

J.P. Morgan Mtge. Acquisition Corp. v Elliott

2022 NY Slip Op 30387(U)

January 12, 2022

Supreme Court, New York County

Docket Number: Index No. 850288/2013

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 KAHN, III PART 32

Justice

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INDEX NO. 850288/2013

J.P. MORGAN MORTGAGE ACQUISITION CORP.,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 006

- v -

LYDIA ELLIOTT, WINDWARD BOARD, LLC, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK SOCIAL SERVICES DISTRICT, THE CHERRY TREE CORP., WORKERS COMPENSATION BOARD OF NEW YORK STATE, JANET SMITH, KRISTIN DIMITREW

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 228, 229, 230, 231, 232, 233

were read on this motion to/for JUDGMENT - SUMMARY

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

In this action, Plaintiff seeks to foreclose on an alleged first mortgage encumbering residential real property located at 107 West 132nd Street, New York, New York. Defendant The Cherry Tree Corp. ("Cherry"), a subordinate lienor, joined issue by filing an answer on January 8, 2014 and asserted eleven affirmative defenses including lack of standing. Defendant mortgagor Lynda Elliott defaulted in appearing in this action.

Plaintiff moved to amend its complaint to add a judgment creditor and Defendant Windward Bora, LLC ("Windward"), then a non-party, cross moved to intervene and be substituted for Defendant National City Bank. By order dated April 15, 2019, the motions were granted. However, it appears the order issued by Justice Arlene Bluth erroneously referred to Defendant Windward Bora, LLC as Windward Board, LLC in her decision. Windward filed its answer to the amended complaint on April 29, 2019 and asserted twenty affirmative defenses including lack of standing.

Discovery ensued and by order dated January 14, 2020 Justice Bluth tolled the recovery of interest by Plaintiff until further order of the court as a penalty for its failure to provide disclosure. By order dated June 21, 2021, this Court limited the interest toll to six [6] months.

Now, Plaintiff moves for, inter alia, summary judgment against the appearing Defendants, to dismiss their affirmative defenses, for a default judgment against the non-appearing parties, to appoint a

referee to compute and to amend the caption. Defendants Elliott, Windward and Cherry failed to submit opposition. Non-party West 132nd LLC (“West”), as claimed successor in interest to Windward, opposed the motion and sought, without service of a notice of cross-motion, to intervene in this action. In reply, Plaintiff opposed West’s request for leave to intervene.

Plaintiff was required on the branch of its motion for summary judgment to establish *prima facie* proof of the mortgage, the note, and evidence of the borrower’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]). “A default is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form” (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d 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 was also required to demonstrate its standing since Defendants Cherry and Windward raised this affirmative defense in their answers (*see eg Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582 [2d Dept 2020]). “To demonstrate standing to commence a foreclosure action, a plaintiff must have been the holder or assignee of the note at the time the action was commenced” (*21st Mtge. Corp. v Rudman*, ___ AD3d ___, 2022 NY Slip Op 00031 [2d Dept 2022]; *see also Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). In most instances, a written assignment of the underlying note or physical delivery of the note indorsed in blank prior to the commencement of the foreclosure action is sufficient to transfer the obligation (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). The mortgage passes with the note as an inseparable incident thereto (*see Aurora Loan Servs., LLC v Taylor*, *supra*; *see also U.S. Bank N.A. v Carnivale*, 138 AD3d 1220, 1221 [3d Dept 2016]).

To demonstrate the note, mortgage and Elliot’s default, Plaintiff submitted the affidavit of Anthony Younger (“Younger”), an Assistant Secretary employed by Rushmore Loan Management, LLC (“Rushmore”), the attorney-in-fact for Plaintiff. As Younger’s affidavit is not based on personal knowledge, but through the review of documents, those business records must be proffered in admissible form for the statements therein regarding Elliott’s loan and default to be established (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]). Younger’s affidavit and the annexed documentation established the mortgage, note, and evidence of mortgagor’s default. The affidavit was sufficiently supported by admissible business records as Younger averred that his knowledge was based upon his employer’s business records and prior servicers’ records which were incorporated into Rushmore’s records and normally relied upon in its business (*see CPLR 4518*; *Bank of Am., NA v Brannon*, 156 AD3d 1 [1st Dept 2017]; *see also U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, Plaintiff demonstrated that the required notices under the terms of the mortgage were given (*see HSBC Bank USA, N.A. v Nelson*, 190 AD3d 842 [2d Dept 2021]). Plaintiff also demonstrated compliance with RPAPL §1303 with the affidavit of the process server (*US Bank v Nathan*, 173 AD3d 1112 [2nd Dept 2019]).

