U.S. Bank N.A. v Fitzmaurice
2017 NY Slip Op 30866(U)
April 21, 2017
Supreme Court, Suffolk County
Docket Number: 4830/2014
Judge: Jr., Howard H. Heckman
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Short Form Order

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

COPY

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

INDEX NO.: 4830/2014
MOTION DATE: 05/10/2016
MOTION SEQ. NO.: 001 MG

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U.S. BANK N.A.,

Plaintiffs,

-against-

THOMAS F. FITZMAURICE,

Defendants.

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PLAINTIFFS' ATTORNEY:
HOGAN LOVELLS US LLP
875 THIRD AVENUE
NEW YORK, NY 10022

DEFENDANTS' ATTORNEYS:
LIEB AT LAW, P.C.
376A MAIN STREET
CENTER MORICHES, NY 11934

Upon the following papers numbered 1 to 27 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-23 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 24-25 ; Replying Affidavits and supporting papers 26-27 ; 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 defendant Thomas F. Fitzmaurice; 2) substituting Frederick Mayer as a named party defendant in place and stead of the defendant designated as "John Doe"; 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.

Plaintiff's action seeks to foreclose a mortgage in the sum of $1 million executed by defendant Thomas F. Fitzmaurice on December 23, 2004 in favor of Wells Fargo Bank, N.A. On the same date defendant Thomas F. Fitzmaurice also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated March 13, 2013 Wells Fargo Bank, N.A. assigned the mortgage to plaintiff U.S. Bank, N.A. Plaintiff claims that the defendant defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning June 1, 2013. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In opposition, defendant Fitzmaurice submits an attorney's affirmation and claims that plaintiff has failed to submit sufficient admissible evidence to prove that the mortgage lender has standing to maintain this action, Defendant contends that the assignment of the mortgage does not establish that title to the note was also transferred to the plaintiff and claims that questions of fact exist concerning the mortgage servicer's authority to act on behalf of the plaintiff. Defendant also claims that should the court dismiss the complaint the defendant is entitled to an award of reasonable attorneys' fees pursuant to Real Property Law 282.

In reply, the plaintiff submits an attorney's affirmation and argues that no basis exists to deny plaintiff's application for an award of summary judgment. Plaintiff claims that the proof submitted in the form of an affidavit from the mortgage servicer's vice president of loan documentation together with copies of the promissory note and mortgage agreement provide sufficient evidence entitling the mortgage lender to foreclose the mortgage. Plaintiff contends the mortgage servicer's representative's affidavit detailing the bank records pertaining to the defendant's note and mortgage satisfies the business records exception to the hearsay rule and reveals that defendant has defaulted under the terms of the mortgage by failing to make mortgage payments since June 1, 2013. Plaintiff claims the evidence shows that U.S. Bank, N.A. has standing to maintain since the mortgage servicer has provided evidence that the authorized agents of the plaintiff have had continuous physical possession of the duly indorsed in blank promissory note since February 17, 2005. Plaintiff also claims that standing is proven by plaintiff's attachment of the indorsed in blank promissory note to the complaint together with the CPLR 3012-b attorney certification filed with the Clerk's Office on the day the action was commenced.

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)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor*, *supra.*; *Emigrant Bank v.*

Larizza, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to commencement of the action is sufficient to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)). A plaintiff's attachment of a duly indorsed note to its complaint or to the certificate of merit required pursuant to CPLR 3012(b), coupled with an affidavit in which it alleges that it had possession of the note prior to the commencement of the action, has been held to constitute due proof of the plaintiff's standing to prosecute its claims for foreclosure and sale (*JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

The plaintiff's proof in support of its motion consists of: 1) a copy of the signed adjustable rate promissory note with an affixed stamped indorsement in blank signed by a vice president of the original mortgage lender, Wells Fargo Bank, N.A ; 2) copies of the December 23, 2004 mortgage and adjustable rate rider signed by defendant Thomas F. Fitzmaurice; 3) copies of the Wells Fargo/ Wachovia Bank PSA and Wells Fargo/Wells Fargo servicing agreement each dated as of February 16, 2005; 4) a copy of the March 13, 2013 assignment from Wells Fargo to U.S. Bank, N.A.; and 5) an attorney's affirmation confirming that plaintiff's law firm had physical possession of the duly indorsed in blank promissory note on March 6, 2014, the date the action was commenced.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendant does not argue his failure to make payments due under the terms of the promissory note and mortgage agreements. Rather, the issue raised by the defendant concerns plaintiff's standing to prosecute this foreclosure action.

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 event, 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 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 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 (*see People v. Kennedy, supra* @ pp. 579-580)). 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 Drive Housing Company, Inc.,* 100AD3d 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 mortgage lender 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 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)).

As recently stated in the Appellate Division, Second Judicial Department decision in *Citigroup, etc., v. Kopelowitz, et al.,* 2017 NY Slip Op 01331 (2nd Dept., 2/22/17): "There is no requirement that a plaintiff in a foreclosure action rely upon any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a), and the records themselves actually evince the facts for which they are relied upon (citations omitted)."

The affidavit submitted from the mortgage service provider's vice president of loan documentation provides the evidentiary foundation for establishing the mortgage lender's right to foreclose. The affidavit sets forth the servicer employee's review of the business records maintained by Wells Fargo; the fact that the books and records are made in the regular course of Wells Fargo's business; that it was the mortgage servicer's regular course of business to maintain such records; that the records were made at or near the time the underlying transaction took place; and that the records were created by individuals with personal knowledge of the underlying transactions. Based upon submission of these affidavits, the plaintiff has provided an admissible evidentiary foundation which satisfies the business records exception to the hearsay rule with respect to issues raised in its summary judgment application.

With respect to the issue of standing, plaintiff has submitted sufficient evidence to prove that the mortgage servicer had authority to act on behalf of the mortgage lender and that plaintiff U.S

Bank, N.A. was the successor trustee to the defunct entity known as Wachovia Bank. Plaintiff's evidence in support of its claim of standing was proof primarily in the form of the affidavit from the mortgage servicer's vice president of loan documentation. The affidavit provides evidence to prove the plaintiff has standing, as the holder of the original promissory note signed by the defendant which has been in its (Wells Fargo's) possession beginning on February 17, 2005, and until releasing it to plaintiff's counsel on January 17, 2014. This admissible, relevant evidence establishes plaintiff's standing to maintain this action by proof of the lender's agent's physical possession of the indorsed in blank promissory note prior to the action being commenced (*Aurora Loan Services v. Taylor; supra.; Wells Fargo Bank, N.A. v. Parker, supra.; U.S. Bank, N.A. v. Ehrenfeld,* 144 AD3d 893, 41 NYS3d 269 (2nd Dept., 2016); *GMAC Mortgage, LLC v. Sidberry,* 144 AD3d 863, 40 NYS3d 783 (2nd Dept., 2016)). In addition, plaintiff established its standing to maintain this action by attaching a certified copy of the indorsed in blank promissory note to its complaint, together with the attorney certification which confirmed the plaintiff's possession of the promissory note on March 6, 2014, the date the action was commenced (see *JPMorgan Chase Bank, N.A. v. Weinberger, supra.; Nationstar Mortgage LLC v. Catizone, supra.*).

Under these circumstances the arguments raised concerning the "validity" of the assignment of the mortgage and defendants' entitlement to reasonable attorneys' fees pursuant to RPL 282 are irrelevant, since possession of the promissory note is the paramount issue to determine standing. It is a fundamental legal principle that the mortgage follows the note and any transfer of the promissory note requires that the mortgage obligation be also transferred regardless of whether the two instruments have been separated. A promissory note is enforceable against real property because of the mortgage agreement, but a mortgage is not independently enforceable as a debt absent the existence of the note. It is therefore the owner of the note (in this instance, the plaintiff) that dictates the ownership of the mortgage and plaintiff has shown that it owns the promissory note and had possession of it when the action was commenced, thereby proving its standing to maintain this action.

With respect to the issue of the defendant's breach, the evidence submitted by the plaintiff has shown, and the defendant does not factually dispute, that the mortgagor has defaulted under the terms of the mortgage by failing to make timely monthly mortgage payments since June 1, 2013. The plaintiff has also submitted sufficient evidence to prove its compliance with RPAPL 1304 & 1306 requirements. The bank, having proven entitlement to summary judgment, it is incumbent upon the defendant to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendant has wholly failed to do so.

Finally, as the defendant has failed to raise any evidence to address his remaining affirmative defenses and one counterclaim in opposition to plaintiff's motion, those affirmative defenses and counterclaim must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Therault 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); *Flagstar Bank v. Bellafiore,* 94 AD3d 1044, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A v. Perez,* 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly the plaintiff's motion seeking an order granting summary judgment and for the appointment of a referee is granted. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Dated: April 21, 2017

Howard H. Heckl, Jr.
J.S.C.