

<b>Bank of N.Y. Mellon v Johnson</b>
2023 NY Slip Op 30246(U)
January 13, 2023
Supreme Court, New York County
Docket Number: Index No. 850102/2019
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. 850102/2019

MOTION DATE

MOTION SEQ. NO. 001

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-6,

Plaintiff,

- v -

ALLAN A. JOHNSON, GERALD HENRY JOHNSON, MARILYN ANN LOUISE HAMILTON, UNITED STATES OF AMERICA BY THE INTERNAL REVENUE SERVICE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE C-BASS MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-SL1, THE BOARD OF MANAGERS OF THE BRADHURST CONDOMINIUM, CRIMINAL COURT OF THE CITY OF NEW YORK, GENE KAUFMAN ARCHITECT PC, D.S.S. & DIVISION OF LIENS AND RECOVERY, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU, JOHN DOE

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70

were read on this motion to/for

JUDGMENT - SUMMARY

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

The within action is to foreclose on a mortgage encumbering a parcel of residential real property located at 2611 Frederick Douglas Blvd., Apt 5F, New York, New York. The mortgage secures a loan with an original principal amount of \$360,000.00 memorialized by an interest only adjustable-rate note. The note and mortgage, both dated February 6, 2006, were given by Philip R. Johnson, who predeceased commencement of this action.

Plaintiff, The Bank Of New York Mellon f/k/a The Bank Of New York, As Trustee for the Certificateholders CWABS, Inc., Asset Backed Certificates, Series 2006-6 ("BONY Certificateholders"), commenced this action alleging the Mortgagor defaulted under the terms of the note. Defendant Allan A. Johnson a/k/a Allan Alexander Johnson, as Administrator of the Estate of Philip R. Johnson a/k/a Pihlilp R. Johnson a/k/a Philip Johnson a/k/a Phillip Johnson a/k/a Philip Reginald Johnson a/k/a Pihllip Reginald Johnson ("Administrator"), answered and raised sixteen affirmative defenses, including lack of standing. Defendant The Board of Managers of the Bradhurst

Condominium answered by raised no defenses. Thereafter, BONY Certificate Holders, apparently assigned the mortgage to The Bank Of New York Mellon f/k/a The Bank Of New York, As Trustee for the Registered Holders CWABS, Inc., Asset Backed Certificates, Series 2006-6 (“BONY Registered Holders”).

Now, Plaintiff moves for, *inter alia*, summary judgment against all appearing Defendants, striking their answers and affirmative defenses, a default judgment against all non-appearing parties, to appoint a Referee to compute and to amend the caption. Defendant Administrator opposes the motion and cross-moves to dismiss Plaintiff’s complaint based upon lack of standing. Plaintiff opposes the cross-motion.

At the outset, Defendant’s assertion that Plaintiff lacks standing to make this motion or prosecute this action based upon the assignment to BONY Registered Holders is without merit. Pursuant to CPLR §1018, either Plaintiff or BONY Registered Holders is authorized, with or without formal substitution, to continue prosecution of the action despite the alleged assignment of the note and mortgage (*see* CPLR §1018; *Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574 [2d Dept 2020]; *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1<sup>st</sup> Dept 2017]).

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 [1<sup>st</sup> Dept 2020]; *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]). Since Defendant Administrator raised lack of standing in his answer, Plaintiff was required to demonstrate same (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2<sup>nd</sup> Dept 2020]).

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 [1<sup>st</sup> Dept 2019]). 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 Jennifer Ann Lozano (“Lozano”), an employee of Carrington Mortgage Services, LLC (“Carrington”), the alleged servicing agent/attorney-in-fact for BONY Registered Holders. Lozano’s affidavit laid a proper foundation for the admission of Carrington’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 Carrington 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 Lozano (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1<sup>st</sup> Dept 2020]) as well as a power of attorney demonstrating the authority of Carrington to act on behalf of Plaintiff and BONY Registered Holders (*see Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 901 [2d Dept 2019]).

Lozano's affidavit and the referenced documents sufficiently evidenced the note and mortgage. As to the Mortgagor'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, Lozano's review of the attached account records demonstrated that the Mortgagor defaulted in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1<sup>st</sup> Dept 2011]).

As to standing in a foreclosure action, the note is the dispositive instrument (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank N.A. v Carnivale*, 138 AD3d 1220, 1221 [2d Dept 2016], quoting *Onewest Bank, F.S.B. v Mazzone*, 130 AD3d 1399, 1400 [2d Dept 2015]). However, "mere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing or to make a plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note" (*U.S. Bank N.A. v Moulton*, 179 AD3d 734, 737 [2d Dept 2020]). "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]). "The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster*, 142 AD3d 636, 638 [2d Dept 2016]; cf. *JPMorgan Chase Bank, N.A. v Grennan*, supra).

Here, Plaintiff annexed a copy of the note to the complaint which contained an endorsement in blank on its face executed by the original lender. This is sufficient to demonstrate that Plaintiff BONY Certificate Holders was the holder of the note when the action was commenced (*see Bank of NY v Knowles*, supra at 597). In opposition, Plaintiff failed to raise an issue of fact on any point. Any assertion that a question exists as to the validity and timing of the assignments is unavailing (*see Mortgage Stanley Private Bank, N.A. v Ceccarelli*, 210 AD3d 478 [1<sup>st</sup> Dept 2022] *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643 [2d Dept 2016]).

As to any affirmative defenses unaddressed by Defendant, by failing to raise specific legal arguments in rebuttal of the branch of the motion to dismiss same they were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafigliore*, 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 (*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 the caption is granted (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

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

ORDERED that that **Scott H. Siller, Esq., 706 Equestrian Way, Westbury, NY 11590 -- 516-644-6769** 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 or is required to perform other significant services in issuing the report, 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 "John Doe" be removed as a party defendant in this action as no occupants reside at the property and the caption of this action be amended to reflect the removal of "John Doe" as a party defendant; and it is further

ORDERED that the caption of this action be amended to reflect that the Plaintiff is THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE REGISTERED HOLDERS OF CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2006-6; and it is further

ORDERED that the caption shall read as follows:

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

-----X  
THE BANK OF NEW YORK MELLON F/K/A THE  
BANK OF NEW YORK, AS TRUSTEE FOR THE  
REGISTERED HOLDERS OF CWABS, INC., ASSET  
BACKED CERTIFICATES, SERIES 2006-6,

Index No. 850102/2019

Plaintiff,

-against-

ALLAN A. JOHNSON A/K/A ALLAN ALEXANDER  
JOHNSON, AS ADMINISTRATOR OF THE ESTATE OF  
PHILIP R. JOHNSON A/K/A PHILIP R. JOHNSON  
A/K/A PHILIP JOHNSON A/K/A PHILLIP JOHNSON  
A/K/A PHILIP REGINALD JOHNSON A/K/A PHILLIP  
REGINALD JOHNSON, GERALD HENRY JOHNSON,  
MARILYN ANN LOUISE HAMILTON A/K/A MARILYN  
ANN LOUISE JOHNSON, UNITED STATES OF  
AMERICA BY THE INTERNAL REVENUE SERVICE,  
NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE, US BANK NATIONAL ASSOCIATION,  
AS TRUSTEE FOR THE C-BASS MORTGAGE LOAN  
ASSET-BACKED CERTIFICATES, SERIES 2006-SL1,  
THE BOARD OF MANAGERS OF THE BRADHURST  
CONDOMINIUM, CRIMINAL COURT OF THE CITY  
OF NEW YORK, GENE KAUFMAN ARCHITECT PC,  
D.S.S. & DIVISION OF LIENS AND RECOVERY, CITY  
OF NEW YORK ENVIRONMENTAL CONTROL  
BOARD, CITY OF NEW YORK PARKING  
VIOLATIONS BUREAU, CITY OF NEW YORK  
TRANSIT ADJUDICATION BUREAU,

Defendants.

-----X

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

All parties are to appear for a virtual conference via Microsoft Teams on **April 12, 2023, at 11:00 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.

1/13/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

J.S.C.

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

*F.A. Kahn III*

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

**HON. FRANCIS A. KAHN III**