

HMC Assets, LLC v Tsimmer
2023 NY Slip Op 31846(U)
May 26, 2023
Supreme Court, New York County
Docket Number: Index No. 850209/2020
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. 850209/2020HMC ASSETS, LLC SOLELY IN ITS CAPACITY AS
SEPARATE TRUSTEE OF CAM XV TRUST,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

LEO TSIMMER, ANGELIKA LEE, BOARD OF MANAGERS
OF THE BLAIR HOUSE CONDOMINIUM, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, JOHN AND JANE
DOE

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

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 200 East 58th Street, Unit 16F, New York, New York. The mortgage, dated August 22, 2007, was given by Defendant Leo Tsimmer ("Tsimmer") to non-party Bank of America, NA and secures a loan with an original principal amount of \$420,000.00. The loan is memorialized by an adjustable rate note of the same date. By deed dated December 8, 2008, Tsimmer transferred title to the premises to Defendant Angelika Lee ("Lee") for no consideration.

Plaintiff commenced this action and alleged that "[t]he Mortgagor defaulted on the Mortgage on December 1, 2011, but Plaintiff only seeks to collect installments due and owing within the last 6 years. Therefore, for accounting purposes, the loan is due and owing for January 1, 2015." Defendant Tsimmer and Lee answered and pled nineteen [19] affirmative defenses, including lack of standing, failure to provide a contractual pre-foreclosure notice and failure to comply with RPAPL §§1303, 1304 and 1306. Defendants also pled a counterclaim for attorney's fees pursuant to RPL §282.

Now, Plaintiff moves for summary judgment against Defendants Tsimmer and Lee, 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. Defendants Tsimmer and Lee oppose the motion and cross-move 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 Defendants 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 §§1303, 1304 and 1306 (*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 Oxford Nordberg ("Nordberg"), an Assistant Secretary of Fay Servicing, Inc. ("Fay"), the "attorney-in-fact for the named Plaintiff's assignee HMC Assets, LLC solely in its capacity as separate trustee of CAM XI (hereinafter "CAM XI")". Nordberg's affidavit laid a proper foundation for the admission of the records of Fay 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 Nordberg sufficiently established that those records were received from the makers and incorporated into the records Fay kept and that it 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 Nordberg (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]) as well as a power of attorney, dated November 23, 2020, 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]).

Nordberg'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, Nordberg'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 an endorsement in blank on its face executed by the original lender. 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. Roza-Castellanos*, 201 AD3d 995, 999 [2d Dept 2022]).

Plaintiff was also 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 Nordberg, Plaintiff also submitted the affidavit of Cheryl Mallory, an Assistant Vice President of BSI Financial Services (“BSI”) which demonstrated strict compliance with the notice requirements under RPAPL §1304 (see *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667 [2d Dept 2019]). Mallory’s affidavit laid a proper foundation for the admission of BSI’s records into evidence under CPLR §4518 (see *Bank of N.Y.*

Mellon v Gordon, 171 AD3d 197 [2d Dept 2019]). Mallory also attested to personal knowledge of the practices and procedures of Covius Document Services, LLC f/k/a Walz Group, LLC (“Covrius”), the entity that performed the mailing. As such, an affidavit from an employee of Covrius was not required (see *Bank of N.Y. Mellon v Gordon*, supra). Mallory attested that Covrius generated the notices and performed the mailings. Mallory described Covrius’s standard office procedure, in detail, attached copies of the notices and USPS documents related to Defendant’s loan, including the utilization of a “TrackRight” system (see *Bank of Am., N.A. v Bloom*, 202 AD3d 736 [2d Dept 2022]; *HSBC Bank USA, N.A. v Butt*, 199 AD3d 662 [2d Dept 2021]). Likewise, the proffered affidavit and documentation proved compliance with RPAPL §1306 and service of the contractual pre-foreclosure notices (see eg *HSBC Bank NA v Bermudez*, 175 AD3d 667 [2d Dept 2019]). Plaintiff also demonstrated, with the affidavit of the process server, compliance with RPAPL §1303 (see *HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822 [2d Dept 2017]).

Accordingly, Plaintiff established *prima facie* that it sent both the statutory and contractual pre-foreclosure notices.

Defendants’ entire opposition and support for the cross-motion was based upon the decision and reasoning in *Bank of America, NA v Kessler*, 202 AD3d 10 [2d Dept 2021]. That argument is no longer viable as that decision was reversed some two weeks after Defendants submitted their opposition (see *Bank of Am., N.A. v Kessler*, 39 NY3d 317 [2023]). Defendants claim that the amount due and owing was misstated in the notice, that alleged defect never constituted a fatal defect (see *Emigrant Bank v Cohen*, 205 AD3d 103 [2d Dept 2022]).

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]).

As pled, all the affirmative defenses are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (see *Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569 [1st Dept 2019]; see also *Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; see also *Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]). Further, to the extent that specific legal arguments were not proffered in support of any affirmative defense, those 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]).

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]).

The branch of Plaintiff's motion for issuance of an order directing the New York County Clerk's Office to accept certain documents for recording is denied. Declaratory relief is only available via action, not motion, and the compliant does not seek such relief (*see* CPLR §3001; *Matter of Mount Olive Baptist Church of Manhasset*, 178 AD3d 1051 [2d Dept 2019]). In any event, recording in New York City is accomplished at the Office of the City Register of the City of New York.

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 Defendants' cross-motion for summary judgment is denied; and it is further

ORDERED that that **Paul Sklar, Esq., 551 5th Avenue, Ste 2200, New York, New York 10176-0001- (212) 972-8845** 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 the named Plaintiff, "HMC Assets, LLC, solely in its capacity as Separate Trustee of CAM XV TRUST" shall be substituted with "HMC Assets, LLC solely in its capacity as separate trustee of CAM XI Trust" and that the caption of this action shall be amended accordingly to reflect the proper alignment of the parties; and it is further

ORDERED that the caption of this action is amended by replacing those parties named herein as "JOHN DOE" and "JANE DOE" with "New York City Parking Violations Bureau," and "New York City Transit Adjudication Bureau", "Nikita Tsimmer," and "Maya Tsimmer," and all proceedings heretofore filed herein shall be deemed amended accordingly, 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
HMC ASSETS, LLC SOLELY IN ITS CAPACITY AS
SEPARATE TRUSTEE OF CAM XI TRUST,

Index No. 850209/2020

Plaintiff,

-against-

LEO TSIMMER a/k/a LEO E. TSIMMER; ANGELIKA LEE;
BOARD OF MANAGERS OF THE BLAIR HOUSE
CONDOMINIUM; NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD; NEW
YORK CITY PARKING VIOLATIONS BUREAU;
NEW YORK CITY TRANSIT ADJUDICATION
BUREAU; NIKITA TSIMMER; MAYA TSIMMER,

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/supctmanh)); and it is further

All parties are to appear for a virtual conference via Microsoft Teams on **October 4, 2023, at 10:20 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.

5/26/2023

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

☐

CASE DISPOSED

☒

GRANTED

☐

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☒

FIDUCIARY APPOINTMENT

☐

OTHER U.S.C.

☐

REFERENCE

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

HON. FRANCIS A. KAHN III