

Wells Fargo Bank, N.A. v Kirschenbaum

2022 NY Slip Op 33256(U)

September 27, 2022

Supreme Court, New York County

Docket Number: Index No. 850004/2022

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 32

Justice

INDEX NO. 850004/2022

WELLS FARGO BANK,N.A., AS TRUSTEE FOR IMPAC SECURED ASSETS CORP., MORTGAGE PASS- THROUGH CERTIFICATES, SERIES 2005-2,

MOTION DATE

MOTION SEQ. NO. 001

Plaintiff,

- v -

JOSHUA KIRSCHENBAUM, BOARD OF MANAGERS OF THE 400 CENTRAL PARK WEST CONDOMINIUM, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE 1 THROUGH JOHN DOE 12

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 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

were read on this motion to/for

JUDGMENT - SUMMARY

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

This is an action to foreclose on a mortgage encumbering a parcel of real property located at 400 Central Park West, Unit 18Y, New York, New York. The mortgage, given by Defendant Joshua Kirschenbaum ("Kirschenbaum"), secures a loan with an original principal amount of \$480,000.00 which is memorialized by a consolidated note dated October 20, 2005. Plaintiff commenced this action alleging Defendant defaulted in making installment payments under the note. Defendant Kirschenbaum answered and pled six affirmative, including lack of standing, failure to provide a contractual based default notice and failure to comply with RPAPL §1304.

Now, Plaintiff moves for summary judgment against Defendant Kirschenbaum, striking the answer and affirmative defenses, a default judgment against all non-appearing parties, to appoint a Referee to compute and to amend the caption. Defendant Kirschenbaum opposes the motion and cross-moves for summary judgment dismissing Plaintiff's complaint. Plaintiff opposes the cross-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 Defendants' 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]). Additionally, Plaintiff was obliged to demonstrate its strict compliance with RPAPL §1304 as well as its substantial compliance with the requisites under paragraph 22 of the mortgage (*see Deutsche Bank Natl. Trust Co. v Pariser*, 207 AD3d 518 [2d Dept 2022]; *HSBC Mtge. Corp. (USA) v Gerber*, 100 AD3d 966, 966-967 [2d Dept 2012]).

In support of a motion for summary judgment on a cause of action for foreclosure, a plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported with an affidavit from Diego Rojas ("Rojas"), a Contract Management Coordinator for Plaintiff. Although Rojas's knowledge was not entirely based upon personal knowledge of the facts, to the extent it was not, it was sufficiently founded in the business records of Plaintiff (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]; *Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). Rojas laid a proper foundation for the admission of his employer's own records by demonstrating the requisites of CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of prior servicers were also admissible since Rojas attested those records were received from prior entities, incorporated into the records his employer kept and were routinely relied on by same in its business (*see Bank of Am., N.A. v Brannon*, 156 AD3d 1, 10 [1st Dept 2017]; *see also U.S. Bank Trust, N.A. v Bank of Am., N.A.*, 201 AD3d 769, 772 [2d Dept 2022]). Further, annexed to Rojas's affidavit were the records which the affiant relied upon (*see eg Ciras, Inc. v Katz*, 202 AD3d 590 [1st Dept 2022]). The affidavit established the mortgage, note, and evidence of mortgagor's default and was sufficiently supported by the ledger of Defendant's account in Exhibit P annexed to Rojas' affidavit (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

Plaintiff established its standing to prosecute this action as a copy of the note, endorsed in blank on its face, was annexed to the complaint (*see eg Bank of NY v Knowles*, supra; *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643 [2d Dept 2016]). In opposition, Defendant failed to raise an issue of fact on this point.

With respect to the contractual default notice, paragraph 22 of the mortgage, a ubiquitous provision in residential mortgages, provides that as a precondition to acceleration of the note, the lender must send a notice containing the information specified in paragraph 22[b][1] – [6] in the manner described in paragraph 15 of the mortgage. That section provides that all notices must be in writing and "is considered given to [Mortgagor] when mailed by first class mail or when actually delivered to my notice address if sent by other means . . . The notice address is the address of the Property unless I give notice to Lender of a different address".

Here, the proffered contractual default notice, dated June 23, 2021, is not addressed to the mortgaged property nor has Plaintiff established that the Mortgagor apprised lender to deliver notices to the address on the notice. Plaintiff assertion that the RPAPL §1304 notice it served at the mortgaged premises satisfied the contractual requisites is without merit. That notice does not state: the action the Mortgagor must take to correct the default, that if the conditions stated in Section 19 of the Security Instrument are met, the Mortgagor will have the right to have Leader's enforcement of the security

instrument stopped and to have the note remain effective and that Mortgagor has the right in any foreclosure action to assert there was no default and to present any other defenses.

Plaintiff also failed to establish, *prima facie*, that RPAPL §1304 is not applicable herein. Compliance with RPAPL §1304 is limited to “home loans” where, *inter alia*, the “debt is incurred by the borrower primarily for personal, family, or household purposes” and “[t]he loan is secured by a mortgage [on] . . . a one to four family dwelling . . . used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling” (*see* RPAPL §1304[6][a][1][ii] and [iii]). The assessment of whether the transaction qualifies as a “home loan” is considered at the time the subject mortgage is given (*see HSBC Bank United States v McKenna*, 37 Misc 3d 885 [Sup. Ct. Kings County, 2012]). The only proof to support this claim was twofold: [1] Defendant Kirschenbaum listed his address in the mortgage as 400 Central Park West, Unit 6J, which is not the mortgaged premises and [2] a 1-4 family rider to the mortgage, expressly deletes Section 6 of the mortgage which required the Mortgagor occupy the mortgaged premises as their principal residence. All this demonstrates is that at the time the mortgage was given, Kirschenbaum was not residing at the premises and that he was not required to under the mortgage. Absent is any proof that Kirschenbaum did not intend to occupy the mortgaged premises as his principal dwelling.

In support of the cross-motion for summary judgment dismissing the complaint based upon failure to provide pre-foreclosure notices under the mortgage and RPAPL §1304, Defendant Kirschenbaum failed to demonstrate *prima facie* entitlement to dismissal on either of these issues. Kirschenbaum's uncorroborated affidavit containing a naked denial of receipt of the default notice “was not sufficient to establish that the plaintiff did not comply with the mortgage's notice provisions” (*see Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [2d Dept 2020]; *Wells Fargo Bank, N.A. v Tricario*, *supra* at 852). Defendant also failed to show that RPAPL §1304 is applicable herein. Defendant Kirschenbaum avers in an affidavit in opposition that he has resided a premises in New Jersey with his family since 2011 and makes no claim that at the time the mortgage was given, he intended or occupied the premises as his primary residence.

As neither party has established, in the first instance, whether or not RPAPL §1304 is applicable, there is no need to reach the issue of the effect of the decision of the Appellate Division, Second Department in *Bank of America, N.A. v Andrew Kessler*, 202 AD3d 10 [2nd Dept 2021] on the matter herein.

As to the branch of Plaintiff's motion to dismiss all Defendants' 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]).

The first affirmative defense, which is directed Plaintiff's standing, fails based upon this Court's determination *supra*.

The second and third affirmative defenses remain viable based upon the determinations supra.

The fourth affirmative defense claiming lack of personal jurisdiction was waived when Defendants failed to move to dismiss pursuant to CPLR §3211[a][8] within sixty [60] days of pleading this affirmative defense (*see* CPLR §3211[e]).

The fifth and sixth affirmative defenses claim the statute of limitations bars this action either partially or entirely. Plaintiff acknowledges a predecessor in interest accelerated the mortgage on July 16, 2014, by written notice served on the borrower. As the limitations period in this matter is six-years (*see* CPLR §214[6]; *Freedom Mortgage Corp. v Engel*, 37 NY3d 1 [2021]), the bar dated was July 16, 2020. Given this action was commenced on January 6, 2022, to be entitled to dismissal of this defense, Plaintiff was required to demonstrate that the mortgage was affirmatively de-accelerated before that date or that the limitations period was tolled or extended (*see generally Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]). Plaintiff relies on a toll between October 1, 2019, and April 1, 2021, 548 days, to cover the period from the expiration of the statute of limitations to commencement of this action, 539 days. However, since none of the information regarding the acceleration and other events is contained in the affidavit of facts, no *prima facie* case is made.

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 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 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 the motion for a default judgment against the non-appearing parties is granted, and it is

ORDERED that the branch of the motion to dismiss Defendant's affirmative defenses is granted as to the first, but denied as to all others, and it is

ORDERED, that the caption be amended by substituting JOHN DOE AS "JOHN DOE #1" AND JOHN DOE AS "JOHN DOE #2", by and in place of "John Doe #1" through "John Doe #2", and it is

ORDERED, that the caption be amended by removing "John Doe #3" through "John Doe #12" as party defendants in this action, and it is

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
WELLS FARGO BANK, N.A., AS TRUSTEE FOR

850004/2022 WELLS FARGO BANK, N.A., AS TRUSTEE FOR IMPAC SECURED ASSETS CORP.,
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-2 vs. KIRSCHENBAUM, JOSHUA
ET AL
Motion No. 001

Page 4 of 5

IMPAC SECURED ASSETS CORP., MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2005-2,
Plaintiff,

-against-

JOSHUA KIRSCHENBAUM; BOARD OF
MANAGERS OF THE 400 CENTRAL PARK WEST
CONDOMINIUM; NEW YORK CITY PARKING
VIOLATIONS BUREAU; NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD; NEW
YORK CITY TRANSIT ADJUDICATION BUREAU;
JOHN DOE AS "JOHN DOE #1" AND JOHN DOE AS
"JOHN DOE #2",

Defendants.

-----X

and it is

ORDERED that Defendant Kirschenbaum's cross-motion for summary judgment dismissing Plaintiff's complaint is denied.

All parties are to appear for a virtual status conference via Microsoft Teams on **December 7, 2022, at 10:40 am.**

9/27/2022
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

Francis A. Kahn III

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