

HSBC Bank USA, N.A. v Ji Youn Min

2023 NY Slip Op 31749(U)

May 19, 2023

Supreme Court, New York County

Docket Number: Index No. 850245/2019

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. FRANCIS A. KAHN, III PART **32**

Justice

INDEX NO. 850245/2019

MOTION DATE _____

MOTION SEQ. NO. 001

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HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF DEUTSCHE ALT-A SECURITIES INC. MORTGAGE LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-OA4,

Plaintiff,

- v -

JI YOUN MIN, YOOMI MIN, SUNG JIN MIN, NEW YORK SUPREME COURT, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, INTERNAL REVENUE SERVICE, THE BOARD OF MANAGERS OF 200 CHAMBERS STREET CONDOMINIUM, NATIONAL CITY BANK, AND JOHN DOE AND MARY DOE, (SAID NAMES BEING FICTITIOUS, IT BEING THE INTENTION OF PLAINTIFF TO DESIGNATE ANY AND ALL OCCUPANTS, TENANTS, PERSONS OR CORPORATIONS, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE PREMISES BEING FORECLOSED HEREIN)

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion 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 200 Chambers Street, Unit 7K, New York, New York. The mortgage, given by Defendant Ji Youn Min ("Min"), secures a loan with an original principal amount of \$688,000.00 which is memorialized by a note dated April 10, 2007. Plaintiff commenced this action alleging Defendant Min defaulted in making installment payments under the note. Defendant Min answered and pled fifteen affirmative defenses, including lack of standing, failure to provide a pre-foreclosure notice pursuant to the mortgage and failure to comply with RPAPL §1304.

Now, Plaintiff moves for summary judgment against Defendant Min, 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 Min opposes the motion and cross-moves to dismiss pursuant to RPAPL §1304. 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]). Since Defendant Min raised in the answer lack of standing, failure to serve an RPAPL §1304 notice and lack of a contractual pre-foreclosure notice, Plaintiff was required to demonstrate, *prima facie*, its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]), its substantial compliance with the requisites under paragraph 22 of the mortgage (*see eg Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [2d Dept 2020]) as well as its strict compliance with RPAPL §1304 (*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 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 Nicholad J. Raab ("Raab"), an Assistant Vice President of Select Portfolio Servicing, Inc. ("SPS"), the alleged servicing agent and attorney-in-fact for Plaintiff. Raab's affidavit laid a proper foundation for the admission of the records of Plaintiff and SPS into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Further, annexed to the motion were records referenced by Raab (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]) as well as a power of attorney, dated January 19, 2017, demonstrating the authority of SPS to act on behalf of Plaintiff (*see Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 901 [2d Dept 2019]).

Raab'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, Raab'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 [1st 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).

In this case, Plaintiff annexed a copy of the note to the complaint which contained two endorsements on its face. One endorsement transfers the note from Countrywide Bank, NA to Countrywide Home Loans, Inc. The other endorsement is in blank and is executed by Countrywide Home Loans, Inc. This is sufficient to demonstrate that Plaintiff was the holder of the note when the action was commenced (see *Bank of NY v Knowles*, supra at 597; cf. *U.S. Bank N.A. v Rozo-Castellanos*, 201 AD3d 995, 999 [2d Dept 2022]).

Plaintiff was required to proffer “sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304” (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). As to the contractual pre-foreclosure notice, paragraph 22 of the mortgage, a ubiquitous provision in residential mortgages, provides that as a prior 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”. Paragraph 8 of the note also states that required notices will be given by delivering it . . . at the Property Address above or at a different address if I give the Note Holder a notice of my different address”. That section also provides that “any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it . . . to the Note Holder at the address stated in Section 3(A)”.

The Court of Appeals has “has long recognized a party can establish that a notice or other document was sent through evidence of actual mailing or—as relevant here—by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature” (*Cit Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2020][internal citations omitted]). A satisfactory office practice giving rise to the presumption “must be geared so as to ensure the likelihood that [the] notice . . . is always properly addressed and mailed” (*Nassau Ins. Co. v Murray*, 46 NY2d 828, 830 [1978]) and can be demonstrated via an affiant who explains “among other things, how the notices and envelopes were generated, posted and sealed, as well as how the mail was transmitted to the postal service” (*Cit Bank N.A. v Schiffman*, supra). An affidavit from the person who performed the actual mailing is not necessary (see *Bossuk v Steinberg*, 58 NY2d 916, 919 [1983]). Proof from a person with “personal knowledge of the practices utilized by the [sender] at the time of the alleged mailing” is sufficient (*Preferred Mut. Ins. Co. v Donnelly*, 22 NY3d 1169, 1170 [2014]; see also *Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 21 [2d Dept 2019][internal quotation marks omitted]). Fulfillment of this requirement can raise a presumption that the required notice was sent and received by the projected addressee (*Cit Bank N.A. v Schiffman*, supra).

