS TRUSTEE FOR  
LSF9 MASTER PARTICIPATION TRUST

Plaintiff.

-against-

THOMAS FERENTINOS, BANK OF  
AMERICA, N.A., THE BOARD OF  
MANAGERS OF ARTIST LAKE  
CONDOMINIUM.

Defendant(s).

-----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 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' third and fourth affirmative defenses 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, May 15, 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 status conference at which future compliance will be determined.

This is an action to foreclose a mortgage on residential real property known as 68 Artist Lake Drive, Middle Island, Suffolk County, New York given by defendant Thomas Ferentinos ("defendant") on July 1, 2005 to plaintiff's predecessor in interest. Defendants purportedly defaulted on the obligation and plaintiff Green Tree Servicing LLC ("plaintiff") commenced this action by filing the summons, complaint and notice of pendency with the Suffolk County Clerk on July 16, 2013. Defendant interposed an answer August 8, 2013 consisting of general denials and twelve affirmative defenses, including plaintiff's failure to establish standing to commence the action (second and

eighth affirmative defenses), failure to serve notice of default as required under the mortgage (third affirmative defense) and failure to comply with RPAPL Article 13 (fourth affirmative defenses).

Plaintiff now moves for an order granting summary judgment against defendant, striking his answer and affirmative defenses, amending the caption, and for an order of reference appointing a referee to compute pursuant to RPAPL § 1321. Defendant does not oppose 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 Eroboho*, 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], *Zanfani 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 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 defendant's answer, as here by defendant's second and eighth affirmative defenses, 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*, 164 AD3d 545 [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 (third and fourth affirmative defenses), 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 AD3 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's submissions include the Affidavit of Mailing and Note Possession of plaintiff's representative, Chelsie Rostad, Document Execution Representative of Ditech Financial LLC f/k/a Green Tree Servicing LLC. Through this affidavit plaintiff demonstrates its standing as holder of the note by the affiant establishing her ability to testify as to plaintiff's records pursuant to CPLR 4518(a)

and a review of books and business records maintained in the ordinary course of business indicating possession of the note on January 11, 2012, a date prior to commencement of the action (see *Aurora Loan Services, LLC v Taylor*, 25 NY3d 355 [2015]; *Wells Fargo Bank, N.A. v Charlaff*, 134 AD3d 1099 [2d Dept 2015]; *HSBC Bank, USA v Espinal*, 137 AD3d 1079 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Joseph*, 137 AD3d 896 [2d Dept 2016]; *Flagstar Bank v Mendoza*, 139 AD3d 898 [2d Dept 2016]; *US Bank N.A. v Ellis*, 154 AD3d 710 [2d Dept 2017]). Defendant's second and eighth affirmative defenses addressing plaintiff's lack of standing are 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 defendant has 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. The affiant merely states a review of the records establishes plaintiff "caused to be mailed" the 90-day notices "by certified and first class mail" and annexes a copy of the notices to her affidavit. Even if the affiant establishes her ability to testify as to the business records pursuant to CPLR 4518, if the affiant merely states a review of the records establishes the notices were mailed by plaintiff by both regular and certified mail on a certain date, they 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 defendant's third and fourth affirmative defenses 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, fifth through seventh, and ninth through twelfth affirmative defenses are dismissed.

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### 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 [1<sup>st</sup> 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 Sihen & 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 third and fourth affirmative defenses, 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' third and fourth affirmative defenses will be set for trial pursuant to CPLR §2218, R 3212(e) and (g) at the conference scheduled for **Wednesday, May 15, 2019 at 9:30 AM.**

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

This constitutes the Order and decision of the Court.

Dated: January 3, 2019

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