

<b>Bank of Am., N.A. v Tornabene</b>
2019 NY Slip Op 33424(U)
November 18, 2019
Supreme Court, Suffolk County
Docket Number: 624447/2017
Judge: Michael A. Gajdos Jr.
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SHORT FORM ORDER

INDEX NO. 624447/2017

**ORIGINAL**  
SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 54 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. MICHAEL A. GAJDOS JR.  
Justice of the Supreme Court

MOTION DATE: 08/27/2018  
ADJ. DATE:  
Mot. Seq. # 001 - MG

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BANK OF AMERICA, N.A.,

Plaintiff,

- against -

BERNADETTE TORNABENE; SECRETARY OF  
HOUSING AND URBAN DEVELOPMENT,

“JOHN DOE #1” through “JOHN DOE #12,” the last  
twelve names being fictitious and unknown to plaintiff,  
the persons or parties intended being the tenants,  
occupants, persons or corporations, if any, having or  
claiming an interest in or lien upon the premises,  
described in the complaint,

Defendants.

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Upon the following papers: Notice of Motion by Plaintiff, dated July 26, 2018, with supporting papers; Affirmation in Opposition by Defendant, dated August 20, 2018, with supporting papers; Affirmation in Reply by Plaintiff, dated August 22, 2018, with supporting papers; and upon due consideration; it is

**ORDERED** that this motion by the plaintiff for, among other things, an order granting summary judgment on the complaint insofar as asserted against the defendant Bernadette Tornabene, fixing the defaults of the non-answering defendants, appointing a referee, and amending the caption is granted; and it is

**ORDERED** that the affirmative defenses asserted in the answer are dismissed with prejudice; and it is

**ORDERED** that the caption is amended by substituting “JOHN DOE” for the fictitious “JOHN DOE #1” defendant, and excising the remaining “JOHN DOE #2” through “JOHN DOE #12” defendants, along with the remaining descriptive wording relating thereto; and it is

Bank of America, N.A. v Tornabene, et.al.  
Index No.: 624447/2017  
Pg. 2

**ORDERED** that the caption of this action shall hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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BANK OF AMERICA, N.A.,

Plaintiff,

-against-

BERNADETTE TORNABENE; SECRETARY OF  
HOUSING AND URBAN DEVELOPMENT; JOHN DOE,

Defendants.

\_\_\_\_\_; and it is

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**ORDERED** that the plaintiff shall serve a copy of this order amending the caption upon the Calendar Clerk of this Court; and it is

**ORDERED** that the plaintiff shall promptly serve a copy of this order pursuant to CPLR 2103(b)(1), (2), (3), (6) or (7) upon counsel for the defendant Bernadette Tornabene, and by first-class mail upon all other appearing parties that have not waived further notice, and the plaintiff shall thereafter file the affidavit(s) of service with the Clerk of the Court.

On March 17, 2011, Christine Tornabene executed a fixed-rate promissory note in favor of the plaintiff, secured by a reverse mortgage on property in Lindenhurst, New York. The note, home equity conversion loan agreement and two attached exhibits, which include a payment plan, were executed solely by Christine as borrower. The mortgage, which secured the note, was executed by Christine as life tenant and borrower and by Bernadette as remainderman.

By way of an assignment executed on September 18, 2012, the note and mortgage were allegedly transferred by the plaintiff to Champion Mortgage Company (Champion). Through an undated, blank endorsement with physical delivery, the note was allegedly transferred back to the plaintiff, memorialized by an assignment of the mortgage executed on October 27, 2016 by Nationstar Mortgage LLC doing business as Champion. Thereafter, the assignment was recorded on November 15, 2016.

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Bank of America, N.A. v Tornabene, et.al.

Index No.: 624447/2017

Pg. 3

The note and mortgage provide that the lender may require immediate payment in full of all outstanding principal and accrued interest if one or more of certain enumerated conditions occurs. These enumerated conditions include the borrower's death, cessation of use of the mortgaged property as the borrower's principal residence, failure to timely pay property taxes to the appropriate authority, and failure to maintain hazard insurance.

Christine died on December 16, 2016, leaving Bernadette as the sole owner of the property. The plaintiff allegedly sent a notice dated January 10, 2017 to the "Estate of Christine Tornabene, deceased" at the property that the loan was "due and payable" upon Christine's death, and the fully accelerated loan balance was \$280,594.16. The notice provides, among other things, for three options to satisfy the loan.

After Bernadette allegedly failed to pay the balance due upon Christine's death, or take one of the other options to satisfy the loan, the plaintiff commenced the instant action by the filing of the *lis pendens*, summons and complaint on December 22, 2017. Bernadette answered the complaint and asserted various affirmative defenses, including, the plaintiff's lack of standing and the failure to provide a notice of default pursuant to paragraph 20 of the mortgage. The United States Secretary of Housing and Urban Development sued herein as Secretary of Housing and Urban Development (HUD) appeared herein, waived all, but certain, defenses and asserted a conditional claim for surplus monies. The remaining defendant never answered the complaint or appeared herein, and, thus, is in default.