Regarding the mailing of these notices, in addition to the affidavit of Raab, Plaintiff offered the affidavit of Cynthia Wallace (“Wallace”), the Second Vice President for SPS. Although Raab and Wallace claimed personal familiarity with SPS’s mailing practices and procedures, neither described that procedure in any detail (*see Freedom Mtge Corp v Granger*, 188 AD3d 11631165 [2d Dept 2020]; *M & T Bank v Biordi*, 176 AD3d 11941196 [2d Dept 2019]; *cf. Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794 [2d Dept 2020]). Raab and Wallace did not claim to have personal knowledge of the mailing itself and did not annex any records reviewed to support their assertions that SPS complied with its standard practice (*cf. United States Bank Trust, N.A. v Mehl*, 195 AD3d 1054 [2d Dept 2021]). Further, documentary proof that the certified and first-class mailings actually occurred was absent (*see US Bank v Zientek*, 192 AD3d 1189, 1191 [2d Dept 2021]; *US Bank v Hammer*, 192 AD3d 846, 848-849 [2d Dept 2021]). Mere annexation of the notices with a bar code and 10-digit code number does not constitute proof the notice was mailed (*see U.S. Bank N.A. v Hammer*, 192 AD3d 846 [2d Dept 2021]; *U.S. Bank, N.A. v Zientek*, 192 AD3d 1189 [2d Dept 2021]).

Accordingly, Plaintiff failed to establish *prima facie* that it sent pre-foreclosure notices pursuant to RPAPL §1304 and paragraph 22 of the mortgage.

As to the branch of the motion to dismiss 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]). In this case, Plaintiff’s memorandum of law is entirely silent as to the viability of the fifteen affirmative defenses.

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 (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Concerning the cross-motion, “[e]ven in the face of a plaintiff’s failure to establish, *prima facie*, that a notice was properly mailed on a motion for summary judgment on the complaint, . . . a defendant still has to meet its burden, on a cross motion for summary judgment dismissing the complaint, of establishing that the condition precedent was not fulfilled” (*Citibank, N.A. v Conti-Scheurer*, supra at 24). Defendants failed to demonstrate, as a matter of law, that the notices were facially deficient (*see U.S. Bank N.A. v Cambardella*, 214 AD3d 925 [2d Dept 2023]), or that either was not properly sent (*see Wells Fargo Bank NA v Tricario*, 180 AD3d 848 [2d Dept 2020]).

Accordingly, it is

ORDERED that the branch of Plaintiff’s motion for summary judgment on its causes of action for foreclosure, striking the affirmative defenses and appointment of a referee are 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 Defendants' cross motion to dismiss pursuant to CPLR §3211 and RPAPL §1304 is denied, and it is

ORDERED that Sung Jin Min having been served as 'John Doe' and 'Mary Doe' is substituted for defendant 'John Doe' or 'Mary Doe' and the caption herein is amended; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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HSBC BANK USA, NATIONAL ASSOCIATION, AS
TRUSTEE FOR THE HOLDERS OF DEUTSCHE ALT-A
SECURITIES INC. MORTGAGE LOAN TRUST, MORTGAGE
PASS-THROUGH CERTIFICATES SERIES 2007-OA4,

Plaintiff,

Index No. 850245/2019

-against-

JI YOUN MIN; YOONI MIN; SUNG JIN MIN;
NEW YORK SUPREME COURT; NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE;
NEW YORK CITY PARKING VIOLATIONS BUREAU;
NEW YORK CITY TRANSIT ADJUDICATION BUREAU;
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD;
INTERNAL REVENUE SERVICE; THE BOARD OF MANAGERS
OF 200 CHAMBERS STREET CONDOMINIUM; NATIONAL
CITY BANK; SUNG JIN MIN;

Defendants.
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This matter is set down for a status conference on **July 19, 2023 @ 11:20 am** via Microsoft Teams.

5/19/2023
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

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