

U.S. Bank N.A. v Ricciardi

2024 NY Slip Op 31253(U)

April 2, 2024

Supreme Court, New York County

Docket Number: Index No. 850286/2023

Judge: Francis A. Kahn III

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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. 850286/2023

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE CERTIFICATEHOLDERS OF ADJUSTABLE RATE MORTGAGE TRUST 2005-10 ADJUSTABLE RATE MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2005-10,

MOTION DATE _____

MOTION SEQ. NO. 001

Plaintiff,

- v -

ANTHONY RICCIARDI, LIMORE D. RICCIARDI, THE BORARD OF MANAGERS OF THE REVERE CONDOMINIUM, THE BORAD OF MANAGERS OF EAST 54TH STREET CONDO., INTERSTATE BILLING SERVICE, INC., WISSELMAN HAROUNIAN & ASSOCIATES A/K/A WISSELMAN & ASSOCIATES, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE AND JANE DOE SAID NAMES BEING FICTITIOUS, IT BEING THE INTENTION OF PLAINTIFF TO DESIGNATE ANY AND ALL OCCUPANTS OF PREMISES BEING FORECLOSED

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for JUDGMENT - SUMMARY

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

In this action Plaintiff seeks to foreclose on a mortgage encumbering residential real property located at 400 East 54th Street, Unit 7F, New York, New York. The mortgage, dated August 8, 2005, was given by Defendants/Mortgagors Anthony Ricciardi and Limore D. Ricciardi ("Ricciardi") to non-party Washington Mutual Bank, FA ("Washington") to secure a loan with an original principal amount of \$525,000.00. The indebtedness is evidenced by a note executed the same date as the mortgage. Ricciardi executed a loan modification agreement with JPMorgan Chase Bank, NA dated July 1, 2019. Therein, Ricciardi admitted financial hardship, a default and promised to make all payments as scheduled in the agreement.

Plaintiff commenced this action alleging *inter alia* that Ricciardi defaulted in repayment of the loan secured by the mortgage on or about September 1, 2019. Ricciardi filed an answer and pled thirty-four affirmative defenses, including lack of standing and failure to comply with RPAPL §1304 and 1036, as well as asserting a counterclaim. Now, Plaintiff moves for summary judgment against the appearing Defendants, to strike their answers and affirmative defenses, a default judgment against the non-appearing Defendants, for an order of reference and to amend the caption. Ricciardi Defendants oppose the motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendants' default in repayment (see *U.S. Bank, N.A. v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (see CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). Based on the affirmative defenses pled, Plaintiff was required to demonstrate, *prima facie*, its standing (see eg *Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]), its strict compliance with RPAPL §§1303, 1304 and 1306 (see *U.S. Bank, NA v Nathan*, 173 AD3d 1112 [2d Dept 2019]; *HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 669 [2d Dept 2019]) and its substantial compliance with any contractual pre-foreclosure notice requirements (see eg *Wells Fargo Bank, N.A. v McKenzie*, 186 AD3d 1582, 1584 [2d Dept 2020]). In support of a motion for summary judgment on a cause of action for foreclosure, a plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (see eg *U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (see eg *Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported by an affidavit from Diane Weinberger ("Weinberger"), a Document Control Officer of Select Portfolio Servicing, Inc. ("SPS"), the alleged servicer and attorney-in-fact for Plaintiff. As the action was not commenced by SPS as servicer for Plaintiff nor is it presently being prosecuted as same (cf. *CWC Capital Asset Mgt. v Charney-FPG 114 41st St., LLC*, 84 AD3d 506, 507 [1st Dept 2011]), Plaintiff is required to demonstrate SPS's authority to act on its behalf for Weinberger's affidavit to be valid (see eg *21st Mtge. Corp. v Adames*, 153 AD3d 474, 476-477 [2d Dept 2017]). This is customarily established through a power of attorney, pooling and servicing agreements or a combination of same (see *U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *US Bank N.A. v Louis*, 148 AD3d 758 [2d Dept 2017]). Where a servicer acts pursuant to a power of attorney which is "restricted and conditioned" on a discrete document, the referenced material must also be produced for the affidavit submitted by the servicer to be sufficient (see *U.S. Bank N.A. v Tesoriero*, supra at 1068)¹.

In support of the motion, Plaintiff proffered two powers of attorney to support SPS's authority to act. By the first, dated November 3, 2020, Plaintiff nominated JPMorgan Chase Bank, National Association ("JPMorgan") to act as its servicer and attorney-in-fact. That delegation stated that it was "being issued in connection with Servicer's responsibilities to service certain mortgage loans (the "Loans") held by the Trustee". Annexed to the power of attorney as exhibit "A" was a list of the Trustee's loans which included reference to Plaintiff. The authority granted JPMorgan by the power of attorney is expressly limited to those acts "required or permitted under the terms of the related servicing agreements". By power of attorney dated November 17, 2020, JPMorgan granted a limited power of attorney to SPS's to be sub-servicer of Plaintiff's loans subject similarly limited to "only to those enumerated transactions for which the Trustee has appointed".

The referenced trustee document, commonly referred to as a "pooling and servicing agreement" was not annexed to the moving papers. Ordinarily on a motion for summary judgment, such a defect is fatal to the motion (see generally *Wells Fargo Bank v Mitselmakher*, 216 AD3d 1056, 1058 [2d Dept 2023]; *Ditech Fin.*,

¹ This latter requirement is ostensibly founded in a combination of the common law doctrine of incorporation of documents by reference and the best evidence rule (see *21st Mtge. Corp. v Adames*, supra at 752, citing *Amica Mut. Ins. Co. v Kingston Oil Supply Corp.*, 134 AD3d 750 [2d Dept 2015]).

LLC v Cummings, 208 AD3d 634, 636 [2d Dept 2022]; *Deutsche Bank Natl. Trust Co. v Adlerstein*, 171 AD3d 868, 870 [2d Dept 2019]). However, a claim of lack of corporate authority to act which is raised for the first time by an opponent to summary judgment is curable by a submission in reply (*see GMAC Mtge., LLC v Coombs*, 191 AD3d 37, 50-51 [2d Dept 2020]; *Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2d Dept 2015]). This includes considering submission of a power of attorney or a pooling and servicing agreement (*see Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898 [2d Dept 2019]; *Deutsche Bank Natl. Trust Co. v Rudman*, 170 AD3d 950 [2d Dept 2019]).

Here, the “pooling and servicing agreement” submitted in reply, titled Adjustable Rate Mortgage Trust 2005-10 Adjustable Rate Mortgage-Backed Pass Through Certificates, Series 2005-10, dated January 25, 2005, establishes that Plaintiff is trustee thereof and expressly includes the responsibility to “supervis[e] foreclosures or repossessions” and grants the servicer the authority to “delegate its servicing obligations to third-party subservicers”. That SPS may have served as power of attorney for both JP Morgan and, by extension Plaintiff, is irrelevant (*see Wells Fargo Bank, N.A. v Walker*, 141 AD3d 986, 989 [3d Dept 2016]). As such, Plaintiff sufficiently demonstrated SPS’s authority to act (*see Deutsche Bank Natl. Trust Co. v Silverman*, supra at 901).

As to the substance of the affidavit, Weinberger claims that her submission was made based upon her review of SLS’s records and knowledge of its record keeping practices. Personal knowledge can be sufficient to demonstrate a *prima facie* case for summary judgment (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019][“Admissible evidence may include ‘affidavits by persons having knowledge of the facts [and] reciting the material facts’”]). Weinberger’s affidavit laid a proper foundation for the admission of the records of SLS into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). The records of other entities were also admissible since Weinberger sufficiently established that those records were received from the makers and incorporated into the records SPS kept and that it routinely relied upon such documents in its business (*see U.S. Bank N.A. v Kropp-Somoza*, 191 AD3d 918 [2d Dept 2021]). Further, annexed to the motion were records referenced by Weinberger (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

As to the Mortgagor’s default, it “is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form” (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). Here, Weinberger’s review of the attached account records demonstrated that the Mortgagor defaulted in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]).

Accordingly, Plaintiff established the material facts underlying the claim for foreclosure, to wit the mortgage, note, and evidence of mortgagor’s default (*see eg Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra).

As to standing in a foreclosure action, it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note prior to commencement of the action that contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). “The attachment of a properly endorsed note to the complaint may be sufficient to establish, *prima facie*, that the plaintiff is the holder of the note at the time of commencement” (*Deutsche Bank Natl. Trust Co. v Webster*, 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, supra). In this case, Plaintiff annexed a copy of the note to the complaint endorsed in blank by the original lender,

Washington, on its face. This is sufficient to demonstrate that Plaintiff was the holder of the note when the action was commenced (*see Bank of NY v Knowles*, supra at 597; *cf. U.S. Bank N.A. v. Rozo-Castellanos*, 201 AD3d 995, 999 [2d Dept 2022]).

Proof of compliance with RPAPL §1304 requires Plaintiff to proffer “sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304” (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). “[P]roof of the requisite mailing . . . can be established with proof of the actual mailings, such as affidavits of mailing or domestic return receipts with attendant signatures, or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure” (*Deutsche Bank Natl. Trust Co. v Dennis*, 181 AD3d at 866, quoting *Citibank, N.A. v Conti-Schewer*, 172 AD3d 17, 21 [2d Dept 2019]). In other words, an affidavit from the person who performed the actual mailing is not necessary (*see Bossuk v Steinberg*, 58 NY2d 916, 919 [1983]) and proof from a person with “personal knowledge of the practices utilized by the [sender] at the time of the alleged mailing” is sufficient (*Preferred Mut. Ins. Co. v Donnelly*, 22 NY3d 1169, 1170 [2014]).

To demonstrate standard mailing procedure, the Court of Appeals has “has long recognized a party can establish that a notice or other document was sent through evidence of actual mailing or—as relevant here—by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature” (*Cit Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2d Dept 2020][internal citations omitted]). A satisfactory office practice giving rise to the presumption “must be geared so as to ensure the likelihood that [the] notice . . . is always properly addressed and mailed” (*Nassau Ins. Co. v Murray*, 46 NY2d 828, 830 [1978]) and can be demonstrated via an affiant who explains “among other things, how the notices and envelopes were generated, posted and sealed, as well as how the mail was transmitted to the postal service” (*Cit Bank N.A. v Schiffman*, supra). Fulfillment of this requirement can raise a presumption that the required notice was sent and received by the projected addressee (*Cit Bank N.A. v Schiffman*, supra).

In support of the motion, the mailing of the statutory and contractual notices was attested to by Weinberger who averred to having personal knowledge of SPS’s notice practices and procedures. Further, Weinberger described SPS’s process of mailing default notices in adequate detail (*see United States Bank Trust, N.A. v Mehl*, 195 AD3d 1054 [2d Dept 2021]; *Citimortgage, Inc. v Ustick*, 188 AD3d 793, 794 [2d Dept 2020]).

In opposition, Defendants’ arguments concerning SPS’s authority to act and the sufficiency of the service of the statutory and contractual pre-foreclosure notices are unavailing.

As to the branch of Plaintiff’s motion to dismiss Defendants’ affirmative defenses, CPLR §3211[b] provides that “[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit”. For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a “defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed” (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

All the affirmative defenses, and the counterclaim, are entirely conclusory and unsupported by any facts in the answer or by the papers submitted in opposition. As such, these affirmative defenses are nothing more than an unsubstantiated legal conclusion which is insufficiently pled as a matter of law (*see Board of Mgrs. of*

Ruppert Yorkville Towers Condominium v Hayden, 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]). Further, to the extent that no specific legal argument as proffered in support of a particular affirmative defense or counterclaim, those defenses and claims were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (*see CPLR §3215; SRMOF II 2012-1 Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted without opposition (*see generally CPLR §3025; JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that the branch of Plaintiff's motion for summary judgment against the appearing Defendants, for a default judgment against the non-appearing parties, as well as the other relief is granted; and it is further

ORDERED that all the affirmative defenses in Defendants' answer as well as the counterclaim are stricken, and it is

ORDERED that **Tom Kleinberger, Esq., 411 5th Avenue, New York, New York 10016 (917) 326-5523** 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, 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 that failure to submit objections to the referee may 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 45 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 and all papers previously filed herein shall be amended by striking defendants "John Doe #1" through "John Doe #10" all without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that the caption shall be amended to read as follows:

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

-----X
U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE, FOR THE BENEFIT OF THE
CERTIFICATE HOLDERS OF ADJUSTABLE RATE
MORTGAGE TRUST 2005-10 ADJUSTABLE RATE
MORTGAGE-BACKED PASS-THROUGH
CERTIFICATES, SERIES 2005-10,

Plaintiff,

-against-

ANTHONY RICCIARDI A/K/A ANTHONY
RICCARDI; LIMORE D. RICCIARDI A/K/A LIMORE
RICCIARDI A/K/A LIMORE RICCARDI; THE
BOARD OF MANAGERS OF THE REVERE
CONDOMINIUM; THE BOARD OF MANAGERS OF
EAST 54TH STREET CONDO.; INTERSTATE
BILLING SERVICE, INC.; WISSELMAN
HAROUNIAN & ASSOCIATES A/K/A WISSELMAN
& ASSOCIATES; NEW YORK CITY TRANSIT
ADJUDICATION BUREAU,

Defendants.

-----X
850286/2023 U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE
CERTIFICATEHOLDERS OF ADJUSTABLE RATE MORTGAGE TRUST 2005-10 ADJUSTABLE
RATE MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2005-10 vs. RICCIARDI,
ANTHONY ET AL
Motion No. 001

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/supctmanh)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **August 7, 2024, at 11:00 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.

4/2/2024

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

FRANCIS A. KAHN III

HON. FRANCIS A. KAHN III
J.S.C.