

Bank of N.Y. Mellon v Schlossbach
2021 NY Slip Op 31493(U)
April 23, 2021
Supreme Court, New York County
Docket Number: 850058/2019
Judge: Francis A. Kahn III
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 32

Justice

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INDEX NO. 850058/2019

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWABS INC., ASSET-BACKED CERTIFICATES, SERIES 2007-11,

MOTION DATE

MOTION SEQ. NO. 001

Plaintiff,

- v -

RICHARD SCHLOSSBACH, THREE TO GET READY LLC, LOUIS GALASSO III, BOARD OF MANAGERS OF THE BOWERY TENANTS CONDOMINIUM, PAUL GALASSO, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents the motion is determined as follows:

In this residential mortgage foreclosure action, Plaintiff moves for, inter alia, summary judgment against Defendant Three to Get Ready, LLC ("Three") and for a default judgment against the non-appearing parties.

In moving for summary judgment, Plaintiff was required to establish prima facie entitlement to judgment as a matter of law though proof of the mortgage, the unpaid note, and evidence of mortgagor's default (see eg Bank of NY v Knowles, 151 AD3d 596 [1st Dept 2017]; Fortress Credit Corp. v Hudson Yards, LLC, 78 AD3d 577 [1st Dept 2010]). As Defendant Three pled an affirmative defense of lack of standing in its answer, Plaintiff was also required to demonstrate its standing as part of its motion (see eg Wells Fargo Bank, N.A. v Tricario, 180 AD3d 848 [2nd Dept 2020]). Proof supporting a prima facie case on a motion for summary judgment must be in admissible form (see CPLR §3212[b]; Tri-State Loan Acquisitions III, LLC v Litkowski, 172 AD3d 780 [1st Dept 2019]).

Plaintiff's motion was supported with an affidavit of facts from Mhari Holtzclaw ("Holtzclaw"), a Litigation FC Specialist employed by NewRez, LLC F/K/A New Penn Financial, LLC D/B/A Shell Point Mortgage Servicing. Holtzclaw avers her employer is servicing company and attorney-in-fact for the Plaintiff. Holtzclaw's affidavit established the

mortgage, note, and evidence of mortgagor's default and was sufficiently supported by admissible business records (*see generally* CPLR 4518). Although Defendant Three's assertion that Holtzclaw's affidavit did not contain a statement she was familiar with Plaintiff's record keeping practices is correct, the records were nonetheless admissible since in paragraph two Holtzclaw sufficiently established that the records she relied on were received from the maker, incorporated into the records her employer kept for Plaintiff and that Shellpoint routinely relied upon such records in its business (*see U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, the records Holtzclaw relied upon were referenced and annexed to the motion (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Also, contrary to Defendant Three's assertion, movant established its standing, via physical receipt of the note prior to the commencement of the action, since a copy thereof, endorsed in blank, was affixed it to the summons and compliant when it was filed (*see Bank of NY v Knowles*, supra at 597; *see also Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]).

In opposition, Defendant Three failed to raise any issue of fact. The claim of unclean hands is not established on the facts presented as there is no "immoral or unconscionable" conduct directly related to the formation of the mortgage or the default in payments (*see Phh Mtge. Corp. v. Davis*, 111 AD3d 1110 [3rd Dept 2013]; *see also National Distillers & Chemical Corp. v. Seyopp Corp.*, 17 NY2d 12, 15-16 [1996]). Nor is the defense of res judicata/collateral estoppel applicable since the prior dismissals were not on the merits since the basis therefore, fundamentally, was for failure to prosecute (*see Lema v New York Cent. Mut. Fire Ins. Co.*, 112 AD3d 891 [2nd Dept 2013]; *San Filippo v. Adler*, 278 AD2d 402 [2nd Dept 2000]; *see also Caliguri v JPMorgan Chase Bank, N.A.*, 121 AD3d 1030 [2nd Dept 2013]).

Accordingly, it is

ORDERED that the motion for summary judgment against the appearing mortgagor and for a default judgment against the non-appearing Defendants is granted and the affirmative defenses asserted in the mortgagor's answer are severed and dismissed; and it is

ORDERED that **Elaine Shay, Esq.**, 800 3rd Avenue, Ste. 2800, New York, New York 10022 – elaine@shayesq.com is hereby appointed Referee in accordance with RPAPL § 1321 to examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that the Referee shall hold no hearing and take no testimony or evidence other than by written submission; the Court is the ultimate arbiter and the Referee's report is merely an advisory finding; 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 and to defendants who have appeared in this case 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 if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; 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 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 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/suptctmanh)); and it is further

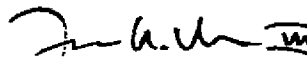
ORDERED that Plaintiff shall, in accordance with RPAPL §1321, the name and telephone number of its servicer as well as proof of service of same on the mortgagor, and it is further

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.

All parties are to appear for a virtual conference via Microsoft Teams on **July 21, 2021 at 10:20 m.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

4/23/2021

DATE



FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:

CASE DISPOSED

NOT FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

J.S.C.

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

HON. FRANCIS A. KAHN III