

Flagstar Bank, FSB v Hart

2024 NY Slip Op 33566(U)

February 1, 2024

Sup Ct, Suffolk County

Docket Number: Index No. 206919/2022

Judge: Robert F. Quinlan

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 206919/2022

**SUPREME COURT - STATE OF NEW YORK
IAS PART 27 - SUFFOLK COUNTY**

MOTION DATE: 12/1/23

ADJ. DATE: 1/9/24

Mot. Seq. #01/MG 02/MD

**PRESENT: Hon. ROBERT F. QUINLAN
Supreme Court Justice**

FLAGSTAR BANK, FSB,

Plaintiff,

**ROACH & LIN, P.C.
Attorneys for Plaintiff
6851 JERICHO TPKE STE 185
SYOSSET, NY 11791-4460**

-against-

**TIMOTHY K. HART AKA TIMOTHY HART, MARIE
C. HART AKA MERIE HART, B&B CAPITAL, LLC,
CHEMICAL BANK, NORTH SHORE MEDICAL
GROUP, UNITED STATES OF AMERICA INTERNAL
REVENUE SERVICE, John Doe #1 through John Does
#1, the last twelve names being fictitious and unknown to
Plaintiff, intended to be the persons or parties intended
being the tenants or occupants, persons or corporations, if
any, having claiming an interest or lien upon the premises
described in the Complaint,**

**Law Office of Charles Wallshein, Esq. PLLC
Counsel for Defendants Yurukov
35 Pinelawn Road, Suite 106E
Melville, New York 11747**

Defendants.

X

Upon the papers submitted (notice of motion with supporting papers, notice of cross motion and opposition to the cross motion) it is

ORDERED that the motion seeking leave to enter a default judgment and summary judgment is granted, and it is further

ORDERED that the cross motion to dismiss is denied, and it is further

ORDERED that an order of reference is signed this date.

On May 5, 2006 the defendants, Timothy K. Hart and Marie C. Hart , executed a note in the amount of \$325,000.00 to the plaintiff. To secure repayment, the defendants executed a mortgage on property located at 24 Cornflower Lane East Northport, New York. The defendants failed to make the payment due on May 1, 2010, and every payment due thereafter. The plaintiff commenced a foreclosure action on February 14, 2011. The action was dismissed by order dated July 11, 2022 (Rouse, J.), which stated it was “without prejudice to recommence the action as may be permitted by CPLR § 205.” The plaintiff commenced this action on November 18, 2022. The defendants answered with nine affirmative defenses. The plaintiff has moved for summary judgment and the defendants have cross moved to dismiss. The defendants claims that the statute of limitations bars the action.

The basis of the defendants defense under the statute of limitation is that the plaintiff is not entitled to the saving period under CPLR 205 or 205-a as it was not the same entity. Specifically, although the plaintiff provided the loan, it had sold the loan to Fannie Mae, and was the loan servicer and plaintiff in the 2011 action. The loan was returned to the plaintiff in 2013. The amended CPLR 205-a prohibits the saving provision in foreclosures to “ a successor in interest or an assignee of the original plaintiff.” However, as of 2013, the plaintiff was the holder of the note and mortgage.¹ As this was not changed in the commencement of this action, the plaintiff is provided the 6 month saving period.

The defendant also argues that the prior action was pending as the notice of appeal was ordered terminated and withdrawn on January 30, 2023, and therefore, this action was improperly commenced. RPAPL §1301(3) holds that “While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, including an action to foreclose the mortgage, without leave of the court in which the former action was brought.” Initially, the order of Acting Justice Rouse provided leave to commence this action. Moreover, *Concepcion v. Lessel Transportation Corp.*[213 A.D.3d 449 (1st Dept 2023)], cited by the defendants allows the commencement of the second action while the appeal of a first action is still unresolved. Although the Court of Appeals has noted, in interpreting CPLR 205, that the saving period does not commence until appeals are exhausted, such does not establish that the action is pending under RPAPL §1301 (*Malay v. City of Syracuse*, 25 N.Y.3d 323 [2016]). This fact does not prohibit the plaintiff from commenced the new action while the discretionary appeal is pending (*Favourite Ltd. v. Cico*, 208 A.D.3d 99, 112 [1st Dept. 2022]).² Consequently, the motion is timely and the cross motion is denied.

The plaintiff has established proof of standing in this action by annexing to the complaint upon commencement a copy of the note, showing plaintiff's possession at the time the action was commenced (see *HSBC Bank USA v Olivier*, 179 AD3d 648 [2nd Dept. 2020]). The affidavit of Vanessa Ellison, a Sr. Loan Adm Analyst, of plaintiff lays the foundation for the business records, which are attached to the affidavit. This establishes the plaintiff's prima facie case. Furthermore, where a defendant does not address an affirmative defense in his or her opposition papers, the failure to do so constitutes an abandonment or waiver of such defense or defenses (see *Kuehne & Nagel Inc. v Baiden*, 36 NY2d 539 [1975]; *U.S. Bank, N.A. v Gonzalez*, 172 AD3d 1273 [2nd Dept. 2019]; *JPMorgan Chase Bank, N.A. v Cao*, 160 AD3d 821 [2nd Dept. 2018]). Consequently, as the defendants have not raised any issue of facts, the plaintiff is entitled to summary judgment, as it established prima facie the mortgage, note and default, against the answering defendant (*Deutsche Bank Natl. Trust Co. v. Abdan*, 131 A.D.3d

¹. The complaint in the 2011 action provides the status of the plaintiff in the alternative is holder and agent. In any case, pursuant to CPLR 1018, the plaintiff would be the holder of the note and not servicer at the time the action was terminated.

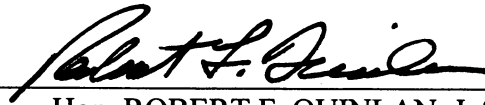
². Furthermore, on a motion to dismiss pursuant to CPLR 3211(a)(4), a stay pending the determination is the usual determination.

1001 [2nd Dept. 2015]).

The plaintiff has established a basis to grant default judgments against the non-answering defendants (CPLR 3215).

The foregoing constitutes the decision and order of the Court.

Dated: February 1, 2024



Hon. ROBERT F. QUINLAN, J..S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION