

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

PRESENT: Hon. _____ Robert D. KALISH
Justice

PART 29

LAVERNE LEONARD,

INDEX NO. 151492/2018

Plaintiff,

MOTION DATE 8/15/18

- v -

MOTION SEQ. NO. 001

**NATIONAL CITY BANK n/k/a PNC FINANCIAL
SERVICES GROUP and E*TRADE FINANCIAL
CORPORATION,**

Defendants.

NYSCEF Doc Nos. 4-34 were read on this motion to dismiss.

Motion pursuant to CPLR 3211 (a) (1) by defendant E*Trade Financial Corporation to dismiss the verified complaint is denied. Cross-motion pursuant to CPLR 305 (c) and 3025 (b) by Plaintiff Laverne Leonard for leave to amend the complaint is granted.

BACKGROUND

Plaintiff Laverne Leonard ("Leonard") commenced the instant RPAPL § 1501 (4) action on February 16, 2018, by e-filing a summons and verified complaint. Plaintiff seeks to cancel and discharge of record a certain mortgage on 130 West 131st Street, New York, New York 10027 (the "Property"), allegedly owned and occupied by Leonard. Plaintiff alleges that Defendants National City Bank n/k/a PNC Financial Services Group ("NCB") and E*Trade Financial Corporation ("E*Trade Financial") may have an interest in the property by means of a certain mortgage. Plaintiff alleges that the statute of limitations has run on enforcing the mortgage due to a 2009 acceleration and that there was never a foreclosure.

On March 14, 2018, E*Trade Financial filed the instant motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint. In support of its motion, E*Trade Financial annexes an "Assignment and Conveyance," dated March 21, 2007, which states, in sum, that NCB is conveying certain HELOCs to E*Trade Bank pursuant to a Purchase Agreement and a HELOC Purchase Schedule. Both the Purchase Agreement and the HELOC Purchase Schedule are referenced in the Assignment and Conveyance, but neither document is annexed to the motion submission. The Assignment and Conveyance is signed but is not notarized.

E*Trade Financial annexes an affidavit, dated March 14, 2018, by Edward Smoczynski, the Senior Manager of Credit Risk Operations at E*Trade Bank, who states that the Assignment

and Conveyance conveyed from NCB to E*Trade Bank all rights to the subject mortgage. The affidavit further states that E*Trade Bank retains all such rights and interest.

E*Trade Financial annexes a letter, dated March 13, 2018, to its motion submission stating that Plaintiff has sued “the wrong party” and indicating that NCB’s interest in the subject mortgage was transferred to E*Trade Bank.

The letter annexes a heavily redacted spreadsheet (the “Spreadsheet”). The attorney for E*Trade Financial, Mr. Barry R. Lax, alleges in his March 13, 2018 letter that the Spreadsheet “includes part of the list of all HELOC mortgages covered by the Assignment and Conveyance, including Plaintiff’s.” On row 8318 of the Spreadsheet, Plaintiff’s name is listed along with a “HELOC” with an “Origination Date” of October 27, 2006.

E*Trade Financial argues in the papers submitted support of its motion, in sum and substance, that it is the incorrect party to be sued in this action and that E*Trade Bank is the correct party.

Plaintiff cross-moves pursuant to CPLR 305 (c) and 3025 (b) to amend its complaint and serve a supplemental summons adding E*Trade Bank as a party defendant. Plaintiff opposes E*Trade Financial’s motion to dismiss based upon that the documentary evidence submitted fails to conclusively resolve all fact issues.

E*Trade Financial argues in its reply papers that the instant motion should be granted, and the cross-motion should be denied. In addition to reiterating the arguments in its moving papers, E*Trade Financial opposes the cross-motion and argues that the statute of limitations has not run on enforcing the subject mortgage, so the proposed amended complaint is palpably insufficient.

On August 15, 2018, E*Trade Financial and Plaintiff appeared in this Court by their counsel for oral argument on the instant motion and cross-motion. Notably, counsel for movant indicated that E*Trade Financial is the parent company of E*Trade Bank. Counsel for movant also confirmed that the Spreadsheet as annexed to the submitted papers does not reference the Assignment and Conveyance, nor does the Assignment and Conveyance reference the Spreadsheet. Rather, both were attached to Mr. Lax’s March 13, 2018 letter, in which Mr. Lax referred to the Spreadsheet as “part of the list of all HELOC mortgages covered by the Assignment and Conveyance, including Plaintiff’s.”

DISCUSSION

CPLR 3211 (a) (1) permits a party to move for judgment dismissing one or more causes of action asserted against it on the ground that a defense is founded upon documentary evidence. Dismissal under this provision “is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Alden Global Value Recovery MF, L.P. v KeyBank Natl. Assn.*, 159 AD3d 618, 621 [1st Dept 2018].) The

documentary evidence must “conclusively refute the complaint’s allegations.” (*Lowenstern v Sherman Square Realty Corp.*, 143 AD3d 562, 562 [1st Dept 2016].)

Here, the Assignment and Conveyance submitted does not state by its terms that NCB conveyed the subject mortgage to E*Trade Bank. While the Assignment and Conveyance does state that NCB conveyed to E*Trade Bank certain “Eligible HELOCs,” “HELOC Agreements,” and certain “related Mortgages for the Eligible HELOCs,” none of said HELOCs, agreements, or mortgages are annexed to the motion submission.

Moreover, neither the Smoczynski affidavit nor the affirmation or letter of Mr. Lax can cure this deficiency:

“To constitute documentary evidence, the evidence must be unambiguous, authentic, and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable. Conversely, letters, emails, and [] affidavits do not meet the requirements for documentary evidence. An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit.”

(*Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2d Dept 2017]; *see also Mamoon v Dot Net Inc.*, 135 AD3d 656 [1st Dept 2016] [holding that “[a]n affidavit, let alone an affirmation, is not ‘documentary evidence’ within the meaning of the rule governing [CPLR 3211 [a] [1] motions].) Further, the Spreadsheet does not constitute documentary evidence pursuant to CPLR 3211 (a) (1). (*See Gorbatov v Tsirelman*, 155 AD3d 836, 839 [2d Dept 2017].) Even if it did, movant has conceded that there is no connection between the Assignment and Conveyance and the Spreadsheet in the papers submitted other than Mr. Lax’s March 13, 2018 letter, to which both were annexed. Neither the Assignment and Conveyance nor the Spreadsheet reference each other. As such, E*Trade Financial has failed to conclusively establish a defense to the claims in the verified complaint by means of this document.

Turning to Plaintiff’s cross-motion, “[a]s a general rule, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court.” (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks omitted]; *see also Y.A. v Conair Corp.*, 154 AD3d 611 [1st Dept 2017] [holding that leave should be granted “absent . . . surprise resulting therefrom”].) “To obtain leave, a plaintiff must submit evidentiary proof of the kind that would be admissible on a motion for summary judgment.” (*Velarde v City of New York*, 149 AD3d 457, 457 [1st Dept 2017].) “[P]laintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010].)

Here, there is no dispute between the parties that E*Trade Bank may have an interest in the subject Property and mortgage. Further, as, among other things, E*Trade Financial is the

parent company of E*Trade Bank, and as E*Trade Financial has indicated that it is authorized to accept service on behalf of E*Trade Bank, no surprise or prejudice of the type contemplated in *Y.A. v Conair* will result from the addition of E*Trade Bank as a party defendant. Plaintiff has submitted ample evidentiary proof in support of her cross-motion in the form of correspondence between Leonard and both E*Trade Financial and E*Trade Bank tending to support that both E*Trade Financial and E*Trade Bank may have some interest in the subject mortgage. Further, the Court finds for the purposes of the instant cross-motion that Plaintiff has sufficiently alleged in its first cause of action in the proposed amended complaint that the statute of limitations has expired due to events in 2008 or 2009 and that Plaintiff has a cause of action under RPAPL § 1501 (4).

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CONCLUSION

Accordingly, it is

ORDERED that the motion pursuant to CPLR 3211 (a) (1) by defendant E*Trade Financial to dismiss the verified complaint is denied; and it is further

ORDERED that the cross-motion pursuant to CPLR 305 (c) and 3025 (b) by Plaintiff Laverne Leonard to amend the complaint is granted, and the amended complaint in the proposed form annexed to the cross-motion shall be deemed served upon NCB and E*Trade Financial upon service of a clean copy thereof and upon service of a copy of this order with notice of entry upon such defendants, to be completed within 20 days of the date of the decision and order on this motion; and it is further;

ORDERED that Plaintiff shall serve the supplemental summons and amended complaint upon E*Trade Bank per the CPLR within 20 days of the date of the decision and order on this motion; and it is further

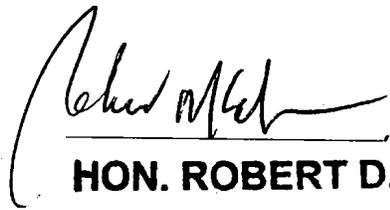
ORDERED that all party defendants shall answer or move in response to the amended complaint per the CPLR; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 29, located at 71 Thomas Street, Room 104, New York, New York 10013-3821, on Tuesday, OCTOBER 23, 2018, at 9:30 a.m.; and it is further

ORDERED that E*Trade Financial shall, within 30 days of the date of the decision and order on this motion, obtain a copy of today's oral argument transcript, provide a hard copy to the Court, and upload a copy to NYSCEF.

The foregoing constitutes the decision and order of the Court.

Dated: August 15, 2018
New York, New York



J.S.C.

HON. ROBERT D. KALISH

J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE