

Wilmington Trust, N.A. v Boaziz

2025 NY Slip Op 31574(U)

April 11, 2025

Supreme Court, New York County

Docket Number: Index No. 850380/2014

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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WILMINGTON TRUST, NATIONAL ASSOCIATION, AS
SUCCESSOR TRUSTEE TO CITIBANK, N.A., AS
TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN
TRUST, MORTGAGE LOAN ASSET-BACKED
CERTIFICATES, SERIES 2005-FF12,

INDEX NO. 850380/2014
MOTION DATE _____
MOTION SEQ. NO. 007

Plaintiff,

- v -

MORDECHAI BOAZIZ, THE BOARD OF MANAGERS OF
GRAND BEEKMAN CONDOMINIUM, TRINITY FINANCIAL
SERVICES, LLC, TELERENT LEASING CORP., VENDOR
CAPITAL GROUP, WADSWORTH EQUITIES HOLDINGS,
LLC, UNITED STATES OF AMERICA INTERNAL REVENUE
SERVICE, THE PEOPLE OF THE STATE OF NEW YORK,
JOHN DOE # 1 THROUGH JOHN DOE # 12

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 244, 245, 246, 247,
248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268,
269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289,
290, 291, 292, 293, 294, 295, 299

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 a mortgage encumbering residential real property located at 400/406 East 51 Street, Unit 4B, New York, New York. The mortgage, dated September 7, 2005, was given by Defendant Mordechai Boaziz (“Boaziz”) to non-party First Franklin, a Division of National City Bank, NA (“Franklin”) to secure an indebtedness with an original principal amount of \$1,000,000.00. The loan is memorialized by a note dated the same day as the mortgage. Plaintiff commenced this action alleging that Boaziz defaulted in repayment of the loan. Defendant Boaziz answered and pled fifteen affirmative defenses, including lack of standing and failure to abide by a contractual condition precedent to foreclosure. Defendant also pled a counterclaim. Now, Plaintiff moves for summary judgment against the appearing Defendant, to strike his answer and affirmative defenses, for a default judgment against the non-appearing Defendants, for an order of reference and to amend the caption. Defendant opposes 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]).

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]), 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 a cause of action for foreclosure 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 Rebecca C. Wallace ("Wallace"), Document Execution Associate of Nationstar Mortgage LLC d/b/a Mr. Cooper ("Nationstar"), attorney in fact for Plaintiff. Wallace avers that the affidavit is based on personal review of Nationstar's business records. Wallace's affidavit laid a proper foundation for the admission Nationstar'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 Wallace established that those records were received from the makers and incorporated into the records Nationstar 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 Wallace were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]). Nationstar's authority to act on Plaintiff's behalf was established with submission of a limited power of attorney, dated May 18, 2017 (*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]).

Wallace'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]). “The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement” (*Deutsche Bank Natl. Trust Co. v Webster*, 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, supra). In this case, Plaintiff annexed a copy of the note, endorsed in blank on its face, to the complaint which is sufficient to demonstrate that Plaintiff was the holder of the note when the action was commenced (*see Ocwen Loan Servicing LLC v Siame*, 185 AD3d 408 [1st Dept 2020]; *Bank of NY v Knowles*, supra at 597). In any event, annexed to Wallace’s affidavit were two written assignments of the mortgage, both 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]), both assignments provide the mortgage was transferred with the “Note”. This language sufficiently established conveyance of the note and rendered any issues concerning the allonges and 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]).

In opposition, Defendants’ assertion that Plaintiff failed to establish it accelerated the loan is entirely unavailing as paragraph fifteen of the complaint expressly states that “Plaintiff hereby declares the balance of the principal indebtedness immediately due and payable” (*see eg Bank of N.Y. Mellon v Del Rio*, ___AD3d___, 2024 NY Slip Op 06293 [1st Dept 2024]). The argument that Plaintiff was required to demonstrate it possessed the note at the time of the modification is inapposite. A plaintiff’s standing to bring a foreclosure action is measured when the action is commenced (*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]). Indeed, as between the parties, the Plaintiff’s rights as mortgagee were fixed when the final mortgage was given and the consolidation agreement is convenience of the contracting parties (*see FDIC v Five Star Mgmt., Inc.*, 258 AD2d 15, 22 [1st Dept 1999]).

Defendants’ claim that Plaintiff failed to demonstrate all the elements of a cause of action for foreclosure is without merit. The affidavit and proffered business documents were all in admissible form. To the extent, Defendants assert the motion must be denied because no discovery has been conducted is unavailing as they have offered nothing more than speculation to support that Plaintiff is in exclusive possession of facts to support its defenses (*see Island Fed. Credit Union v I&D Hacking Corp.*, 194 AD3d 482 [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 Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]). Since the counterclaim is largely reflective of the affirmative defenses, that claim fails as well (*see* *Deutsche Bank, NA v Marino*, ___AD3d___, 2025 NY Slip Op 00374 [1st Dept 2025]).

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 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 affirmative defenses and counterclaims pled by the appearing Defendant 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 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 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

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WILMINGTON TRUST, NATIONAL
ASSOCIATION, AS SUCCESSION TRUSTEE TO
CITIBANK, N.A., AS TRUSTEE FOR FIRST
FRANKLIN MORTGAGE LOAN TRUST,
MORTGAGE LOAN ASSET-BACKED
CERTIFICATES, SERIES 2005-FF12,

Plaintiff,

-against-

MORDECHAI BOAZIZ if living, and if she/he be dead, any and all persons unknown to plaintiff, claiming, or who may claim to have an interest in, or general or specific lien upon the real property described in this action; such unknown persons being herein generally described and intended to be included in the following designation, namely: the wife, widow, husband, widower, heirs at law, next of kin, descendants, executors, administrators, devisees, legatees, creditors, trustees, committees,

lienors, and assignees of such deceased, any and all persons deriving interest in or lien upon, or title to said real property by, through or under them, or either of them, and their respective wives, widows, husbands, widowers, heirs at law, next of kin, descendants, executors, administrators, devisees, legatees, creditors, trustees, committees, lienors and assigns, all of whom and whose names, except as stated, are unknown to plaintiff; THE BOARD OF MANAGERS OF GRAND BEEKMAN CONDOMINIUM; TRINITY FINANCIAL SERVICES, LLC; TELERENT LEASING CORP.; VENDOR CAPITAL GROUP; WADSWORTH EQUITIES HOLDINGS, LLC; UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE; THE PEOPLE OF THE STATE OF NEW YORK,

Defendants.

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and it is 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 11:20 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.

4/11/2025
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER REFERENCE

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT

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