On the issue of standing, Plaintiff proffered the affidavit of Vicky Weaver, an Executive Director of JP Morgan Chase Custody Services, Inc. (“Chase Custody”), the loan servicer and attorney-in-fact for Plaintiff. Weaver’s affidavit established a foundation for the admission of the documents annexed thereto as business records under CPLR §4518 and, therefore, her statements concerning the contents of that evidence is admissible (*see Bank of Am., NA v Brannon*, *supra*). As such, Weaver’s affidavit and

the proffered documents demonstrated Plaintiff was in possession of the original note, endorsed in blank, more than six years before this action was commenced.

In opposition, non-party West lacked standing to oppose this motion. The request to intervene in the opposition papers is defective as such an application must be made “[u]pon timely motion” (CPLR §§1012[a] and 1013). If West’s claim to be a successor in interest to Windward is accurate, it could, conceivably, continue to defend this action in the name of Windward pursuant to CPLR §1018 (*see Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574 [2d Dept 2020]; *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1st Dept 2017]). However, West proffered no affidavit from a party with knowledge and/or corroborating documentation that it is, in fact, the successor in interest to Windward (*see U.S. Bank, N.A. v Duran*, 174 AD3d 768, 769 [2d Dept 2019]). Even if the Court considered West’s substantive opposition, it failed to raise an issue of fact and the other affirmative defenses in Windward’s answer were abandoned by failing to address same in the opposition (*see One W. Bank, FSB v Rosenberg*, 189 AD3d 1600 [2d Dept 2020]).

Accordingly, the branches of Plaintiff’s motion for summary judgment, dismissing Windward and Cherry’s affirmative defenses and the appointment of a referee to compute are granted.

The branch of Plaintiff’s motion for a default judgment against the non-appearing parties is granted without opposition (*see CPLR §3215; SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff’s motion to substitute the names of Janet Smith and Kristin Dimitrew in place of "John Doe" and that the caption be amended to reflect this substitution is granted (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszlo*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Plaintiff is granted summary judgment on its cause of action for foreclosure and the affirmative defenses of The Cherry Tree Corp. and Defendant Windward Bora, LLC, are severed and dismissed; and it is further

ORDERED that Plaintiff is awarded a default judgment against the non-appearing Defendants; and it is further

ORDERED that **Clark Whitsett, Esq., 108-26 Myrtle Avenue, Richmond Hill, NY 11418-1235 (718) 850-0003** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff to examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; 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 if the Referee holds a hearing, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; 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 names of Janet Smith and Kristin Dimitrew be substituted in the caption of this action in place of "John Doe" and that the caption be amended to reflect this substitution; and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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J.P. MORGAN MORTGAGE ACQUISITION
CORP.

Index No. 850288/2013

Plaintiff,
-against-

LYDIA ELLIOTT, WINDWARD BOARD, LLC,
CITY OF NEW YORK ENVIRONMENTAL CONTROL
BOARD, COMMISSIONER OF SOCIAL SERVICES OF

THE CITY OF NEW YORK SOCIAL SERVICES
DISTRICT, THE CHERRY TREE CORP.,
WORKERS' COMPENSATION BOARD OF NEW
YORK STATE, JANET SMITH, KRISTIN DIMITR

Defendants.

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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 **May 4, 2022 at 10:40 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.

1/12/2022

DATE



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

HON. FRANCIS A. KAHN III
NON-FINAL DISPOSITION
J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE