

U.S. Bank N.A. v Slavutsky

2021 NY Slip Op 31498(U)

April 28, 2021

Supreme Court, New York County

Docket Number: 850357/2014

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
Acting Justice
INDEX NO. 850357/2014
MOTION DATE
MOTION SEQ. NO. 006

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR
NRZ PASS-THROUGH TRUST IV,

Plaintiff,

- v -

ELIZABETH SLAVUTSKY, YUHA GROUP, LLC, THE
BOARD OF MANAGERS OF THE LINCOLN SQUARE
CONDOMINIUMS HOMEOWNERS ASSOCIATION, THE
LOW AND MID RISE BOARD OF MANAGERS, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
WORKER'S COMPENSATION BOARD OF NEW YORK
STATE, CITY OF NEW YORK ENVIRONMENTAL
CONTROL BOARD, CITY OF NEW YORK PARKING
VIOLATIONS BUREAU, and CITY OF NEW YORK
TRANSIT ADJUDICATION BUREAU,

Defendants.

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 108-158
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 seeks to foreclose on a mortgage on residential real property
located. A judgment of foreclosure and sale was issued on default. Defendant Elizabeth
Slavutsky's ("Slavutsky") default and the judgment were vacated on consent and issue was
joined by Slavutsky who raised numerous affirmative defenses and a counterclaim. Now,
Plaintiff moves for summary judgment against Slavutsky, for a default judgment against the non-
appearing Defendants, an order of reference, to amend the caption and to reform the legal
description in the deed. Slavutsky 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 Slavutsky's default in payment under the note (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]). Since
Defendant Slavutsky asserts an affirmative defense that Plaintiff failed to comply with the notice
requirements of RPAPL §1304 in its motion Plaintiff must produce "sufficient evidence

demonstrating the absence of material issues as to its strict compliance with RPAPL §1304” (*HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019] quoting *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]; RPAPL §1304 [1]). Likewise, Plaintiff was also required to demonstrate its standing as part of its motion based upon Slavutsky raising lack of standing in the answer (*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. Plaintiff’s motion was supported with an affidavit of facts from Cheryl Mallory (“Mallory”), an Assistant Vice-President employed by BSI Financial Services (“BSI”) the servicer and attorney in fact for Plaintiff. Mallory’s affidavit sufficiently established proof of the mortgage, note, and evidence of mortgagor’s default, was properly supported by annexed and admissible business records. Although Mallory did not claim familiarity with Plaintiff’s record keeping practices, the records annexed to the affidavit were nonetheless admissible since Mallory sufficiently established that the records relied upon were received from their makers, incorporated into BSI’s records and that BSI routinely relied upon such records in its business (*see eg U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Plaintiff also complied with certificate of merit and certificate of conformity requirements (*see CPLR § 2309[c]; CPLR §3012-b; Moccia v Carrier Car Rental, Inc.*, 40 AD3d 504 [1st Dept 2007]).

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 complaint (*see Bank of NY v Knowles*, supra at 597; *see also Federal Natl. Mtge. Assn. v Nugent*, 187 AD3d 716 [2nd Dept 2020]; *Wells Fargo Bank, N.A. v Tricario*, supra). Likewise, Plaintiff established with the affidavit of April Hawkins, a Document Execution Associate of the entity that mailed the notices, that strict compliance with RPAPL §1304 and §1306 were complied with prior to commencement of the action (*see HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 670 [2d Dept 2019]). The affidavit of service of the process server demonstrated that Plaintiff fulfilled the requirements of RPAPL §1303 (*see U.S. Bank, N.A. v Nathan*, 173 AD3d 1112, 1114 [2d Dept 2019]).

In opposition, Slavutsky failed to raise an issue of fact. The complaints concerning how Plaintiff came into possession of the note as well as the validity and timing of assignments is unavailing as physical possession of the note was established (*see see Aurora Loan v Taylor*, 25 NY3d 355 [2015]; *U.S. Bank, N.A. v Garcia*, 183 AD3d 506 [1st Dept 2020]; *Bank of Am., N.A. v Pennicooke*, 186 AD3d 545 [2d Dept 2020]; *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643 [2d Dept 2016]). Slavutsky also lacks standing to raise complaints concerning any alleged non-compliance with pooling and servicing agreements (*see U.S. Bank N.A. v Saravanan*, 146 AD3d 1010 [2d Dept 2017]). With respect to the notice requirements, Slavutsky proffered no evidence to demonstrate an issue of fact and her naked denial of receipt of the notices is insufficient (*see Nationstar Mtge., LLC v LaPorte*, 162 AD3d 784 [2d Dept 2018]).

Plaintiff also demonstrated that Slavutsky’s other affirmative defenses were conclusory and not factually supported (*see Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803 [2d Dept 2020]). To the extent Slavutsky failed to address these affirmative defenses in opposition, those affirmative defenses abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d

1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafigliore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]). Plaintiff's demonstration of entitlement to summary judgment also nullifies Slavutsky's counterclaim as it is entirely dependent on the claim that the notice of pendency was improperly filed because Plaintiff was not entitled to commence this action.

Accordingly, the branch of Plaintiff's motion for summary judgment is granted and Slavutsky's affirmative defenses and counterclaim are dismissed.

The branch of Plaintiff's motion for default judgment against all non-appearing Defendants is denied as moot since this relief was previously granted (*see* NYSCEF Document #45).

The branch of Plaintiff's motion to amend the complaint and substitute U.S. Bank Trust National Association, as Trustee of the Cabana Series III Trust in the place of U.S. Bank National Association as Trustee for NRZ Pass-Through Trust IV is granted. Contrary to Slavutsky's arguments, Plaintiff proffered sufficient proof of the assignments (*see* CPLR §§1018, 1021; General Obligations Law §13-105; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 1001 [2d Dept 2015]).

The branch of Plaintiff's motion to reform the legal description of the deed seeking the last deed of record for Reel 2262, Page 278 to recite a recording date of November 16, 1995 is granted (*see Bank of Am., N.A. v Pennicooke*, *supra*).

Accordingly, it is

ORDERED Tom Kleinberger, Esq., 411 5th 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 the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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U.S. BANK TRUST NATIONAL ASSOCIATION,
AS TRUSTEE OF THE CABANA SERIES III TRUST,

Plaintiff,

Index No. 850032/2019

-against-

ELIZABETH SLAVUTSKY, YUHA GROUP, LLC,
THE BOARD OF MANAGERS OF THE LINCOLN SQUARE
CONDOMINIUMS HOMEOWNERS ASSOCIATION,
THE LOW AND MID RISE BOARD OF MANAGERS,
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,
WORKER'S COMPENSATION BOARD OF NEW YORK STATE,
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 Plaintiff must bring a motion for a judgment of foreclosure and sale within 45 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/supctmanh)); 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.

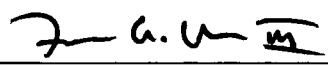
All parties are to appear for a virtual conference via Microsoft Teams on **August 13, 2021 at 10:00 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

4/28/2021
DATE

CHECK ONE: CASE DISPOSED GRANTED DENIED

APPLICATION: SETTLE ORDER FIDUCIARY APPOINTMENT

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE


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