Deutsche Bank Trust Co. Ams. v Danna
2018 NY Slip Op 32605(U)
October 2, 2018
Supreme Court, Suffolk County
Docket Number: 16692/13
Judge: Thomas F. Whelan

[* 1]

MEMO DECISION & ORDER

COPY

INDEX No. 16692/13

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/2/18
SUBMIT DATE 9/7/18
Mot. Seq. # 001 - MotD
Pre-Trial Conf Sched.: 10/30/18
CDISP Y____ N __X__

DEUTSCHE BANK TRUST COMPANY AMERICAS as Trustee for RALI 2005-OS11, Plaintiff, -against- MARIE MARJORIE DANNA a/k/a MARIE M. DANNA a/k/a MARIE DANNA, MATTHEW DANNA, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for First National Bank of Arizona, "JOHN DOE #1" to "JOHN DOE #10", the last 10 names being fictitious and unknown to plaintiff, the person 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.	McCABE, WEISBERG et al Attys. For Plaintiff 145 Huguenot St. - Ste. 210 New Rochelle, NY 10801 ADAM C. GOMERMAN, ESQ. Atty. For Defendants Danna 907 E. Jericho Tnpk. Huntington Sta., NY 11746

Upon the following papers numbered 1 to 10 read on this motion to appoint a referee to compute among other things; Notice of Motion/Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers: _____; Opposing papers: 6-8; Reply papers 9-10; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by plaintiff for, among other things, summary judgment, amendment of the caption and the appointment of a referee to compute, is granted with respect to the Second Affirmative Defense of standing only; and it is further

ORDERED that plaintiff's motion (#001) is denied with respect to the Third and Fourth Affirmative Defenses regarding the mailing of the pre-commencement notice of default and RPAPL § 1304 notice; and it is further

ORDERED that the remaining portions of the plaintiff's motion (#001) wherein it seeks summary judgment on its complaint against the answering defendants, default judgments against the remaining defendants served with process, and a caption amendment together with an order appointing a referee to compute are denied without prejudice; and it is further

ORDERED that pursuant to CPLR 3212(g), the court hereby declares that the trial of this action, if any, shall be limited to the unresolved issues framed by the terms of this order, namely, regarding the plaintiff's mailing of the pre-commencement notice of default and RPAPL § 1304 notice; and it is further

ORDERED that counsel for the respective parties shall appear for a pre-trial conference on **October 30, 2018**, at 9:30 a.m., in Part 33 at the courthouse located at 1 Court Street - Annex, Riverhead, New York, at which time the Court shall inquire as to whether the limited, unresolved issues of the plaintiff's standing can be resolved through subsequent motion submission, or whether directives shall issue in order to ready this matter for a trial on the limited, unresolved issues regarding the plaintiff's mailing of the pre-commencement notice of default and RPAPL § 1304 notice. It is also directed that failure to appear on this date may result in sanctions; and it is further

ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(2); and it is further

This is an action to foreclose a mortgage on residential property situate in Coram, NY. In essence, on April 22, 2005, defendants Matthew and Marie Marjorie Danna borrowed $252,000.00 from plaintiff's predecessor-in-interest and executed a promissory note and mortgage. The defendants defaulted on September 1, 2011 by failing to pay the monthly installments due and owing. This action was commenced by filing on June 26, 2013. The defendants submitted an answer with twelve affirmative defenses. By the instant motion (#001), plaintiff moves for an order granting it summary judgment as against the answering defendants, default judgments against all non-appearing defendants, amendment of the caption, and the appointment of a referee to compute. The defendants have opposed the motion.

The plaintiff addresses its burden of proof on this summary judgment motion in the moving papers, and refutes the affirmative defenses of the answer. The burden then shifts to defendants (*see* ***Bank of America, N.A. v DeNardo***, 151 AD3d 1008, 58 NYS3d 469 [2d Dept 2017]) and it was incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing or in support of the affirmative defenses asserted in the

answer or otherwise available to defendants (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, NA v Agnello,*** 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Notably, affirmative defenses predicated upon legal conclusions that are not substantiated with allegations of fact are subject to dismissal (*see* CPLR 3013, 3018[b]; ***Katz v Miller***, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; ***Becher v Feller***, 64 AD3 672, 677, 884 NYS2d 83 [2d Dept 2009]; ***Cohen Fashion Opt., Inc. v V & M Opt., Inc.***, 51 AD3d 619, 858 NYS2d 260 [2d Dept 2008]). 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 NY2d 539, 369 NYS2d 667 [1975]; *see also* ***Madeline D'Anthony Enter., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591[2d Dept 2010]). Additionally, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy (*see* ***New York Commercial Bank v J. Realty F Rockaway, Ltd.***, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; ***Starkman v City of Long Beach***, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]).

The defendants' opposition consists of an affidavit signed by the defendants, as well as an affirmation of the defendants' attorney. In the affidavit, the defendants allege that they did not receive the notice of default as required by the terms of the mortgage or the notice pursuant to RPAPL §1304, and they challenge the plaintiff's proposed balance of amount due. The attorney's affirmation also challenges plaintiff's compliance with RPAPL §1304, as well as, plaintiff's standing and further notes that the defendants are entitled to discovery. The Court addresses the allegations raised herein, however, in accordance with the above, all affirmative defenses raised in the answer and not addressed in the opposition are dismissed as abandoned (*see* ***JPMorgan Chase Bank, Natl. Assn. v Hua***, 160 AD3d 821, 2018 WL 1833244 [2d Dept 2018]).

The Court turns first to the defendants' generalized contentions regarding plaintiff's affidavit in support. Plaintiff submits the affidavit of Christian Lazu, Vice President of Ocwen Loan Servicing, the loan servicer and power of attorney of the plaintiff, sworn to on October 6, 2017. Mr. Lazu's averments were made based upon his review of Ocwen's business records, which he notes are created and maintained in the course of Ocwen's regular conducted business activities. He avers that he has personal knowledge of Ocwen's records and reviewed the records in making the statements in the affidavits, and notes that the records include the records of any prior servicers.

The allegations regarding the general admissibility of plaintiff's affidavit are unavailing. The affidavit adequately sets forth the basis of the affiant's knowledge and establishes the admissibility of the documents appended to the affidavit as business records, and comports with the dictates of both ***Nationstar Mtge., LLC v LaPorte***, 162 AD3d 784, 79 NYS3d 70 [2d Dept 2018] and ***HSBC***

Bank USA v Ozcan, 154 AD2d 822, *supra*; *see also* ***Olympus America, Inc. v Beverly Hills Surgical Inst.***, 110 AD3d 1048, 974 NYS2d 89 [2d Dept 2013]; ***DeLeon v Port Auth. of N.Y. & N.J.***, 306 AD2d 146, 761 NYS2d 54 [2d Dept 2003]), and satisfies the admissibility requirements of CPLR 4518(a) (*see* ***City Natl. Bank v Foundry Dev. Group, LLC***, 160 AD3d 920, 72 N.Y.S.3d 491 [2d Dept 2018]; ***Stewart Title Ins. Co. v Bank of New York Mellon***, 154 AD3d 656, 61 NYS3d 634 [2d Dept 2017]; ***Citigroup v Kopelowitz***, 147 AD3d 1014, 1015, 48 NYS3d 223 [2d Dept 2017]; *see generally* ***Citimortgage, Inc. v Espinal***, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]).

With regards to the mailing of the default notices, Mr. Lazu states that the notice was mailed to the defendants on March 22, 2012 and annexed a copy to his affidavit. In opposition, defendants bare conclusory denial of receipt fails to raise a question of fact. The plaintiff's submissions thus demonstrate plaintiff's compliance with the default notice provision of the mortgage.

Where the affidavit falls short, however, is in demonstrating the plaintiff's compliance with RPAPL §1304. In the affidavit, the plaintiff suggests that RPAPL §1304 is inapplicable to the matter at hand, as the borrowers filed a bankruptcy petition and thus an "application for the adjustment of debts or an order for relief from the payment of debts" prior to commencement of the action. RPAPL §1304(3) provides that "[t]he ninety day period specified in the notice ... shall not apply, or shall cease to apply" in such circumstances, but does not relieve the plaintiff of the obligation to send the notice prior to commencing the foreclosure action. The plaintiff's reply papers fail to adequately address this issue and, in fact, confuse the issue further by referring to copies of letters attached as Exhibit D in plaintiff's motion, that are not referred to whatsoever in plaintiff's affidavit.

As plaintiff has failed to establish its compliance with this condition precedent, this portion of plaintiff's motion is denied as to defendants' Fourth affirmative defense (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]).

Turning then to the respective defendants' challenge to plaintiff's standing, the Court notes that the standing defense has lost its significance and vitality with the advent of CPLR 3012-b. One of the various methods that standing may be established is by due proof that the plaintiff or its custodial agent was in possession of the note prior to the commencement of the action. The production of such proof is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, 12 NYS3d 612 [2015]; ***Wells Fargo Bank, NA v Frankson***, 157 AD3d 844, 66 NYS3d 529 [2d Dept 2018]; ***U.S. Bank v Ehrenfeld,*** 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; ***Citimortgage, Inc. v Klein***, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; ***U.S. Bank Natl. Assn. v Godwin***, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Joseph***, 137 AD3d 896, 26 NYS3d 583 [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]).

As occurred in this action, the plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit required by CPLR 3012-b has been held to constitute due proof of the plaintiff's possession of the note prior to the commencement of the action and thus its

standing to prosecute its claim for foreclosure and sale (*see* ***HSBC Bank USA, NA v Oscar***, 161 AD3d 1055, 1055, 2018 WL 2325896 [2d Dept 2018], *citing* ***US Bank NA v Cohen***, 156 AD3d 844, 846, 67 NYS3d 643 [2d Dept 2017]; ***US Bank NA v Saravanan,*** 146 AD3d 1010, 1011, 45 NYS3d 547 [2d Dept 2017]; ***JPMorgan Chase Bank, NA v Weinberger***, 142 AD3d 643, 645, 37 NYS3d 286 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Leigh***, 137 AD3d 841, 842, 28 NYS3d 86 [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904, *supra*; ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 1152, 9 NYS3d 315 [2d Dept 2015]; *see also* ***HSBC Bank USA v Ozcan***, 154 AD2d 822, 64 NYS3d 38 [2d Dept 2017]). Here, the plaintiff alleged in its complaint that it was the current holder of the note and attached a copy of the endorsed note to the complaint. Plaintiff has thus demonstrated standing.

In opposition, defendants contend that the plaintiff is required to provide the details of delivery including the "exact date" the note was transferred, however, there are no such requirements imposed upon plaintiff. Here, the plaintiff properly demonstrated possession of the note prior to the commencement of the action (*see* ***Wells Fargo Bank, NA v Frankson***, 157 AD3d 844, *supra; **Bank of NY Mellon v Burke***, 155 AD3d 932, *supra*), and therefore, the affirmative defenses addressed to standing are dismissed (*see* ***US Bank Natl. Assn. v Richards***, 151 AD3d 1001, 57 NYS3d 509 [2d Dept 2017]; ***Silvergate Bank v Calkula Prop., Inc.***, 150 AD3d 1295, 56 NYS3d 189 [2d Dept 2017]; ***Central Mtge. Co. v Jahnsen***, 150 AD3d 661, 56 NYS3d 107 [2d Dept 2017]; ***Bank of America, N.A. v Barton***, 149 AD3d 676, 50 NYS3d 546 [2d Dept 2017]). Pursuant to CPLR 3212(g), the court hereby declares that the issue of the plaintiff's standing is hereby resolved in favor of the plaintiff for all purposes of this action.

The defendants' contention that discovery is outstanding and that an order of summary judgment would be premature is also rejected. There is no showing as to how such discovery would have helped to defeat plaintiff's motion for summary judgment (*see* ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d at 645-6, *supra*; ***American Prescription Plan, Inc. v American Postal Workers Union***, 170 AD2d 471, 565 NYS2d 830 [2d Dept 1991]).

The remaining portions of the plaintiff's motion wherein it seeks an award of summary judgment on its complaint against the answering defendants, default judgments against the remaining defendants served with process and the appointment of a referee to compute, are premature in light of the existence of a potentially meritorious defense that is not subject to dismissal pursuant to CPLR 3212(b). Accordingly, those demands for relief are denied.

In accordance with the above, plaintiff's motion (#001) is decided as indicated above. Counsel for the parties are directed to appear for a pre-trial conference on **October 30, 2018** as noted herein and the proposed order submitted by plaintiff has been marked "not signed."

DATED: 10/2/18

THOMAS F. WHELAN, J.S.C.