Pennymac Holdings, LLC v Biedermann
2022 NY Slip Op 30472(U)
February 7, 2022
Supreme Court, New York County
Docket Number: Index No. 850032/2019
Judge: Francis A. Kahn
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Acting Justice

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INDEX NO. 850032/2019

PENNYMAC HOLDINGS, LLC,

MOTION DATE ______

Plaintiff,

MOTION SEQ. NO. 001

- v -

JUDITH BIEDERMANN a/k/a GRACE BIEDERMANN, YONASH E. BIEDERMANN, BOARD OF MANAGERS OF L'ECOLE CONDOMINIUM, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE #1 - #10,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 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, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

were read on the motion/cross-motion to/for SUMMARY JUDGMENT/EXTEND TIME TO ANSWER.

Upon the foregoing documents, the motion and cross-motion are decided as follows:

Plaintiff, Pennymac Holdings, LLC ("Pennymac"), commenced this action to foreclose on a mortgage encumbering real property located at 212 East 47th Street, Unit B, New York, New York. Defendant/Mortgagor Judith Biedermann a/k/a Grace Biedermann ("Biedermann") answered, *pro se*, and raised numerous affirmative defenses and counterclaims. Defendant Board of Managers of L'Ecole Condominium ("L'Ecole") defaulted in appearing.

Now, Ariel Bronxville LLC ("Ariel"), as claimed assignee and successor-in-interest to Pennymac, moves for *inter alia* summary judgment against Biedermann, dismissal of affirmative defenses and counterclaims in Biedermann's answer, amending the caption to substitute named parties for the John Doe Defendants, for a default judgment against the non-appearing Defendants, for an order of reference and to substitute Ariel as Plaintiff. Defendant L'Ecole opposes Plaintiff's motion and cross-moves pursuant CPLR §§2004 and 3012[d] for an order extending its time to answer or compelling Plaintiff to accept same.

Preliminarily, the branch of the motion to substitute Ariel as Plaintiff in the place and stead of Pennymac is granted. For the limited purpose of substitution only, Ariel has demonstrated it presently is the real party in interest (*see U.S. Bank, N.A. v Duran,* 174 AD3d 768, 769 [2d Dept 2019]; *Central Fed. Sav., F.S.B v. 405 West 45th St., Inc.*, 242 AD2d 512 [1st Dept 1997]). Indeed, Ariel could have continued to prosecute this action in the name of Pennymac without a formal substitution (*see* CPLR §1018; *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1st Dept 2017]).

On the branch of its motion for summary judgment, Plaintiff was required 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]). 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 Defendant Biedermann raised this affirmative defense in the answer (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]; *Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582 [2d Dept 2020]). Additionally, based on the affirmative defenses raised, Plaintiff was obliged to prove its compliance with RPAPL §1304, §1306 and the notice requisites under paragraph 22 of the mortgage (*see U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]).

In support of the branch of the motion for summary judgment, Plaintiff submitted the affidavit of Oleg Langbort ("Langbort"), the managing member of Ariel. Langbort's affidavit laid a proper foundation for the admission of Ariel's records into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of other entities were also admissible since Langbort sufficiently established that those records were received from the makers and incorporated into the records Ariel which routinely relied upon such documents in its business (*see U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]). Further, the records Langbort relied on were referenced and annexed to the motion (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Langbort's affidavit and the referenced documents sufficiently evidenced the note and mortgage. As to Biedermann's default, it "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]). Here, the attached modification agreement is sufficient proof of Defendant Biederman's default as she acknowledged the debt and her default thereunder (*see Redrock Kings, LLC v Kings Hotel, Inc.,* 109 AD3d 602 [2d Dept 2013]; *EMC Mortg. Corp. v Stewart*, 2 AD3d 772 [2d Dept 2003]).

Standing in a foreclosure action is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*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]). As to the latter two circumstances, the note is the dispositive instrument (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). Here, Plaintiff is required to demonstrate that Pennymac, not Ariel, was the holder of the note at the time the action was commenced. Since there is no dispute that Pennymac was not the original lender, one of the two other requisites must be proved.

The second circumstance requires Plaintiff to show, in this case, that Pennymac, was the "holder" of the note at the time the action was commenced. "Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2d Dept 2015] [citations omitted]). The indorsement must be made either on the face of the note or on an allonge "so firmly affixed thereto as to become a part thereof" (UCC §3-202[2]). In a

mortgage foreclosure action, "[t]he attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster,* 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513 [2d Dept 2019]).

