

Santander Bank, N.A. v Krishnamoorthy

2025 NY Slip Op 31500(U)

April 11, 2025

Supreme Court, New York County

Docket Number: Index No. 850163/2023

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. 850163/2023

SANTANDER BANK, N.A.,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

SARAVANAN KRISHNAMOORTHY, CASEY GALEGHER,
THE LENOX CONDOMINIUM, JOHN DOE #1 THROUGH
AND INCLUDING JOHN DOE#25, THE DEFENDANTS
LAST NAMED IN QUOTATION MARKS BEING INTENDED
TO DESIGNATE TENANTS OR OCCUPANTS IN
POSSESSION OF THE HEREIN DESCRIBED PREMISES
OR PORTIONS THEREOF, IF ANY THERE BE, SAID
NAMES BEING FICTITIOUS,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 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

were read on this motion to/for

JUDGMENT - SUMMARY

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

In this action, Plaintiff seeks to foreclose on two mortgages encumbering residential real property located at 10 Little West Street, Unit PH1C, New York, New York. The first mortgage, dated June 26, 2012, was given by Defendants Saravanan Krishnamoorthy and Casey Galegher (“Mortgagors”) to non-party Wells Fargo Bank, NA (“Wells Fargo”) to secure an indebtedness with an original principal amount of \$729,000.00. The loan was given to Defendant Krishnamoorthy and is memorialized by a note dated the same day as the mortgage. A gap mortgage was given by Mortgagors to Plaintiff to secure a loan with an original principal amount of \$15,404.77 given to Krishnamoorthy. Concomitantly with the second transaction, the mortgagors executed a consolidation, extension and modification agreement. All the loan documents related to the latter loan transaction are dated August 18, 2016.

Plaintiff commenced this action alleging that Mortgagors defaulted in repayment of the loans. Mortgagors answered jointly and pled fourteen defenses, including lack of standing, noncompliance with RPAPL §§1303, 1304 and 1306 and failure to abide by a contractual condition precedent to foreclosure. Now, Plaintiff moves for summary judgment against Mortgagors, to strike the answer and affirmative defenses, a default judgment against the non-appearing Defendants, an order of reference and to amend the caption. Mortgagors oppose the 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]). 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, or demonstrate the inapplicability of, 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]).

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 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 precise set of business records must be proffered, so 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 Anthony Cosgrove ("Cosgrove"), an Assistant Secretary of Dovenmuehle Mortgage, Inc., ("DMI"), the authorized loan sub-servicer for Plaintiff. Cosgrove avers that his affidavit is based on personal review of DMI's business records. Cosgrove's affidavit laid a proper foundation for the admission DMI'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 referenced by Cosgrove were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). DMI's authority to act on Plaintiff's behalf was established with submission of a secretary's certificate dated March 19, 2018 (*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]).

As to the note and mortgage, these documents were referenced by Cosgrove and annexed to his affidavit (*cf. 938 St. Nicholas Ave. Lender LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 218 AD3d 417 [1st Dept 2023]). As such, proof of the loan documents was established in the first instance. As to Defendants' 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]). Cosgrove's review of the attached records evidenced Mortgagors' 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*).

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 lender when the consolidated note and CEMA were given, it was in direct privity with the Mortgagors 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]). In any

event, annexed to Cosgrove's affidavit was an assignment of the initial mortgage, dated before the action was commenced. Although a written assignment of a mortgage is often a nullity in this context (*see eg U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]), the assignment provides the mortgage was transferred with the "Note". This language sufficiently established conveyance of the original note and rendered any issue concerning the physical delivery of the note irrelevant (*see Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611 [1st Dept 2023]; *US Bank Natl. Assn. v Ezugwu*, 162 AD3d 613 [1st Dept 2018]).

Plaintiff was also required to proffer "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]). As to the contractual pre-foreclosure notice, paragraph 22 of the mortgage, a ubiquitous provision in residential mortgages, provides that prior to acceleration of the note, the lender must send a notice containing the information specified in paragraph 22[b][1] – [6] in the manner described in paragraph 15 of the mortgage. That section provides that all notices must be in writing and "is considered given to [Mortgagor] when mailed by first class mail or when actually delivered to my notice address if sent by other means . . . The notice address is the address of the Property unless I give notice to Lender of a different address".

While RPAPL §1304 does not specify the proof necessary to demonstrate compliance therewith, 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 . . . 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]). Proof of actual mailing may be shown with an affidavit of mailing or domestic return receipts with attendant signatures (*see eg US Bank v Zientek*, 192 AD3d 1189, 1191 [2d Dept 2021]). Evidence of a satisfactory office practice can raise a presumption that the required notice was sent and received by the projected addressee (*Cit Bank N.A. v Schiffman*, *supra*). A 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*). 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]). An affidavit from the person who performed the mailing is not necessary (*see Bossuk v Steinberg*, 58 NY2d 916, 919 [1983]).

Regarding the mailing of these notices, Cosgrove attested to personal knowledge of DMI's standard mailing procedure, described the procedure in adequate detail and attached DMI's records and those from the United States Postal Service (*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]). Accordingly, Plaintiff demonstrated *prima facie* its strict compliance with RPAPL §1304. Likewise, this evidence also demonstrated Plaintiff's substantial compliance with the contractual pre-foreclosure notice required by the mortgage. Compliance with RPAPL §1306 was shown by submitting a copy of a proof of filing statement from the New York State Department of Financial Services (*see United States Bank Trust, N.A. v Mehl*, *supra* at 1056) and RPAPL §1303 via the affidavit of Plaintiff's process server (*see HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822 [2d Dept 2017]).

In opposition, 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 the issues of the note, mortgage and the default 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 opposition regarding the pre-foreclosure notices, including Defendants' denial of receipt of same, does not raise an issue of fact (*See United Nations Fed. Credit Union v Diarra*, 194 AD3d 506 [1st Dept 2021]).

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 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]). 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 Bellaftore*, 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-I 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 Plaintiff's motion for summary judgment against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

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

ORDERED that **Christy M. Demelfi, Esq., 2280 Grand Avenue, Suite 202 Baldwin New York 11510, (516) 887-1975** 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 mortgage and any necessary loan documents related to such Mortgage be, and the same hereby are, reformed by substituting therein the intended Legal Description of the mortgaged premises, which is the correct description, in place of the mortgage premises description which is erroneous (a copy of the Intended Mortgaged premises is attached); and it is further

ORDERED that the New York County Register for the City of New York note in the original recorded mortgage recorded in the Register for the City of New York on September 27, 2016, in CRFN 2016000338172, that the legal description is hereby reformed; and it is further

ORDERED, that the caption of this action be amended by substituting City of New York Transit Adjudication Bureau sued herein as "John Doe" and "Jane Doe" without prejudice to the proceedings heretofore had herein; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
Santander Bank, N.A.,

Plaintiff,

-against-

Saravanan Krishnamoorthy, Casey Galegher, The
Lenox Condominium,

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 **August 6, 2025, at 11:40 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: Santander Bank, NA -- Phone: 1-800-669-0340 x 6732.

4/11/2025

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER **J.S.C.**

REFERENCE



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

HON. FRANCIS A. KAHN III