

Bank of Am., N.A. v Reid

2022 NY Slip Op 34812(U)

March 11, 2022

Supreme Court, Queens County

Docket Number: Index No. 711206/2018

Judge: Tracy Catapano-Fox

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This opinion is uncorrected and not selected for official publication.

Short Form Order
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS



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Bank of America, N.A.,

Plaintiff,

-against-

Patricia Reid, New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau, and "JOHN DOE #1" through "JOHN DOE #10" The last ten names being fictitious and unknown to the plaintiff, the Persons or parties, if any, having or claiming an interest in or lien Upon the mortgaged premises described in the Complaint,

Defendants.

-----X

NOTICE OF MOTION
Index No.: 711206/2018
Motion Calendar:
January 31, 2022
Sequence No. 1
Calendar No. 10

The following papers numbered 1 to 11 read on this motion by plaintiff for summary judgment and an Order of Reference pursuant to CPLR §3212, to strike defendant’s affirmative defenses and counterclaim, to appoint a referee and a default judgment against non-appearing defendants, and this cross-motion by defendant Patricia Reid to dismiss plaintiff’s Complaint for failure to comply with RPAPL §1304 and for violation of the application statute of limitations.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion, Affirmation, Exhibits.....	1-4
Notice of Cross-Motion, Affirmation, Exhibits.....	5-8
Plaintiff’s Affirmation in Opposition, Exhibits.....	9-11

Upon the foregoing papers, it is ordered that these motions are determined as follows:

Plaintiff’s motion for summary judgment and an Order of Reference, and to strike defendant’s affirmative defenses is denied, and defendant Patricia Reid’s cross-motion to dismiss plaintiff’s Complaint is denied. (See *JP Morgan Chase Bank, Nat’l Assn. v. Escobar*, 177 A.D.3d 721 [2d Dept. 2019].)

Plaintiff commenced this residential foreclosure action to recover real property that was secured by a note signed by defendant Patricia Reid on August 21, 2008, for the property located at 259-51 149th Road, Rosedale, Queens, New York. Plaintiff first filed the Summons and Complaint on March 29, 2010, under Queens Supreme Court Index #7731/2010, and said action was dismissed by court order on May 6, 2015. Plaintiff then commenced the instant action on

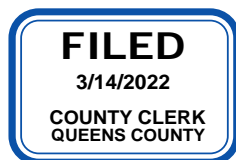
July 20, 2018, and now seeks summary judgment and an Order of Reference, and striking defendant's affirmative defenses.


In a foreclosure action, a plaintiff can establish a prima facie case through the production of the mortgage, the unpaid note and evidence of default. (*See JP Morgan Chase Bank v. Akanda*, 177 A.D.3d 718, 719 [2d Dept. 2019].) Here, plaintiff failed to establish a prima facie case, notwithstanding the sufficiency of defendant's opposition papers. Plaintiff's affidavit of merit from Nelson Eubanks established that it was in physical possession of the note at the time of commencement of the second action. However, the affidavit of Nelson Eubanks, plaintiff's authorized representative, is insufficient as it did not address the onboarding of the Bank of America documents into PennyMac's business records or that he reviewed the Bank of America as well as the PennyMac business records relied upon by him in demonstrating the mortgage and defendant Reid's evidence of default. (*See Citibank N.A. v. Gentile*, 156 A.D.3d 859 [2d Dept. 2017].) Eubanks' affidavit acknowledges that he is an employee of PennyMac, the servicer of Bank of America, but failed to establish that he reviewed Bank of America's records or that they were incorporated into Pennymac's business records. It is noted that plaintiff's notice of default and acceleration reflected a default date of August 1, 2012, while the first action was pending. As plaintiff failed to establish prima facie that it is entitled to summary judgment, plaintiff's motion is denied. (*See Aurora Loan Servs. LLC v. Taylor*, 25 N.Y.3d [2015].)

Defendant Reid's cross-motion for dismissal of plaintiff's Complaint is denied. Defendant Reid's argument that plaintiff failed to comply with RPAPL §1304 is denied, as defendant acknowledged receiving the 90-day notice on September 20, 2016. Defendant Reid's argument that plaintiff's failure to commence the action until July 20, 2018, is a violation of RPAPL §1304 is without merit, as the statute only requires plaintiff to wait ninety days before commencing an action but does not mandate an expiration date to commence after the 90-day notice is served. As defendant failed to present any case law that requires plaintiff to commence the action within a certain time period after the 90-day notice, defendant's motion to dismiss is denied. Further, defendant Reid's motion to dismiss for violation of the applicable statute of limitations is denied. While defendant Reid presented evidence that plaintiff commenced the action more than six years after acceleration of the debt, plaintiff raises an issue of fact as to whether it is subject to the six-year statute of limitations as a federally insured Housing and Urban Development loan.

Accordingly, plaintiff's motion for summary judgment and an Order of Reference, and to strike defendant's affirmative defenses is denied, and defendant Patricia Reid's cross-motion to dismiss plaintiff's Complaint is denied.

Dated: March 11, 2022




Tracy Catapano-Fox, J.S.C.