The plaintiff now moves for an order awarding summary judgment in its favor against the Bernadette, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption. In support of the motion, the plaintiff submitted, among other things, the affidavit in support of Nicole Johnson (Johnson), an Authorized Signer of Reverse Mortgage Solutions (RMS) the plaintiff's servicer and various other exhibits.

In opposition, Bernadette submitted, *inter alia*, the affirmation of her counsel. In his affirmation, counsel argues, among other things, that the plaintiff failed to provide proper notice of default to Bernadette and that the endorsement on the note is forged and/or fraudulent. In response, the plaintiff submitted the affirmation of its counsel.

The court turns first to Bernadette's arguments that she was entitled to a notice of default pursuant to paragraph 20 of the mortgage and that the plaintiff failed to furnish sufficient proof of compliance with the same. Under the facts of this case where the acceleration is based upon the death of the borrower (*see* Mtge ¶ 9[a][i]), the pre-foreclosure notice of default referred to in the mortgage paragraph 20 of the mortgage was not required to be provided to Bernadette, a non-borrower (*see generally Cadet v James B. Nutter & Co.*, 133 AD3d 561, 19 NYS3d 307 [2d Dept 2015]; *Nationstar Mtge. LLC v Hoar*, 64 Misc3d 757, 104 NYS3d 884 [Sup Ct, Westchester County 2019]). Even if notice of default pursuant to paragraph 20 of the mortgage were required, Bernadette waived this defense by failing to assert the same as an affirmative defense in the answer (*see* CPLR 3018[b], 3015[a], 3211[a][e]; *see also Federal Natl. Mtge. Assn. v Onuoha*, 172 AD3d 1170, 102 NYS3d 214 [2d Dept 2019]; *Nationstar Mtge., LLC v Vordermeier*, 165 AD3d 822, 86 NYS3d 191 [2d Dept 2018]; *First N. Mortgage Corp. v Yatrakis*, 154 AD2d 433, 546 NYS2d 9 [2d Dept 1989]). It is well-settled, where a defendant attempts to inject into the litigation matters that are not the plaintiff's burden to prove as part of the cause of action, those matters

Bank of America, N.A. v Tornabene, et.al.

Index No.: 624447/2017

Pg. 4

must be affirmatively pleaded as defenses (*US Bank N.A. v Nelson*, 169 AD3d 110, 113, 93 NYS3d 138 [2d Dept 2019]). In opposition, Bernadette failed to raise a triable issue of fact.

Where, as here, an answer served includes the defense of standing, the plaintiff must prove its standing in order to be entitled to relief (see *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]). The plaintiff established that it had standing to commence this action by submitting the affidavit of its representative, which established that the plaintiff had physical possession of the note at the time it commenced this action (see *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]; *Bethpage Fed. Credit Union v Caserta*, 154 AD3d 691, 61 NYS3d 645 [2d Dept 2017]; *HSBC Bank USA, N.A. v Armijos*, 151 AD3d 943, 57 NYS3d 205 [2d Dept 2017]; *Silvergate Bank v Calkula Props., Inc.*, 150 AD3d 1295, 56 NYS3d 189 [2d Dept 2017]). In her affidavit in support, Johnson alleges, among other things, that the plaintiff had possession of the note on January 5, 2017 and that it was in possession of the note on the date of commencement. Additionally, the documentary evidence submitted by the plaintiff includes, among other things, the note transferred via an undated, blank endorsement (cf. *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]).

In order to meet its prima facie burden, the plaintiff was not required to submit proof that the person who indorsed the note on behalf of the plaintiff was authorized to do so. A signature on a negotiable instrument "is presumed to be genuine or authorized" (UCC 3-307 [1] [b]; *CitiMortgage, Inc. v McKinney*, 144 AD3d 1073, 1074, 42 NYS3d 302 [2d Dept 2016]; see UCC 3-104 [2] [stating that UCC art 3 applies to notes]). Because the defendant only speculates that Michele Sjolander, Senior Vice President of the plaintiff may not have been authorized to sign the endorsement, her signature is presumed authorized and the plaintiff was not required to submit any proof of authorization (see *Goldman Sachs Mtge. Co. v Mares*, 166 AD3d 1126, 1130, 87 NYS3d 665 [3d Dept 2018]; *CitiMortgage, Inc. v McKinney*, 144 AD3d at 1074). Even if the note failed to contain a proper endorsement, the plaintiff was the originator of the subject loan (see *Nationstar Mtge., LLC v Cantwell*, 2019 NY Slip Op 07892 [2d Dept 2019]; cf. *Bank of N.Y. Mellon v Ettinger*, 2019 NY Slip Op 07759 [2d Dept 2019]).

Moreover, the record before the court shows that the promissory note was in the plaintiff's possession at the time of commencement, as evidenced by the attachment of a copy of the indorsed note to the e-filed complaint (see *U.S. Bank, N.A. v Nathan*, 173 AD3d 1112, 104 NYS3d 144 [2d Dept 2019]; *U.S. Bank N.A. v Mezrahi*, 169 AD3d 952, 94 NYS3d 611 [2d Dept 2019]; see also *Wells Fargo Bank, N.A. v Ballard*, 172 AD3d 1440, 102 NYS3d 229 [2d Dept 2019] [judicial notice of the fact that the original complaint filed in the action, available electronically on the New York State Courts Electronic Filing System, included the note as an attachment]; *Matter of Transtechnology Corp. v Assessor*, 71 AD3d 1034, 897 NYS2d 494 [2d Dept 2010] [judicial notice of the New York State Unified Court System E-Courts public website]; *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 871 NYS2d 680 [2d Dept 2009] [judicial notice of undisputed court records and files]; *Perez v New York City Hous. Auth.*, 47 AD3d 505, 850 NYS2d 75 [1st Dept 2008] [judicial notice taken of the court's computerized records]).

In response, Bernadette has not come forward with any evidence to raise a triable issue of fact as to plaintiff's standing (see *Deutsche Bank Natl. Trust Co. v Cardona*, 172 AD3d 1313, 99 NYS3d 668019 [2d Dept 2019]; *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 37 NYS3d 286 [2d

Bank of America, N.A. v Tornabene, et.al.

Index No.: 624447/2017

Pg. 5

Dept 2016]). “There is simply no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it” (*JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d at 645; *see*, UCC 3-204[2]). In this case, 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” (*Deutsche Bank Natl. Trust Co. v Logan*, 146 AD3d 861, 863, 45 NYS3d 189 [2d Dept 2017] [internal quotation marks and citations omitted]).

The plaintiff submitted sufficient proof to establish, *prima facie*, that the remaining affirmative defenses set forth in the answer are subject to dismissal due to their unmeritorious nature (*see Katz v Miller*, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; *Becher v Feller*, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009] [unsupported affirmative defenses are lacking in merit]; *see also Crest/Good Mfg. v Baumann*, 160 AD2d 831, 554 NYS2d 264 [2d Dept 1990] [dispute as to exact amount owned may be resolved after the reference]).

The plaintiff also demonstrated the default in payment (*see Bank of Am., N.A. v Cudjoe*, 157 AD3d 653, 69 NYS3d 101 [2d Dept 2018]; *Emigrant Bank v Marando*, 143 AD3d 856, 39 NYS3d 83 [2d Dept 2016]; *RBS Citizens, N.A. v Galperin*, 135 AD3d 735, 23 NYS3d 307 [2d Dept 2016]; *Emigrant Funding Corp. v Agard*, 121 AD3d 935, 995 NYS2d 154 [2d Dept 2014]). The affidavit of the plaintiff’s representative, combined with the plaintiff’s other submissions sufficiently show that the loan has been in default since December 16, 2016.

Because the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendants (*see HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon Bernadette to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also Madeline D’Anthony Enters., 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]). Additionally, “uncontradicted facts are deemed admitted” (*Tortorello v Carlin*, 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

Even when considered in the light most favorable to Bernadette, the opposing papers are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff’s claims for foreclosure and sale (*see Caputo v Citimortgage, Inc.*, 165 AD3d 748, 86 NYS3d 212 [2d Dept 2018]; *Bank of N.Y. Mellon v Burke*, 155 AD3d 932, 64 NYS3d 114 [2d Dept 2017]; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]). Bernadette’s opposition papers are also insufficient to demonstrate any bona fide defenses (*see CPLR 3211[e]; Wells Fargo Bank, N.A. v Soskil*, 155 AD3d 923, 63 NYS3d 726 [2d Dept 2017]; *Rimbambito, LLC v Lee*, 118 AD3d 690, 986 NYS2d 855

Bank of America, N.A. v Tornabene, et.al.  
Index No.: 624447/2017  
Pg. 6

[2d Dept 2014]). Further, the affirmation of counsel submitted in opposition to the motion is without probative value and insufficient to raise a triable issue of fact (*see Matter of Ziomek*, 40 AD3d 774, 833 NYS2d 906 [2d Dept 2007]; *see also US Natl. Bank Assn. v Melton*, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]).

The plaintiff is therefore awarded summary judgment in its favor against Bernadette (*see Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558, 655 NYS2d 631 [2d Dept 1997]). The answer is stricken and the affirmative defenses asserted therein are dismissed with prejudice.

The branch of the motion for an order amending the caption is granted (*see CPLR 1024; Deutsche Bank Natl. Trust Co. v Islar*, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]). The plaintiff also established the default in answering on the part of the defendants HUD and John Doe (*see RPAPL 1321; HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]).

Because the plaintiff has been awarded summary judgment against Bernadette and it has established the default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see RPAPL 1321; Green Tree Servicing, LLC v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]).

The proposed order of reference, as modified by the court, has been signed with this decision.

Dated: 11-18-19

  
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Hon. MICHAEL A. GAJDOS, JR. J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION