

OneWest Bank, FSB v Knakal
2019 NY Slip Op 31560(U)
June 4, 2019
Supreme Court, Suffolk County
Docket Number: 14588/13
Judge: Thomas F. Whelan
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COPY

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4/12/19
SUBMIT DATE 5/17/19
Mot. Seq. # 001 - MG
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ONEWEST BANK, FSB, :
: :
Plaintiff, :
: :
-against- :
: :
CHARLES F. KNAKAL and "JOHN DOE", :
"RICHARD DOE", "JANE DOE", "CORA COE", :
DICK MOE" and "RUBY POE", the six defendants :
last named in quotation marks being intended to :
designate tenants or occupants in possession of the :
herein described premises or portions thereof, if any :
there by, said names being fictitious, their true name :
being unknown to plaintiff, :
: :
Defendants. :
-----X

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Upon the following papers numbered 1 to 7 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 1-3; Notice of Cross Motion and supporting papers: _____; Opposing papers: 4-5; Reply papers 6-7; 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 defendant, 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 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 Huntington Station. In essence, on February 15, 2006, defendant Charles Knakal agreed to repay \$360,000.00 to

plaintiff's predecessor in interest and executed a note and mortgage. The defendant ceased making monthly payments as of August 1, 2012 and the instant foreclosure action was commenced by filing on June 4, 2013. Defendant, Charles Knakal, filed an answer dated July 8, 2013 alleging three affirmative defenses. 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. Defendant Knakal opposed 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 defendant (*see Bank of America, N.A. v DeNardo*, 151 AD3d 1008, 58 NYS3d 469 [2d Dept 2017]) and it was incumbent upon the answering defendant 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 him (*see Flagstar Bank v Bellafiore*, 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 City of Long Beach*, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]).

Defendant's submission, which consists solely of counsel's affirmation, challenges plaintiff's standing and proof of mailing of the notice pursuant to RPAPL §1304, and alleges that the plaintiff's motion is premature as discovery is outstanding. 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]).

One of the various methods that standing may be established is by due proof that the plaintiff or its custodial agent was in possession of the note prior to the commencement of the action. The production of such proof is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]; *Wells Fargo Bank, NA v Frankson*, 157 AD3d 844, 66 NYS3d 529 [2d Dept 2018]; *U.S. Bank v Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016]; *JPMorgan Chase Bank, Natl. Assn. v Weinberger*, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; *Citimortgage, Inc. v Klein*, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; *U.S. Bank Natl. Assn. v Godwin*, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Joseph*, 137 AD3d 896, 26 NYS3d 583 [2d Dept 2016]; *Emigrant Bank v Larizza*, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]).

Here, to demonstrate standing, plaintiff has submitted the affidavit of Marisa Browles, Vice President of CIT Bank, NA f/k/a OneWest Bank, N.A. f/k/a OneWest Bank, FSB ("CIT Bank"), plaintiff herein, sworn to on April 27, 2018. Initially, the Court notes that the affidavit adequately sets forth the basis of her knowledge and establishes the admissibility of the documents appended to the affidavit as business records, and comports with the dictates of *Bank of N.Y. Mellon v Gordon*, 2019 NY Slip Op 02306, 2019 WL 1372075 [2d Dept March 27, 2019]; *Nationstar Mtge., LLC v LaPorte*, (162 AD3d 784, 79 NYS3d 70 [2d Dept 2018]) and *HSBC Bank USA v Ozcan*, (154 AD2d 822, 64 NYS3d 38 [2d Dept 2017]); *Olympus America, Inc. v Beverly Hills Surgical Inst.*, 110 AD3d 1048, 974 NYS2d 89 [2d Dept 2013]; *DeLeon v Port Auth. of N.Y. & N.J.*, 306 AD2d 146, 761 NYS2d 54 [2d Dept 2003]), and satisfies the admissibility requirements of CPLR 4518(a) (*see City Natl. Bank v Foundry Dev. Group, LLC*, 160 AD3d 920, 72 NYS3d 491 [2d Dept 2018]; *Stewart Title Ins. Co. v Bank of New York Mellon*, 154 AD3d 656, 61 NYS3d 634 [2d Dept 2017]; *Citigroup v Kopelowitz*, 147 AD3d 1014, 1015, 48 NYS3d 223 [2d Dept 2017]; *see generally Citimortgage, Inc. v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]). The affidavit is thus admissible.

Ms. Browles provides the date which plaintiff came into possession of the note and further avers that plaintiff remained in possession on the date of commencement of the instant action (*see Bank of New York Mellon v Aiello*, 164 AD3d 632, 83 NYS3d 135 [2d Dept 2018], *Tribeca Lending Corp. v Lawson*, 159 AD3d 936, 73 NYS3d 575 [2d Dept 2018]; *U.S. Bank Nat. Assn. v Ellis*, 154 AD3d 710, 61 NYS3d 663 [2d Dept 2017]; *DLJ Mtge. Capital, Inc., v Sosa*, 153 AD3d 666, 60 NYS3d 278 [2d Dept 2017]; *HSBC Bank USA, Nat. Assn. v Armijos*, 151 AD3d 943, 57 NYS3d 205 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Thomas*, 150 AD3d 1312, 52 NYS3d 894 [2d Dept 2017]). Attached to the affidavit is a copy of the note, bearing an endorsement in blank.

The Court finds no merit to defendant's contentions. Any challenges to the assignments of the mortgage are without merit since it is the note that is the controlling document for standing purposes (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]; *see also Deutsche Bank Natl. Trust Co. v Pietranico*, 32 Misc3d 528, 928 NYS2d 818 [Sup. Ct. Suffolk County 2011], *affd* 102 AD3d 724, 957 NYS2d 868 [2013]). Thus, pursuant to CPLR 3212(g), the court hereby declares that the issue of the plaintiff's standing is resolved in favor of the plaintiff for all purposes of this action.

In addressing plaintiff's compliance with RPAPL § 1304, it is noted that the defendant makes no representations regarding receipt of the notice or otherwise, as the opposition consists solely of an affirmation of an attorney having no personal knowledge of the facts. As such, the submission is without evidentiary value and is insufficient to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *see also Bank of New York Mellon v Aiello*, 164 AD3d 632, 83 NYS3d 135 [2d Dept 2018]). As "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]), a failure to address the notice at all warrants the same result. The Court therefore disregards counsel's hearsay statements in connection with the RPAPL §1304.

The defendant's request for discovery is denied as there is no showing as to how such discovery would have helped to defeat any of plaintiff's motions (*see JPMorgan Chase Bank, Natl. Assn. v Weinberger*, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; *American Prescription Plan, Inc. v American Postal Workers Union*, 170 AD2d 471, 565 NYS2d 830 [2d Dept 1991]). All remaining contentions are found to be without merit and are likewise stricken.

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 defendant has 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]).

The Court also grants that portion of the motion seeking to substitute U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust 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 Kolette Modlin, Authorized Officer of Caliber Home Loans, the loan servicer of plaintiff's successor in interest, avers that U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust 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.

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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: 6/4/19



THOMAS F. WHELAN, J.S.C.