

HSBC Bank USA, N.A. v Ji Youn Min

2024 NY Slip Op 32151(U)

June 21, 2024

Supreme Court, New York County

Docket Number: Index No. 850245/2019

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
Justice

PART 32

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HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF DEUTSCHE ALT-A SECURITIES INC. MORTGAGE LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-OA4,

INDEX NO. 850245/2019
MOTION DATE _____
MOTION SEQ. NO. 003

Plaintiff,

- v -

JI YOUN MIN, YOOMI MIN, SUNG JIN MIN, NEW YORK SUPREME COURT, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, INTERNAL REVENUE SERVICE, THE BOARD OF MANAGERS OF 200 CHAMBERS STREET CONDOMINIUM, NATIONAL CITY BANK, AND JOHN DOE AND MARY DOE, (SAID NAMES BEING FICTITIOUS, IT BEING THE INTENTION OF PLAINTIFF TO DESIGNATE ANY AND ALL OCCUPANTS, TENANTS, PERSONS OR CORPORATIONS, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE PREMISES BEING FORECLOSED HEREIN)

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126

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 at 200 Chambers Street, Unit 7K, New York, New York. The mortgage, given by Defendant Ji Youn Min ("Min"), secures a loan with an original principal amount of \$688,000.00 which is memorialized by a note dated April 10, 2007. Plaintiff commenced this action alleging Defendant Min defaulted in making installment payments under the note. Min answered and pled fifteen affirmative defenses, including lack of standing, failure to provide a pre-foreclosure notice pursuant to the mortgage and failure to comply with RPAPL §1304.

By order of this Court dated May 19, 2023, Plaintiff's motion for summary judgment was denied on the basis that *prima facie* proof of compliance with RPAPL §1304 and paragraph 22 of the mortgage

was not established. Now, Plaintiff again moves for summary judgment against the Defendant Min, for an order of reference and to amend the caption. Defendant Min opposes the motion.

In denying the prior motion the Court determined on the above issues as follows:

Regarding the mailing of these notices, in addition to the affidavit of Raab, Plaintiff offered the affidavit of Cynthia Wallace (“Wallace”), the Second Vice President for [Specialized Loan Service]. Although Raab and Wallace claimed personal familiarity with [SLS]’s mailing practices and procedures, neither described that procedure in any detail (*see Freedom Mtge Corp v Granger*, 188 AD3d 1163-1165 [2d Dept 2020]; *M & T Bank v Biordi*, 176 AD3d 1194-1196 [2d Dept 2019]; *cf. Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794 [2d Dept 2020]). Raab and Wallace did not claim to have personal knowledge of the mailing itself and did not annex any records reviewed to support their assertions that SPS complied with its standard practice (*cf. United States Bank Trust, N.A. v Mehl*, 195 AD3d 1054 [2d Dept 2021]). Further, documentary proof that the certified and first-class mailings actually occurred was absent (*see US Bank v Zientek*, 192 AD3d 1189, 1191 [2d Dept 2021]; *US Bank v Hammer*, 192 AD3d 846, 848-849 [2d Dept 2021]). Mere annexation of the notices with a bar code and 10-digit code number does not constitute proof the notice was mailed (*see U.S. Bank N.A. v Hammer*, 192 AD3d 846 [2d Dept 2021]; *U.S. Bank, N.A. v Zientek*, 192 AD3d 1189 [2d Dept 2021]).

In support of the present motion, the mailing of the statutory and contractual notices was attested to by Wallace in an affidavit dated February 15, 2024. Unlike her prior affidavit, Wallace described SLS’s process of mailing default notices in adequate detail (*see United States Bank Trust, N.A. v Mehl*, 195 AD3d 1054 [2d Dept 2021]; *Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794 [2d Dept 2020]). The records evidencing the mailing of the contractual pre-foreclosure notice as well as the required notices under RPAPL §1304 were proffered. In opposition, Defendant Min’s arguments concerning the sufficiency of the service of the statutory and contractual pre-foreclosure notices are unavailing. The mere denial of receipt of these notices also fails to raise an issue of fact (*see United Nations Fed Credit Union v Diarra*, 194 AD3d 506 [1st Dept 2021]). To the extent Defendant is arguing the within motion is an inappropriate successive motion for summary judgment is unavailing. Multiple disputed issues are not presented here (*cf. Wells Fargo Bank v Gittens*, 217 AD3d 901, 903 [2d Dept 2023]) and entertaining a second summary judgment motion furthers the ends of justice by allowing the Court to eliminate the need for a trial on issues that are not contested, to wit the existence of the note, mortgage and Defendant’s default (*see MTGLQ Invs, LP v Collado*, 183 AD3d 414 [1st Dept 2020]; *Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1st Dept 2017])[Uncontradicted facts on a motion for summary judgment are “deemed to be admitted”]).

As to the branch of Plaintiff’s motion to dismiss all 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]).

All the affirmative defenses 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, to the extent that no specific legal argument was proffered in support of a particular affirmative defense, such 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]).

Accordingly, based on the foregoing, as well as the findings in the Court's May 19, 2023 decision, it is

ORDERED that the branch of Plaintiff's motion for summary judgment against the appearing Defendant is granted and Defendant's affirmative defenses are stricken; and it is further

ORDERED that **Matthew D. Hunter III, Esq., 71-01 Austin Street, Forest Hills, NY 11575 (718) 309-1660** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the property identified in the notice of pendency 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, 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 that failure to submit objections to the referee may 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 45 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

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **October 31, 2024, at 10:40 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk (SFC-Part32-Clerk@nycourts.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.

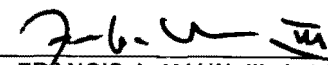
Mortgage Servicer: Specialized Loan Servicing, LLC - Phone #: 800- 306-6062

6/21/2024
DATE

CHECK ONE: CASE DISPOSED GRANTED DENIED

APPLICATION: SETTLE ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE


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