Wilmington Sav. Fund Socy., FSB v Green
2024 NY Slip Op 34574(U)
December 23, 2024
Supreme Court, Kings County
Docket Number: Index No. 501679/2019
Judge: Cenceria P. Edwards
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At an IAS Term, Part FRP1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of December, 2024.

P R E S E N T:
HON. CENCERIA P. EDWARDS, C.P.A.,
Justice.

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WILMINGTON SAVINGS FUND SOCIETY, FSB, AS TRUSTEE OF STANWICH MORTGAGE LOAN TRUST A,

Plaintiff(s),

-against-

FEIGE GREEN, et al.,

Defendant(s).

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ORDER

Motion Calendar: 7/21/2022
Motion Cal. #(s): 70

Index #: 501679/2019
Mot. Seq. #(s): 2

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion, Affidavits (Affirmations), and Exhibits	50-67
Opposing Affidavits (Affirmations) and Exhibits	70-71
Reply Affidavits (Affirmations) and Exhibits	72

On January 24, 2019, plaintiff WILMINGTON SAVINGS FUND SOCIETY, FSB, AS TRUSTEE OF STANWICH MORTGAGE LOAN TRUST A ("Plaintiff") commenced this action to foreclose on a mortgage encumbering residential real property located at 1256 48th Street in Brooklyn, NY, owned by defendant-mortgagor FEIGE GREEN ("Defendant"). Plaintiff now moves, pursuant to CPLR 3212 and 3215, and RPAPL 1321, for, *inter alia*: summary judgment on the complaint as against Defendant, to strike her amended Answer, and dismiss her defenses; for default judgment against the other defendants who failed to timely appear or answer the complaint; for an Order of Reference ("ORef"); and to amend the caption. Defendant opposes the motion.

It is alleged in the Complaint that "[o]n or about August 14, 2006, [Defendant] borrowed the sum of $390,000.00 from Bank of America, N.A. [Plaintiff's predecessor-in-interest], and executed and delivered a certain Note dated August 14, 2006" (NYSCEF Doc. #1 [Complaint], ¶1). Plaintiff further alleges that this debt was secured by the subject mortgage, and Defendant

breached her obligations to make the monthly installment payments beginning with the payment due on February 23, 2011, and all subsequent payments (*see id.*, ¶¶ 3-5 and 8; NYSCEF Doc. #52 [Affidavit in Support of Motion for Summary Judgment], p.3). Defendant's amended Answer asserts several defenses, including: lack of standing; that a prior action seeking the same relief was still pending; statute of limitations; and failure to comply with notice requirements under the mortgage loan agreements and pursuant to RPAPL § 1304 (*see* NYSCEF Doc. #38).

Summary Judgment Standard

Summary judgment is a drastic remedy to be granted only if the movant demonstrates, through submission of evidence in admissible form, the absence of any material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and affirmatively establishes the merit of his or her cause of action or defense (*see Zuckerman v New York*, 49 NY2d 557, 562 [1980]). A failure to make this *prima facie* showing of entitlement to judgment as a matter of law "requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once said showing is made, the burden shifts to the non-movant "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*). Courts must view the evidence in the light most favorable to the non-movant (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and draw all reasonable inferences in his or her favor (*see Haymon v Pettit*, 9 NY3d 324, 327, n* [2007]). The *prima facie* burden of a plaintiff moving for summary judgment on the complaint and to dismiss a defendant's defenses, includes demonstrating that the defenses lack merit as a matter of law (*see Prompt Mtge. Providers of N. Am., LLC v Singh*, 132 AD3d 833, 834 [2d Dept 2015]; *Jessabell Realty Corp. v Gonzales*, 117 AD3d 908, 909 [2d Dept 2014]; *Fairmont Capital, LLC v Laniado*, 116 AD3d 998, 998-999 [2d Dept 2014]; *Mendel Group, Inc. v Prince*, 114 AD3d 732, 733 [2d Dept 2014]).

Standing

Since the amended Answer includes the defense, this Court must address the threshold issue of Plaintiff's standing to bring this action. "Where [] the issue of standing is raised by a

defendant, a plaintiff must prove its standing in order to be entitled to relief" (*Bank of New York v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]).

> "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder of, or the assignee of, the underlying note. 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" (*M&T v Barter*, 186 A.D.3d 698, 700 [2d Dept 2020] [internal quotation marks and citations omitted]).

"A 'holder' is 'the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession'" (*Bayview Loan Servicing, LLC v Kelly*, 166 AD3d 843, 845-46 [2d Dept 2018], quoting UCC §1-201 [b] [21] [A]). "Where an instrument is endorsed in blank, it may be negotiated by delivery" (*id.*, citing UCC §§ 3-202 [1] and 3-204 [2]). "To establish standing as the holder of a note endorsed in blank, a plaintiff must demonstrate that it was in physical possession of the note prior to the commencement of the action (*Cent. Mtge. Co. v Resheff*, 200 AD3d 640, 644 [2d Dept 2021]). "The attachment of an endorsed note to the complaint in a foreclosure action is sufficient to demonstrate, prima facie, that the plaintiff was the holder of the note when the action was commenced" (*Deutsche Bank Natl. Trust Co. v Murray*, 176 AD3d 1172, 1174 [2d Dept 2019]).

In the affirmation submitted in support of this motion, Plaintiff's attorney states, "Plaintiff was the owner and holder of the Note, properly endorsed, and Mortgage at the time of commencement of this foreclosure action and is currently the holder of said Note and Mortgage" (NYSCEF Doc. #51, ¶4), and "Plaintiff was the owner and holder of the Note, by virtue of the physical delivery of same prior to the commencement of the foreclosure action, and thus, had legal standing to commence the within foreclosure action" (*id.*, ¶5). Counsel further asserts that "the duly endorsed the [*sic*] Note" was attached to the Complaint and an affidavit from its servicer "contains such a statement" alleging that the note was in Plaintiff's possession prior to the commencement of this action (*see id.*, citing Exhibit "F" to the Motion). Exhibit "F" is a 123-page document containing a 10-page affidavit (including a 2-page jurat) by Elizabeth A. Ostermann, a representative of Carrington Mortgage Services, LLC ("Carrington"), executed on September 1, 2020 (*see* NYSCEF Doc. #58 [Exhibit "F"]). Ostermann avers in paragraphs "1" and "3," that Carrington was the "prior servicer and attorney-in-fact for [Plaintiff]" and Carrington's records show that on the January 24, 2019 date on which this action was

commenced, Plaintiff "was in possession of the original Credit Line Agreement ('Note') endorsed in blank – a copy of which was annexed to the filed Complaint and which is annexed hereto" (*see* NYSCEF Doc. #58 [Exhibit "F"], pp. 1-2).

At the outset, it is noted that while Ostermann states that Carrington is Plaintiff's prior servicer, she fails to disclose when Carrington serviced the subject loan and so it remains unclear whether that period encompassed this action's commencement on January 24, 2019. This raises questions as to the probative value of Ostermann's testimony regarding Plaintiff's possession of the purported note on that date. Further, as Defendant notes, Plaintiff's moving papers-in-chief lack any documentation of Carrington's authority to service the subject loan.

More importantly, Plaintiff's arguments make clear that it asserts standing on the ground that it was a valid holder of "the note," endorsed in blank, when it commenced this action (*see* NYSCEF Doc. #51, ¶5). However, the rule that possession of a note automatically confers standing is based on the principle that "[a] promissory note is a negotiable instrument within the meaning of the Uniform Commercial Code" (*HSBC Bank USA, N.A. v Herod*, 203 AD3d 805, 807 [2d Dept 2022], *citing, inter alia*, UCC § 3-104 [2][d]; *see also Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 684-685 [2d Dept 2016]). Hence, in order to avail itself of this principle, Plaintiff must be in possession of an actual note.

Exhibit "A" to the Summons and Complaint and Exhibit "B" to this motion contain copies of the purported "note" (*see* NYSCEF Doc. #s 2 and 54). The document, dated August 14, 2006, is titled "Bank of America Equity Maximizer Agreement and Disclosure Statement," and indicates that the "Borrower," *i.e.*, Defendant, was given a credit limit of $390,000.00. In its introductory section, the document refers to itself as an "Agreement" that "governs your line of credit (the 'Credit Line' or the 'Credit Line Account') issued through Bank of America, N.A." The second paragraph memorializes the Borrower's "promise to pay Bank of America, N.A., or order, the total of all credit advances and FINANCE CHARGES, together with all costs and expenses for which you are responsible under this Agreement or under the 'Mortgage' which secures your Credit Line" (*id.* [capitalization in original]). This Court also cannot overlook that, in contrast to the representations of Plaintiff's attorneys in the Complaint and in the Affirmation in Support of the Motion, Ms. Ostermann, the affiant from Plaintiff's servicer, Carrington, also calls the purported "note" a "Credit Line Agreement." Hence, Plaintiff's own evidentiary submissions show that what it calls "the note" is really a line of credit agreement.

