

Onewest Bank, FSB v Cook

2019 NY Slip Op 33787(U)

December 27, 2019

Supreme Court, Suffolk County

Docket Number: 15641/2013

Judge: Thomas F. Whelan

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SHORT FORM ORDER

INDEX No. 15641/13

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

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/20/19
SUBMIT DATE 10/18/19
Mot. Seq. # 002 - MotD
Pre-Trial Conference: 1/24/20
CDISP Y N X

-----X

ONEWEST BANK, FSB, :
 :
 :
 Plaintiff, :
 :
 :
 -against- :
 :
 :
 DONALD J. COOK a/k/a DONALD JONATHAN :
 COOK, LYNN A. COOK, ONEWEST BANK, :
 FSB, TABAT, COHEN, BLUM & YOVINO, LLP :
 and "JOHN DOE", "RICHARD DOE", "JANE :
 DOE", "CORA COE", "DICK MOE" and "RUBY :
 POE", the six defendants last named in quotation :
 marks being intended to designate tenants or :
 occupants in possession of the herein described :
 premises or portions thereof, if any there by, said :
 names being fictitious, their true name being :
 unknown to plaintiff, :
 :
 :
 Defendants. :
 -----X

RAS BORISKIN, LLC
Attys. For Plaintiff
900 Merchants Concourse - Ste. 310
Westbury, NY 11590

RANALLI LAW GROUP, PLLC
Attys. For Defendant Donald Cook
742 Veterans Memorial Hwy.
Hauppauge, NY 11788

ROBERT COHEN, ESQ.
Atty. For Def. Tabat, Cohen, Blum
150 Motor Pkwy. - Ste. 425
Hauppauge, NY 11788

Upon the following papers numbered 1 to 8 read on this motion for the appointment of a referee to compute among other things; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers: ; Opposing papers: 4-6; Reply papers 7-8; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by the plaintiff for an award of summary judgment dismissing the affirmative defenses and counterclaims asserted in the respective answers of defendants, Lynn Cook and Donald J. Cook, default judgments against the remaining defendants

OneWest v Cook
Index No. 15641/2013
Page 2

served with process, and an order appointing a referee to compute is considered under CPLR §§3215, 1003 and RPAPL §1321, and 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 Lynn Cook's answer, is granted; and it is further

ORDERED that so much of the plaintiff's motion that seeks an order striking the first, through third and fifth through ninth affirmative defenses in defendant Donald Cook's answer, is granted; and it is further

ORDERED that so much of plaintiff's motion that seeks an order striking the fourth affirmative defense in defendant Donald Cook's answer regarding plaintiff's mailing of the RPAPL § 1304 notice is denied; 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, the plaintiff's mailing of the RPAPL § 1304 notice; and it is further

ORDERED that the branch of plaintiff's motion seeking default judgments against the non-answering defendants is granted; and it is further

ORDERED that counsel for the respective parties shall appear for a pre-trial conference on January 24, 2020, 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 issue of the plaintiff's mailing of the RPAPL § 1304 notice 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 issue regarding the plaintiff's mailing of the RPAPL § 1304 notice. It is also directed that there will be no adjournments of this conference and 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).

This is an action to foreclose a mortgage on residential real property situated in Deer Park. In essence, on June 9, 2006, defendants Donald Cook and Lynn Cook, borrowed \$310,000.00 from plaintiff's predecessor in interest and executed a consolidated note and consolidated mortgage. The defendants ceased making monthly payments as of July 1, 2012. This action was thereafter commenced by filing on June 17, 2013. Defendant, Lynn Cook, interposed a pro-se answer dated June 18, 2013, asserting general denials of the contents of the complaint. Thereafter, on July 12, 2013, defendant Donald Cook, interposed an answer through counsel asserting nine affirmative defenses. Although the answer itself refers to someone other than Mr. Cook in the first paragraph, annexed to the answer is a verification by Mr. Cook attesting to the truth of the statements asserted in the answer.

On October 23, 2018, plaintiff filed a motion (#001) seeking an order granting it leave to amend and supplement the previously filed summons and complaint. The motion was granted by

Onewest v Cook
Index No. 15641/2013
Page 3

Order dated October 29, 2018 (Whelan, J.S.C.). However, a review of the record before the Court indicates that, for reasons unknown, the proposed caption change was not completed within the Court's system. Nevertheless, plaintiff now moves (#002) for 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. Only defendant Donald Cook has opposed the motion. Plaintiff filed a reply.

In the moving papers on this summary judgment motion, the plaintiff addresses its burden of proof and refutes the affirmative defenses in the answer. Therefore, plaintiff has satisfied its prima facie burden on this summary judgment motion (*see HSBC Bank USA, Natl. Assn. v Espinal*, 137 AD3d 1079, 28 NYS3d 107 [2d Dept 2016]; *U.S. Bank Natl. Assn. v Cox*, 148 AD3d 692, 49 NYS3d 527 [2d Dept 2017]). 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 them (*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]; *Ames 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 AD3d 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 Mentessana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). In addition, 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]).

Defendant's submission, which consists of an affirmation of counsel and an affidavit of the defendant, challenges plaintiff's standing and proof of mailing of the RPAPL §1304 notice. The submission further challenges plaintiff's compliance with RPAPL §§1303 and 1306, although the latter is not addressed. The Court will address these claims herein, however, in accordance with the above, the remaining affirmative defenses, which were abandoned, are dismissed, as is the answer of Lynn Cook (*see JPMorgan Chase Bank, Natl. Assn. v Cao*, 160 AD3d 821, 76 NYS3d 82 [2d Dept 2018]; *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 defense of standing has lost its significance and vitality with the advent of CPLR §3012-b. One of the various methods standing may be established is by due proof that the plaintiff or its custodial agent was in possession of the endorsed 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]).

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 Green Tree Servicing, LLC v Molini*, 171 AD3d 880, 98 NYS3d 136 [2d Dept 2019]; *U.S. Bank N.A. v Offley*, 170 AD3d 1240, 97 NYS3d 307 [2d Dept 2019]; *Nationstar Mtge LLC v Balducci*, 165 AD3d 959, 2018 WL 5020218 [2d Dept 2018]; *HSBC Bank USA, NA v Oscar*, 161 AD3d 1055, 78 NYS3d 428 [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 [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 note, endorsed in blank, to the complaint. The defendant's reliance on a statement in counsel's affirmation is misplaced, as counsel is merely citing to caselaw and not discussing the facts of this case. "[T]he defendant's contention that the affidavits submitted by the plaintiff contained inadmissible hearsay is unavailing, as these submissions were not required under the circumstances to establish the plaintiff's standing" (*JPMorgan Chase Bank, N.A. v Escobar*, 177 AD3d 721, 2019 WL 5950745 [2d Dept 2019], *citing JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d at 645, *supra*; *cf. Wells Fargo Bank, N.A. v Talley*, 153 AD3d 583, 584, 59 NYS3d 743 [2d Dept 2017]; *Arch Bay Holdings, LLC v Albanese*, 146 AD3d 849, 853, 45 NYS3d 506 [2d Dept 2017]).

The plaintiff, through its submissions, has thus demonstrated the requisite possession of the note prior to the commencement of the action (*see Deutsche Bank Natl. Tr. Co. v Cardona*, 172 AD3d 1313, 99 NYS3d 668 [2d Dept 2019]; *Nationstar Mtge LLC v Balducci*, 165 AD3d 959, *supra*; *HSBC Bank USA, NA v Oscar*, 161 AD3d 1055, *supra*; *Wells Fargo Bank, NA v Frankson*, 157 AD3d 844, *supra*; *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]). As the defendant has failed to raise an issue of fact with regard to plaintiff's standing, the court hereby declares, pursuant to CPLR §3212(g), that the issue of the plaintiff's standing is resolved in favor of the plaintiff for all purposes of this action.

The Court next addresses the defendant's challenge to plaintiff's proof of mailing of the RPAPL § 1304 notice. While an affidavit of service is the preferred demonstration of mailing, "[t]here is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR §4518(a), and the records themselves actually evince the facts for which they are relied upon" (*Aurora Loan Services, LLC v Vrionedes*, 167 AD3d 829, 832, 91 NYS3d 150 [2d Dept 2018], citing *Citigroup v Kopelowitz*, 147 AD3d 1014, 1015, 48 NYS3d 223; see also *HSBC Bank USA, N.A. v Ozcan*, (154 AD2d 822, 826, 64 NYS3d 38 [2d Dept 2017])). A foreclosure plaintiff or its servicer can demonstrate mailing by providing proof of actual mailing or a description of the sender's office practice and procedure for mailing (see *Citibank, N.A. v Wood*, 150 AD3d 813, 55 NYS3d 109 [2d Dept 2017]). Thus, due proof of the mailing of the notice can be established by submission of an affidavit of service (see *Investors Sav. Bank v Salas*, 152 AD3d 752, 58 NYS3d 600 [2d Dept 2017]; *Bank of NY Mellon v Aquino*, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; *Emigrant Mtge. Co., Inc. v Persad*, 117 AD3d 676, 985 NYS2d 608 [2d Dept 2014]); an affidavit of mailing (see *JPMorgan Chase Bank, NA v Schott*, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; *Wells Fargo v Moza*, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015]), or "with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure" (*Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 21, 98 NYS3d 273 [2d Dept 2019] [citations omitted]).

The plaintiff's submission falls short in this respect. Although plaintiff submits two separate affidavits purporting to demonstrate the mailing of the notices, neither submission contains an affidavit of service, or a description of the plaintiff's regular mailing practices and attestation that same were adhered to, or proof of mailing from the postal service (*PNMAC Mtge. Opportunity Fund Invs, LLC v Torres*, 175 AD3d 1335, 1337, 108 NYS3d 143 [2d Dept 2019] citing *Emigrant Bank v. Myers*, 147 AD3d 1027, 1028, 47 NYS3d 446 [2d Dept 2017]; *Nationstar Mtge., LLC v Dimura*, 127 AD3d 1152, 1153, 7 NYS3d 573 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Eisler*, 118 AD3d 982, 983, 988 NYS2d 682 [2d Dept 2014]). Therefore, plaintiff has failed to demonstrate compliance with the mailing requirement of the RPAPL § 1304.

The Court finds the defendant's remaining challenge to plaintiff's compliance with RPAPL §1303 to be without merit. The defendant has failed to overcome the presumption of service of the notice, "in compliance with RPAPL Sect. 1303 notice" on colored paper, as set forth in the affidavit of service (see *Eastern Sav. Bank, FSB v Tromba*, 148 AD3d 675, 48 NYS3d 499 [2d Dept 2017]; *Deutsche Bank Natl. Trust Co. v Quinones*, 114 AD3d 719, 981 NYS2d 107 [2d Dept 2014]; *U.S.*

Onewest v Cook
Index No.15641/2013
Page 6

Bank N.A. v Tate, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]).

Given the above, the plaintiff's motion (#002) is decided as granted in part and denied in part. The proposed order submitted by plaintiff is marked "NOT SIGNED." Counsel for the parties are directed to appear for a pre-trial conference on **January 24, 2020** at 9:30 a.m., as noted above.

DATED: 12/27/19



THOMAS F. WHELAN, J.S.C.