

US Bank Trust N.A. v Padilha
2022 NY Slip Op 33755(U)
October 27, 2022
Supreme Court, New York County
Docket Number: Index No. 850132/2021
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

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INDEX NO. 850132/2021

US BANK TRUST NATIONAL ASSOCIATION, NOT IN ITS
INDIVIDUAL CAPACITY BUT SOLELY AS OWNER
TRUSTEE FOR VRMTG ASSET TRUST,

MOTION DATE

MOTION SEQ. NO. 001

Plaintiff,

- v -

JOCELY MARIA PADILHA, JONICE PADILHA, BOARD OF
MANAGERS OF THE DIPLOMAT CONDOMINIUM, OCEAN
BANK, F.S.B., HOME LOAN INVESTMENT BANK, F.S.B.
F/K/A OCEAN BANK, F.S.B., ANGELA PEREIRA, JUCIELE
AMARAL, 35 WEST REALTY CO. LLC, MI FACTORS
LIMITED LIABILITY COMPANY, UNITED STATES OF
AMERICA O/B/O INTERNAL REVENUE SERVICE, JOHN
DOE,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

were read on this motion to/for JUDGMENT - SUMMARY

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
210 East 47th Street, Unit 2C, New York, New York. The mortgage at issue was originally given by the
Defendants Jocely Maria Padilha and Jonice Padilha ("Padilhas") to non-party Republic Consumer
Lending Group, Inc. on October 27, 1998. The encumbrance secured a loan of \$129,375.00
memorialized by a note of the same date. The Padilhas gave a second mortgage on the premises to
Defendant Home Loan Investment Bank, F.S.B. f/k/a Ocean Bank, F.S.B. ("Home Loan") to secure a
loan of \$195,000.00 which was memorialized by a note dated January 24, 2007.

Padilhas defaulted in repayment under the 1998 note and entered into a loan modification
agreement, dated June 22, 2016, with the then assignee of the note and mortgage. In that document,
Padilhas acknowledged the debt and their default thereunder. The modification agreement also provided
that \$81,228.46 in "New Money" was added to the indebtedness. On or about, September 1, 2016,
Padilhas defaulted in repayment under the 2016 modification agreement. A month later, Padilhas
defaulted in repayment under the 2007 note.

Defendant Home Loan commenced an action titled Home Loan Investment Ban v Padilha, NY
Cty Index No 850158/2019 to foreclose on the 2007 mortgage and joined as a Defendant Specialized
Loan Servicing ("SLS"), the then holder of the of 1998 note and mortgage and the 2016 modification.

Issue was joined by SLS which raised numerous affirmative defenses in their answer as well as a counterclaim for a judgment declaring its mortgage has priority over Plaintiff's lien. Home Loan disputed the counterclaim and pled its mortgage had priority because its consent to the modification was not obtained. Plaintiff commenced this action on May 7, 2021 and named Home Loan as a Defendant. Home Loan joined issue and raised the subordination issue as an affirmative defense.

By order of this Court dated November 5, 2021, Home Loan's motion for, *inter alia*, summary judgment on its claim for foreclosure of its mortgage was granted (NYSCEF Doc No 58). On the issue of the priority between the 1998 and 2007 mortgage liens, this Court determined that the 2016 modification did not substantially impair or destroy Home Loan's equity in its 2007 mortgage lien. As such, Home Loan's demand that SLS's lien be entirely subordinated to its lien was denied. However, based upon the extension of new money, this Court granted partial subordination and ordered that "\$81,228.46 in added principal under the loan modification agreement was subordinated to Plaintiff's mortgage. After the referee appointed to compute the amount due rendered a report, a judgment of foreclosure and sale was entered on July 21, 2022. To date, it does not appear a sale has been scheduled pursuant to the Court's direction in that judgment.

Now, Plaintiff moves for summary judgment against Defendant Home Loan, for a default judgment against the non-appearing Defendants and for an order of reference. Defendant Home Loan opposes the motion.

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's motion was supported with an affidavit of facts from Priscilla Serrato ("Serrato"), an officer of Fay Servicing, LLC ("Fay"), the alleged servicer/attorney-in-fact for Plaintiff. Serrato's affidavit laid a proper foundation for the admission of Fay'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 Serrato 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, annexed to the motion were records referenced by Serrato (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]) as well as a power of attorney demonstrating the authority of Fay to act on behalf of Plaintiff (*see Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 901 [2d Dept 2019]).

Serrato's affidavit and the referenced documents sufficiently evidenced the note and mortgage. As to Padilhas' 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 Padilhas' default as they acknowledged the debt and their default under the 1998 note (*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 opposition, Home Loan's assertion that Plaintiff did not demonstrate Padilhas' default is incorrect. Its reliance on RPAPL §1304 is entirely without merit as it is a stranger to the note that is the subject of foreclosure (*see Nationstar Mtge., LLC v. Koznitz I, LLC*, 208 AD3d 500 [2d Dept 2022] *Bank of Am. v Lestrade*, 189 AD3d 969 [2d Dept 2020]). Resultantly, its citation to *Bank of Am. v Kessler*, 202 AD3d 10 [2d Dept 2021] is unavailing.

Parenthetically, the Court notes that Defendant Home Loan's submission of opposition herein is baffling. The issue of priority of these liens was decided and all the parties hereto are bound by that determination. Indeed, Plaintiff acknowledged Home Loan's partial priority in its reply. With the majority of Home Loan's lien still subordinated to Plaintiff's lien, and with there being no record of a scheduled sale in the earlier action, the Court is at a loss to discern what benefit Home Loan believes it will gain by delaying an expedient conclusion of this matter. Further delay only increases Plaintiff's already accruing interest and expenses herein thereby decreasing any surplus that would satisfy the majority of Home Loan's lien.

Accordingly, the branches of Plaintiff's motion for summary judgment, to strike the answer and affirmative defenses of Defendant Home Loan and for the appointment of a referee to compute is granted.

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted (*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 only to the extent that the John Doe defendant is stricken (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]). Entry of a judgment with a John/Jane Doe Defendant in the caption is not permitted by the New York County Clerk.

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment against the appearing Defendants, for a default judgment against the non-appearing parties as well as the other relief is granted; and it is further

ORDERED that **Bruce Lederman, 747 3rd Ave Floor 23, New York, NY 10017 (917) 612-9298** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the property identified in the notice of pendency 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 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 the amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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US BANK TRUST NATIONAL ASSOCIATION,
NOT IN ITS INDIVIDUAL CAPACITY BUT
SOLELY AS OWNER TRUSTEE FOR VRMTG
ASSET TRUST

Index No. 850132/2021

Plaintiff,
-against-

JOCELY MARIA PADILHA A/K/A JOCELY M.
PADILHA A/K/A JOCELY PADILHA; JONICE
PADILHA; BOARD OF MANAGERS OF THE
DIPLOMAT CONDOMINIUM; OCEAN BANK,
F.S.B.; HOME LOAN INVESTMENT BANK,

850132/2021 US BANK TRUST NATIONAL ASSOCIATION vs. JOCELY MARIA PADILHA;
JONICE PADILHA, BOARD OF MANAGERS OF THE DIPLOMAT CONDOMINIUM; OCEAN BANK;
HOME LOAN INVESTMENT BANK
Motion No. 001

F.S.B. F/K/A OCEAN BANK, F.S.B.; ANGELA PEREIRA; JUCIELE AMARAL; 35 WEST REALTY CO. LLC; MI FACTORS LIMITED LIABILITY COMPANY; UNITED STATES OF AMERICA O/B/O INTERNAL REVENUE SERVICE;

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/suptmanh)); 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 February 24, 2023, at 10:00 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.

10/27/2022

DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

INITIAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

Francis A. Kahn III

FRANCIS KAHN, III, A.J.S.

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