

**Wilmington Trust, N.A. v Carlson**

2024 NY Slip Op 34211(U)

March 13, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 204125/2022

Judge: Betsy Heckman Torres

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Short Form Order

SUPREME COURT - STATE OF NEW YORK  
IAS PART 18 - SUFFOLK COUNTY

**PRESENT:**

**HON. S. BETSY HECKMAN TORRES, J.S.C.**

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WILMINGTON TRUST, N.A.,

Plaintiff,

-against-

HEIDI CARLSON, et al.,

Defendants.

-----X

INDEX NO.: 204125/2022

MOTION DATE: 11/21/2023

MOTION SEQ. #: #001 MG

**PLAINTIFF'S ATTORNEY:**

Friedman Vartolo LLP

85 Broad Street, Suite 501

New York, NY 10004

**DEFENDANT'S ATTORNEY:**

William Grausso, Esq.

80 Orville Dr Ste 100

Bohemia, NY 11716

Upon the following electronically filed documents listed on NYSCEF as #s 25-51 read on this motion (#001) by plaintiff seeking, among other things, summary judgment, opposition and reply thereto, and upon due consideration; it is

**ORDERED** that this motion (001) by the plaintiff for, *inter alia*, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the answering defendant Heidi Carlson-Alisicio (hereinafter "defendant"), striking her answer and dismissing the affirmative defenses 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; and it is further

**ORDERED** that the plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein within thirty (30) days of the date of this order, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property located in Blue Point, New York. On September 29, 2006, defendant executed a note in favor of plaintiff's predecessor American Brokers Conduit in the principal amount of \$305,600. To secure said note, on the same date, defendant executed a mortgage on the property in favor of Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for the lender. On March 1, 2009, defendant executed a loan modification agreement with American Home Mortgage Servicing, Inc. On October 1, 2010, defendant executed a second loan modification with American Home Serving, Inc. The mortgage was subsequently assigned to plaintiff by assignment of mortgage dated August 20, 2015. On August 27, 2019, defendant executed a third loan modification agreement in favor of plaintiff. Defendant allegedly defaulted on the note and mortgage by failing to make monthly payments of principal and interest which had come due on October 1, 2019 and continuing thereafter. After defendant failed to cure the default in payment, plaintiff commenced the instant action by the filing of a lis pendens, summons and complaint on October 27, 2022. Issue was joined by the interposition of defendant's answer dated November 23, 2022. The remaining defendants have not answered the complaint. Plaintiff now moves for summary judgment and an order of reference. The defendant opposes plaintiff's motion.

By her answer, defendant generally denies the material allegations set forth in the complaint, and asserts twenty-one (21) affirmative defenses. The grounds for the answering defendant's opposition to plaintiff's motion is limited to plaintiff's alleged lack of standing, and plaintiff failed to properly serve defendant with the notice of default as required by the mortgage.

At the outset, defendant seemingly seeks in her opposition papers affirmative relief in the nature of dismissing the complaint. To the extent that defendant seeks affirmative relief in her opposition papers, that request for relief is denied as improperly before the court (CPLR 2215). In the absence of a notice of cross motion, a defendant is not entitled to obtain any affirmative relief (see, *Lee v. Colley Group McMontebello, LLC*, 90 AD3d 1000 [2d Dept 2011]; *DeLorenzo v. Gabbino Pizza Corp.*, 83 AD3d 992 [2d Dept 2011]).

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]). Where, as here, a plaintiff's standing to maintain a foreclosure action is placed in issue by a defendant, a plaintiff must prove its standing to be entitled to relief (see *Wilmington Sav. Fund Socy., FSB v. Finn*, 170 A.D.3d 1246, 1247, 96 N.Y.S.3d 627). A plaintiff has standing to maintain a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced (see *Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d 355, 361-362, 12 N.Y.S.3d 612, 34 N.E.3d 363).

"Pursuant to UCC 3-804, which is intended to provide a method of recovery on instruments that are lost, destroyed, or stolen, a plaintiff is required to submit 'due proof of [the plaintiff's] ownership, the facts which prevent [its] production of [the note,] and its terms' "



(*Deutsche Bank Natl. Trust Co. v. Anderson*, 161 A.D.3d at 1044, 79 N.Y.S.3d 42, quoting UCC 3-804).

Here, although plaintiff was unable to produce the note, a copy of the note endorsed in blank submitted by the plaintiff provided sufficient evidence of its terms (see *N.Y. Community Bank v. Jennings*, 2015 N.Y. Slip Op. 31591(U), \*4, 2015 WL 5062168 [Sup. Ct., N.Y. County]).

Plaintiff also submits the lost note affidavit of Joel Pires, an employee of Ocwen Loan Servicing LLC, servicer for a purported prior assignee of the note, the nonparty MTGLQ Investors, L.P. According to Pires, on February 7, 2014, a good faith, diligent search for the original note was conducted and the original note could not be located, inter alia.

Further, plaintiff established that the August 2019 modification agreement created a direct contractual relationship between the plaintiff and defendant relating specifically to the subject promissory note and mortgage. By entering into the modification agreement and making monthly installment payments thereunder, the defendant expressly acknowledged the plaintiff's status as the holder of the subject note as of August 2019—well before the commencement of this action (See, *Wells v. Graffioli*, 167 A.D. 3d 969 (2<sup>nd</sup> Dept. 2018)). Therefore, contrary to the defendant's contention, the plaintiff established its standing to maintain this action (cf. *Wells Fargo Bank, N.A. v. Walker*, 141 A.D.3d 986, 988-989, 35 N.Y.S.3d 591; *IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd.*, 84 A.D.3d 637, 637, 923 N.Y.S.2d 508; *Wilmington Trust Co. v. Hurtado*, 48 Misc.3d 1201[(A), 2015 WL 3822249 [Sup. Ct., Suffolk County]).

Further, contrary to defendant's contention, plaintiff established its strict compliance with notice requirements of the mortgage agreement. Section 22 of the mortgage agreement, along with section 15 of the same agreement, require service of a specified default notice as a condition precedent to the acceleration of the mortgage loan (see *Deutsche Bank Natl. Trust Co. v. Crimi*, 184 A.D.3d 707, 709-711, 126 N.Y.S.3d 197). Pursuant to section 15, the notice of default must be "mailed by first class mail or ... actually delivered to [the defendants'] notice address if sent by other means." The mortgage agreement provides that the notice address is the address of the mortgaged property unless the plaintiff is notified of another address by the borrower.

Here, plaintiff submitted the affidavit of Priscilla Serrato, an employee of plaintiff's servicer. Serrato stated that the servicer utilizes Covius Document Services, LLC., f/k/a Walz Group, LLC (hereinafter "Covius") for the mailing of its notices of default and 90-day notices. As part of her employment, Serrato stated that she was familiar with the mailing practices and procedures and record keeping practices of Covis, and she described those procedures. She further avers that Covis' records are incorporated into the servicer's own records and routinely relied upon in the regular course of its business. Serrato states that upon review of the business records, attached as an Exhibit to her affidavit, "on May 12, 2022, Notices of Default were sent to (defendant) at the Mortgaged Premises by first-class mail and certified-mail. Further, attached to her affidavit is a copy of the Notice of Default, along with a "Transaction Report" generated

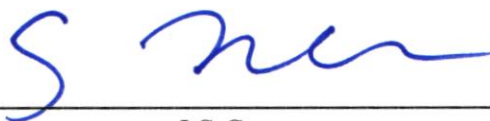
by Covius, the entity that mailed the notices on behalf of the plaintiff. Accordingly, plaintiff established that it complied with the notice requirements of the mortgage agreement.

The defendant failed to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's *prima facie* showing or in support of an affirmative defense and counterclaim (see *Grogg v South Rd. Assoc.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; *Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; *JP Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]). Even when considered in the light most favorable to the defendant the opposing papers are insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale (see *Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 968 NYS2d 95 [2d Dept 2013]; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]). Plaintiff submitted sufficient proof to establish, *prima facie*, that the affirmative defenses 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]).

Defendant's remaining contentions lack merit.

Accordingly, plaintiff's motion (#001) is granted, and the proposed order of reference, as modified by the Court, is being signed concurrently herewith.

Dated: March 13, 2024



J.S.C.

HON. S. BETSY HECKMAN TORRES, J.S.C.