

Wells Fargo Bank, N.A. v O'Bryant

2022 NY Slip Op 34264(U)

December 9, 2022

Supreme Court, New York County

Docket Number: Index No. 850120/2019

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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. 850120/2019

WELLS FARGO BANK, N.A.,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

LATASHA O'BRYANT, BOARD OF MANAGERS OF ST. CHARLES CONDOMINIUM I, COMMISSIONER OF JURORS, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU, JOHN DOE, SAID NAME BEING FICTITIOUS, IT BEING THE INTENTION OF PLAINTIFF TO DESIGNATE ANY AND ALL OCCUPANTS OF PREMISES BEING FORECLOSED HEREIN, AND ANY PARTIES,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 79, 82, 85, 86, 87, 88, 89

ORDER OF REFERENCE/REFERENCE TO COMPUTE

were read on this motion to/for

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

This is an action is to foreclose on a mortgage encumbering a parcel of real property located at 297 West 137th Street, Unit No 2574D, New York, New York. The mortgage, given by Defendant Latasha O'Bryant ("O'Bryant"), secures a loan with an original principal amount of \$459,098.00 which is memorialized by a note dated November 16, 2009. Plaintiff commenced this action alleging Defendant O'Bryant defaulted in making installment payments under the note. Now, Plaintiff moves for a default judgment against all defendants, an order of reference and to amend the caption. Defendant O'Bryant opposes the motion.

"An applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear" (*Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 899 [2d Dept 2019]). A plaintiff needs "only [to] allege enough facts to enable a court to determine that a viable cause of action exists" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]).

Plaintiff established *prima facie* its entitlement to a default judgment against O'Bryant and the other Defendants by submitting proof of the mortgage, the unpaid note, notice of default, proof of service on each Defendant as well as proof of their failure to appear or answer (*see* CPLR §3215[f];

SRMOF II 2012-I Trust v Tella, 139 AD3d 599, 600 [1st Dept 2016]; *U.S. Bank Natl. Assn. v Wolnerman*, 135 AD3d 850 [2d Dept 2016]; *see also Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]).

“To defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense” (*Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 901 [2d Dept 2020], *citing US Bank N.A. v Dorestant*, 131 AD3d 467, 470 [2d Dept 2015]). Here, Defendant O’Bryant has established neither. In opposition, Defendant proffered an attorney’s affirmation wherein no personal knowledge regarding the sufficiency of service on O’Bryant or a reasonable excuse for not appearing was established which is insufficient (*see Wilmington Trust, N.A. v Ashe*, 189 AD3d 1130 [2d Dept 2020]).

The sole argument tendered was Plaintiff’s alleged non-compliance with the requisites of RPAPL §1304. Contrary to Defendant’s assertion, Plaintiff was not required to prove of compliance with RPAPL §1304 to be entitled to a default judgment (*see Flagstar Bank, FSB v Jambelli*, 140 AD3d 829 [2d Dept 2016]). Failure to comply with RPAPL §1304 is not jurisdictional (*Wells Fargo Bank, N.A. v Cascarano*, 208 AD3d 729 [2d Dept 2022]), rather it is a defense which if not raised does not have to be disproved (*see Flagstar Bank, FSB v Jambelli*, *supra*). Where, as here, a plaintiff demonstrates, *prima facie*, that a mortgagor is in default for failure to appear, failure to demonstrate a basis to be relieved of the default precludes the mortgagor from raising RPAPL §1304 and any other non-jurisdictional defenses (*see Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006 [2d Dept 2020]).

Accordingly, it is

ORDERED that Plaintiff is awarded a default judgment against the non-appearing defendants; and it is further

ORDERED that that **Jeffery R. Miller, Esq, 32 Broadway, 13th Floor, New York, New York 10004, 212-227-4200** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and examine whether the tax parcel 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 or is required to perform other significant services in issuing the report, 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 the failure by defendants to submit objections to the referee shall 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 30 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 caption of this action be amended by substituting "John Doe" in place of "JOHN DOE"; and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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U.S. Bank National Association, not in its individual
capacity but solely as trustee for the RMAC Trust, Series
2018 G-CTT,

Plaintiff,

Index No. 850120/2019

-against-

LATASHA O'BRYANT, BOARD OF MANAGERS
OF ST. CHARLES CONDOMINIUM I,
COMMISSIONER OF JURORS, NEW YORK
STATE DEPARTMENT OF TAXATION AND
FINANCE, CITY OF NEW YORK ENVIRONMENTAL
CONTROL BOARD, CITY OF NEW YORK PARKING
VIOLATIONS BUREAU, CITY OF NEW YORK
TRANSIT ADJUDICATION BUREAU,
"John Doe"

Defendants

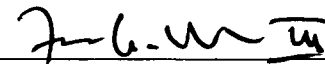
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and it is further

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/suptmanh)]; and it is further

All parties are to appear for a virtual conference via Microsoft Teams on **March 23, 2023, at 10:20 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.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.

<u>12/9/2022</u>					
DATE			FRANCIS A. KAHN, III, A.J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	HON. FRANCIS A. KAHN III
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	J.S.C.
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	<input type="checkbox"/>