

Deutsche Bank Natl. Trust Co. v Maffei
2018 NY Slip Op 30593(U)
March 20, 2018
Supreme Court, Suffolk County
Docket Number: 6950/2012
Judge: C. Randall Hinrichs
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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 - STATE OF NEW YORK
IAS PART 49 - SUFFOLK COUNTY**

PRESENT: Hon. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 11-30-2017
Motion Sequence: 003-RTC; 004-MD

DEUTSCHE BANK NATIONAL TRUST COMPANY
AS TRUSTEE OF THE INDYMAC INDX
MORTGAGE TRUST 2007-AR5, MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2007-AR5
UNDER THE POOLING AND SERVICING
AGREEMENT DATED MARCH 1, 2007,

HOUSER & ALLISON, APC
Attorneys for Plaintiff
60 East 42nd Street, Suite 1148
New York, New York 10165

HARVEY SORID, ESQ.
Attorney for Defendants MAFFEI
358 RXR Plaza
Uniondale, New York 11556

Plaintiff,

-against-

MICHAEL MAFFEI A/K/A MICHAEL P. MAFFEI;
MARYANN MAFFEI; DISCOVER BANK;
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. AS NOMINEE FOR INDYMAC
BANK, F.S.B.; NORTH STAR CAPITAL
ACQUISITION, LLC; "JOHN DOE #1" TO "JOHN
DOE #10", the last 10 names being fictitious and
unknown to plaintiff, the persons or parties intended
being the persons or parties, if any, having or claiming an
interest in or lien upon the mortgaged premises described
in the verified complaint,

Defendants.

Upon the following papers numbered 1 to 40 read on this motion for summary judgment and cross motion to
dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting
papers 19 - 39; and Answering Affidavits and supporting papers 40; it is,

ORDERED that this motion (003) by the plaintiff for, *inter alia*, an order: (1) pursuant to CPLR
3212 awarding summary judgment in its favor and against the answering defendants Michael Maffei and
Maryann Maffei, striking their answer and dismissing the affirmative defenses and counterclaim set forth
therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; (3) pursuant
to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b)
examine and report whether the subject premises should be sold in one parcel or multiple parcels; and
(4) amending the caption, is granted in part and denied in part; and it is further

ORDERED that so much of the plaintiff's motion that seeks an order striking the Sixth through Ninth affirmative defense and the counterclaim is granted, and the motion for summary judgment dismissing the answer and an order of reference is otherwise denied with prejudice; and it is further

ORDERED that so much of plaintiff's motion that seeks an order fixing the defaults of non-answering defendants is granted; and it is further

ORDERED that so much of the plaintiff's motion that seeks to delete defendants "JOHN DOE #1" through "JOHN DOE #10," and to amend the caption accordingly, is granted; and it is further

ORDERED, that the caption of this action shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
DEUTSCHE BANK NATIONAL TRUST COMPANY
AS TRUSTEE OF THE INDYMAC INDX
MORTGAGE TRUST 2007-AR5, MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2007-
AR5 UNDER THE POOLING AND SERVICING
AGREEMENT DATED MARCH 1, 2007,

Index No. 6950-2012

Plaintiff,

-against-

MICHAEL MAFFEI A/K/A MICHAEL P. MAFFEI;
MARYANN MAFFEI; DISCOVER BANK;
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. AS NOMINEE FOR INDYMAC
BANK, F.S.B.; NORTH STAR CAPITAL
ACQUISITION, LLC;

Defendants.

-----X

and it is further,

ORDERED that the plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of this Court; and it is further

ORDERED that the defendant's cross-motion (004) to dismiss the complaint is denied; and it is further

ORDERED that plaintiff is directed to file a note of issue within sixty (60) days of the date of entry of this order, and in the event plaintiff fails to do so, the complaint shall be subject to dismissal upon motion of any party or by the Court *sua sponte*; and it is further

ORDERED that the attorneys for the parties shall appear for a pre-trial conference in Part 49 in the Cromarty Court Building, 4th Floor, Courtroom 16, on **April 25, 2018 at 9:30 a.m.**, and it is further

ORDERED that the plaintiff is directed to serve a copy of this order with notice of entry upon the answering defendant within thirty (30) days of the date herein, and to promptly file the affidavit of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property situate in Suffolk County, New York. On October 1, 2004, defendant-mortgagor Michael P. Maffei executed a note in favor of Argent Mortgage Company, LLC., in the principal amount of \$405,000. To secure said note, on the same date, defendant-mortgagors Michael P. Maffei and Maryann Maffei gave the lender a mortgage on the property. On January 3, 2007, Michael P. Maffei executed a second note, as well as a consolidated note in the aggregate amount of \$472,000, in favor of Indymac Bank, F.S.B. On the same date, both defendant-mortgagors executed corresponding mortgages in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Indymac Bank, F.S.B. By way of a blank endorsements with physical delivery, the notes were transferred to plaintiff prior to commencement of this action. Subsequently, on August 17, 2010, Michael P. Maffei executed a Home Affordable Modification Agreement in plaintiff's favor, in the aggregate amount of \$501,425. Defendant-mortgagors allegedly defaulted on the notes, mortgages and loan modification agreement by failing to make monthly payments of principal and interest which had come due on May 1, 2011. After defendant-mortgagors failed to cure the default in payment, plaintiff commenced the instant action by the filing of a *lis pendens*, summons and complaint on February 29, 2012. Issue was joined by the timely, albeit undated, interposition of an answer from defendant-mortgagors. By their answer, the defendant-mortgagors generally deny the material allegations set forth in the complaint, and assert ten affirmative defenses and one counterclaim.

By order of this Court, dated June 12, 2017, plaintiff's prior motion (001), seeking the same relief as that being sought here, was denied, as was defendants' prior cross-motion (002) to dismiss the complaint. Plaintiff's prior motion was denied for failure to provide an affidavit of merit comporting with the business records exception to the hearsay rule under CPLR 4518(a). The Court denied plaintiff's prior motion with leave to renew. Accordingly, plaintiff now renews its motion for summary judgment and an order of reference. Defendants oppose plaintiff's motion and cross move for an order dismissing the complaint on the alleged grounds that plaintiff lacks standing and failed to demonstrate compliance with RPAPL 1303, 1304 and the pre-foreclosure notice provision (section 22) of the subject mortgage.

A plaintiff seeking summary judgment in a foreclosure action is required to produce the mortgage, the unpaid note, and evidence of default (*see DLJ Mtg. Capital, Inc. v Sosa*, 153 AD3d 666, 60 NYS3d 278 [2d Dept 2017]; *Pennymac Holdings, LLC v Tomanelli*, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; *Wachovia Bank, N.A. v Carcano*, 106 AD3d 724, 965 NYS2d 516 [2d Dept 2013]. Further, when a defendant serves an answer which includes the affirmative defense of standing, the plaintiff must prove its standing so as to be entitled to relief (*see Bank of N.Y. Mellon v Visconti*, 136 AD3d 950, 25 NYS3d 630 [2d Dept 2016]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]).

Here, plaintiff has produced, *inter alia*, the notes (indorsed in blank), mortgages, loan modification agreement, assignment and evidence of nonpayment of the consolidated debt. Plaintiff established its standing by submission of an affidavit from Katherine Ortwerth, an representative of Ocwen Loan Servicing LLC (“Ocwen”), plaintiff’s loan servicing agent, attesting to plaintiff’s possession of all notes, mortgages and the loan modification agreement prior to commencement of the action (see *Bethpage Federal Credit Union v Caserta*, 154 AD3d 691, 61 NYS3d 645 [2d Dept 2017]; *Hudson City Sav. Bank v Genuth*, 148 AD3d 687, 48 NYS3d 706 [2d Dept 2017]). Defendant has offered no evidence to contradict that. The Court rejects defendants’ argument concerning the sufficiency of plaintiff’s proof with regard to the assignment. “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident.” (*U.S. Bank N.A. v Collymore*, 68 AD3d 752, 754, 890 NYS2d 578 [2d Dept 2009]; see e.g. *Bank of America, N.A. v Barton*, 149 AD3d 676, 50 NYS3d 546 [2d Dept 2017]). Since the plaintiff proved its standing by physical delivery, the Court need not address the validity of the assignment (see *Deutsche Bank v Whalen*, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]). The Ortwerth affidavit also attests to the default in payment under the consolidated note, mortgage and loan modification agreement. Said affidavit was based upon personal knowledge acquired by a review of business records kept by Ocwen in the ordinary course of business. Ms. Ortwerth averred that the business records of Ocwen included records of the prior loan servicers, which were fully incorporated and relied upon by Ocwen in the routine course of business, and therefore the averments concerning possession of the note and payment default comport with CPLR 4518(a) (see *Carothers v GEICO Indemnity Co.*, 79 AD3d 864, 914 NYS2d 199 [2d Dept 2010]; *People of the State of New York v DiSalvo*, 284 AD2d 547, 727 NYS2d 146 [2d Dept 2001]; *Plymouth Rock Fuel Corp. v Leucadia*, 117 AD2d 727, 498 NYS2d 453 [2d Dept 1986]; *Johnson v Lutz*, 253 NY 124, 128 [1930]; see also *U.S. Bank N.A. v Noble*, 144 AD3d 788, 41 NYS3d 79 [2d Dept 2016]).

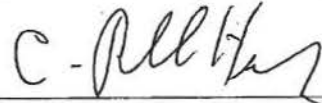
Plaintiff however failed to establish its prima facie entitlement to judgment as a matter of law because it did not supply adequate evidentiary proof of compliance with the pre-foreclosure notice provisions of the subject mortgage and RPAPL § 1304 (see *Aurora Loan Servs. LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; *HSBC Mortg. Corp. (USA) v Gerber*, 100 AD3d 966, 955 NYS2d 131 [2d Dept 2012]). The plaintiff submitted neither affidavits of service, nor an affidavit from one with personal knowledge of the practices and procedures customarily used in the ordinary course of business for mailing of statutory notices (see *Citibank v Wood*, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017]; *Citimortgage v Papas*, 147 AD3d 900, 47 NYS3d 415 [2d Dept 2017]; *JPMorgan Chase Bank, Nat. Ass'n v. Kutch*, 142 A.D.3d 536, 537, 36 N.Y.S.3d 235, 236 [2d Dept 2016]). Plaintiff’s affidavit avers, in conclusory fashion, that the notices were sent by certified or registered mail and first class mail. Such conclusory statements are insufficient (see *Citimortgage v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]). The affidavit plaintiff provided here is not sufficient to establish that the requisite notices were sent because the affiant did not aver that she was familiar with the mailing practices and procedures for mailing the notices, “and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed (citations omitted)” (see *Citimortgage v Papas*, *supra*. 147 AD3d at 901; *Wells Fargo Bank, N.A. v Trupia*, 150 AD3d 1049, 55 NYS3d 134 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Lewczuk*, 153 AD3d 890, 61 NYS3d 244 [2d Dept 2017]). Additionally, defendants argue that plaintiff has not demonstrated strict compliance with the notice provision of RPAPL 1303. Plaintiff argues that the affidavits of service

attached to the complaint prove such compliance. However, plaintiff has not attached a copy of the complaint nor the affidavits of service to its motion papers. Therefore, the answering defendants' First through Fifth and Tenth affirmative defense remain viable and are not stricken.

Plaintiff submitted sufficient proof to establish, *prima facie*, that the remaining affirmative defenses and counterclaim are subject to dismissal due to their unmeritorious nature (*see Becher v Feller*, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539, 369 N.Y.S.2d 667 [1975]; *see also Argent Mtge. Co., LLC v. Montesana*, 79 A.D.3d 1079, 915 N.Y.S.2d 59 [2d Dept 2010]).

Accordingly, plaintiff's motion is granted in part and denied in part as set forth herein.

Dated: March 20, 2018



HON. C. RANDALL HINRICH, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION