

State of N.Y. Mtge. Agency v Phelps
2020 NY Slip Op 31871(U)
February 6, 2020
Supreme Court, Suffolk County
Docket Number: 0007298/2013
Judge: C. Randall Hinrichs
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**SUPREME COURT - STATE OF NEW YORK
IAS PART 49 - SUFFOLK COUNTY**

**PRESENT: Hon. C. RANDALL HINRICHS
Justice of the Supreme Court**

**Motion Date: 8-17-2018
Adjourned Date: 9-28-2018
Motion Sequence: 003-MotD**

STATE OF NEW YORK MORTGAGE AGENCY, X

Plaintiff,

-against-

FEIN, SUCH & CRANE, LLP
Attorneys for Plaintiff
1400 Old Country Road, Suite C103
Westbury, NY 11590

NELSON B. PHELPS; AGNIESZKA E. PHELPS;
STATE OF NEW YORK MORTGAGE AGENCY;
BOARD OF MANAGERS OF COURTHOUSE
COMMONS CONDOMINIUM II; "JOHN DOE #1-5"
and "JANE DOE #1-5" said names being fictitious, it
being the intention of Plaintiff to designate any and all
occupants, tenants, persons or corporations, if any,
having or claiming an interest in or lien upon the
premises being foreclosed herein,

FRED M. SCHWARTZ, ESQ.
Attorney for Defendants
Nelson B. Phelps and Agnieszka E. Phelps
317 Middle Country Road, Suite 5
Smithtown, NY 11787

Defendants.

X

Upon the following papers: Notice of Motion by Plaintiff, dated July 12, 2018, with supporting papers; Affirmation in Opposition by Defendant, dated September 4, 2018, with supporting papers; Affirmation in Reply by Plaintiff, dated September 25, 2018, with supporting papers; stipulations of adjournment; and upon due consideration; it is

ORDERED that this motion (#003) by the plaintiff for, among other things, an order granting summary judgment on the complaint insofar as asserted against the defendants Nelson B. Phelps and Agnieszka E. Phelps, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted solely to the extent indicated below, otherwise denied with leave to renew within 120 days of the date herein, or, in the alternative, the filing of a note of issue within 120 days of the date herein; and it is

ORDERED that the affirmative defenses in the answer are dismissed with prejudice, except for the sixth affirmative defense (compliance with the 30-day default notice provisions in the mortgage) the tenth affirmative defense (compliance with the 90-day notice provisions of RPAPL 1304) and the twelfth affirmative defense (the payment history); and it is

ORDERED that the caption is amended by excising the fictitious "JOHN DOE #1-5" and "JANE DOE #1-5" defendants as well as the remaining descriptive wording related thereto; and it is

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

STATE OF NEW YORK MORTGAGE AGENCY,

Plaintiff,

Index Number:
7298-2013

-against-

NELSON B. PHELPS; AGNIESZKA E. PHELPS;
STATE OF NEW YORK MORTGAGE AGENCY;
BOARD OF MANAGERS OF COURTHOUSE
COMMONS CONDOMINIUM II,

Defendants.

_____ ; and it is

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

ORDERED that counsel for 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 defendants Nelson B. Phelps and Agnieszka E. Phelps, and by first-class mail upon all other parties that have appeared herein and not waived further notice within thirty (30) days of the date of this order, and counsel shall promptly file the affidavit(s) of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property known as 1531 Finch Lane, Central Islip, New York 11722. On September 30, 2011, the defendants Nelson B. Phelps and Agnieszka E. Phelps (the defendants) executed a fixed-rate note in favor of Wells Fargo Bank, N.A. (the lender) in the principal sum of \$193,900.00. To secure said note, the defendants gave the lender a mortgage also dated September 30, 2011, on the property. The mortgage was subsequently recorded on October 12, 2011.

By way of, among other things, a specific endorsement to the plaintiff dated October 14, 2011, with physical delivery, the note was allegedly transferred by the lender to State of New York Mortgage Agency (the plaintiff) prior to commencement. The transfer of the note to the plaintiff was also memorialized by an assignment of the note and mortgage executed on September 30, 2011, which was subsequently duly recorded in the Office of the Suffolk County Clerk on October 12, 2011.

The defendants allegedly defaulted on the mortgage by failing to make the monthly payment of principal and interest due on or about February 1, 2012, and each month thereafter. Although some payments were made after the initial default in payment, the defendants allegedly failed to cure the default, and the plaintiff commenced the instant action by the filing of a lis pendens, summons and complaint on May 12, 2013.

In response to the complaint, defendants interposed a verified joint answer sworn to on April 2, 2013. In the answer, the defendants also assert twenty-one affirmative defenses, alleging among other things, the failure to comply with the 90-day notice requirements of RPAPL 1304, the failure to comply with the 30-day notice provisions of the mortgage, the failure to allocate payments made by the defendants and the plaintiff's lack of standing. The defendant Board of Managers of Courthouse Commons Condominium II (CCC II) filed a notice of appearance and claim to surplus monies. The defendant State of New York Mortgage Agency (SONYMA) neither appeared nor answered herein.

The plaintiff now moves again for, among other things, an order granting it summary judgment on the complaint insofar as asserted against the defendants, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption. In support of this motion, the plaintiff submitted, among other things, the endorsed note, the mortgage and the assignment; a SONYMA rider and down payment assistance loan agreement; the affirmation from its counsel, Richard D. Femano, Esq., the affidavit in support from Dean R. Setter, Banking Officer of M & T Bank, the plaintiff's servicer and attorney-in-fact; the affidavit in support from Karen M. Clark, Banking Officer of M & T Bank, a power of attorney given to M & T by the plaintiff, executed on February 12, 2012 by George Leocata, a Senior Vice President of the plaintiff and various other documents.

In opposition to the motion, the defendants have submitted the affirmation of their counsel and the affidavit made by Mr. Phelps. In their opposing papers, the defendants reassert their previously pleaded affirmative defenses pertaining to the plaintiff's alleged failure to comply with the notice requirements of RPAPL 1304, the default notice provisions in the mortgage and the failure to allocate payments made by the defendants. They also assert that the power-of-attorney document is deficient and that the plaintiff submitted inadequate documentation as to the alleged default date. The defendants further assert, inter alia, that they should be afforded an opportunity to conduct discovery to ascertain whether mortgage insurance covered the subject mortgage loan. In reply, the plaintiff has filed, among other things, the affirmation of counsel and various exhibits.

The court turns first to certain conditions precedent to this action. The plaintiff failed to establish, prima facie, that it complied with RPAPL 1304. The Setter affidavit is insufficient to establish that the notice was sent to the defendants in the manner required by RPAPL 1304, as Setter did not attest to knowledge of the mailing practices of M & T, and the plaintiff provided no independent proof of the actual mailing (see *U.S. Bank N.A. v Cope*, 175 AD3d 527, 107 NYS3d 104 [2d Dept 2019]; *Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 98 NYS3d 273 [2d Dept 2019]; *Citibank, N.A. v Wood*, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017]). Attached to the affidavit were copies of 90-day notices, bearing some indicia of mailing by certified mail, but not first-class mail, and bearing no postmark or date of mailing. Further, even if the unauthenticated document submitted with the 90-day notice were admissible, it would still be insufficient, by itself, to demonstrate the actual mailing of the 90-day notice or a regular mailing practice related to the notice. Because the plaintiff failed to provide proof of the

actual mailing, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304.

For the same reasons, the plaintiff failed to submit sufficient evidence that the defendants were served with a 30-day notice of default prior to demanding payment of the loan in full (*see Wells Fargo Bank, N.A. v Sakizada*, 168 AD3d 789, 91 NYS3d 268 [2d Dept 2019]; *US Bank N.A. v Singh*, 147 AD3d 1007, 47 NYS3d 439 [2d Dept 2017]; *see also Viviane Etienne Med. Care v Country-Wide Ins. Co.*, 25 NY3d 498, 14 NYS3d 283 [2015]). The conclusory allegations with respect to the mailing of the notice of default by Setter is insufficient to demonstrate compliance with paragraph 22 of the mortgage. The Clark affidavit is similarly deficient with respect to proper service of the 30-day notice. Further, the unauthenticated document submitted with the 30-day notice, even if were admissible, would still be insufficient to demonstrate the actual mailing of the notice or a regular mailing practice related to the notice.

Even though the issue of proper service of the 30-day notice remains outstanding, the submitted notice of default itself sufficiently comports with the requirements set forth in the mortgage (*see Hudson City Sav. Bank v Friedman*, 146 AD3d 757, 43 NYS3d 912 [2d Dept 2017]; *Pennymac Holdings, LLC v Tomanelli*, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016] [default notice substantially complied with the mortgage terms]).

Concerning the merits of this action, the plaintiff failed to adequately demonstrate its prima facie burden with respect to the alleged default in payment by way of sufficient proof (*see Federal Natl. Mtge. Assn. v Marlin*, 168 AD3d 679, 91 NYS3d 262 [2d Dept 2019]; *U.S. Bank, N.A. v Noble*, 144 AD3d 788, 41 NYS3d 79 [2d Dept 2016]). Setter did not state that she is familiar with M & T's record keeping practices and procedures as to the payment history since the time of the default, nor did she adequately describe such practices. Setter also did not assert that she has personal knowledge of the payment history based upon M & T's records for the (unspecified) period of time that M & T acted as servicer for the subject loan. Although Setter attached a one page unauthenticated document purporting to show the default in payment to her affidavit, even if admissible, the document would be insufficient to demonstrate the payment history for the subject loan (*see Federal Natl. Mtge. Assn. v Brotzman*, 173 AD3d 1139, 105 NYS3d 487 [2d Dept 2019]; *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 97 NYS3d 286 [2d Dept 2019]).

The plaintiff demonstrated its standing by way of physical possession of the note on a date prior to commencement, and continued to hold the note through to the date of commencement (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 12 NYS3d 612 [2015]; *Silvergate Bank v Calkula Props., Inc.*, 150 AD3d 1295, 56 NYS3d 189 [2d Dept 2017]). In his affidavit, Setter alleges, in relevant part, that the plaintiff took physical delivery of the original note on September 19, 2012. Further, the documentary evidence submitted includes, among other things, endorsed to the plaintiff on October 14, 2011 (*cf. Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721 [2d Dept 1989]).

The plaintiff also demonstrated its standing by, inter alia, submission of the written assignment of the mortgage and the note executed prior to commencement (*see Wells Fargo Bank, N.A. v Archibald*, 150 AD3d 937, 54 NYS3d 439 [2d Dept 2017]; *U.S. Bank N.A. v Cox*, 148 AD3d 962, 49 NYS3d 527 [2d Dept 2017]; *U.S. Bank N.A. v Akande*, 136 AD3d 887, 26 NYS3d 164 [2d Dept 2016]).

In this case, the assignment included the mortgage “TOGETHER with the bond or note or obligation described in said [m]ortgage, and the moneys due to grow thereon with interest.” In any event, the record demonstrates that a copy of the underlying note bearing an endorsement to the plaintiff was annexed to the complaint (*see Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 46 NYS3d 185 [2d Dept 2017]).

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]; *Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 8 NYS3d 143 [1st Dept 2015] [dismissal of boilerplate defenses lacking in merit]; *Long Is. Sav. Bank of Centereach, F.S.B. v Denkensohn*, 222 AD2d 659, 635 NYS2d 683 [2d Dept 1995] [dispute as to amount owed by the mortgagor is not a defense to a foreclosure action]). Moreover, the plaintiff demonstrated that the subject loan is not predatory (*see* Banking Law §§ 6-1[1][e] and 6-m[1][d]; *see also Disa Realty, Inc. v Rao*, 137 AD3d 740, 25 NYS3d 677 [2d Dept 2016]).

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 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]).

In opposition to the motion, the defendants offered no proof or arguments in support of the pleaded defenses in the answer, except as noted above. The failure by the defendants to raise and/or assert each of the remaining pleaded defenses in the answer warrants the dismissal of same as abandoned under the case authorities cited above (*see Kuehne & Nagel v Baiden*, 36 NY2d 539). All of the unsupported affirmative defenses asserted in the answer are thus dismissed.

To the extent that the defendants request that they be permitted discovery with respect to purported mortgage insurance, that request, made without the benefit of a cross motion, is denied as unmeritorious (*see Fried v Jacob Holding, Inc.*, 110 AD3d 56, 970 NYS2d 260 [2d Dept 2013]). In any event, the mortgage specifically provides that the “[b]orrower is not a party to the [m]ortgage [i]nsurance policy” (*see* Mtge ¶ 10) (*see U.S. Bank N.A. v Saravanan*, 146 AD3d 1010, 45 NYS3d 547 [2d Dept 2017]; *Bank of Am. N.A. v Patino*, 128 AD3d 994, 9 NYS3d 656 [2d Dept 2015] [those without privity of contract or who are not the intended third-party beneficiaries thereof cannot bring defenses/claims under the contract]).

For the same reasons, the defendants lack standing to dispute the sufficiency of the power-of-attorney document given by the plaintiff to M & T (*see U.S. Bank N.A. v Saravanan*, 146 AD3d 1010). In any event, the defendants arguments in this respect are entirely conclusory and devoid of merit. The remainder of the defendants’ contentions have been examined and found to be without merit.

Accordingly, the affirmative defenses asserted in the answer are dismissed with prejudice, except for the sixth, tenth and twelfth affirmative defenses (*see Emigrant Bank v Myers*, 147 AD3d 1027, 47

NYS3d 446 [2d Dept 2017] [unmeritorious and duplicative affirmative defenses dismissed]). The court next turns to the ancillary relief in plaintiff's motion.

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]). Further, the default in answering of the defendants SONYMA (as a subordinate lienor) and CCC II is fixed (see RPAPL 1321; *HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]).

In view of the foregoing, the remainder of the plaintiff's motion is denied at this juncture. Pursuant to CPLR 3212 (g), the court finds that the sole remaining issues of fact relate to proof of proper service of the 90-day and 30-day pre-foreclosure notices upon the defendants and the payment history for the subject loan. The plaintiff's renewal motion, if any, shall include the proof specified above, a copy of the papers submitted with this motion and a copy of this order.

In view of the above determination, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: Feb. 6, 2020



HON. C. RANDALL HINRICHS, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION