

U.S. Bank N.A. v Wei Feng Zhu
2023 NY Slip Op 32902(U)
August 16, 2023
Supreme Court, New York County
Docket Number: Index No. 850201/2022
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. 850201/2022

U.S. BANK NATIONAL ASSOCIATION, NOT IN ITS
INDIVIDUAL CAPACITY, BUT SOLELY AS OWNER
TRUSTEE OF THE NEW RESIDENTIAL MORTGAGE
LOAN TRUST 2021-NQM1R,

MOTION DATE

MOTION SEQ. NO. 001

Plaintiff,

- v -

WEI FENG ZHU, BOARD OF MANAGERS OF 385 FIRST
AVENUE CONDOMINIUM, JOHN DOE AND JANE DOE

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

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 385 1st Avenue, Apt 17D, New York, New York. The mortgage, dated May 18, 2018, was given by Defendant Wei Feng Zhu ("Zhu") to New Penn Financial, LLC and secures a loan with an original principal amount of \$1,500,000.00 which is memorialized by a note of the same date. Plaintiff commenced this action and alleged that Zhu defaulted in repayment of the indebtedness on or about February 1, 2019. Zhu answered and pled five [5] affirmative defenses, including lack of standing, failure to comply with RPAPL §§1304 and 1306 as well as lack of personal jurisdiction.

Now, Plaintiff moves for summary judgment against Defendant Zhu, 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 Zhu 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 [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 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 [2nd Dept 2020]) and its strict compliance

with RPAPL §§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 Beatrix Phalen ("Phalen"), a Document Verification Specialist of New Rez LLC, F/K/A New Penn Financial, LLC D/B/A Shellpoint Mortgage Servicing ("Shellpoint"), Plaintiff's alleged attorney-in-fact. Phalen's affidavit laid a proper foundation for the admission of the records of Shellpoint 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 Phalen sufficiently established that those records were received from their makers and incorporated into the records Shellpoint kept which and 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 Phalen (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]) as well as a limited power of attorney, dated April 1, 2021, demonstrating the authority of Shellpoint to act on behalf of Plaintiff (*see Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 901 [2d Dept 2019]).

Phalen'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, Phalen'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 to which an allonge was attached. That document contained an endorsement, in blank, executed by “NewRez LLC fka New Penn Financial, LLC”. That New Penn may have ceased to exist, indicated by the “fka” designation which commonly stands for “formerly known as”, does not negate Plaintiff’s standing or the authority to assign the note. Defunct and merged business entities are authorized to continue business in the name of the former entity (*see* LLCL §703[a]; *PNC Bank NA v Klein*, 125 AD3d 953 [2d Dept 2015]). Moreover, Phalen averred in her affidavit that the allonge was firmly affixed to the note when the action was filed. Contrary to Defendant’s assertions, the proffered evidence was sufficient to demonstrate Plaintiff was in possession of a properly endorsed in blank note when the action was commenced (*see PNC Bank, NA v Salcedo*, 161 AD3d 571 [1st Dept 2018]; *Bank of New York Mellon v Knowles*, 151 AD3d 596 [1st Dept 2017]).

Accordingly, Plaintiff demonstrated *prima facie* the note, mortgage and Defendant’s default in repayment thereunder.

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]). 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 Phalen demonstrated strict compliance with the notice requirements under RPAPL §1304 (*see HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667 [2d Dept 2019]). Phalen’s affidavit laid a proper foundation for the admission of Shellpoint’s records into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Phalen also attested to personal knowledge of the mailing practices and procedures of Shellpoint. Phalen attested that Shellpoint generated the notices and performed the mailings. Phalen described Shellpoint’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]). 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, Defendant's claim that Plaintiff failed to demonstrate entitlement to summary judgment, its standing or compliance with statutory requirements is without merit. By establishing it physically possessed a properly endorsed note, through annexation to the complaint, Defendant's claim that an issue of fact exists based upon a subsequent assignment of the mortgage is unavailing (*see US Bank NA v Askew*, 138 AD3d 402 [1st Dept 402]; *see also Bank of Am., N.A. v. Dudkevich*, 199 AD3d 628 [2d Dept 2021]).

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 Bellafigliore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The assertion the motion must be denied because no discovery has been conducted is unavailing as Defendant offered nothing to demonstrate Plaintiff is in exclusive possession of facts which would establish a viable defense to summary judgment (*see Island Fed. Credit Union v I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted (*see CPLR §3215; SRMOF II 2012-1 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]).

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

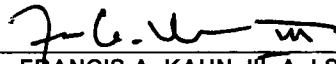
ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee’s report; and it is further

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/suptctmanh)); and it is further

All parties are to appear for a virtual conference via Microsoft Teams on **December 14, 2023, at 10:40 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.

<u>8/16/2023</u>					
DATE				FRANCIS A. KAHN, III, J.S.C.	
CHECK ONE:	☐	CASE DISPOSED	☒	NON FINAL DISPOSITION	
	☒	GRANTED	☐	GRANTED IN PART	
APPLICATION:	☐	SETTLE ORDER	☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☒	FIDUCIARY APPOINTMENT	
				☐ OTHER	
				☐ REFERENCE	