

PNC Bank, N.A. v Otero
2022 NY Slip Op 30554(U)
February 14, 2022
Supreme Court, New York County
Docket Number: Index No. 850159/2019
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 KAHN, III PART 32

Acting Justice

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INDEX NO. 850159/2019

PNC BANK, NATIONAL ASSOCIATION,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

BIEN OTERO, PETER WILLIAMSON, UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, TECTRONICS TRADING & CONTRACTING LLC, NYC TRANSIT ADJUDICATION BUREAU, JP MORGAN CHASE BANK, NA, 825 WEST END CONDOMINIUM, JOHN DOE NO. 1 THROUGH JOHN DOE NO. 100

AMENDED DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 66, 67, 68, 71, 74, 75, 76

were read on this motion to/for

JUDGMENT - SUMMARY

The court sua sponte vacates its decision and order on motion dated August 26, 2021 (NYSCEF Doc No 71) and substitutes the following in its place and stead:

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

In this action, Plaintiff seeks to foreclose on a mortgage on residential real property located at 825 West End Avenue, Unit 3B, New York, New York. Issue was joined by Defendants Bien Otero and Peter Williamson, who raised numerous affirmative defenses in their answer, including failure to serve notices in accordance with RPAPL §§1303, 1304 and 1306 as well as Plaintiff's lack of standing.

Now, Plaintiff moves for summary judgment against Defendants Otero and Williamson, for a default judgment against the non-appearing Defendants and for an order of reference. Defendants Otero and Williamson oppose the 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 note, and evidence of Otero and Williamson's default in repayment (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 Defendants raised lack of standing in their answer, Plaintiff was required to demonstrate same (see eg Wells Fargo Bank, N.A. v Tricario, 180 AD3d 848 [2nd Dept 2020]). Plaintiff was also required to show its compliance with RPAPL §1303, §1304 and §1306 as those affirmative defenses were also raised (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]).

Plaintiff's motion was supported with an affidavit of facts from William Hardrick ("Hardrick"), an employee of Plaintiff. Hardrick's affidavit established the mortgage, note, and evidence of mortgagor's default and was sufficiently supported by admissible business records (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra). As to standing "PNC's submissions, which were in admissible form, established that, through a series of corporate mergers, the original mortgage and note devolved from National City to it and, accordingly, it made a prima facie showing that it had standing" (*see PNC Bank, N.A. v Klein*, 125 AD3d 953, 955 [2d Dept 2015]). Plaintiff also demonstrated with Hardrick's affidavit its strict compliance with the notice requirements under RPAPL §1304 which included proof of Plaintiff's standard office procedure, described in detail, based upon his personal knowledge and copies of the notices attached to his affidavit (*see HSBC Bank USA, N.A. v Bermudez*, supra). Hardrick's affidavit also demonstrated compliance with RPAPL §1303 and §1306 (*id.*; *US Bank v Nathan*, supra).

In opposition, Otero and Williams 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 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]). Further, the assertion that the business records relied upon by Hardrick were not admissible as business records under CPLR §4518 is without merit. Hardrick claimed personal knowledge of Plaintiff's record keeping practices and with respect to Nations City's records the records annexed to the affidavit were admissible since Hardrick established that those records were received from their maker, incorporated into Plaintiff's records and routinely relied upon 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]).

As to Defendant's remaining affirmative defenses and counterclaims, since Defendant failed to adduce any evidence or otherwise address same in his opposition, those affirmative defenses and counterclaims were abandoned and are 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]).

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 amend the caption to substituting "John Doe #1" (refused name) for the defendants "John Doe #1" through "John Doe #100" is granted without opposition (*see generally CPLR §3025*; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that **Bruce Lederman Esq., 747 3rd Avenue Floor 23, New York, New York 10071-2844 (917) 612-9298** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and 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 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 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 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 that failure to submit objections to the referee may 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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PNC BANK, NATIONAL ASSOCIATION,

Plaintiff,

Index No. 850159/2019

-against-

BIEN OTERO, PETER WILLIAMSON, UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, TECTRONICS TRADING & CONTRACTING LLC, NYC TRANSIT ADJUDICATION BUREAU, JP MORGAN CHASE BANK, NA, 825 WEST END CONDOMINIUM, and JOHN DOE #1,

Defendants.
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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 **November 18, 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) 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.

2/14/2022
DATE

Francis A. Kahn III

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

HON. FRANCIS A. KAHN III
NON-FINAL DISPOSITION

CHECK ONE:

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

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

APPLICATION:

CHECK IF APPROPRIATE: