

HSBC Bank USA, N.A. v Smidt
2018 NY Slip Op 30389(U)
February 14, 2018
Supreme Court, Suffolk County
Docket Number: 38419/2012
Judge: Robert F. Quinlan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE: 08/08/2014
SUBMIT DATE: 04/07/2016
Mot. Seq.: #001- Mot D

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HSBC BANK USA, NATIONAL ASSOCIATION, AS
INDENTURE TRUSTEE OF THE FBR
SECURITIZATION TRUST 2005-1, CALLABLE
MORTGAGE-BACKED NOTES, SERIES 2005-1,

Plaintiff,

- against -

KEITH SMIDT, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS INC., AS NOMINEE
FOR ACCREDITED HOME LENDERS INC.,
UNITED STATES OF AMERICA, FIA CARD
SERVICES A/K/A BANK OF AMERICA, NEW
YORK STATE-DEPARTMENT OF TAXATION &
FINANCE, RONALD RULA

and JOHN DOE AND JANE DOE #1 through #7, the
last seven (7) names being fictitious and unknown to
the plaintiff, the persons or parties intended being the
tenants, occupants, persons or parties, if any, having or
claiming an interest in or lien upon the mortgaged
premises described in the complaint ,

Defendant(s).

STIENE & ASSOCIATES, P.C.
Attorneys for Plaintiff
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Kenneth C. Henry, Jr.
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Keith Smidt
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Upon the following papers numbered 1 - 94 read on this motion for an order granting summary judgment, default judgment and order of reference; Notice of Motion dated July 1, 2014 and supporting papers (1-34); Affirmation in Opposition dated July 30, 2014 and supporting papers (35-58); Affirmation in Reply dated August 4, 2014 and supporting papers (59-79); Affidavit in Opposition sworn to August 8, 2014 and supporting papers (80-89); Affirmation in Reply dated August 28, 2014 and supporting papers (90-94) it is,

ORDERED that this motion by plaintiff for summary judgment pursuant to CPLR §§ 3212 as against the answering defendant Ronald Rula, striking his answer and removing him as a defendant, setting the default against the non-appearing, non-answering defendants, amending the caption and for an order of reference pursuant to RPAPL § 1321 is decided as set forth herein; and it is further

ORDERED that plaintiff is granted summary judgment dismissing and striking the answer of defendant Ronald Rula; and it is further

ORDERED that the default of all non-appearing, non-answering defendants is fixed and set; and it is further

ORDERED that plaintiff's application to amend the caption pursuant to CPLR 3025 (b) to remove the "JOHN DOE AND JANE DOE #1 through #7" defendants and to add Marion Rodriguez as a party defendant, is granted and the caption is amended as appearing below and shall be used in all further proceedings in this action:

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HSBC BANK USA, NATIONAL ASSOCIATION, AS
INDENTURE TRUSTEE OF THE FBR SECURITIZATION
TRUST 2005-1, CALLABLE MORTGAGE-BACKED
NOTES, SERIES 2005-1,

Plaintiff,

- against -

KEITH SMIDT, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS INC., AS NOMINEE FOR
ACCREDITED HOME LENDERS INC., UNITED STATES
OF AMERICA, FIA CARD SERVICES A/K/A BANK OF
AMERICA, NEW YORK STATE-DEPARTMENT OF
TAXATION & FINANCE, RONALD RULA, AND
MARION RODRIGUEZ,

Defendant(s).

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,and it is further;

ORDERED that plaintiff is directed to serve an executed copy of this order amending the caption of this action upon the Calendar Clerk of this Court within 30 days of the date of this order and all further proceedings are to proceed under that caption; and it is further;

ORDERED that plaintiff's application for the appointment of a referee to compute and determine pursuant to RPAPL § 1321 is granted; and it is further

ORDERED that plaintiff's proposed order submitted with this motion, as modified by the court, is to be signed contemporaneously with this order; and it is further

ORDERED that plaintiff is directed to serve an executed copy of the order of reference amending the caption of this action upon the Calendar Clerk of this Court within 30 days of the date of this order and all further proceedings are to proceed under that caption; and it is further;

ORDERED that plaintiff is to include in any proposed order of judgment of foreclosure and sale language complying with the Suffolk County Local Rule for filing of the Suffolk County Foreclosure Surplus Monies form contained in Suffolk County Administrative Order # 41-13; and it is further

ORDERED, that, if a prior notice of pendency is outdated, plaintiff is directed to file a successive notice of pendency at least twenty (20) days prior to the submission of any proposed judgment of foreclosure

and sale, submitting a copy thereof with proof of filing with any proposed judgment of foreclosure and sale; and it is further.

ORDERED that within 30 days of the date of this order, plaintiff is to serve a copy of the order of reference upon all parties who have appeared in this action, as well as upon the referee and thereafter file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that within 60 days of the date of this order, plaintiff is to provide the referee, and defendants who have appeared, all papers and documents necessary for the referee to perform the determinations required by this order (plaintiff's "submissions"); defendant(s) may submit written objections and proof in support thereof (defendant's "objections") to the referee within 14 days of the mailing of plaintiff's submissions; and it is further

ORDERED that the referee's report is to be prepared and submitted to plaintiff within 30 days of receipt of plaintiff's submissions, and the referee's report is to be submitted by plaintiff with its application for a judgement of foreclosure and sale; and it is further

ORDERED that the referee's duties are defined by this order of reference (CPLR 4311, RPAPL § 1321), and the referee has no power beyond that which is limited by this order of reference to the ministerial functions of computing amounts due and owing to plaintiff and determining whether the premises can be sold in parcels; the referee shall hold no hearing, take no testimony or evidence other than by written submission, and make no ruling on admissibility of evidence; the referee's report is merely advisory and the court is the ultimate arbiter of the issues, if the objections by defendant(s) raise issues as to the proof of amounts due and owing the referee is to provide advisory findings within his/her report; and it is further

ORDERED that if defendant(s) has submitted objections and proof to the referee, defendant(s) shall also submit them to the court if opposing plaintiff's application for a judgment of foreclosure and sale; failure to submit objections to the referee will be deemed a waiver of objections before the court on an application for a judgment of foreclosure and sale; failure to raise and submit the objections made before the referee in opposition to plaintiff's application for a judgment of foreclosure and sale shall constitute a waiver of those objections on the motion; and it is further

ORDERED that plaintiff is to file an application for a judgment of foreclosure and sale within 120 days of the date of this order; and it is further

ORDERED that this action shall be calendared for a status conference on Tuesday, June 19, 2018 at 9:30 AM in Part 27 for the court to monitor the progress of this action. If a judgment of foreclosure and sale is filed with the court before that date, no appearance will be necessary; and it is further

ORDERED that failure to comply with any term of this order will not form the basis for a motion to dismiss the action, but will be the subject of the status conference at which future compliance will be determined.

This is an action to foreclose a mortgage on residential real property known as 44 West 11th Street, Huntington, Suffolk County, New York given by defendant Keith Smidt ("borrower") to Accredited Home

Lenders, Inc. (“the lender”) on April 26, 2005 to secure a note given by defendant to the lender on the same date. Plaintiff HSBC Bank USA, National Association, as Indenture Trustee of the FBR Securitization Trust 2005-1, Callable Mortgage-backed Notes, Series 2005-1 (“plaintiff”) commenced this action by filing the summons and complaint with the Suffolk County Clerk on December 26, 2012. Defendant Ronald Rula (“defendant”) was named as a defendant because of a notice of pendency filed on the property as a result of another action (*Ronald Rula v Keith Smidt and Susan Smidt*, Index No. 008417/2007). Defendant did not sign the note or the mortgage that are the subject of this action. In submissions reference is made to a 2007 action between borrower and defendant (Index #8417/2007) involving a claim of a joint venture between borrower and defendant concerning the property, but that action is marked disposed and is not before the court. Defendant interposed an answer dated May 30, 2013 consisting of general denials and twelve affirmative defenses including *inter alia* failure to establish plaintiff’s standing to prosecute the action, failure to comply with the 90 day notice pursuant to RPAPL 1304 and failure to comply with the notice provision in the mortgage. Defendant United States of America filed a notice of appearance. None of the remaining defendants answered or appeared in this action and are in default.

A foreclosure settlement conferences was held March 5, 2014, as the property was determined to be an investment property and ineligible for conference pursuant to CPLR 3408 the action was released to an IAS Part.

By notice of motion dated July 1, 2014, plaintiff filed the present motion, returnable August 8, 2014 seeking summary judgment pursuant to CPLR § 3212 as against defendant; striking his answer and removing him as a defendant; setting the default against the non-appearing, non-answering defendants, amending the caption and for an order of reference pursuant to RPAPL § 1321. The submissions in support of it’s motion include its attorney’s affirmations, an affidavit in support of summary judgment of a vice president of plaintiff’s servicer, JP Morgan Chase Bank, National Association, the note, mortgage, assignment, pleadings, and the affidavits of service of process. In opposition defendant submits the affirmation of counsel, arguing *inter alia* plaintiff failed to make a prima facie case, failed to establish standing to prosecute the action, failed to prove compliance with the contractual condition precedent in the mortgage, failed to comply with RPAPL 1304, failed to move for default within one year, and failed to serve the borrower within 120 days of purchasing the index number. The borrower, who is in default, served an affidavit in opposition to the motion on August 8, 2014, which was rejected as untimely by plaintiff’s notice of rejection dated August 28, 2014. Plaintiff submits an affirmation in reply to defendant’s opposition as well as an affirmation in reply to borrower’s untimely opposition. The motion was conferenced in IAS Part 24 (Horowitz, J) on October 5, 2015 and in January 2016 the action was transferred to this part and the motion marked “fully submitted” on April 7, 2016.

SUMMARY JUDGMENT

Entitlement to summary judgment in favor of a foreclosing plaintiff is established, prima facie, by plaintiff’s production of the mortgage, the unpaid note, and evidence of default in payment (*see Wells Fargo Bank, N.A. v. DeSouza*, 126 AD3d 965 [2d Dept 2015]; *Wells Fargo, NA v Erobobo*, 127 AD3d 1176 [2d Dept 2015]; *Wells Fargo Bank, NA v Morgan*, 139 AD3d 1046 [2d Dept 2016]). If established by proof submitted in evidentiary form, plaintiff has demonstrated its entitlement to summary judgment (CPLR 3212; RPAPL § 1321; *see Federal Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558 [2d Dept 1997]). The burden then shifts to defendant to demonstrate the existence of a triable issue of fact as to a bona fide

defense (*see Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882 [2d Dept 2010], *Zanfini v Chandler*, 79 AD3d 1031 [2d Dept 2010]; *Citibank, NA v Van Brunt Properties, LCC*, 95 AD3d 1158 [2d Dept 2012]). Defendant must then produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact (*see Washington Mut. Bank v Valencia*, 92 AD3d 774 [2d Dept 2012]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Defendant's answer and affirmative defenses alone are insufficient to defeat plaintiff's motion (*see, Flagstar Bank v Bellafore*, 94 AD3d 1044 [2d Dept 2012]). In deciding the motion the court is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Corp.*, 18 NY3d 499 [2012]).

Where plaintiff's standing has been placed in issue by defendant's answer, plaintiff also must establish its standing as part of its prima facie showing (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015]; *Loancare v Firshing*, 130 AD3d 787 [2d Dept 2015]; *HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 77 [2d Dept 2015]; *US Bank, NA v Richard*, 151 AD3d 1001 [2d Dept 2017]; *Citimortgage v Rockefeller*, 155 AD3d 998 [2d 2017]; *US Bank, N. A. v Cohen*, 156 AD3d 844 [2d Dept 2017]). Plaintiff establishes its standing by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note (*see Aurora Loan Servs., LLC v Taylor, supra; Wells Fargo Bank, NA v Rooney*, 132 AD3d 980 [2d Dept 2015]). A written assignment or physical delivery prior to the commencement of the action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident thereto (*see U.S. Bank, NA v Collymore*, 68 AD3d 752 [2d Dept 2009]; *Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2d Dept 2014])

PLAINTIFF ESTABLISHES STANDING

Plaintiff has standing if it establishes that it was the holder of the note at the time the action was commenced (*see Emigrant Bank v Larizza*, 129 AD3d 904 [2d Dept 2015]; *M&T Bank v Cliffside Prop. Mgt., LLC*, 137 AD3d 876 [2d Dept 2016]). Plaintiff demonstrated its standing as holder of the note by the affidavit of its servicer attesting to possession of the note at the time the action was commenced (*see Aurora Loan Services, LLC v Taylor*, 25 NY3d 355 [2015]; *HSBC Bank, USA v Espinal*, 137 AD3d 1079 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Joseph*, 137 AD3d 896 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Gallagher*, 137 AD3d 898 [2d Dept 2016]; *Deutsche Bank Natl. Trust Co. v Naughton*, 137 AD3d 1199 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Charlauff*, 134 AD3d 1099 [2d Dept 2015]; *Flagstar Bank v Mendoza*, 139 AD3d 898 [2d Dept 2016]). A copy of the note with the undated allonge endorsed in blank by an assistant secretary of Accredited Home Lenders, Inc., is annexed. In opposition defendant submits the affirmation of counsel, who has no personal knowledge of the operative facts, is without probative value and insufficient to defeat the motion (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Flagstar Bank, FSB v Titus*, 120 AD3d 469 [2d Dept 2014]). Defendant's first, fourth, fifth and sixth affirmative defenses are dismissed.

DEFENDANT MORTGAGOR IS IN DEFAULT

It is undisputed that the borrower has defaulted in answering. Although he attempted to submit an affidavit in opposition to the present motion it was rejected by plaintiff as untimely and, in any event, would not have been considered by the court as the borrower is in default. Parties in default, such as the borrower are deemed to have admitted all of the factual allegations contained in the complaint and all reasonable

inferences that flow therefrom (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62 [2002]). Absent a vacatur of his default, which is not requested, he is without authority to be heard in opposition to this motion or to demand affirmative relief in his favor (see CPLR 3215 [f]; *HSBC Mtge. Corp. V. Morocho*, 106 AD3d 875, [2d Dept 2013]; *U.S. Bank Natl. Ass'n v Gonzalez*, 99 AD3d 694 [2d Dept 2012]; *Deutsche Bank Trust Co., Am. v Stathakis*, 90 AD3d 983 [2d Dept 2011]; *Holubar v Holubar*, 89 AD3d 802 [2d Dept 2011]). Even if the court were to consider his affidavit it consists of unsubstantiated conclusory allegations against both plaintiff and defendant and offers no substantive opposition to the motion. Borrower's allegations that plaintiff has hindered the sale of the property, that defendant has illegally rented the property, or that the parties are involved in the separate civil action (mentioned above) are no defense to the motion, even if the borrower was not in default.

**DEFENDANT NON-MORTGAGOR IS
 UNABLE TO RAISE DEFENSES PERSONAL TO
 THE DEFAULTING MORTGAGOR**

In opposition defendant argues the motion should be denied because plaintiff failed to prove compliance with the contractual condition precedent in the mortgage, failed to comply with RPAPL 1304, failed to move for default within one year, and failed to serve the borrower within 120 days of purchasing the index number. A non-mortgagor has no ability to raise defenses such as failure of plaintiff to comply with requirements of service or other statutory requirements or conditions of the mortgage. Those defenses are personal to the mortgagor who has defaulted and not raised them (*see Home Savings of America, F.A. v Gkianos*, 233 AD2d 422 [2d Dept 1996]; *NYCTL 1996-1 Trust v King*, 13 AD3d 429 [2d Dept 2004]; *Wells Fargo Bank v Bowie*, 89 AD3d 931 [2d Dept 2011]; *IMC Mgte Co v Vetere*, 142 AD3d 954 [2d Dept 2016]; *Wells Fargo Bank, NA v Bachmann*, 145 AD3d 712 [2d Dept 2016]). RPAPL § 1304 has been held to be a condition precedent that may be raised by a mortgagor at anytime, but if it is not raised by the mortgagor or required to be pled by statute, plaintiff is not required to prove it (*see U.S. Bank N.A. v Carey*, 137 AD3d 894 [2d Dept 2016]; *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829 [2d Dept, 2016]).

This Court has considered defendants' remaining contentions and finds them to be without merit.

Accordingly, defendant's answer is stricken and plaintiff is awarded summary judgment as to the answering defendant.

The default of the non-appearing, non-answering defendants are fixed and set.

Plaintiff's application is granted to the extent set forth herein and the proposed order submitted with this motion, as modified by the court, is signed contemporaneously herewith.

This constitutes the Order and decision of the Court.

Dated: February 14, 2018



Hon. Robert F. Quinlan, J.S.C.