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Short Form Order

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

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 32015/2013
MOTION DATE: 01/20/2016
MOTION SEQ. NO.: 001 MG

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U.S.BANK, N.A.,

Plaintiffs,

-against-

JASON RUSSO, KERRI RUSSO,

Defendants.

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PLAINTIFFS' ATTORNEY:
ROSENBERG & ESTIS, P.C.
733 THIRD AVENUE
NEW YORK, NY 10017

DEFENDANTS' ATTORNEYS:
ALFRED S. WALENDOWSKI, P.C.
532 BROAD HOLLOW RD., STE. 144
MELVILLE, NY 11747

Upon the following papers numbered 1 to 28 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-24 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 25-26 ; Replying Affidavits and supporting papers 27-28 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff U.S. Bank, N.A., seeking an order: 1) granting summary judgment striking the answer of the defendants Jason Russo and Kerri Russo; 2) discontinuing the action against defendants designated as "John Doe #1-10" through "Jane Doe #1-10"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that plaintiff is directed to forthwith serve a proposed order for the appointment of a referee.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $472,500.00 executed by the defendants Jason Russo and Kerri Russo on May 25, 2005 in favor of Wells Fargo Bank, N.A. On that same date, both defendants executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. On August 7, 2006 the Russo defendants executed a second mortgage in the sum of $232,813.86 in favor of Wells Fargo Bank, N.A. On that

same date (August 7, 2006) defendant Jason Russo executed another promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. On the same date (August 7, 2006) the Russo defendants executed a Consolidation, Extension and Modification Mortgage Agreement combining both loan amounts to form a single lien in the sum of $699,300.00. On the same date defendant (August 7, 2006) Jason Russo executed a consolidated promissory note promising to re-pay the consolidated amount due under the terms of the consolidation agreement to Wells Fargo Bank, N.A. On March 2, 2007 the Russo defendants executed an additional Modification Agreement modifying certain terms set forth in the consolidated note and consolidated mortgage agreement. By assignment dated February 8, 2012 Wells Fargo Bank, N.A. assigned the mortgage to plaintiff U.S. Bank, N.A.. Plaintiff claims that the defendants have defaulted in making timely monthly mortgage payments since August 1, 2011. Court records indicate that the defendants appeared for three court settlement conferences on August 26, 2014, September 23, 2014 and December 16, 2014 at which time the action was marked "not settled". Plaintiff's motion seeks an order granting summary judgment striking defendants' answer and for the appointment of a referee.

In opposition, the defendants submit an attorney's affirmation and claim that the plaintiff has failed to provide sufficient evidence to prove its entitlement to foreclose the mortgage loan. Defendants claim that the submission of an affidavit from a third-party mortgage servicer senior vice-president fails to provide relevant, admissible evidence from the plaintiff bank itself and argue that the servicer's senior vice president's affidavit, which relies solely upon the mortgage servicer's records, constitutes inadmissible hearsay. Defendants contend that the only admissible evidence which would provide an evidentiary framework to establish a legal basis to award plaintiff summary judgment and which would comply with CPLR 4518, is by submission of "an affidavit made by the party" and not a mortgage servicing agent. Defendants also claim that absent submission of a valid power of attorney a mortgage servicing agent is not authorized to present any evidence on behalf of the bank and assert that no power of attorney has been submitted by the plaintiff in support of its motion.

In reply, the plaintiff submits an attorney's affirmation and contends that the affidavit submitted by the mortgage servicer provides sufficient admissible evidence to make a prima facie showing of the mortgage lender's entitlement to foreclose the mortgage. Plaintiff claims that the affidavit provides a proper foundation for the admissibility of the proof submitted which is contained in the business records maintained by the mortgage servicer and which reveal that the defendants executed the mortgage agreements and promissory notes (defendant Jason Russo having signed the second and additional consolidated promissory notes) and thereafter defaulted in making mortgage payments due under the terms of the parties' agreements for more than five years.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct

a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank N.A. v. Eraboba*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)).

