

<b>Wells Fargo Bank, N.A. v Perkins</b>
2022 NY Slip Op 30791(U)
March 16, 2022
Supreme Court, New York County
Docket Number: Index No. 850315/2018
Judge: Francis A. Kahn III
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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**

*Justice*

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INDEX NO. 850315/2018

WELLS FARGO BANK, N.A.,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

LAUREN PERKINS, PENTAGON FEDERAL CREDIT UNION, NEW YORK BUSINESS DEVELOPMENT CORPORATION, BOARD OF MANAGERS OF THE 184 THOMPSON CONDOMINIUM, JOHN DOE,

**DECISION + ORDER ON MOTION**

Defendant.

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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, 60, 61, 62, 63, 64, 65

were read on this motion to/for JUDGMENT - SUMMARY

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

In this mortgage foreclosure action, Plaintiff moves for, *inter alia*, summary judgment against Defendant Lauren Perkins ("Perkins"), a default judgment against the non-appearing parties, appointment of a referee to compute and to amend the caption. Defendant Perkins opposes the motion and cross-moves to amend her answer and for an order returning the matter the foreclosure conference part.

On the branches of the motion for summary judgment and a default judgment and appointment of a referee, Plaintiff established the mortgage, note, and evidence of Mortgagor's default via the affidavit of Miranda Barnes ("Barnes"), a Vice-President of Loan Documentation for Plaintiff, which was sufficiently supported by admissible business records annexed thereto (*see eg Bank of NY v Knowles*, 151 AD3d 596 [1<sup>st</sup> Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1<sup>st</sup> Dept 2010]). Plaintiff also demonstrated its standing with undisputed proof that it was the originator and present holder of the note (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2<sup>nd</sup> Dept 2020]).

Plaintiff demonstrated its strict compliance with the notice requirements under RPAPL §1304 with Barnes' detailed recount of Plaintiff's standard office procedure, based upon her personal knowledge, and copies of the notices attached to her affidavit (*see HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 670 [2d Dept 2019]; *HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822 [2d Dept 2017]). Plaintiff established, with the same evidence and the affidavits of service of the summons and complaint, that it substantially complied with the notice requirement under paragraph 22 of the mortgage as well as the provisions of RPAPL §1303 and §1306 (*see HSBC Bank USA, N.A. v Bermudez, supra; U.S. Bank, N.A. v Nathan*, 173 AD3d 1112, 1114 [2d Dept 2019]).

In opposition, Defendant Perkins' conclusory arguments failed to raise an issue of fact as to any defense to the action, including whether the loan was the product of predatory lending and any bad faith in negotiating the 2016 modification of the original loan (*see Retained Realty, Inc. v Syed*, 137 AD3d 1099 [2<sup>nd</sup> Dept 2016]; *Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793 [2<sup>nd</sup> Dept 2012]). Defendant Perkins also failed to establish an issue of fact that Plaintiff neglected to act in good faith as required by CPLR §3408 since there was no proof "plaintiff's representative was not fully authorized to negotiate a settlement of this residential foreclosure action on plaintiff's behalf or that the negotiations that were had were a sham" (*Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638 [1<sup>st</sup> Dept 2012]). Perkins' remaining affirmative defenses were not pled with sufficient factual support (*see Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 805 [2d Dept 2020]) and, since Defendant failed to posit legal arguments support of same, they were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

Concerning the counterclaims, the first, second and third counterclaims are founded in claimed violations of GBL §340 and CPLR §3408 based upon industry-wide agreements to not approve short sales or to sell the note and mortgage to mortgagors like Defendant. These causes of action fail to state any cognizable claim of monopoly or restraint of trade under the present circumstances (*see Bayside Fuel Oil Depot Corp. v Savino Oil & Heating Co.*, 133 AD2d 658 [2d Dept 1987]). Indeed, this Court could find no caselaw recognizing such a claim in the context of a foreclosure action (*cf. Bank of N.Y. Mellon v Knowles*, 151 A.D.3d 596 [1<sup>st</sup> Dept 2017]).

Similarly, the fourth counterclaim, titled "Robo-signing", is insufficiently pled and Defendant failed to demonstrate any precedent supporting the existence of such a claim.

The fifth counterclaim seeks statutory damages for an alleged violation of the Truth In Lending Act (15 USC §1641). That statute is inapplicable as it concerns the liability of assignees and Plaintiff is the original lender. In any event, the claim is inadequately pled as it is conclusory and lacks any facts identifying what violations were "apparent on the face of the disclosure statement" (*see U.S. Bank Natl. Assn. v Pia*, 73 AD3d 752 [2d Dept 2010]).

The sixth counterclaim for an award of reciprocal attorneys' fees under RPL §282 is entirely conclusory and inadequately pled (*see generally Katz v Miller*, 120 AD3d 768 [2d Dept 2014]). Defendant fails to identify what covenant or agreement in the mortgage Plaintiff failed to perform. Moreover, with the grant to summary judgment to Plaintiff, Defendant has not successfully defended this action.

The seventh counterclaim alleging fraud is based upon representations in the initial loan process as well as the HARP and HAMP modifications. A proper claim for fraud requires that claimant plead, with the requisite particularity, a material misrepresentation of a fact, knowledge of its falsity, intent to induce reliance, and justifiable reliance and actual damages (*see CPLR §3016 [b]; Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). As to the initial application process, Defendant fails to identify what false statements were made by Plaintiff. All the noted representations were allegedly made by a "mortgage broker" or were unattributed. In any event, Defendant ratified the initial loan by making payments thereunder for years (*see Confidential Lending, LLC v Nurse*, 120 AD3d 739 [2d Dept 2014]). As to the refinance process, Plaintiff fails to allege that any of the purported false statements were intended to induce Defendant's reliance (*see Marine Midland Bank, N. A. v Renck*, 208

AD2d 688 [2d Dept 1994]). Indeed, the assertion Defendant was advised to stop paying her mortgage is not attributed to Plaintiff.

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

The branch of Plaintiff's motion to amend caption to strike the 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]).

The branch of Defendant Perkins' cross-motion to amend her answer is denied as she failed to demonstrate "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). There is also no basis to return this matter to the Residential Mortgage Foreclosure Conference Part.

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment is granted and the answer, affirmative defenses and counterclaims of Defendant Lauren Perkins are severed and dismissed; and it is further

ORDERED that the cross-motion by Defendant Perkins to amend her answer is denied; and it is further

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

ORDERED that that **Tom Kleinberger, Esq., 411 5<sup>th</sup> Avenue, New York, New York 10016 (917) 326-5523** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and 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 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 caption be amended to remove the John Doe designation and that the caption be amended to reflect this amendment; 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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WELLS FARGO BANK, N.A.  
Plaintiff,

Index No. 850315/2018

-against-

LAUREN PERKINS, PENTAGON FEDERAL  
CREDIT UNION, NEW YORK BUSINESS  
DEVELOPMENT CORPORATION, BOARD OF  
MANAGERS OF THE 184 THOMPSON  
CONDOMINIUM,  
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

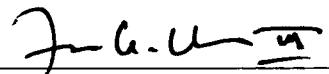
ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/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 and that Defendant Board of Managers Of Riverside Parc Condominium be served with all subsequent papers in this matter.

All parties are to appear for a virtual conference via Microsoft Teams on **June 30, 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](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.

3/16/2022  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

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