

**U.S. Bank Trust, N.A. v AJB200 Corp.**

2017 NY Slip Op 31530(U)

June 19, 2017

Supreme Court, Queens County

Docket Number: 700111/16

Judge: Darrell L. Gavrin

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This opinion is uncorrected and not selected for official publication.

## NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**  
Justice

IA PART 27

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U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9  
MASTER PARTICIPATION TRUST,

Index No. 700111/16

Plaintiff,

Motion

Date February 6, 2017

- against-

Motion

Cal. No. 135

AJB200 CORP., ROYAL CROWN MANAGEMENT  
CORP., JENENG BAO, TERRI WASHINGTON,  
CRIMINAL COURT OF THE CITY OF NEW YORK,  
NEW YORK CITY DEPARTMENT OF HOUSING,  
PRESERVATION AND DEVELOPMENT, NEW  
YORK CITY DEPARTMENT OF FINANCE, NEW  
YORK CITY ENVIRONMENTAL CONTROL BOARD,  
NEW YORK CITY DEPARTMENT OF FINANCE  
PARKING VIOLATIONS BUREAU, NEW YORK  
CITY TRANSIT AUTHORITY TRANSIT  
ADJUDICATION BUREAU, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE, and  
“JOHN DOE #1-10” and “JANE DOE #1-10,” the last  
twenty names being fictitious and unknown to plaintiff  
the persons and parties intended being the tenants,  
occupants, persons or corporations, if any, having or  
claiming an interest in or lien upon the premises  
described in the complaint,

Motion

Seq. No. 1

Defendants.

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The following papers numbered E34 to E77 were read on a motion by plaintiff for summary judgment, striking the defenses in the answer of defendant, Jeneng Bao; awarding default judgment against the non-answering, non-appearing defendants; amending the caption; and appointing a referee to compute, and a cross motion by defendant, Bao, seeking to amend his answer, pursuant to CPLR 3025 (b); to stay the action, pursuant to CPLR 2201; and to dismiss plaintiff's complaint, pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits - Proposed Order....	E34 - E54
Notice of Cross Motion - Affirmation - Exhibits.....	E56 - E66
Answering Affirmation to Cross Motion and Reply - Exhibits..	E67 - E77

Upon the foregoing papers, it is ordered that plaintiff's motion, and Bao's cross motion, are determined as follows:

Plaintiff commenced this action seeking to foreclose on the mortgage given by the defendant, Terri Washington, to Mortgage Electronic Registration Systems, Inc. as nominee for MetLife Home Loans, on the premises known as 45-36 Pearson Street, Long Island City, New York, on January 27, 2009, evidencing a promissory note of the same date in the principal amount of \$641,025.00. Thereafter, the mortgage was assigned to plaintiff. Plaintiff alleges that Washington defaulted under the terms of the mortgage by failing to make the monthly installment payment due on August 1, 2009, and subsequent installments to date. Pursuant to the terms of the mortgage, plaintiff elected to accelerate the mortgage debt, and declare the entire mortgage debt to be due and owing.

Plaintiff served copies of a summons and complaint upon all defendants in January 2016, and all defendants, except Bao, are in default. The branch of plaintiff's motion seeking default judgment against all non-appearing and non-answering defendants is granted. Bao was named as a defendant in this action because he has a possible interest in the premises pursuant to a deed into him, recorded on May 2013. Such deed is the subject of an action to quiet title brought by Bao against defendant, AJB200 Corp. (AJB200), contending that defendant, Royal Crown Management Corp., transferred title to the subject premises to both Bao and AJB200.

In the case at bar, Bao served an answer on or about March 25, 2016, which contained fifteen alleged affirmative defenses, including failure to state a cause of action, lack of personal jurisdiction, lack of standing to sue, estoppel, waiver, unclean hands, laches, and novation.

Plaintiff moves for, among other things, summary judgment, the striking of Bao's defenses listed in his answer, and the appointment of a referee to ascertain the amounts due plaintiff. Bao cross-moves to amend his answer, to stay the action, and for summary judgment dismissing the action, based, mainly, upon plaintiff's alleged lack of standing to commence the action, and alleged failure to hold a settlement conference, pursuant to RPAPL 1304.

Where, as here, a plaintiff's standing to commence an action is placed in issue, to be entitled to relief, movant must prove plaintiff's standing by demonstrating that plaintiff was the holder or assignee of the underlying promissory note at the time the action was commenced (*see US Bank, N.A. v Zwisler*, 147 AD3d 804 [2d Dept 2017]; *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643 [2d Dept 2016]). Where an instrument is indorsed in blank, it may

be negotiated by delivery (see UCC 3-202 [1]; 3-204 [2]). “There is simply no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it” (*JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 645 [2d Dept 2016]). While “it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date” (*JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 645 [2d Dept 2016]), plaintiff has submitted proof of the assignment into itself, and has shown it had possession of the mortgage and note, endorsed in blank, at the commencement of this action, by attaching the promissory note to the summons and complaint, and by asserting possession, and establishing defendant, Washington’s default in payment, in the affidavit in support of David Nilsen of Caliber Home Loans, Inc., “the servicing agent and attorney in fact to plaintiff” (see *U.S. Bank Nat. Ass’n. v Saravanan*, 146 AD3d 1010 [2d Dept 2017]; *Penny Mac Corp. v Chavez*, 144 AD3d 1006 [2d Dept 2016]). The production of such proof is sufficient to establish, *prima facie*, plaintiff’s possession of the requisite standing to prosecute its claims for foreclosure and sale (see *Bank of Am., N.A. v Barton*, 149 AD3d 676 [2d Dept 2017]; *Deutsche Bank Trust Co. v Garrison*, 147 AD3d 725 [2d Dept 2017]). Opposing defendant, Bao, has failed to rebut this *prima facie* demonstration of standing at the time of commencement of the action.

Defendant, Bao, included an affirmative defense of improper service in his March 24, 2016 answer, but failed to move for judgment on this ground within the sixty-day statutory period required by CPLR 3211 (e), thereby waiving such objection (see *Generation Mortg. Co. v Medina*, 138 AD3d 688 [2d Dept 2016]; *JP Morgan Chase bank v Munoz*, 85 AD3d 1124 [2d Dept 2011]). Further, Bao failed to refute the *prima facie* evidence of proper service demonstrated by the January 2016 affidavit of service, because said defendant, in his motion papers, failed to “swear to specific facts to rebut the statements in the process server’s affidavits” (*US Bank, N.A. v Peralta*, 142 AD3d 988, 988 [2d Dept 2016]; quoting *Simonds v Grobman*, 277 AD2d 369, 370 [2d Dept 2000]). As such, Bao’s opposition to plaintiff’s motion, based on the alleged failure to obtain personal jurisdiction, is without supporting evidence, and such affirmative defense is dismissed.

Bao cross-moved for leave to amend his answer to include an additional affirmative defense alleging a violation of the applicable statute of limitations. While “[a] motion for leave to amend a pleading should be freely granted in the absence of prejudice or surprise resulting directly from the delay, unless the amendment would be palpably insufficient or patently devoid of merit” (*HSBC Bank USA v Phillistin*, 99 AD3d 667, 667 [2d Dept 2012]; see *Wells Fargo Bank, N.A. v Fanto*, 146 AD3d 1012 [2d Dept 2017]), the decision to allow an amendment is left “almost entirely to the [motion] court’s discretion” (*U.S. Bank Nat. Ass’n. v Lomuto*, 140 AD3d 852, 854 [2d Dept 2016], quoting *Murray v City of New York*, 43 NY2d 400, 405 [1977]). In the case at bar, the existing evidence demonstrates that the action was commenced within the statute of limitations. Bao’s proposed affirmative defense, based as it is “upon information and belief,” without any corroborating evidence other than mere conjecture, is palpably insufficient or patently devoid of merit, and leave to amend is, therefore, denied.

Plaintiff's moving papers demonstrate, *prima facie*, that the remaining asserted defenses in defendant, Bao's answer are without merit. It is, therefore, incumbent upon said defendant to produce evidentiary proof demonstrating the existence of a triable issue of fact with regard to a bona fide defense (see *TD Bank, N.A. v Piccolo Mondo 21<sup>st</sup> Century, Inc.*, 98 AD3d 499 [2d Dept 2012]). Said defendant has failed to do so. Bao's opposition papers fail to deny the allegations contained in the complaint with regard to Washington's indebtedness and failure to pay. Bao's remaining affirmative defenses, lacking in either evidentiary facts or documentary proof in support, constitute bare legal conclusions. The mere semblance of an issue, or bald, unsupported, conclusory assertions, are insufficient to defeat a motion for summary judgment (see *Yen-fu Chen v Oheka Catering, LLC*, 130 AD3d 808 [2d Dept 2015]; *Orange County-Poughkeepsie Limited Partnership v Bonte*, 37 AD3d 684 [2d Dept 2007]). Consequently, the branch of plaintiff's motion seeking to dismiss the affirmative defenses in Bao's answer, and to strike Bao's answer, is granted, and said affirmative defenses are dismissed and Bao's answer is stricken.

“[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). On plaintiff's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving defendants (see *Open Door Foods, LLC v Pasta Machines, Inc.*, 136 AD3d 1002 [2d Dept 2016]; *Boulos v Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]).

The court's function on a motion for summary judgment is “to determine whether material factual issues exist, not to resolve such issues” (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]). As summary judgment is to be considered the procedural equivalent of a trial, such drastic remedy should not be granted where there is any doubt as to the existence of such issues or where the issue is arguable (*Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v Heht*, 52 AD3d 767 [2d Dept 2008]). Summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014], citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact (see *Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Khadka v American Home Mortg. Servicing, Inc.*, 139 AD3d 808 [2d Dept 2016]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Med. Ctr.*, 64 NY2d 851 [1985]).

Plaintiff has established *prima facie* entitlement to judgment as a matter of law by presenting, in support of its motion, proof of the note, the mortgage, and of borrower's failure to make payments thereunder (see *CitiMortgage, Inc. v McKinney*, 144 AD3d 1073 [2d Dept 2016]; *Pennymac Corp. v Chavez*, 144 AD3d 1006 [2d Dept 2016]). Movant has tendered sufficient evidence to demonstrate the absence of any material issue of fact as to whether it has

effectively exercised its option to proceed pursuant to the default on the mortgage (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Plaintiff demonstrated that a notice of default was timely mailed to the borrowing defendant, and the applicable requisite notices and filings of RPAPL 1303, 1304 and 1306, and of CPLR 3012, were complied with. In opposition, defendant, Bao, has failed to raise a triable issue of fact to deny plaintiff's entitlement to summary judgment herein.

Defendant, Bao's cross motion, seeking summary judgment dismissing plaintiff's complaint, and a stay of the proceedings herein, is denied. Cross movant has failed to successfully argue plaintiff's lack of standing to commence the foreclosure proceeding; has failed to demonstrate improper service of the pleadings; has failed to show entitlement to a stay of the proceedings; and has failed to demonstrate the absence of a material issue of fact with regard to the issue of plaintiff's compliance with the notice requirements of the RPAPL. Specifically, the notice requirements of RPAPL 1304 apply, in this instance, only if the mortgage loan is by a natural person, and the property is designated for family use as a home or residence, which is occupied by the borrower as borrower's principal dwelling. Qualification of a loan under this section is a question of fact (*see Richlew Real Estate Venture v Grant*, 131 AD3d 1223 [2d Dept 2015]). Where a borrower-defendant alleges non-compliance with this section, such individual bears the burden of proving that the subject loan qualifies as a "home loan" within the meaning of RPAPL 1304 (*see CitiMortgage Inc. v Simon*, 137 AD3d 1190 [2d Dept 2016]). In the case at bar, the "borrower-defendant," Washington, has not denied service of such notice, nor has she argued the right to, or necessity of, foreclosure conferences, or opposed plaintiff's motion for summary judgment. Defendant, Bao, who has opposed the instant motion, although not a "borrower" herein, has failed to submit evidence to show that the subject loan was a "home loan," and, therefore, was subject to the statutory notice requirements of the RPAPL. Such failure of proof warrants denial of defendant, Bao's cross motion for summary judgment on that basis.

That branch of plaintiff's motion seeking to amend the caption to substitute "John Smith" and "Jane Smith" (occupants), as party defendant, in place and stead of "John Doe," is granted without opposition.

That branch of plaintiff's motion seeking the appointment of a referee to determine the amount due and owing to plaintiff is granted, without opposition.

Defendant, Bao's remaining contentions are either without merit or need not be addressed in light of the foregoing determinations.

Accordingly, plaintiff's motion is granted in its entirety. Defendant, Bao's cross motion is denied.

Dated: June 19, 2017

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DARRELL L. GAVRIN, J.S.C.