The plaintiff's proof submitted in support of its motion consists of copies of the mortgages and promissory notes signed by the defendants, together with a copy of the Limited Power of Attorney authorizing the mortgage servicer to act on behalf of its principal (U.S Bank), and an affidavit from the bank's mortgage servicer's senior vice president detailing the history of the transaction, the defendants' default and the actions taken by the mortgage servicer prior to and subsequent to the commencement of the foreclosure action.

Paragraphs 2 & 3 of the senior vice-president's affidavit provides in pertinent part:

2. Rushmore Loan Management Services, LLC has specific authority to administer the mortgage loan being foreclosed and maintains the books and records relevant to the loan on behalf of Plaintiff. I reviewed the books and records relating to this mortgage loan and make this affidavit based upon my own personal knowledge. As loan servicer and Attorney-In-Fact, RLMS' duties include collecting and posting payments, maintaining escrow accounts, handling all aspects of customer servicer (sic), and referring loans for foreclosure when, as occurred here, borrowers default on their monthly payments.

3. I am fully familiar with the facts and circumstances of the present foreclosure action. I have reviewed the Complaint and Answers. I have also reviewed the books and records contemporaneously created, and regularly maintained and utilized by RLMS in the ordinary course of its loan servicing business. As servicer for the loan at issue, RLMS creates and maintains records in the regular course of business regarding custody of loan documents, including the Note and Mortgage, and the contents of individual loan files. It is the regular practice of RLMS to make and maintain such records and to rely upon them in the course of its business.

Paragraphs 11, 12 & 13 of the senior vice-president's affidavit provides:

11. On August 14, 2012, prior to the December 5, 2013 commencement of this action, my office sent the original Consolidated Note to Plaintiff's attorney's office by FedEx for safekeeping pending the completion of the foreclosure action. A copy of a bailee letter sent to Plaintiff's attorney with the original Consolidated Note and acknowledged by Plaintiff's attorney is annexed hereto..

12. Pursuant to the Consolidated Note and Consolidated Mortgage, as modified, Jason and Kerri were to make regular monthly payments beginning April 1, 2007.

13. Jason and Kerri defaulted under the Consolidated Note and Consolidated Mortgage by failing to make the regular monthly payment due on August 1, 2011 and each month subsequent thereto.

Paragraphs 23 & 24 of the senior vice-president's affidavit provides:

23. The Borrowers' default under the Consolidated Note and Consolidated Mortgage has not been cured to date.

24. There is presently due and owing the principal balance of $602,861.39 plus interest thereon from July 1, 2011.

The sole issue to be determined is whether the plaintiff has submitted sufficient relevant, admissible evidence to prove its entitlement to summary judgment. There has been no substantive relevant, admissible evidence submitted by the defendants in opposition to the plaintiff's motion and neither defendant has submitted an affidavit refuting the fact that there has been a default in making payments due under the terms of the parties' agreements since August, 2011 which continues to this day.

CPLR 4518 provides:

Business records.

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or even, or within a reasonable time thereafter.

The Court of Appeals in *People v. Guidice*, 83 NY2d 630, 635, 612 NYS2d 350 (1994) explained that "the essence of the business records exception to the hearsay rule is that records systematically made for the conduct of a business... are inherently highly trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them truthful and accurate for purposes of the conduct of the enterprise" (quoting *People v. Kennedy*, 68 NY2d 569, 579, 510 NYS2d 853 (1986)). It is a unique hearsay exception since it represents hearsay deliberately created and it differs from all other hearsay exceptions which assume that declarations which come within them were not made deliberately with litigation in mind. Since a business record keeping system may be designed to meet the hearsay exception, it is important to provide predictability in this area and discretion should not normally be exercised to exclude such evidence on grounds not foreseeable at the time the record was made (*see Trotti v. Estate of Buchanan*, 272 AD2d 660, 706 NYS2d 534 (3rd Dept., 2000)).

The three foundational requirements of CPLR 4518(a) are: 1) the record must be made in the regular course of business- reflecting a routine, regularly conducted business activity, needed and relied upon in the performance of business functions; 2) it must be the regular course of business to make the records– (i.e. the record is made in accordance with established procedures for the routine, systematic making of the record); and 3) the record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made (*People v. Kennedy supra @ p. 579-580*). It must be noted that the "mere filing of papers received from other entities, even if such papers are retained in the regular course of business, is insufficient to qualify the documents as business records" (*People v. Cratsley*, 86 NY2d 81, 90, 629 NYS2d 992 (1995)). The records will be admissible "if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business" (*State of New York v. 158th Street & Riverside Dr. Housing Company, Inc.*, 100 AD3d 1293, 1296, 956 NYS2d 196 (2012), *leave denied* 20 NY3d 858 (2013)). In this regard with respect to mortgage foreclosures, a loan servicer's employee may testify on behalf of the mortgagee and a representative of an assignee of the original lender can rely upon business records of the original lender to establish its claims for recovery of amounts due from the borrowers provided that the assignee/plaintiff establishes that it relied upon those records in the regular course of business (*Landmark Capital Inv. Inc. v. Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 (1st Dept., 2012); *Portfolio Recovery Associates, LLC, v. Lall*, 127 AD3d 576, 8 NYS3d 101 (1st Dept., 2015); *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.*, 30 AD3d 336, 819 NYS2d 223 (1st Dept., 2006)). More recently, an additional requirement for admissibility requires that the loan servicer's employee must allege that he/she was *personally* familiar with the plaintiff's record keeping practices and procedures (*Aurora Loan Services, LLC, v. Baritz*, 2016 NY Slip Op (2nd Dept., 2016); *HSBC v. Royal*, 138 AD3d 650, 29 NYS3d 462 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Brewton*, 140 AD3d 948, 34 NYS3d 463 (2nd Dept., 2016); *U.S. Bank, N.A. v. Handler*, 140 AD3d 948, 34 NYS3d 463 (2nd Dept., 2016); *Aurora Loan Services, LLC, v. Mercius*, 38 AD3d 650, 29 NYS3d 462 (2nd Dept., 2016); *Citibank, N.A. v. Cabrera*, 130 AD3d 861, 14 NYS3d 420 (2nd Dept., 2015)).

In this case, the mortgage servicer employee's affidavit avers that not only does he have "personal knowledge" of the facts underlying all aspects of this foreclosure action based upon a review of "the books and records relating to the mortgage loan", but also upon a review of "the books and records contemporaneously created, and regularly maintained and utilized" by the mortgage servicer "in the ordinary course of its loan servicing business". The servicing agent goes on to state that the servicer's office prepared and mailed the 30 day mortgage default notice and, in accordance with office procedure, prepared and mailed the 90 day default notice in compliance with RPAPL 1304 requirements to the borrowers. In this regard, this is not merely a third-party servicer's employee reviewing records created by a prior servicer(s) and/or mortgage lender and merely repeating the contents of its predecessor's records, but is an affidavit from the servicer which entity incorporated the business records of the prior mortgagee as its own, documented the continuing default by the borrowers of not having made any payments since August 11, 2011, and thereafter participated and aided in commencing the prosecution of this action through its customary practice of complying with the mortgage and statutory requirements by mailing notices of default and forwarding the original, duly indorsed promissory note to plaintiff's counsel's office for filing and prosecution purposes. Under these circumstances the submission of copies of the unpaid promissory note and mortgage coupled with the servicer's power of attorney , together with the affidavit from an

employee of the mortgage servicer establishing the facts underlying the defendants' default provides sufficient proof to establish the bank's right and entitlement to an order granting foreclosure.

Accordingly, the bank having proven entitlement to summary judgment, it is incumbent upon the defendants to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendants have wholly failed to do so. Their submission of an attorney's affirmation provides no relevant, admissible evidence to establish any questions of fact sufficient to defeat plaintiff's motion. The only evidence sufficient to raise such an issue would have been by submission of an affidavit from the defendants denying their default and having failed to submit such evidence the defendants have effectively conceded that fact. Moreover, as the defendants have failed to submit any proof to address their remaining pleaded eight affirmative defenses set forth in their answer in opposition to this motion, those affirmative defenses must be deemed abandoned and subject to dismissal (*see Kronick v. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Wells Fargo Bank Minnesota N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Plaintiff's motion is therefore granted in its entirety and counsel is directed to forthwith serve a proposed order for the appointment of a referee to compute the sums due and owing to the plaintiff.

Dated: December 12, 2016

Howard Heckler

J.S.C.