Plaintiff's assertion that Pennymac attached the note to the complaint is unavailing. At the outset, the note was not annexed to the complaint, but rather to the certificate of merit required under CPLR §3012-b (NYSCEF Doc No 3). As that statute states that the complaint be "accompanied" by the certificate of merit, it has been held that annexing the note to the certificate of merit does not constitute attachment to the complaint (*Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79 [2d Dept 2021]). Even if the attachment to the certificate of merit was sufficient, Plaintiff failed to establish Pennymac was holder of the note at that time. Since the indorsements at issue were on separate allonges, not note itself, Plaintiff was required, but neglected, to establish the indorsements or allonges were "firmly affixed" to the original note (*see Nationstar Mtge., LLC v Calomarde*, ____AD3d____, 2022 NY Slip Op 00428 [2d Dept 2022]; *JPMorgan Chase Bank, N.A. v Grennan*, supra at 1516). Langbort's affidavit on this point was nothing more that conclusory boilerplate which is insufficient (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 524 [1st Dept 2016]; *Deutsche Bank Natl. Trust Co. v Weiss*, 133 AD3d 704, 705 [2d Dept 2015]). Not every attachment can satisfy UCC §3-202[2] (*see HSBC Bank, USA, N.A. v Roumiantseva,* 130 AD3d 983 [2d Dept 2015]*; Slutsky v Blooming Grove Inn,* 147 AD2d 208 [2d Dept 1989]) and Langbort offered no description of the nature of the attachment other than to say the allonges were "appended" to the note.

Proof of the third circumstance is also lacking. No proof of a written assignment of the note was proffered. Langbort's affidavit and corroborating documents only show that a written assignment of the mortgage was made to Pennymac. "[W]hile assignment of a promissory note also effectuates assignment of the mortgage, the converse is not true: since a mortgage is merely security for a debt, it cannot exist independently of the debt, and thus, a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it" (*see U.S. Bank N.A. v Dellarmo,* 94 AD3d 746, 748 [2d Dept 2012][internal citations omitted]). On this issue, therefore, Plaintiff has shown written assignment of the mortgage only which is a nullity (*see eg US Bank, NA v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]).

To the extent Plaintiff relies on naked physical possession of the note to establish Pennymac's standing, "mere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing or to make a plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note" (*U.S. Bank N.A. v Moulton*, 179 AD3d 734, 737 [2d Dept 2020]).

Accordingly, Plaintiff's moving papers failed to establish *prima facie* Pennymac had standing to commence the action.

Proof of satisfaction of the required pre-action notice requirements was also lacking. "In a residential foreclosure action, a plaintiff moving for summary judgment must tender '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], *citing Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]) and its "substantial compliance" with the notice requirements contained in paragraph 22 of the mortgage (*see Wells Fargo Bank, N.A. v Tricario*, supra at 850).

Proof of compliance of the mailing requirements under RPAPL §1304 was not demonstrated. Langbort's affidavit and the annexed records of Pennymac do not show the notices were actually mailed as no affidavit of mailing or signed return receipts of the certified mailing was included in the documentation (*U.S. Bank, N.A. v Zientek*, 192 AD3d 1189, 1191 [2d Dept 2021]). Moreover, although Langbort described Pennymac's mailing procedures, he did not profess to having "personal knowledge" of same, which is insufficient (*see Cit Bank N.A. v. Schiffman*, 36 NY3d 550, 556 [2021]; *Wells Fargo Bank, N.A. v Tricario*, supra). The proof of service of the notice required under paragraph 22 of the mortgage failed for the same reasons (*see Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [2d Dept 2020]).

Accordingly, the branch of Plaintiff's motion for summary judgment on its foreclosure cause of action and for an order of reference is denied for failure to establish a *prima facie* case.

As to the branch of Plaintiff's motion to dismiss all Biedermann's affirmative defenses, CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

Based upon the findings above, Plaintiff has failed to demonstrate that the affirmative defenses related to standing and pre-foreclosure notices are without merit.

The affirmative defense/counterclaim based upon alleged violations of the Real Estate Settlement Procedures Act [12 USC §2614] is inadequately pled and dismissed. It lacks any facts identifying which acts are attributable to Plaintiff or the original lenders. This is of particular significance as neither Plaintiff, nor its assignor, were the originator of the loans.

Plaintiff has established that it is entitled to a default judgment against all non-appearing Defendants other than L'Ecole (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend caption to substitute Denise Biedermann in place of John Doe #1, Yonash E. Biedermann in place of John Doe #2 and to strike the remaining "John Doe" Defendants from the caption is granted without opposition (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Turning to the cross-motion, "[u]nder CPLR 3012 (d), a trial court has the discretionary power to extend the time to plead, or to compel acceptance of an untimely pleading 'upon such terms as may be just,'" (*Emigrant Bank v Rosabianca*, 156 AD3d 468, 472 [1st Dept 2017]). "To extend the time to answer the complaint and to compel the plaintiff to accept an untimely answer as timely, a defendant must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action" (*Bank of N.Y. Mellon v Tedesco*, 174 AD3d 490, 491 [2d Dept 2019]). When exercising its discretion in determining a motion under this section "a court should consider such relevant factors as the extent of the delay, prejudice or lack of prejudice to the opposing party as well as the strong public

policy in favor of resolving cases on the merits (*Orwell Bldg. Corp. v Bessaha*, 5 AD3d 573, 574 [2d Dept 2004][internal citations omitted]).

As a reasonable excuse L'Ecole asserts it was not properly served with the summons and complaint. It is established that defective service can constitute a reasonable excuse for a default in answering (*see eg Equicredit Corp. of Am. v Campbell,* 73 AD3d 1119 [2d Dept 2010]). "Ordinarily, the affidavit of a process server constitutes a prima facie showing of proper service, but when a defendant submits a sworn denial of receipt of service containing specific facts to refute the statements in the affidavit of the process server, the prima facie showing is rebutted and the plaintiff must establish personal jurisdiction by a preponderance of the evidence at a hearing" (*Wells Fargo Bank, NA v Spaulding*, 177 AD3d 817, 819 [2d Dept 2019] [citation and internal quotation marks omitted]; *see also NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]).

In the affidavit of service, Plaintiff's process server avers L'Ecole was served "C/O AKAM ASSOCIATES, MANAGING AGENT" by delivering the summons and complaint to "Alex Gil, Mail Clerk – Person authorized to accept papers". Service on L'Ecole, an unincorporated association (*see Pomerance v McGrath*, 104 AD3d 440, 441 [1st Dept 2013]), may be made by delivering process to its president or treasurer (*see* General Association Law §13). Alternatively, L'Ecole designated in its declaration that the New York State Secretary of State is an agent for service of process as per Article 9-B of the Condominium Act (*see* Real Property Law §339-n). As such, the affidavit of service did not constitute *prima facie* evidence of proper service as Plaintiff's process server failed to serve the proper representative of L'Ecole (*see Statewide Credit Services Corp., v Corona Plaza Condominium*, 56 Misc3d 8 [App Term, 2nd, 11th, 13th Judicial Districts, 2017]; *compare to Pascual v Rustic Woods Homeowners Assoc, Inc.*, 134 AD3d 1006 [2d Dept 2015]). While it is evident that L'Ecole was aware of the commencement of this action, unless Plaintiff served the Defendant as authorized by statute, it fails to bring a Defendant within the jurisdiction of the Court (*see Macchia v Russo*, 67 NY2d 592, 595 [1986]).

As such, L'Ecole has established a reasonable excuse for its failure to answer timely. Concerning a meritorious defense, the proof needed is less than that required when opposing a summary judgment motion (*see Goodwin v New York City Hous. Auth.*, 78 AD3d 550 [1st Dept 2010]). With the Court's determination above, a potential meritorious defense of standing is evident, although the Court is at a loss to understand what purpose asserting it would serve. Defendant L'Ecole's papers do not reveal a defense that would extinguish Plaintiff's lien or that would give L'Ecole's priority over Plaintiff's mortgage.

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment on its cause of action for foreclosure is denied, and it is

ORDERED that the branch of Plaintiff's motion to dismiss the affirmative defenses and counter claims is granted only to the extent the affirmative defense/counterclaim based upon alleged violations of the Real Estate Settlement Procedures Act [12 USC §2614] is dismissed, and it is

ORDERED that the branch of Plaintiff's motion for a default judgment is granted as against all non-appearing Defendants, except Defendant Board of Managers of L'Ecole Condominium, and it is

ORDERED that the branch of Plaintiff's motion to amend the caption is granted and the amended caption is as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK
--X
ARIEL BRONXVILLE LLC,

Index No. 850032/2019

-against-

JUDITH BIEDERMANN a/k/a GRACE BIEDERMANN, YONASH E. BIEDERMANN, BOARD OF MANAGERS OF L'ECOLE CONDOMINIUM, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE AND DENISE BIEDERMANN

--X

and it is

ORDERED that Defendant Board of Managers of L'Ecole Condominium's cross-motion is granted to the extent that its time to file and serve an answer is extended 30 days from the date of efiling of this order.

This matter is set down for a status conference on **March 31, 2022 @ 11:20 am** via Microsoft Teams.

2/7/2022
DATE

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

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE