

<b>PHH Mtge. Corp. v Morton</b>
2019 NY Slip Op 32225(U)
July 26, 2019
Supreme Court, New York County
Docket Number: 850098/2017
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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PHH MORTGAGE CORPORATION,
Plaintiff,

INDEX NO. 850098/2017

MOTION DATE N/A, N/A

MOTION SEQ. NO. 003 004

- v -

ALLEN MORTON, PATSY MORTON, ALLEN J. MORTON
JR AND PATSY MORTON, AS TRUSTEES OF THE ALLEN
J. MORTON REVOCABLE TRUST- II, CRIMINAL COURT
OF THE CITY OF NEW YORK, DEPARTMENT OF
HOUSING PRESERVATION & DEVELOPMENT, CITY OF
NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY
OF NEW YORK TRANSIT AUTHORITY TRANSIT
ADJUDICATION BUREAU, JOHN DOE

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 110, 111, 112, 113,
114, 115, 116, 117, 118, 119, 122, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150,
151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 162, 163, 166, 167, 168, 169, 170, 171, 172, 173, 174,
247, 250, 252

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 227, 228, 229, 230,
231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 248, 251

were read on this motion to/for JUDGMENT - SUMMARY

Motion Sequence Numbers 003 and 004 are consolidated for disposition. The motion
(MS003) by defendant Patsy Morton to vacate decisions of this Court denying Ms. Morton's
prior motions is denied and the cross-motion by plaintiff for summary judgment and to appoint a
referee is granted. The motion (MS004) by Ms. Morton for summary judgment is denied.

Background

This mortgage foreclosure action relates to property owned by the Mortons located at 424
West 147th Street in Manhattan. Plaintiff claims that the Mortons executed a Consolidated Note

and a Consolidation, Extension and Modification Agreement (“CEMA”) worth \$284,598 in May 2002. Plaintiff insists that the Consolidated Note and CEMA were transferred to Cendant Mortgage Company in May 2003, an entity that later became plaintiff. Plaintiff claims that the Mortons stopped making payments and a 90-day notice was sent in March 2015.

### **Motion to Vacate**

“To vacate a default, a party must demonstrate both a reasonable excuse and the existence of a meritorious defense” (*Terrapin Indus., LLC v Bank of New York*, 137 AD3d 569, 570 27 NYS3d 153 [1st Dept 2016]).

Ms. Morton moves to vacate the Court’s denial of her prior motions (MS 001 and 002), which were denied when Ms. Morton did not appear for oral argument (*see* NYSCEF Doc. Nos. 108, 109). She claims she had no knowledge of the appearance date. In opposition, plaintiff claims that Ms. Morton has not established a reasonable excuse for missing the court appearance.

As an initial matter, the Court finds that Ms. Morton established a reasonable excuse—she didn’t know that there was an oral argument scheduled for her motions. Ms. Morton is self-represented in this matter and this Court will not find that a self-represented litigant willfully neglected to show up after missing a single oral argument.

However, as will be discussed in more detail below, Ms. Morton has not established a meritorious defense to plaintiff’s claims. There is no dispute that she has not paid her mortgage in years and she fails to raise a sufficient defense to foreclosure in this motion or in MS004.

### **Cross-Motion and Motion for Summary Judgment**

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York*

*Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Plaintiff cross-moves for summary judgment and contends it has stated a prima facie case. Plaintiff asserts it has standing and that it sent various notices to the Mortons despite the fact that they were not required—plaintiff contends that the Mortons do not live in the subject premises so certain notices, including RPAPL 1304 do not apply. Plaintiff attaches the affidavit of William Long (an Assistant VP for plaintiff), who claims that over \$270,000 is now due (NYSCEF Doc. No. 142). He also claims that the 90-day notice was sent and that plaintiff complied with RPAPL 1306 (*id.*).

In opposition, Ms. Morton insists that the cross-motion must be denied because no discovery has taken place. She also argues that plaintiff has no standing. In support of her

motion for summary judgment (MS 004), Ms. Morton also argues that plaintiff has no standing and that Mr. Long is not employed by plaintiff and works for another entity called Cenlar FSB. Ms. Morton also claims that she served a notice to admit on Mr. Long personally and did not receive a response. She also demands that the Court impose sanctions on plaintiff's counsel for various alleged misconduct.

In opposition, plaintiff points out that there is another person named William Long who works for Cenlar FSB and this person has no relation to the William Long that works for plaintiff. Plaintiff argues that the Notice to Admit was a nullity since it was served on the William Long who works for Cenlar FSB, a non-party to this action.

The Court grants plaintiff's cross-motion and denies Ms. Morton's motion for summary judgment. The fact is that plaintiff established its standing by attaching the note to the complaint (*see* NYSCEF Doc. No. 1 at 57-60). "A plaintiff may establish standing in a foreclosure action either by showing assignment of the mortgage note or physical delivery of the note prior to the commencement of the foreclosure action. . . if the note is affixed to the summons and complaint at the time the action is commenced, it is unnecessary to give factual details of the delivery to establish that possession was obtained prior to a particular date" (*Bank of New York Mellon v Knowles*, 151 AD3d 596, 596-97, 57 NYS3d 473 [1st Dept 2017] [internal quotations and citations omitted]).

At oral argument on July 25, 2019, Ms. Morton admitted that she has not lived at the subject premises since 2000; therefore, plaintiff was not required to send the required notices under RPAPL 1304. Even if mailing these notices were required, plaintiff established that it satisfied these obligations through the Long affidavit (*see* NYSCEF Doc. No. 142).

The Court also finds that the notice to admit drafted by Ms. Morton was a nullity because it was apparently sent to an individual who happened to have the same name as plaintiff's employee but has no relation to this case. Moreover, the notice to admit was not served on plaintiff's counsel. Given these errors, there is no basis to impose sanctions on plaintiff's counsel. There is also no reason for discovery as plaintiff met its prima facie burden on its claims and Ms. Morton failed to raise an issue of fact.

Accordingly, it is hereby

ORDERED that the motion to vacate (MS003) by defendant Patsy Morton is denied and the cross-motion for summary judgment by plaintiff is granted, and the answer, affirmative defenses and counterclaims asserted by defendants Allen Morton, aka Allen J. Morton, Allen J. Morton Jr., as trustee of the Allen J. Morton Revocable Trust - II and Patsy Morton aka Patsy J. Morton and Patsy Morton, as trustee of the Allen J. Morton Revocable Trust- II (NYSCEF Doc. No. 123) are severed and dismissed; and it is further

ORDERED that the motion (MS004) by defendant Patsy Morton for summary judgment is denied; and it is further

ORDERED that plaintiff is awarded a default judgment against all non-appearing defendants; and it is further

ORDERED that Jeffrey Miller, Esq. with an address of Miller, Leiby & Assoc.  
32 Broadway, 13<sup>th</sup> floor, NY NY 10004 212-227-4200 is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the tax parcel 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 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 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 himself or paying funds to himself 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 Thomas Lewis, Patricia Lewis, John Doe and John Doe shall be substituted for John Doe and the caption shall read as follows:

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

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PHH MORTGAGE CORPORATION,

Plaintiff,

v.

ALLEN MORTON, PATSY MORTON,  
ALLEN J. MORTON JR AND PATSY  
MORTON, AS TRUSTEES OF THE ALLEN  
J. MORTON REVOCABLE TRUST- II,  
CRIMINAL COURT OF THE CITY OF NEW  
YORK, DEPARTMENT OF HOUSING  
PRESERVATION & DEVELOPMENT, CITY  
OF NEW YORK ENVIRONMENTAL  
CONTROL BOARD, CITY OF NEW YORK  
TRANSIT AUTHORITY TRANSIT  
ADJUDICATION BUREAU, THOMAS  
LEWIS, PATRICIA LEWIS, JOHN DOE,  
JOHN DOE,

Defendant(s).

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and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed and substituted pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address ([www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh))).

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.

Next Conference: January 7, 2020 @ 2:15 p.m. If a motion for judgment of foreclosure and sale has been filed, then no conference is necessary and plaintiff may seek an adjournment. Please consult this part's rules for information on how to obtain an adjournment. If a motion has not been made, then a conference is required to explore the reasons for the delay.

7/26/19  
DATE

*Arlene P. Bluth*  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED
<input checked="" type="checkbox"/>	GRANTED
<input type="checkbox"/>	DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

SETTLE ORDER

FIDUCIARY APPOINTMENT

REFERENCE

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

**HON. ARLENE P. BLUTH**