

<b>Wilmington Sav. Fund Socy. FSB v Artola</b>
2019 NY Slip Op 31479(U)
May 20, 2019
Supreme Court, Suffolk County
Docket Number: 614662/16 E
Judge: Thomas F. Whelan
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MEMO DECISION & ORDER

INDEX No. 614662/16 E

# ORIGINAL

SUPREME COURT - STATE OF NEW YORK  
1AS PART 33 - SUFFOLK COUNTY

## PRESENT:

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 3/25/19  
SUBMIT DATE 5/3/19  
Mot. Seq. # 001 - MG  
CDISP Y      N   X  

-----X

WILMINGTON SAVINGS FUND SOCIETY FSB :  
as Trustee for Stanwich Mortgage Loan Trust :  
Series 2013-6, :  
:  
Plaintiff, :  
:  
-against- :  
:  
JOSE R. ARTOLA, SOUTHSIDE HOSPITAL, :  
NEW YORK STATE DEPARTMENT OF :  
TAXATION AND FINANCE, AMERICAN :  
HONDA FINANCE CORPORATION, UNISHAR :  
JOINT VENTURE, LLC, AAO CHASE :  
MANHATTAN BANK USA AAO JPMORGAN :  
CHASE BANK USA, INCORPORATED :  
VILLAGE OF ISLANDIA, CLERK OF SUFFOLK :  
COUNTY DISTRICT COURT, "JOHN DOE" :  
said name being fictitious, to represent unknown :  
tenants/occupants of the subject property and any :  
other party or entity of any kind, if any, having or :  
an interest or lien upon the mortgage d property) :  
:  
Defendants. :  
-----X

FRIEDMAN VARTOLO LLP  
Attys. For Plaintiff  
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New York, NY 10004

CABANILLAS & ASSOC., PC  
Atty. For Defendant Artola  
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White Plains, NY 10605

Upon the following papers numbered 1 to 8 read on this motion for the appointment of a referee to compute among other things; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers:         ; Opposing papers: 5-6; Reply papers 7-8; Other         ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (#001) by plaintiff seeking summary judgment against the answering defendants, default judgments against the remaining defendants, amendment of the caption, and the appointment of a referee to compute, is granted; and it is further

**ORDERED** that the proposed Order submitted by plaintiff, as modified by the court, is signed

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simultaneously herewith; and it is further

**ORDERED** that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(2).

This is an action to foreclose a mortgage on residential real property situate in Brentwood. In essence, on May 24, 2007, defendant Jose R. Artola agreed to repay \$318,750.00 to plaintiff's predecessor in interest and executed a note and mortgage. The loan was thereafter modified by Loan Modification Agreement executed by defendant, Jose R. Artola, on May 14, 2014. The defendant ceased making monthly payments as of June 1, 2014 and the instant foreclosure action was commenced by filing on September 20, 2016. Defendant, Jose R. Artola, filed an answer on October 13, 2016, through counsel alleging seven affirmative defenses and three counterclaims. Plaintiff now moves for an order granting it summary judgment as against the answering defendant, default judgments against all non-appearing defendants, amendment of the caption, and the appointment of a referee to compute. Jose R. Artola and co-defendant, Ana Artola, oppose the motion, and plaintiff filed a reply affirmation.

In the moving papers on this summary judgment motion, the plaintiff addresses its burden of proof and refutes the affirmative defenses and counterclaims in the answer. Therefore, plaintiff has satisfied its prima facie burden on this summary judgment motion (*see HSBC Bank USA, Natl. Assn. v Espinal*, 137 AD3d 1079, 28 NYS3d 107 [2d Dept 2016]; *U.S. Bank Natl. Assn. v Cox*, 148 AD3d 692, 49 NYS3d 527 [2d Dept 2017]).

