

Bank of Am., N.A. v Royer

2025 NY Slip Op 30471(U)

January 16, 2025

Supreme Court, New York County

Docket Number: Index No. 113514/2009

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

INDEX NO. 113514/2009

BANK OF AMERICA, N.A.,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

LUIS A. ROYER, FARAH F. ROYER, RITA ROYER,
BOARD OF MANAGERS-THE LANGSTON
CONDOMINIUM, PEOPLE OF THE STATE OF NEW
YORK, THE CITY OF NEW YORK, DEPARTMENT OF
HOUSING AND DEVELOPMENT

DECISION + ORDER ON
MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29,
30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58,
59, 60, 61

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion and cross-motion are determined as follows:

In this action, Plaintiff seeks to foreclose on a mortgage encumbering residential real property
located at 68 Bradhurst Ave., Unit 8D, New York, New York. The mortgage, dated August 30, 2001,
was given by Defendants Luis A. Royer, Farah F. Royer and Rita Royer ("Royer") to Plaintiff to secure
an indebtedness with an original principal amount of \$612,000.00. The loan was given to Defendant
Luis A. Royer and is memorialized by a note dated the same as the mortgage. Plaintiff commenced this
action over sixteen years ago on September 24, 2009, alleging that the Mortgagors defaulted in
repayment of the loan. Royer is presently deceased. Defendants Farah F. Royer and Rita Royer initially
defaulted in appearing, but after an initial CPLR §3408 conference was held Farah F. Royer and Rita
Royer answered and pled twenty-one affirmative defenses and five counterclaims. The answer also
claimed to be on behalf of "Defendant Roy Henley". This person's name is not in the caption of the
original or amended complaint. Indeed, it is not contained in the caption on Defendant's cross-motion.
Plaintiff replied to the 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. Defendants Farah
F. Royer and Rita Royer, as well as non-party Roy Henley oppose the motion and cross-move to dismiss
pursuant to CPLR §3215[c]. Plaintiff opposes the cross-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]). A mortgagor's default "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]). Also, 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]), its strict compliance with RPAPL §§1303, 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]) as well as its substantial compliance with the requisites under paragraph 22 of the mortgage (*see eg Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [2d Dept 2020]).

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 affirmation from David Ornelas ("Ornelas"), Senior Vice President of Land Home Financial Services, Inc. ("Land"), servicer and attorney-in-fact for Laelia, LCC ("Laelia"), who is purportedly the present owner of the note and mortgage. Schoenfeld avers that his affidavit is based on personal knowledge as well as a review of records. Ornelas's affidavit laid a proper foundation for the admission Land's records into evidence under CPLR §4518 by sufficiently showing that the records "reflect[ed] a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record[s][were] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record[s] [were] made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). The records of other entities were also admissible since Ornelas established that those records were received from the makers and incorporated into the records Land kept and that it routinely relied upon such documents in its business (*see eg U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, the records referenced by Ornelas were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). Land's authority to act on Laelia's behalf was established with submission of a limited power of attorney, dated July 10, 2020 (*see U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *US Bank N.A. v Louis*, 148 AD3d 758 [2d Dept 2017]).

Ornelas's review of the attached records demonstrated the material facts underlying the claim for foreclosure, to wit the mortgage, note, and evidence of mortgagor's default 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]; *see also Bank of NY v Knowles*, *supra*; *Fortress Credit Corp. v Hudson Yards, LLC*, *supra*). Likewise, the submissions proved that all the statutory and contractual pre-foreclosure requisites were fulfilled (*see generally 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]).

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]). Here, since Plaintiff was the lender when the note and mortgage were given, it was in direct privity with the mortgagor 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]). Accordingly, Plaintiff established its entitlement to summary judgment on its cause of action for foreclosure against the answering Defendants.

In opposition, Defendants' citation to assignments made after this action was commenced is unavailing. A plaintiff's standing to bring a foreclosure action is measured when the action is commenced, not thereafter (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]; *PNC Bank, N.A. v Salcedo*, 161 AD3d 571 [1st Dept 2018]; *Bank of Am., N.A. v Thomas*, 138 AD3d 523 [1st Dept 2016]). Here, it is undisputed that the present Plaintiff, Bank of America, commenced this action. The six assignments that occurred *after* this action was commenced are governed by CPLR §1018 which provides that "[u]pon any transfer of interest, the action may be continued by or against the original parties" (CPLR §1018). As such, Laelia, through its servicer land, was authorized to continue prosecution of this action without first seeking substitution (*see 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]).

Defendants' claim that Plaintiff failed to lay a proper foundation under CPLR §4518 is ineffective. The affidavit and proffered business documents were all in admissible form. Further, since none of the salient facts on these issues were contradicted by any of the appearing defendants, they are "deemed to be admitted" (*Bank of Am NA v Brannon*, 156 AD3d, 1, 6 [1st Dept 2017]). The alleged failure to serve Roy Henley is a non-issue as he is not a named Defendant herein. Even if Henley was a party, any personal jurisdiction defense was waived when it was pled in the answer and no motion to dismiss was made within 60 days thereafter (CPLR §3211[e]). Similarly, any reliance on CPLR §3215[c] was waived when the Defendants served their answer (*see Onewest Bank v Bernstein*, 196 AD3d 591, 592 [2d Dept 2021]).

On the issue of interest, "[i]n 'an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by particular facts in each case,' including wrongful conduct by either party" (*U.S. Bank N.A. v Beymer*, 190 AD3d 445 [1st Dept 2021], *citing South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978, [2d Dept 1976]). Generally, lengthy unexplained delays and "egregious" wrongful conduct must exist for the Court to assess an interest toll (*see eg U.S. Bank, N.A. v Gendelman*, 214 AD3d 928 [2d Dept 2023]; *Wells Fargo Bank, N.A. v Lee*, 208 AD3d 1384 [2d Dept 2022]; *Prompt Mtge. Providers of N. Am., LLC v Zarour*, 155 AD3d 912, 915 [2d Dept 2017]). Here, multiple unjustifiable delays in prosecuting this action exist. Other than filing an amended pleading some nine months after commencement of this action, not substantive action was taken until September 18, 2020, when a request for judicial intervention was filed. Even then, a request for a CPLR §3408 conference was not made until approximately eighteen months later. As such, interest is stricken from the commencement of this action until May 5, 2022, when the conference request was filed.

As to the branch of Plaintiff's motion to dismiss Defendants' affirmative defenses and counterclaims, 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 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 and claims 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 or claim, they 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 2012-1 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 foreclosure claim against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that the cross-motion to dismiss is denied, but the request to toll interest is granted to the extent that Plaintiff shall recover no interest from September 24, 2009, to May 3, 2022; and it is further

ORDERED that the affirmative defenses and counterclaims pled by all the appearing Defendants are dismissed; and it is further

ORDERED that **Georgia Papazis, Esq., 2478 Pine Place, Bellmore, New York 11710 – 516-603-9987** 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 the “John Doe” and “Jane Doe” defendants are removed as party defendants as the New York County Clerk will not accept any judgment for filing with a “Doe” defendant in the caption; and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK
-----X
BANK OF AMERICA, N.A.,
Plaintiff,

-against-

LUIS ROYER, HEIR TO THE ESTATE OF LUIS A. ROYER; UNKOWN HEIRS OF LUIS A. ROYER, HEIR TO THE ESTATE OF LUIS A. ROYER; FARAH F. ROYER; RITA ROYER; BOARD OF MANAGERS – THE LANGSTON CONDOMINIUM; PEOPLE OF THE STATE OF NEW YORK; THE CITY OF NEW YORK,

ACTING BY AND THROUGH ITS DEPARTMENT OF HOUSING AND DEVELOPMENT; UNITED STATES OF AMERICA ACTING THROUGH THE IRS;

Defendants.

-----X

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 7/2/2025, at 10:20 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.

1/16/2025

DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

Francis Kahn III

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

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