

Ariel Bronxville LLC v Biedermann
2022 NY Slip Op 33419(U)
October 3, 2022
Supreme Court, New York County
Docket Number: Index No. 850032/2019
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS KAHN, III PART 32

Justice

-----X

INDEX NO. 850032/2019

ARIEL BRONXVILLE LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 003

- v -

JUDITH BIEDERMANN, YONASH BIEDERMANN, BOARD
OF MANAGERS OF LECOLE CONDOMINIUM, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
DENISE BIEDERMANN

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion is determined 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 9B, 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”) initially defaulted in appearing.

By order of this Court dated February 7, 2022, Plaintiff’s motion for summary judgment was denied on the basis that *prima facie* proof of standing was not established. However, the branch of the motion to substitute Ariel Bronxville LLC (“Ariel”), as assignee and successor-in-interest to Pennymac, as Plaintiff in the place and stead of Pennymac was granted. Also in that order, Defendant L’Ecole’s motion to extend its time to answer was granted. L’Ecole pled four affirmative defenses, including lack of standing, statute of limitations and RPAPL §1304, as well as a cross claim against Biedermann.

Now, Ariel moves for summary judgment against Biedermann and L’Ecole, dismissal of their affirmative defenses and for an order of reference. Defendant L’Ecole opposes Plaintiff’s motion. Defendant Biedermann submitted no opposition.

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 or that it was inapplicable (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]).

Also proffered, was the affidavit of David M. Perez, an Assistant Vice President of PennyMac. Perez laid a proper foundation for the admission of Ariel’s records into evidence under CPLR §4518. Perez’s affidavit demonstrated 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). Perez’s affidavit also demonstrated compliance with RPAPL §1306 (*id.*; *US Bank v Nathan*, supra).

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]). In addition, the affidavits of Langbort and Perez demonstrated Biedermann’s default in repayment.

Standing in a foreclosure action is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] holder status via physical possession of the note prior to commencement of the action which 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]). In support of the motion, Plaintiff only proffers proof in support in support of the second circumstance.

“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]). Evidence of the nature of the attachment is required (*see One Westbank FSB v Rodriguez*, 161 AD3d 715 [1st Dept 2018]), since not every appendment can satisfy the statutory requisite (*see HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983 [2d Dept 2015])[Paperclip not a firm annexation]). In support of Ariel claim of PennyMac’s holder status, Perez states the following in his affidavit:

12. When the foreclosure complaint was filed on February 11, 2019, PennyMac was the owner, holder, and assignee of the Note and Mortgage that are the subject of this foreclosure proceeding.

14. On or about July 8, 2019, PennyMac transferred the original Note to Plaintiff by its counsel Zeichner Ellman & Krause LLP. Before transferring the original Note, I inspected the original Note and found that each allonge referenced in paragraph 9, supra, was appended and firmly affixed by staples to the original Note. Next, before assembling the original Note for transfer to Plaintiff, the allonge from PennyMac to Plaintiff was appended and firmly affixed by staples to the original Note. See Ex A.

The allegations in paragraph 12 of Perez’s affidavit are entirely conclusory and insufficient as they are absent personal knowledge or corroborated by documentary evidence (*cf. Wells Fargo Bank, N.A. v Davis*, 181 AD3d 890, 892 [2d Dept 2020]). The statements in paragraph 14 are sufficiently specific to demonstrate firm annexation and possession, but are, at best, circumstantial as Perez’s examination occurred some seven months after the action was commenced. Even assuming this was *prima facie* evidence of holder status when the complaint was filed, Defendant L’Ecole raised an issue of fact on this point. In opposition, Defendant proffered the affirmation of Thomas V. Juneau, Jr. (“Juneau”) and a printed copy of the purported LinkedIn profile of Perez which indicates he was not employed by PennyMac until 2021, two years after the events claimed in paragraph 14.

Plaintiff’s attempt to cure these defects with a further affidavit from a different employee of PennyMac submitted in reply is inappropriate and may not be considered by the Court (*see Deutsche Bank Natl. Trust Co. v Adlerstein*, 171 AD3d 868, 870 [2d Dept 2019]). The reply affidavit is not intended to clarify an issue raised for the first time in opposition, to wit Perez’s employment chronology, but seeks to correct a defect in Plaintiff’s *prima facie* case (*cf. Central Mtge. Co. v Jahnsen*, 150 AD3d 661, 664-665 [2d Dept 2017]).

Accordingly, the branch of Plaintiff's motion for summary judgment and the appointment of a referee to compute is denied.

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

The first affirmative defense, which is directed to the legal sufficiency of Plaintiff's complaint, is unnecessary as a general matter since dismissal cannot be effectuated without a motion pursuant to CPLR 3211[a][7] (*see Riland v Frederick S. Todman & Co.*, 56 AD2d 350 [1st Dept 1977]). Normally, this defense is nothing more than "'harmless surplusage,' and . . . a motion by the plaintiff to strike the same should be denied" (*Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]). However, where all other affirmative defenses fail as a matter of law, it may be dismissed (*Raine v Allied Artists Productions, Inc.*, 63 AD2d 914, 915 [1st Dept 1978]).

The second affirmative defense alleges that "Plaintiff is barred by the Statute of Limitations". Concerning the foreclosure cause of action, Plaintiff established that it timely commenced this action with the affidavits and documents submitted in support of its motion which demonstrated Plaintiff's assignee accelerated the debt for the first time with the commencement of this action (*see CPLR §214[6]; Freedom Mortgage Corp. v Engel*, 37 NY3d 1 [2021]). In opposition, Defendants failed to offer any facts, or simply allegations, to support that the indebtedness under the note was accelerated more than six-years before this action was commenced.

The third affirmative defense is viable based upon the above findings of the Court.

The fourth affirmative defense fails as a matter of law since L'Ecole, as a stranger to the note and mortgage, lacks standing to rely on RPAPL §1304 (*see eg Bank of Am. V Lestrade*, 189 AD3d 969 [2d Dept 2020]).

In any event, since Defendants' opposition was entirely based upon its defense of lack of standing, the other affirmative defenses were abandoned (*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]).

Parenthetically, the Court again notes it is unable to discern what purpose L'Ecole's defense herein serves. This action was commenced in 2019 and is based upon a 2018 default in repayment. Even if acceleration of the indebtedness occurred in 2018, the statute of limitations would not expire until 2024. Further, L'Ecole has proffered no claim that its lien is superior to

Plaintiff's mortgage lien. Perpetuating this litigation only increases the amount of Plaintiff's lien and imperils any possibility that surplus monies will exist to satisfy L'Ecole's lien.

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 all the affirmative defenses in Defendant L'Ecole's answer, except the third fifteenth, are dismissed

ORDERED that all parties are directed to appear, in-person, for a preliminary conference on **November 1, 2022 @ 11:00am** in Part 32 of the Courthouse located at 111 Centre Street, Courtroom 1127[b].

10/3/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

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

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