The Appellate Division, Second Department, in *OneWest Bank, N.A. v FMCDH Realty, Inc.* (165 AD3d 128 [2d Dept 2018]), recently addressed "whether a bank can establish its standing to foreclose on a reverse mortgage securing the repayment of a home equity line of credit by demonstrating that it was in possession of the original line of credit agreement, indorsed in blank, at the time this action was commenced" (*see id. at* 129-130]).[1] Since that plaintiff specifically, "s[ought] to establish its standing on the basis that it is a valid holder in due course of the Cash Account Agreement," the Court required additional briefing on "the threshold question of whether the Cash Account Agreement falls within the definition of a negotiable instrument as contemplated by section 3-104 of the Uniform Commercial Code" (*see id.* at 132). Although that agreement was signed by the borrower and contained an unconditional promise to pay, the Court held that it did not qualify as a negotiable instrument because, *inter alia*, it did not require payment of a sum certain as required by UCC § 3-104 (1)(b), but instead created an open-end line of credit upon which the borrower could draw up to a larger limit, and it also contained additional provisions "that go well beyond what is permitted under the UCC" (*see id.* at 133-134). The Second Department, thus, held that "the plaintiff cannot establish its standing merely by showing that it possessed the original Cash Account Agreement, indorsed in blank, on the date this action was commenced" (*id.* at 135).

Although *FMCDH Realty, Inc.* involved a "reverse mortgage," the undersigned sees little meaningful difference between the line of credit agreement described therein, and the line of credit agreement at issue in the instant matter, at least for the purpose of determining whether the latter qualifies as a negotiable instrument under the UCC. Since the subject agreement is not a negotiable instrument, Plaintiff is not a valid "holder in due course." Accordingly, this Court must find that Plaintiff has failed to establish its standing merely by showing that it possessed the original agreement, indorsed in blank, on the date this action was commenced (*see id.*).

Foreclosure Cause of Action

Plaintiff's failure to provide a proper note also means it has failed to establish a *prima facie* case. "Generally, in moving for summary judgment in an action to foreclose a mortgage, a

[1] The decision calls the line of credit agreement "the Cash Account Agreement" (*see FMCDH Realty, Inc.*,165 AD3d at 130).

plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" (*Bank of Am., N.A. v Sebrow*, 180 AD3d 982, 984 [2d Dept 2020]). In an action to foreclose on a "credit line mortgage," the Second Department affirmed denial of summary judgment where, "in support of its motion, the plaintiff did not submit any note, or any other admissible evidence showing that [the mortgagor] owed an obligation that could be foreclosed upon" (*Urban Equity Partners, LLC v Aribisala*, 143 AD3d 887, 888 [2d Dept 2016]). The Court held that the plaintiff failed to meet its *prima facie* burden because "[t]he line of credit agreement submitted by the plaintiff merely indicated that [the mortgagor] had a line of credit that he could use to obtain cash advances from [the lender]," but "[t]he plaintiff presented no evidence that [the mortgagor] actually received any such cash advances" (*see id.*).

Plaintiff cannot make a *prima facie* case based solely on the line of credit agreement because, unlike a promissory note containing an unequivocal promise to pay a sum certain, the subject agreement merely shows that Defendant had a line of credit from which she could obtain cash advances and, thus, does not constitute proof of an obligation that can be foreclosed upon. Rather, Plaintiff must also submit evidence that Defendant actually received cash advances from Bank of America under the agreement (*see id.*).

Plaintiff's attorney's supporting affirmation is completely silent on the topic of cash advances, perhaps because since the inception of this action, Plaintiff has incorrectly referred to the subject line of credit agreement as a note, for which such proof would be superfluous. Instead, counsel merely states that "Defendant defaulted under the terms of the Note [*sic*] as demonstrated by Exhibit 'E,' …" (*see* NYSCEF Doc. #51, ¶6]). "A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" (*Autovest v Cassamajor*, 195 AD3d 672, 673 [2d Dept 2021]). Exhibit "E" to the motion is comprised of what appear to be a three-page printout of an account transaction history from Bank of America, and a three-page printout of a payment history from Carrington (*see* NYSCEF Doc. #57). Plaintiff's attorney does not claim to have personal knowledge of how either entity creates and maintains its records, nor does he discuss the content of the records in any way. Accordingly, he does not even attempt to establish that Defendant received any cash advances under the line of credit agreement.

Plaintiff also submits an affidavit from Ron McMahon, CEO of AMIP Management, LLC ("AMIP"), who avers that AMIP is the current servicer and attorney-in-fact for the

proposed substituted plaintiff, WILMINGTON SAVINGS FUND SOCIETY, FSB, AS OWNER TRUSTEE OF THE RESIDENTIAL CREDIT OPPORTUNITIES TRUST V-C (*see* NYSCEF Doc. #52). McMahon, citing Exhibit "E" as proof, avers that Defendant defaulted on February 23, 2011, having last made the monthly payment due January 23, 2011 (*see id*., ¶4c). Putting aside that the affidavit was executed nearly a decade later, on July 13, 2020, McMahon does not discuss the content of Exhibit "E" and, particularly, does not attest that any cash advances were made at any time.

For the foregoing reasons, the Court finds that Plaintiff failed to establish, *prima facie*, its entitlement to judgment as a matter of law. Hence, summary judgment must be denied regardless of the sufficiency of the opposition (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Defendant's Defenses

Plaintiff also seeks dismissal of Defendant's defenses. As the proponent of summary judgment, Plaintiff's *prima facie* burden includes demonstrating that the defenses lack merit as a matter of law (*see e.g., Prompt Mtge. Providers of N. Am., LLC v Singh*, 132 AD3d at 834; *Jessabell Realty Corp. v Gonzales*, 117 AD3d at 909). Since Plaintiff did not meet its initial burden to establish a *prima facie* case, the Court need not move on to Plaintiff's arguments regarding the defenses. In any event, Plaintiff's attorney's affirmation contains no legal argument specifically demonstrating the lack of merit to several defenses raised in the amended Answer, such as: the statute of limitations; that a prior action for the same relief was still pending; and failure to comply with notice requirements under the mortgage loan agreements. Contrary to Plaintiff's insistence, even if it had made a *prima facie* showing on its foreclosure cause of action, that would not, standing alone, shift the burden to Defendant to raise triable issues of fact as to her defenses, since Plaintiff's *prima facie* burden requires that it affirmatively show that they lack merit (*see id*.).

Plaintiff also argues that dismissal is warranted because the defenses lack detail, having only been stated briefly in the amended Answer.[2] It is well settled, however, that "a party cannot succeed on a motion for summary judgment by simply pointing out gaps in the opposing party's case" (*Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 24 [2d Dept 2019]; *see also Harvey v*

[2] It is noted that Plaintiff does not contend that it moved for a Bill of Particulars or utilized any other disclosure device to obtain from Defendant the facts supporting her defenses.

Henry 85 LLC, 176 AD3d 443, 444 [1st Dept 2019] [summary judgment denied where the "defendant only pointed to the gaps in plaintiff's proof instead of carrying its own burden on the motion"]; *Strough v Inc. Vil. of W. Hampton Dunes*, 167 AD3d 800, 805 [2d Dept 2018] [holding that plaintiffs who sought summary judgment dismissing a counterclaim "cannot succeed on their cross motion merely by pointing to gaps in the defendants' case"]). Hence, in the absence of Plaintiff's having first made an affirmative showing that Defendant's defenses lack merit, this argument is also unavailing.

However, the Court agrees with Plaintiff that the record shows that Defendant did not move for relief on the ground of personal jurisdiction within 60 days of serving her Answer or amended Answer, and thus, the defense has been waived (*see* CPLR 3211 [e]). As Defendant does not argue this issue in her opposition, this branch of the motion shall be granted.

Since Plaintiff has failed to make a *prima facie* showing of its standing to commence this action, the Court declines to amend the caption to permit substitution of Plaintiff's proposed successor and other parties.

Accordingly, the above-referenced motion is **GRANTED solely to the extent** that it is:

ORDERED that defendant FEIGE GREEN's defense of personal jurisdiction is dismissed, and the motion is otherwise **DENIED**.

The foregoing constitutes the Decision and Order of this Court.

E N T E R,

Dated: December 23, 2024

Hon. Cenceria P. Edwards, JSC, CPA