

**LPP Mtge. Ltd. v Simeon**

2023 NY Slip Op 32113(U)

June 23, 2023

Supreme Court, New York County

Docket Number: Index No. 850137/2020

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. 850137/2020

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LPP MORTGAGE LTD.,

MOTION DATE \_\_\_\_\_

Plaintiff,

MOTION SEQ. NO. 001

- v -

FLORENCE SIMEON, BOARD OF MANAGERS OF  
RIVERSIDE SOUTH PROPERTY OWNERS  
ASSOCIATION, INC., BOARD OF MANAGERS OF 200  
RIVERSIDE BOULEVARD AT TRUMP PLACE, JOVIA  
FINANCIAL CREDIT UNION F/K/A NASSAU EDUCATORS  
FEDERAL CREDIT UNION, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY  
PARKING VIOLATIONS BUREAU, NEW YORK CITY  
TRANSIT ADJUDICATION BUREAU, JOHN DOE

**DECISION + ORDER ON  
MOTION**

Defendant.  
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 65, 66, 67, 68, 69, 70

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 Riverside Boulevard, Unit 14A, New York, New York. The consolidated mortgage, dated June 11, 2003, was given by Defendant Florence Simeon ("Simeon") to non-party Morgan Stanley Dean Witter Credit Corporation and secures a loan with an original principal amount of \$821,972.61. The loan is memorialized by an adjustable-rate consolidated note of the same date. Also executed that date was a modification and extension agreement. These documents consolidated two prior sets of notes and mortgages on the same property dated September 14, 2000, and January 4, 2002.

Plaintiff commenced this action and alleged that Simeon defaulted in repayment of the indebtedness on or about February 1, 2019. A conference pursuant to CPLR §3408 was initially scheduled for August 10, 2021. Simeon appeared at one of the conferences by counsel, but she failed to appear at the final two conferences. Simeon also failed to file an answer in accordance with a Court set deadline (NYSCEF Doc No 34). Simeon filed a late answer on July 20, 2022, which Plaintiff rejected (CPLR §3408[m]). In that answer, Simeon 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.

Now, Plaintiff moves for summary judgment against Defendant Simeon, notwithstanding her default, striking the answer and affirmative defenses, a default judgment against all non-appearing parties, and to appoint a Referee to compute. Defendant Simeon opposes the 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 [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]). 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]). Since Defendant pled 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 [2<sup>nd</sup> 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 Juliana Thurab ("Thurab"), a Contract Management Coordinator of PHH Mortgage Corporation. ("PHH"), Plaintiff's servicer. Thurab's affidavit laid a proper foundation for the admission of the records of PHH 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 Thurab sufficiently established that those records were received from the makers and incorporated into the records PHH 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 Thurab (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1<sup>st</sup> Dept 2020]) as well as a power of attorney, dated November 1, 2022, demonstrating the authority of PHH to act on behalf of Plaintiff (*see Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 901 [2d Dept 2019]).

Thurab'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, Thurab'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).

In this case, Plaintiff annexed a copy of the note to the complaint to which an allonge was attached. That document contained an endorsement executed by the original lender to Plaintiff. Thurab averred in her affidavit that the allonge was firmly affixed to the note when the action was filed. The proffered evidence was sufficient to demonstrate Plaintiff’s standing (*see Nationstar Mtge, LLC v Calomarde*, 201 AD3d 940 [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 [mortgagor] under this Note will be given by delivering it or by mailing it . . . to [mortgagor] at the Property Address above”.

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).

The affidavit of Thurab demonstrated strict compliance with the notice requirements under RPAPL §1304 (see *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667 [2d Dept 2019]). Thurab's affidavit laid a proper foundation for the admission of PHH's records into evidence under CPLR §4518 (see *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Thurab also attested to personal knowledge of the mailing practices and procedures of PHH. Thurab attested that PHH generated the notices and performed the mailings. Thurab described PHH's standard office procedure, in detail, attached copies of the notices and USPS documents related to Defendant's loan (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.

In opposition, Simeon's claim that Plaintiff failed to demonstrate entitlement to summary judgment, its standing or compliance with statutory and contractual notice requirements is without merit. In any event, since Simeon defaulted in appearing, all those defenses were either waived or precluded (see *Wells Fargo Bank, N.A. v Campbell*, 196 AD3d 726, 727 [2d Dept 2021]; *One W. Bank, FSB v Rosenberg*, 189 AD3d 1600, 1602 [2d Dept 2020]; *Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1011 [2d Dept 2020]; *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, 830 [2d Dept 2016]).

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 [1<sup>st</sup> Dept 2019]; see also *Bosco Credit V Trust Series 2012-1 v Johnson*, 177 AD3d 561 [1<sup>st</sup> Dept 2020]; *170 W. Vil. Assoc. v. G & E Realty, Inc.*, 56 AD3d 372 [1<sup>st</sup> 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 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 **Matthew D. Hunter III, Esq., 108-18 Queens Blvd Forest Hills, NY 10016 (718) 309-1660** 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 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 19, 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](mailto: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.


6/23/2023  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  **HON. FRANCIS A. KAHN III**

APPLICATION:  GRANTED  OTHER **J.S.C.**

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

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