

JPMorgan Chase Bank, N.A. v Salvage
2019 NY Slip Op 31071(U)
April 15, 2019
Supreme Court, New York County
Docket Number: 850171/2013
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X

INDEX NO. 850171/2013

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,
Plaintiff,

MOTION DATE N/A

MOTION SEQ. NO. 003

- v -

THE EXECUTOR OF THE ESTATE OF RITA LERNER, LYNN D.
SALVAGE aka LYNN SALVAGE, ANDREW SALVAGE, BOARD
OF MANAGERS OF ASTOR TERRACE CONDOMINIUM,

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 206, 207, 208, 209, 210, 211, 212

were read on this motion to/for

JUDGMENT - SUMMARY

The motion by plaintiff for *inter alia* summary judgment and to strike the affirmative defenses of defendant Lynn D. Salvage is granted. The cross-motion by defendant Lynn Salvage to *inter alia* dismiss the complaint is denied.¹

Background

This foreclosure action arises out of a note and mortgage executed by Salvage's mother Rita Lerner in 2007 on a condo unit located at 245 East 93rd Street in Manhattan. Salvage was not a party to the note or mortgage although she and her mother owned the unit as joint tenants with right of survivorship. Ms. Lerner failed to make the monthly payment due on July 1, 2008; Ms. Lerner later passed away in November 2009.

¹ Part of Salvage's cross-motion sought a stay of the instant motion pending a decision from the First Department. As will be discussed below, that relief is moot now that a decision has been rendered.

Before this case was transferred to this part, Justice Jaffe granted plaintiff's motion to add the Estate of Rita Lerner as a defendant and to dismiss Salvage's counterclaims and denied defendant Salvage cross-motion to dismiss the complaint (NYSCEF Doc. No. 87). After that decision was appealed, the First Department found that the "motion to add the executor of Lerner's estate should have been denied because no such person had been appointed at the time plaintiff made its motion" (*JPMorgan Chase Bank, Natl. Assoc. v Salvage*, 2019 WL 1441821 [1st Dept 2019]). The Court added that "The estate does not have any ownership interest in the condominium, which passed entirely, as a matter of law, to Salvage upon Lerner's death" (*id.*).

With respect to Salvage's counterclaims, the First Department held that "Salvage's counterclaims should not have been dismissed pursuant to CPLR 3215(c). Salvage and plaintiff/counterclaim defendant (hereinafter Chase) engaged in negotiations after Salvage asserted her counterclaims. It would not be equitable to dismiss counterclaims based on a nine-month gap between the end of negotiations and the making of Salvage's cross-motion, especially where Chase has hardly been a model of celerity" (*id.*).

Discussion

Based on this appellate decision, the Court must now consider Salvage's counterclaims (and affirmative defenses) on their merits. Salvage raises fifteen affirmative defenses and eight counterclaims in her amended answer. All of these are severed and dismissed.

In opposition to plaintiff's motion and in support of her cross-motion, Salvage addresses only three points: (1) Plaintiff failed to name a necessary party (the Executor of Lerner's estate), (2) Plaintiff failed to comply with a notice provision contained in paragraph 22 of the mortgage and (3) Plaintiff failed to comply with the Home Affordable Modification Program ("HAMP")/DIA programs by not offering a permanent loan modification after Lerner made the three

required consecutive payments in late 2009. Salvage does not address any of the other claims raised in her affirmative defenses and counterclaims—accordingly, these are severed and dismissed.

The failure to name a necessary party issue is now moot after the First Department's decision discussed above. With respect to the notice requirement contained in the mortgage, plaintiff submits an affidavit that attaches the acceleration warning sent to Ms. Lerner in May 2011 (NSYCEF Doc. No. 184). Of course, Ms. Lerner passed away in 2009. But that does not negate the fact that plaintiff complied with a term of the mortgage that required it to send the notice. Certainly, that is not a ground to grant Salvage's cross-motion or to deny plaintiff's motion for summary judgment. As stated above, only Ms. Lerner was on the note and mortgage—who else should plaintiff have sent this notice to?

Salvage's contentions about HAMP/DIA are insufficient to defeat plaintiff's motion. As plaintiff points out, Salvage was not a party to the note or the mortgage. Plaintiff has no obligation under HAMP to provide Salvage with a benefit that might have been available to her mother. And at oral argument on April 11, 2019, counsel for Salvage repeatedly stated that Salvage was not financially capable of assuming her mother's note and mortgage. Salvage also admits in reply that she cannot afford to assume the loan (*see* NYSCEF Doc. No. 211, ¶ 7). Salvage cannot have it both ways; she cannot gain the potential benefits afforded to borrowers under federal programs like HAMP or DIA but avoid the taking over the loan. In other words, Salvage wants to step in the shoes of the borrower (her mother) when it suits her, but step aside when it might benefit the mortgagee.

The Court also finds that there is no reason to deny this motion based on the alleged need for discovery. Whether service was properly effectuated on the estate of Ms. Lerner is

inapposite because the First Department ruled that the estate need not be a part of this case. As stated above, Salvage was not entitled to the protections of HAMP or DIA—therefore, there is no need for discovery on these issues.

In reply, Salvage complains that plaintiff has engaged in dilatory litigation tactics for the last ten years. That is not a ground to deny summary judgment or to grant Lerner's cross-motion to dismiss. It also does not accurately reflect the litigation history of this case. Unlike many foreclosure actions in which the borrowers fail to appear or decline to offer substantive defenses, Salvage has actively defended her interests since the beginning of this action. There have been three motions filed in this case (two by plaintiff and one by Salvage) and Salvage has filed two cross-motions. And Salvage appealed Justice Jaffe's decision on Motion Sequence 001. To be clear, there is nothing wrong with Salvage utilizing the litigation strategies and theories available to her. But Salvage cannot engage in litigation and then complain that plaintiff is delaying this case.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendants Lynn D. Salvage a/k/a Lynn Salvage is granted and the affirmative defenses and counterclaims in her amended answer are severed and dismissed; and plaintiff is granted a default judgment against the remaining defendants; and it is further

ORDERED that Leo Salzman, Esq.; 2116 Ave J
Brooklyn, NY 11210 718-338-3183 is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff for principal, interest and other disbursements advanced as provided for in the note and mortgage upon which

this action is brought, and to examine whether the mortgaged property can be sold in parcels; and it is further

ORDERED that the Referee may take testimony pursuant to RPAPL § 1321; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) (“Disqualifications from appointment”), and §36.2 (d) (“Limitations on appointments based upon compensation”), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of her/his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further


ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee’s report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein and ^{within 20 days of} ~~effectuate service of the~~ ~~summons and complaint on the parties added to the caption pursuant to the CPLR.~~
this order being uploaded on NYSCEF.

Next Conference: July 30, 2019 @ 2:15 p.m. If plaintiff has moved for a judgment of foreclosure and sale before the conference, then an adjournment may be obtained. Please consult the part's rules for information about how to obtain an adjournment. An appearance is required if a motion for a JFS has not been made; counsel appearing for plaintiff must come prepared to explain the delay or interest may be tolled.

4.15.19
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	