

First Republic Bank v Sawhney

2023 NY Slip Op 33813(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 850262/2019

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

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INDEX NO. 850262/2019

FIRST REPUBLIC BANK,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

H. GILL SAWHNEY, CITIBANK, NA, BOARD OF
MANAGERS OF 542 LAGUARDIA PLACE CONDOMINIUM,
NEW CITY PARKING VIOLATIONS BUREAU,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 95, 182

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

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

The within action is to foreclose on a mortgage encumbering a parcel of residential real property located 542 LaGuardia Place, Unit 6A, New York, New York. Plaintiff claims to be the holder of a series of six notes and mortgages, as well as five consolidation, extension, and modification agreements (“CEMAs”). The last note, mortgage and CEMA, all June 27, 2008, were given by Defendant H. Gill Sawhney (“Sawhney”) to Plaintiff and secures principal balance of \$1,256,000.00. Defendant Sawhney and Plaintiff also executed two forbearance agreements, dated August 24, 2012, and August 1, 2013.

Plaintiff commenced this action by filing a summons and verified complaint wherein it is alleged that Sawhney defaulted in repayment under the loan documents and forbearance agreements. Defendant Sawhney served a *pro se* answer. Plaintiff filed the within motion for summary judgment against the appearing Defendants, to strike their answers and affirmative defenses, for an order of reference and to amend the caption. Sawhney initially defaulted in opposing this motion. By order of this Court dated April 13, 2023, Sawhney’s default was vacated, this motion was restored to the calendar and a briefing schedule was set.

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]). In support of the motion, 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 Linda K. Rohde ("Rohde"), a Manager Special Assets at Plaintiff. Rohde claims her affidavit was made based upon "my review of First Republic's business records and from my own personal knowledge of how they are kept and maintained" (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019])["a witness may always testify as to matters which are within his or her personal knowledge through personal observation"]. Rohde's affidavit laid a proper foundation for the admission of Plaintiff's the records 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 Rohde sufficiently established that those records were received from the makers and incorporated into the records Plaintiff kept and that it routinely relied upon such documents in its business (*see eg Ciras, Inc. v Katz*, 202 AD3d 590 [1st Dept 2022]; *U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, annexed to the motion were the records referenced by Rohde (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Rohde'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, Rohde'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]). The indebtedness and default were also established based on the terms of the CEMAs and the forbearance agreements (*see Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602 [2d Dept 2013]; *EMC Mortg. Corp. v Stewart*, 2 AD3d 772 [2d Dept 2003]).

Although not raised as affirmative defenses in the answer, Plaintiff demonstrated its standing as well as its compliance with RPAPL §§1303, 1304 and 1306. As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). As to the latter two circumstances, 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]).

Here, since Plaintiff was the lender under the fifth and final CEMA, it was in direct privity with the Defendant Sawhney when the action was commenced and, therefore, unquestionably had standing (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]). Defendant's argument that Plaintiff lacks standing because the note was transferred to another entity after the action was commenced is inapposite. Standing is assessed when an action is commenced (*see Aurora Loan Servs., LLC v Taylor*, supra). After commencement, pursuant to CPLR §1018 either the transferee or transferor is authorized to continue prosecution of the action (*see CPLR §1018; Wells*

Fargo Bank, NA v McKenzie, 183 AD3d 574 [2d Dept 2020]; *B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401 [1st Dept 2017]).

Plaintiff also proffered “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).

Rohde demonstrated Plaintiff's strict compliance with the notice requirements under RPAPL §1304. Annexed to her affidavit was an affidavit of service in which she attested to personally performing the required mailing and attached copies of the notices and USPS documents related to Defendant's loan (*see HSBC Bank USA, N.A. v Bermudez*, supra). With the affidavit of the process server, compliance with RPAPL §1303 as well as §1306 was satisfied (*US Bank v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *see also HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822 [2d Dept 2017]).

In opposition, Defendants' claim that Plaintiff failed to demonstrate entitlement to summary judgment is without merit. All Defendants' other claims are defective as the opposition is supported solely by an affirmation from counsel who did not demonstrate personal knowledge of the facts underlying those defenses (*see eg Prince v Accardo*, 54 AD3d 837, 838 [2d Dept 2008]). Even if the affiants had personal knowledge, the request to amend the answer fails as no proposed pleading was annexed to the opposition (*see Mendoza v Enchante Accessories, Inc.*, 185 AD3d 675, 679 [2d Dept 2020]). Defendants' assertion the motion must be denied because no discovery has been conducted is unavailing as they have offered nothing more than speculation to support that Plaintiff is in exclusive possession of facts to support its unpled defenses (*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-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]).

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 **Elaine Shay, Esq., 800 3rd Avenue, Ste. 2800, New York, New York 10022 (212) 520-2690** 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 **February 8, 2023, at 10:00 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.

10/12/2023
DATE

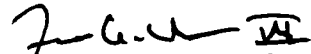
CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

HON. FRANCIS A. KAHN III
 GRANTED IN PART OTHER
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE



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

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