

PHH Mtge. Corp. v Locicero
2019 NY Slip Op 32722(U)
September 3, 2019
Supreme Court, Suffolk County
Docket Number: 22821/12
Judge: Thomas F. Whelan
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ORIGINAL

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

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/11/19
SUBMIT DATE 8/16/19
Mot. Seq. # 001 - MG
CDISP Y N X

-----X
 PHH MORTGAGE CORPORATION, :
 : Plaintiff, :
 : :
 : -against- :
 : :
 DOMINICK LOCICERO, JANICE LOCICERO, :
 and JOHN DOE" said name being fictitious, it being :
 the intention of plaintiff to designate any and all :
 occupants of the premisses being foreclosed herein :
 and any corporations or entities, if any, having or :
 claiming an interest or lien upon the mortgaged :
 premises, :
 : 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 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 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 Port Jefferson. In essence, on December 4, 2008, defendants Dominick and Janice Locicero, agreed to repay

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\$597,375.00 to plaintiff and executed a note and mortgage. The defendants ceased making monthly payments as of August 1, 2011, and the instant foreclosure action was commenced by filing on July 27, 2012. Defendants, Dominick and Janice Locicero, filed an answer on August 12, 2012, through counsel, alleging thirty eight affirmative defenses and eleven counterclaims. Plaintiff now moves for an order granting it summary judgment as against the answering defendants, default judgments against all non-appearing defendants, amendment of the caption, and the appointment of a referee to compute. Defendants, Dominick and Janice Locicero, 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 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 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 Mgt. Co., LLC v Mentosana*, 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]).

Defendants' submission consists of counsel's affirmation and an affidavit from Janice Locicero. No affidavit was provided on behalf of Dominick Locicero. Nevertheless, the defendants challenge plaintiff's standing, compliance with RPAPL 1304 and the mailing of the default notice pursuant to the mortgage. The submission also fleetingly mentions that defendants were not served with the complaint, and alleges predatory tactics at the inception of the loan. 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]).

The defense of standing has lost its significance and vitality with the advent of CPLR 3012-b. One of the various methods standing may be established is by due proof that the plaintiff or its custodial agent was in possession of the endorsed 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]).

The plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit required by CPLR 3012-b has been held to constitute due proof of the plaintiff's possession of the note prior to the commencement of the action and thus its standing to prosecute its claim for foreclosure and sale (*see Green Tree Servicing, LLC v Molini*, 171 AD3d 880, 98 NYS3d 136 [2d Dept 2019]; *U.S. Bank N.A. v Offley*, 170 AD3d 1240, 97 NYS3d 307 [2d Dept 2019]; *Nationstar Mtge LLC v Balducci*, 165 AD3d 959, 2018 WL 5020218 [2d Dept 2018]; *HSBC Bank USA, NA v Oscar*, 161 AD3d 1055, 78 NYS3d 428 [2d Dept 2018], *citing US Bank NA v Cohen*, 156 AD3d 844, 846, 67 NYS3d 643 [2d Dept 2017]; *US Bank NA v Saravanan*, 146 AD3d 1010, 1011, 45 NYS3d 547 [2d Dept 2017]; *JPMorgan Chase Bank, NA v Weinberger*, 142 AD3d 643, 645, 37 NYS3d 286 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Leigh*, 137 AD3d 841, 842, 28 NYS3d 86 [2d Dept 2016]; *Emigrant Bank v Larizza*, 129 AD3d 904, *supra*; *Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151, 1152, 9 NYS3d 315 [2015]; *see also HSBC Bank USA v Ozcan*, 154 AD2d 822, 64 NYS3d 38 [2d Dept 2017]).

Here, the plaintiff alleged in its complaint that it was the current holder of the note and attached a copy of the note, endorsed to plaintiff, to the complaint. Contrary to defendants' contentions, "where the note is affixed to the complaint, 'it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date'" (*U.S. Bank N.A. v Henry*, 157 AD3d 839, 841, 69 NYS3d 656 [2d Dept 2018] [citations omitted]). Additionally, 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, *supra*; *see also Deutsche Bank Natl. Trust Co. v Pietranico*, 32 Misc3d 528, 928 NYS2d 818 [Sup. Ct. Suffolk County 2011], *aff'd* 102 AD3d 724, 957 NYS2d 868 [2013]). The plaintiff, through its submissions, has thus demonstrated the requisite possession of the note prior to the commencement of the action (*see Nationstar Mtge LLC v Balducci*, 165 AD3d 959, *supra*; *HSBC Bank USA, NA v Oscar*, 161 AD3d 1055, *supra*; *Wells Fargo Bank, NA v Frankson*, 157 AD3d 844, *supra*; *US Bank Natl. Assn. v Richards*, 151 AD3d 1001, 57 NYS3d 509 [2d Dept 2017]; *Silvergate Bank v Calkula Prop., Inc.*, 150 AD3d 1295, 56 NYS3d 189 [2d Dept 2017]; *Central Mtge. Co. v Jahnsen*, 150 AD3d 661, 56

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NYS3d 107 [2d Dept 2017]; *Bank of America, N.A. v Barton*, 149 AD3d 676, 50 NYS3d 546 [2d Dept 2017]). As the defendants have failed to raise an issue of fact with regard to plaintiff's standing, the court hereby declares, pursuant to CPLR 3212(g), that the issue of standing is resolved in plaintiff's favor for all purposes of this action.

With regards to the defendants' contentions regarding the demand notice and notice pursuant to RPAPL § 1304, the Court notes that the defendant makes no representations regarding either notice in her affidavit, regarding receipt or otherwise. Here, the vague, conclusory allegations regarding the notices are made by counsel. The affirmation of an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Bank of New York Mellon v Aiello*, 164 AD3d 632, 83 NYS3d 135 [2d Dept 2018]). As a result, the Court finds that counsel's statements in connection with the RPAPL §1304 notice, as well as, the default notice are hearsay and disregarded. Additionally, as it has been held that "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 has considered the defendants' remaining contentions not specifically addressed herein, and find each to be vague, conclusory and unsubstantiated.

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]).

The Court also grants that portion of plaintiff's motion seeking to substitute Nationstar Mortgage LLC as plaintiff. 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 Aaryn Richardson, Litigation Resolution Analyst of Nationstar Mortgage LLC d/b/a Mr. Cooper, plaintiff's successor in interest, avers that Nationstar Mortgage LLC 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

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699, *supra*; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, *supra*). The substitution is, therefore, granted.

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: 9/3/19



THOMAS F. WHELAN, J.S.C.