The burden then shifts to defendants (*see Bank of America, N.A. v DeNardo*, 151 AD3d 1008, 58 NYS3d 469 [2d Dept 2017]) and it was incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing or in support of the affirmative defenses asserted in the answer or otherwise available to them (*see Flagstar Bank v Bellafore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Grogg Assocs. v South Rd. Assocs.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Wells Fargo Bank v Karla*, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; *Washington Mut. Bank v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *J.P. Morgan Chase Bank, NA v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; *Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Notably, affirmative defenses predicated upon legal conclusions that are not substantiated with allegations of fact are subject to dismissal (*see CPLR 3013, 3018[b]*; *Katz v Miller*, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; *Becher v Feller*, 64 AD3d 672, 677, 884 NYS2d 83 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619, 858 NYS2d 260 [2d Dept 2008]). 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 NY2d 539, 369 NYS2d 667 [1975]; *see also Madeline D'Anthony Enter., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). In addition, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy (*see New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; *Starkman v*

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*City of Long Beach*, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]).

Defendants' submission, which consists solely of counsel's affirmation, challenges plaintiff's proof of mailing of the default notice and the notice pursuant to RPAPL §1304. The Court will address these claims herein, however, in accordance with the above, all other affirmative defenses and claims raised in the answer and not addressed in the opposition are dismissed as abandoned (*see JPMorgan Chase Bank, Natl. Assn. v Cao*, 160 AD3d 821, 76 NYS3d 82 [2d Dept 2018]).

Initially, it is noted that defendant, Ana Artola, remains in default in this action, as she failed to answer or otherwise respond to the complaint. By doing so, she has waived all potential defenses (*see Nationstar Mtge., LLC v Kamil*, 155 AD3d 968, 63 NYS3d 890 [2d Dept 2017]; *Washington Mutual Bank, FA v Milford-Jean-Gille*, 153 AD3d 754, 59 NYS3d 781 [2d Dept 2017]; *MidFirst Bank v Ajala*, 146 AD3d 875, 44 NYS3d 771 [2d Dept 2017]; *Emigrant Bank v Marando*, 143 AD3d 856, 39 NYS3d 83 [2d Dept 2016]; *HSBC Bank USA, Natl. Assn. v Hasis*, 154 AD3d 832, 62 NYS3d 467 [2d Dept 2017]; *Bank of America, N.A. v Agarwal*, 150 AD3d 651, 57 NYS3d 153 [2d Dept 2017]). Notwithstanding, Ana Artola is a named defendant by virtue of her occupancy of the premises. As such, Ms. Artola is a stranger to the mortgage transaction, and lacks standing to bootstrap into any claim or defense regarding compliance with the mortgage documents or otherwise, that would be personal to defendant Jose Arola. As she is not subject to the rights and obligations of the promissory note and mortgage, and the opposition seeks to advance allegations regarding the compliance with conditions precedent applicable solely to the borrower, as if she was subject thereto, no legal basis exists for such an assertion (*see Citimortgage, Inc. v Etienne*, \_\_\_ AD3d \_\_\_, 2019 WL 2030161 [2d Dept 2019]).

The Court notes that the allegation regarding the mortgage default notice was not raised in the defendant's answer. The defendant has, therefore, waived his right to assert this lack of compliance in failing to raise the allegation in a timely pre-answer motion to dismiss or answer (*see CPLR 3018; Emigrant Bank v Marando*, 143 AD3d 856, 39 NYS3d 83 [2d Dept 2016]; *Signature Bank v Epstein*, 95 AD3d 1199, 1200-01, 945 NYS2d 347 [2d Dept 2012]; *First N. Mortgagee Corp. v Yatrakis*, 154 A.D.2d 433, 546 N.Y.S.2d 9 [2d Dept 1989]). The failure to do so transforms the defense into an admission of plaintiff's satisfaction of the condition thereby resulting in a waiver of the defense by the defendant (*see CPLR 3015[a]*). Here, the defendant did not make a pre-answer motion to dismiss alleging any claims in connection with the default notice, and did not include any such claims in his answer which contained seven affirmative defenses. To the extent the opposition alleges that defendant's assertion in his answer that "no money is owing to the Plaintiff pursuant to the subject contract's terms, conditions, limitations and exclusions" is the equivalent to an assertion of failure to comply with the mortgage terms in mailing a default notice, the Court rejects same. This contentions has thus been waived and is disregarded.

The defendant's challenge regarding plaintiff's compliance with RPAPL §1304 is also without merit. Notably, a simple denial of receipt, without more, is insufficient to establish prima facie entitlement to judgment as a matter of law dismissing the complaint for failure to comply with the requirements of RPAPL § 1304" (*Citibank, N.A. v Conti-Scheurer*, 2019 WL 1646460, 2019 NY Slip Op 02846 [2d Dept Apr. 17, 2019]). In addition, the Court notes that although the defendant's opposition challenges plaintiff's proof of mailing of the RPAPL § 1304 notice, the answer alleges that plaintiff's non-compliance with RPAPL § 1304 was the result of plaintiff's failing to set forth whether

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the loan was subprime or high cost pursuant to the Banking Law. In light of the above, however, the Court recognizes that claim of non-compliance with RPAPL § 1304 as a “defense,” which is the manner in which it is characterized in RPAPL § 1302 (*see Pritchard v Curtis*, 101 AD3d 1502, 957 NYS2d 440 [3d Dept 2011]), and that such defense is not one that is jurisdictional in nature (*see Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, 32 NYS3d 625 [2d Dept 2016]; *U.S. Bank N.A. v Carey*, 137 AD3d 894, 896, 28 NYS3d 68 [2d Dept 2016]; *Citimortgage v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2016]; *cf., Wells Fargo Bank, N.A. v Muricy*, 135 AD3d 725, 24 NYS3d 137 [2d Dept 2016]). It may be raised at any time during the action and, unlike the affirmative defenses of the type set forth in CPLR 3016, 3018 and 3211(a), is not subject to waiver if not raised in a timely served pre-answer motion to dismiss or in an answer timely served (*see Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, *supra*; *U.S. Bank N.A. v Carey*, 137 AD3d 894, *supra*; *Citimortgage v Espinal*, 134 AD3d 876, *supra*; *cf., Bank of New York Trust Co., N.A. v Chiejina*, 142 AD3d 570, 36 NYS3d 512 [2d Dept 2016]; *Deutsche Bank Trust Co. Americas v Cox*, 110 D3d 760, 973 NYS2d 662 [2d Dept 2013]).

Here, to demonstrate mailing of the RPAPL § 1304 notice, plaintiff submits the affidavit of Natalie Owens, AVP of BSI Financial Services (“BSI”), plaintiff’s prior loan servicer, sworn to on February 8, 2019. Ms. Owens notes that she has access to BSI’s record’s, including those of the instant loan, and that she has knowledge of BSI’s record keeping practices as well as BSI’s procedures for creating and maintaining the records. Ms. Owens avers that the records are made at or near the time of the event by persons with knowledge, kept in the course of its ordinarily conducted business, and it is the business practice of BSI as loan servicer to maintain such records.

While an affidavit of service is the preferred proof of mailing, “[t]here is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a), and the records themselves actually evince the facts for which they are relied upon” (*Aurora Loan Services, LLC v Vrionedes*, 167 AD3d 829, 832, 91 NYS 3d 150 [2d Dept 2018], *citing Citigroup v Kopelowitz*, 147 AD3d 1014, 1015, 48 NYS3d 223; *see also HSBC Bank USA, N.A. v Ozcan*, 154 AD3d at 826, *supra*). A plaintiff or its servicer can demonstrate mailing by providing proof of actual mailing or a description of the sender’s office practice and procedure for mailing (*see Citibank, N.A. v Wood*, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017]). Thus, due proof of the mailing of the notice can be established by submission of an affidavit of service (*see Investors Sav. Bank v Salas*, 152 AD3d 752, 58 NYS3d 600 [2d Dept 2017]; *Bank of NY Mellon v Aquino*, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; *Emigrant Mtge. Co., Inc. v Persad*, 117 AD3d 676, 985 NYS2d 608 [2d Dept 2014]); an affidavit of mailing (*see JPMorgan Chase Bank, NA v Schott*, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; *Wells Fargo v Moza*, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015]) or through business records that detail a standard of office practice or procedure designed to ensure that items are properly addressed and mailed (*see US Bank, N.A. v Sims*, 162 AD3d 825, 79 NYS3d 207 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v Heitner*, 165 AD3d 1038, 87 NYS3d 116 [2d Dept 2018]).

Here, Ms. Owen describes BSI’s mailing practices, and states that BSI’s mailings of the 90-day notice to the defendant was completed in accordance with such regular practices, by certified and regular mail on August 9, 2017. Attached to the affidavit are copies of the 90-day notices, two of which bear certified mail numbers, as well as the Proof of Filing Statement to the New York State Banking Department, pursuant to RPAPL § 1306, offered as proof to the state agency that the mailing

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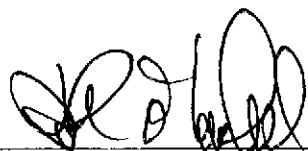
occurred pursuant to the Step One Filing requirement. That the affidavit was submitted with plaintiff's reply submission is of no consequence, as such was in response to allegations raised for the first time in defendant's opposition papers (see *Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879, 23 NYS3d 251 [2d Dept 2015], citing *David v Chong Sun Lee*, 106 AD3d 1044, 1045, 967 NYS2d 80 [2013]; *Conte v Frelen Assoc., LLC*, 51 AD3d 620, 621, 858 N.Y.S.2d 258 [2d Dept 2008]; *Ryan Mgt. Corp. v Cataffo*, 262 AD2d 628, 691 NYS2d 891 [2d Dept 1999]). The Court thus finds that the plaintiff has properly demonstrated proof of its mailing of the notice pursuant to RPAPL § 1304.

The Court also grants that portion of the motion seeking to substitute Wilmington Savings Fund Society, FSB, not in its individual capacity but solely as Trustee, on behalf of Aero Mortgage Loan Trust 2017-1 as plaintiff herein. Where a plaintiff in a mortgage foreclosure action transfers the note by written assignment or by physical delivery to a third party during the pendency of such action, the transferee may continue to prosecute the action in the name of the original plaintiff or it may seek leave to have itself formally substituted for the named plaintiff pursuant to CPLR 1018 (see *U.S. Bank Natl. Assn. v Akande*, 136 AD3d 887, 26 NYS3d 164 [2d Dept 2015]; *Woori Am. Bank v Global Universal Group Ltd.*, 134 AD3d 699, 20 NYS3d 597 [2d Dept 2015]; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 17 NYS3d 137 [2d Dept 2015]). Here, the affidavit of Thomas O'Connell, the Senior Vice President of Planet Home Lending, LLC d/b/a Planet Home Servicing, the loan servicer of plaintiff's successor in interest, avers that Wilmington Savings Fund Society, FSB, not in its individual capacity but solely as Trustee, on behalf of Aero Mortgage Loan Trust 2017-1 is in possession of the note (see *U.S. Bank Natl. Assn. v Akande*, 136 AD3d 887, *supra*; *Woori America Bank v Global Universal Group Ltd.*, 134 AD3d 699, *supra*; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, *supra*). The substitution is, therefore, granted.

In light of the above, plaintiff has satisfied its prima facie burden on this summary judgment motion (see *HSBC Bank USA v Ozcan*, 154 AD2d 822, 64 NYS3d 38 [2d Dept 2017]; *HSBC Bank USA, Natl. Assn. v Espinal*, 137 AD3d 1079, 28 NYS3d 107 [2d Dept 2016]), and the defendants have failed to raise any issue of fact. The Court thus grants plaintiff's motion (#001) for an order appointing a referee to compute, granting it default judgments as against all non-appearing defendants, and to amend the caption (see CPLR 3212, 3215, 1003 and RPAPL §1321; *Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; *Central Mtge. Co. v McClelland*, 119 AD3d 885, 991 NYS2d 87 [2d Dept 2014]; *Peak Fin. Partners, Inc. v Brook*, 119 AD3d 916, 987 NYS2d 916 [2d Dept 2014]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]).

Plaintiff's motion #001 is granted and the proposed order of reference, as modified by the court, has been signed simultaneously with this memorandum decision and order.

DATED: 5/20/19

  
\_\_\_\_\_  
THOMAS F. WHELAN, J.S.C.