First Horizon Bank v Logan

2023 NY Slip Op 33810(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 850154/2022

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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FIRST HORIZON BANK,

Plaintiff,

- v -

WILLIS H LOGAN, KAY W LOGAN, JOHN DOE, JANE DOE

Defendant.

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INDEX NO. 850154/2022

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 46, 47, 48, 49, 50

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is determined as follows:

In this action, Plaintiff seeks to foreclose on a mortgage encumbering residential real property located at 3 West 123rd Street, New York, New York. Plaintiff commenced this action alleging *inter alia* that Defendants/Mortgagors Willis H. Logan and Kay W. Logan ("Logans") defaulted in repayment of the loan secured by the mortgage. Logans filed an answer and pled sixteen affirmative defenses, including lack of standing and failure to comply with RPAPL §1304, as well asserting three counterclaims. Now, Plaintiff moves for summary judgment against the appearing Defendants, to strike their answers and affirmative defenses, for an order of reference and to amend the caption. Logan Defendants oppose 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]). Based on the affirmative defenses pled, 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 by an "affidavit" from Victoria Wolff ("Wolff"), a Limited Vice President of Plaintiff. Wolff acknowledges that her affidavit was based entirely upon review of Plaintiff's records. At the outset, the entire affidavit is defective as Wolff's name is absent from the oath (*see* CPLR §2309[b]). Even were the Court to disregard that defect as an irregularity (CPLR §2004), the affidavit is substantively insufficient.

Wolff established a foundation under CPLR §4518 for admission of her employer's documents as business records via his personal knowledge of the record-keeping procedures of Plaintiff (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). However, the salient loan documents were created by Plaintiff's assignors and Wolff failed to demonstrate knowledge of any other entity's record keeping practices (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). Wolff also failed to attest that any records received from prior makers were incorporated into the records Plaintiff kept and were routinely relied on in its business (*see U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780, 782-783 [2d Dept 2019]; *cf. Bank of Am., N.A. v Brannon,* 156 AD3d 1, 10 [1st Dept 2017]).

As to Defendants' 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]). Since Wolff's knowledge of Defendants' default was admittedly based solely upon a review of documents, the records evidencing the default (ie. an account ledger or similar records) were required to be proffered in admissible form (*see US Bank v Rowe*, 194 AD3d 978 [2d Dept 2021]). Here, Wolff's affidavit does not establish the proffered records were created by Plaintiff. Indeed, the records themselves appear to have been created by several different non-parties.

Accordingly, since none of the evidence proffered to demonstrate the note, mortgage and Defendants' default is in admissible form, Movant failed to establish any of the *prima facie* elements of the cause of action for foreclosure (*see Federal Natl. Mtge. Assn. v* Allanah, 200 AD3d 947 [2d Dept 2021]).

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, the note was attached to the complaint, but the endorsement is contained in an allonge on a separate page which reveals no discernable evidence of firm attachment from a visual inspection (*cf. US Bank NA v Hunte*, 215 AD3d 887 [2d Dept 2023]). Resultantly, Plaintiff was required, but failed, to establish the allonge was "firmly affixed" to the original note (*see 938 St. Nicholas Ave. Lender LLC v. 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 218 AD3d 417 [1st Dept 2023]; *Nationstar Mtge., LLC v Calomarde*, 201 AD3d 940, 942 [2d Dept 2022]; *JPMorgan Chase Bank, N.A. v Grennan*, supra at 1516). Not every attachment can satisfy UCC §3-202[2] and Wolff offered no description of the nature of the attachment (*see HSBC Bank, USA, N.A. v Roumiantseva,* 130 AD3d 983 [2d Dept 2015]; *Slutsky v Blooming Grove Inn,* 147 AD2d 208 [2d Dept 1989]). To the extent one of the transfers involved a merger of financial entities, Banking Law §602, "provides that the receiving bank 'shall be considered the same business and corporate entity' as the bank merged into it, and that all of the property, rights, and powers of the merged bank shall vest in the receiving bank" (*Moxey v Payne*, 167 AD3d 594, 595-596 [2d Dept 2018] *quoting Ladino v Bank of Am.*, 52 AD3d 571, 572 [2d Dept 2008]; *see Barclay's Bank of N.Y. v Smitty's Ranch,* 122 AD2d 323, 324 [3d Dept 1986]). However, no documentary corroboration of the alleged merger was proffered.

Accordingly, Plaintiff failed to establish, *prima facie*, it had standing when this action was commenced.

Proof of compliance with RPAPL §1304 requires Plaintiff 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).

Regarding the mailing of these notices, Wolff failed to describe the procedure used by Plaintiff in sufficient 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]). Wolff did not claim to have personal knowledge of the mailing itself and did not annex any records reviewed to support their assertions that Walz complied with its standard practice (*cf. United States Bank Trust, N.A. v Mehl,* 195 AD3d 1054 [2d Dept 2021]). Further, Plaintiff failed to submit any receipt or corresponding document proving that the notices were actually sent by first-class and certified mail to the Defendants more than 90 days prior to the commencement of the action" (*see US Bank v Zientek*, 192 AD3d 1189, 1191 [2d Dept 2021]; *US Bank v Hammer*, 192 AD3d 846, 848-849 [2d Dept 2021]).

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

As to the branch of Plaintiff's 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]).

The affirmative defense of standing is, at present, viable based upon the determination supra.

The other affirmative defenses and counterclaims are entirely conclusory and unsupported by any facts in the answer or by the papers submitted in opposition. As such, these affirmative defenses are nothing more than an unsubstantiated legal conclusion which is 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, as no specific legal arguments were proffered in support of any affirmative defense or counterclaim, other than standing, those defenses and claims 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 without opposition (*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 without opposition (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment on its causes of action for foreclosure and appointment of a referee are denied, and it is

ORDERED that all the affirmative defenses in Defendants' answer, except the first as it relates to standing, and all the counterclaims are stricken, and it is

ORDERED that the Defendants captioned as "JOHN DOE" are hereby stricken from the caption, 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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FIRST HORIZON BANK,

Plaintiff,

-against-

WILLIA H. LOGAN and KAY W. LOGAN,

Defendants.

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and it is

ORDERED that this matter is set down for a status conference on **November 30, 2023 @ 11:00 am** via Microsoft Teams.

10/12/2023
DATE

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

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE