

**Wells Fargo Bank, N.A. v Juston-Coumat**

2021 NY Slip Op 31497(U)

April 27, 2021

Supreme Court, New York County

Docket Number: 850294/2018

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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
Acting Justice

PART IAS MOTION 32

WELLS FARGO BANK, N.A.,
Plaintiff,

INDEX NO. 850294/2018
MOTION DATE N/A
MOTION SEQ. NO. 001

- v -

DENIS JUSTON-COUMAT a/k/a DENIS COUMAT a/k/a
DENIS JUSTON, RONYWEK CAPITAL LLC, BOARD OF
MANAGERS OF THE 110 CONDOMINIUM 110 EAST 87
CO., CITY OF NEW YORK ENVIRONMENTAL CONTROL
BOARD, CITY OF NEW YORK PARKING VIOLATIONS
BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION
BUREAU, JOHN DOE, said name being fictitious, it being
the intention of Plaintiff to designate any and all occupants of
premises being foreclosed herein, and any parties,

DECISION + ORDER ON
MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25-56
were read on this motion to/for SUMMARY JUDGMENT/ORDER OF REFERENCE .

Upon the foregoing documents, the motion is decided as follows:

In this action Plaintiff commenced an action to foreclose on a mortgage on real property located at 110
East 87th Street, Apartment 9B, New York, New York. Issue was joined by Defendant Denis Juston-Coumat
(“Juston-Coumat”) who raised numerous affirmative defenses and counterclaims. Now, Plaintiff moves for
summary judgment, an order of reference, a default judgment against the non-appearing Defendants and to
amend the caption to remove the Doe Defendants. Juston-Coumat opposes Plaintiff’s motion.

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 Juston-Coumat’s
default (see U.S. Bank, N.A., v James, 180 AD3d 594 [1st Dept 2020]; Bank of NY v Knowles, 151 AD3d 596
[1st Dept 2017]; Fortress Credit Corp. v Hudson Yards, LLC, 78 AD3d 577 [1st Dept 2010]). 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]). As Defendant Juston-Coumat
pled an affirmative defense of lack of standing in the 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]).

Contrary to Defendant’s assertions, Plaintiff has demonstrated a prima facie case for foreclosure and
established its standing to bring the action. Plaintiff’s motion was supported with an affidavit of facts from
Miranda Barnes (“Barnes”), a Vice-President Loan Documentation employed by Plaintiff. Contained within
Barnes’s affidavit established the mortgage, note, and evidence of mortgagor’s default and was sufficiently
supported by admissible business records (see generally CPLR 4518). Movant established its standing, via
physical receipt of the note prior to the commencement of the action, since a copy of the note, endorsed in
blank, was affixed it to the compliant (see Bank of NY v Knowles, supra at 597; see also Federal Natl. Mtge.

*Assn. v Nugent*, 187 AD3d 716 [2<sup>nd</sup> Dept 2020]; *Wells Fargo Bank, N.A. v Tricario*, supra. ; *Bank of America, N.A. v Brannon*, 156 AD3d 1, 8-9 [1<sup>st</sup> Dept 2017]).

In opposition to Plaintiff's motion, Defendant asserts that the affidavit of Barnes fails to properly authenticate predecessor Wachovia bank records that demonstrate Defendant's default on the loan. This argument fails to consider that in 2009, Wachovia merged into Plaintiff Wells Fargo Bank, N.A. "Banking Law § 602, which governs the effect of a merger, provides that the receiving bank 'shall be considered the same business and corporate entity' as the bank merged into it, and that all of the property, rights, and powers of the merged bank shall vest in the receiving bank" (*Moxey v Payne*, 167 AD3d 594, 595-596 [2d Dept 2018] quoting *Ladino v Bank of Am.*, 52 AD3d 571, 572 [2d Dept 2008]; see *Barclay's Bank of N.Y. v Smitty's Ranch*, 122 AD2d 323, 324 [3d Dept 1986]). In any case, since Defendant's default on the loan did not occur until 2018, Wells Fargo's records are relied upon by Plaintiff to demonstrate the default. As to Defendant's remaining affirmative defenses and counterclaims, since Defendant has failed to raise any evidence to address them in opposition to Plaintiff's motion, those affirmative defenses and counterclaims must be deemed abandoned and are hereby dismissed (see *U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

Since Juston-Coumat failed to raise a triable issue of fact, Plaintiff's motion for summary judgment is granted and the affirmative defenses raised in opposition are dismissed (see *U.S. Bank, N.A., v James*, 180 AD3d 594 [1<sup>st</sup> Dept 2020]; *Nationstar Morg., LLC v Catizone*, 127 AD3d 1151 [2d Dept 2015]; see generally *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209-210 [1<sup>st</sup> Dept 2007]).

The branches of the motion for a default judgment against the non-appearing parties and to amend the caption to remove the Doe Defendants are granted without opposition.

Accordingly, it is

ORDERED that **Tom Kleinberger, Esq., 411 5<sup>th</sup> Avenue, New York, New York 10016 – Tel. (917) 326-5523** 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 the "John Doe" and "Jane Doe" defendants be removed in this action. The caption shall read as follows:

SUPREME COURT STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
WELLS FARGO BANK, N.A.,

Plaintiff,

Index No. 850294/2018

-against-

DENIS JUSTON-COUMAT a/k/a DENIS COUMAT a/k/a  
DENIS JUSTON, RONYWEK CAPITAL LLC,  
BOARD OF MANAGERS OF THE 110 CONDOMINIUM  
110 EAST 87 CO., CITY OF NEW YORK ENVIRONMENTAL  
CONTROL BOARD, CITY OF NEW YORK PARKING  
VIOLATIONS BUREAU and CITY OF NEW YORK  
TRANSIT ADJUDICATION BUREAU,

Defendants.  
-----X

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 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/suptmanh)]; 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 **August 13, 2021 at 10:20 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright ([tswright@nycourt.gov](mailto: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.

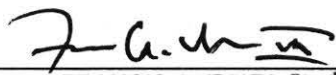
4/27/2021  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

APPLICATION:

CHECK IF APPROPRIATE:

  
 FRANCIS A. KAHN III  
**HON. FRANCIS A. KAHN III**  
**J.S.C.**

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