U.S. Bank, N.A. v Goff
2017 NY Slip Op 31063(U)
April 28, 2017
Supreme Court, Suffolk County
Docket Number: 11-33879
Judge: Joseph Farneti
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PUBLISH

SHORT FORM ORDER

INDEX No. 11-33879

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 12-14-15
MOTION DATE 1-25-16
ADJ. DATE 2-4-16
Mot. Seq. # 001 - MotD
Mot. Seq. # 002 - MotD

U.S. Bank, National Association, as Trustee for RASC 2006-EMX8,

Plaintiff,

- against -

Raymond P. Goff a/k/a Raymond Goff; Christine Goff, In favor of Richard M. Gold, Esq. Law Guardian, "JOHN DOE", said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

SHAPIRO, DICARO & BARAK, LLC
Attorneys for Plaintiff
175 Mile Crossing Boulevard
Rochester, New York 14624

YOUNG LAW GROUP, PLLC
Attorneys for Defendant
RAYMOND P. GOFF
a/k/a RAYMOND GOFF
80 Orville Drive, Suite 100
Bohemia, New York 11716

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated November 20, 2015, and supporting papers; (2) Notice of Cross Motion by the defendant Raymond P. Goff , dated January 15, 2016, and supporting papers; (3) Affirmation in Opposition and Reply by the plaintiff, dated January 22, 2016; (4) Other: stipulation of adjournment ; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now it is

ORDERED that this motion (seq. #001) by the plaintiff, and the motion (seq. #002) by the defendant Raymond P. Goff, which was improperly labeled a cross-motion, are consolidated for the purposes of this determination and decided herewith; and it is further

ORDERED that the motion (seq. #001) by the plaintiff for, *inter alia*, an order awarding summary judgment in its favor against the defendant Raymond P. Goff, fixing the defaults of the non-answering defendants, appointing a referee and amending the caption is granted solely to the extent stated below, otherwise denied with leave to renew within 120 days of the date herein or, in the alternative, the filing of a note of issue within 120 days of the date herein; and it is further

ORDERED that this motion (seq. #002) by the defendant Raymond P. Goff for, *inter alia*, an order, ostensibly, pursuant to: (1) CPLR 3025 (b) for leave to file an amended answer to assert certain affirmative defenses asserting the plaintiff's lack of standing and its failure to demonstrate compliance with the notice requirements of RPAPL 1304 is granted solely to the extent indicated below, otherwise denied; and it is further

ORDERED that the defendant Raymond P. Goff shall serve the plaintiff with an amended answer asserting, as a first affirmative defense, the plaintiff's alleged lack of compliance with the service requirements of the 90-day pre-foreclosure notice pursuant to RPAPL 1304 within sixty (60) days of the date of this order, and he shall thereafter promptly file proof of service of same with the Clerk of the Court; and it is further

ORDERED that the caption is amended by substituting Tracy Dobrie in place of "JOHN DOE," and by excising the remaining descriptive wording relating thereto, and it is further

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

ORDERED that the moving parties shall serve a copy of this order with notice of entry upon opposing counsel pursuant to CPLR 2103 (b) within thirty (30) days of the date herein, 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 known as 259 Oak Street, Patchogue, New York 11772 ("the property"). On June 14, 2006, the defendant Raymond P. Goff ("the defendant mortgagor") executed an adjustable-rate balloon note in favor of Mortgage Lenders Network USA, Inc. ("the lender") in the principal sum of $364,000.00. To secure said note, the defendant mortgagor gave the lender a mortgage also dated June 14, 2006 on the property. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. ("MERS") acted solely as a nominee for the lender and its successors and assigns and that, for the purposes of recording the mortgage, MERS was the mortgagee of record. The mortgage was recorded in the Suffolk County Clerk's Office on July 6, 2006.

The mortgage was subsequently modified by Loan Modification Agreement ("the modification agreement") made on February 5, 2010, between the defendant mortgagor and Wells Fargo Bank, N.A. ("Wells Fargo") doing business as America's Servicing Company ("ASC"). Pursuant to the loan modification agreement, the outstanding principal balance at that time was adjusted to reflect a new unpaid principal balance in the sum of $368,147.23 as of March 1, 2010, the interest rate was decreased to a 5.000% fixed-rate (from an initial adjustable- rate of 7.400%), monthly payments were lowered to approximately $2,097.74 (from $2,368.53) beginning on April 1, 2010 through to July 1, 2036, the maturity date.

By way of a series of endorsements with physical delivery, the promissory note was allegedly transferred to the plaintiff, U.S. Bank National Association, as Trustee for RASC 2006-EMX8, prior to commencement. The transfer of the note to the plaintiff was subsequently memorialized by way of an

assignment of the mortgage executed on August 2, 2011. Thereafter, the assignment was subsequently duly recorded in the Office of the Suffolk County Clerk on August 16, 2011.

The defendant mortgagor allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest, as modified, due on May 1, 2011, and each month thereafter. After the defendant mortgagor allegedly failed to cure the default in payment, the plaintiff commenced an action by the filing of the lis pendens, summons and complaint on November 2, 2011. Issue was joined by the interposition of the defendant mortgagor's verified answer sworn to on November 23, 2011. By his answer, the defendant mortgagor generally denies all of the allegations in the complaint, and asserts, as affirmative defenses, the plaintiff's alleged failure to file a request for judicial intervention and an affirmation pursuant to Administrative Order 431/11.

By way of further background, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification, and foreclosure settlement conferences were conducted or adjourned before this court's specialized Mortgage Foreclosure Part beginning on September 13, 2013 and continuing until May 27, 2015. A representative of the plaintiff attended and participated in all settlement conferences. On the last date, this case was dismissed from the conference program because the parties were unable to reach an agreement modifying the loan or otherwise settling this action. Accordingly, there has been compliance with CPLR 3408, and no further conference is required under any statute, law or rule.

The plaintiff now moves for, *inter alia*, an order: (1) pursuant to CPLR 3212, awarding summary judgment in its favor against the defendant mortgagor, striking the answer and dismissing the affirmative defenses asserted 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.

The defendant mortgagor opposes the plaintiff's motion and moves for, *inter alia*, an order, ostensibly, pursuant to: (1) CPLR 3025 (b) for leave to file an amended answer to assert affirmative defenses asserting the plaintiff's lack of standing and its failure to demonstrate compliance with the notice requirements of RPAPL 1304. In response to the defendant mortgagor's motion, the plaintiff has submitted opposition and reply papers.

At the outset, the Court notes that the defendant mortgagor's untimely motion was improperly denominated a cross-motion because it was not made returnable at the same time as the plaintiff's motion (*see* CPLR 2215). The plaintiff's motion-in-chief was served on November 20, 2015 and made returnable on December 14, 2015; however, the defendant mortgagor's motion (which does not have an affidavit service annexed thereto), was made returnable on January 25, 2016. By stipulation executed on December 1, 2015, the parties agreed to adjourn the plaintiff's motion to February 4, 2016. Thus, in the interest of judicial economy, the motions are consolidated for the purposes of this determination.

The Court first turns to the branch of the defendant mortgagor's motion for an CPLR 3025 (b) for leave to interpose an amended answer asserting certain affirmative defenses. As a general rule, motions

for leave to amend pleadings pursuant to CPLR 3025 (b) are to be liberally granted, absent prejudice or surprise resulting from the delay (***U.S. Bank, N.A. v Sharif***, 89 AD3d 723, 724, 933 NYS2d 293 [2d Dept 2011]; ***Lucido v Mancuso***, 49 AD3d 220, 222, 851 NYS2d 238 [2d Dept 2008]). The movant, however, must make some evidentiary showing that the proposed amendment has merit; otherwise it will not be permitted (***Buckholz v Maple Garden Apts., LLC***, 38 AD3d 584, 585, 832 NYS2d 255 [2d Dept 2007]; ***Curran v Auto Lab Serv. Ctr.***, 280 AD2d 636, 637, 721 NYS2d 662 [2d Dept 2001]).

At the outset, after a ten month delay, the defendant mortgagor moves to interpose an amended answer without proffering any explanation for the four year delay, and after the plaintiff already moved for summary judgment (*see generally* ***Majestic Invs., Ltd. v Lopez***, 111 AD2d 844, 490 NYS2d 585 [2d Dept 1985]). In the instant case, the defendant mortgagor waived any defense based upon the plaintiff's lack of standing because he failed to interpose that defense in the original answer, or in a timely pre-answer motion to dismiss the complaint (*see* CPLR 3211 [a] [3]; [e]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS3d 312 [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Islar***, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; ***Bank of N.Y. Mellon Trust Co. v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; ***U.S. Bank N.A. v Denaro***, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; ***Citibank, N.A. v Herrera***, 64 AD3d 536, 881 NYS2d 334 [2d Dept 2009]). Moreover, the defendant mortgagor's delay deprived the plaintiff of an opportunity to promptly investigate the defense of lack of standing sought to be asserted in the amended answer and to address any alleged defects in this case at a point when it might have been timely cured (*see* ***Wells Fargo Bank, N.A. v Morgan***, 139 AD3d 1046, 32 AD3d 595 [2d Dept 2016]; ***HSBC Bank USA v Philistin***, 99 AD3d 667, 952 NYS2d 83 [2d Dept 2012]). In any event, the plaintiff annexed copies of the endorsed promissory note, the mortgage, the modification agreement and the assignment to the complaint as exhibits (*see* ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2d Dept 2015]; ***Bank of N.Y. Mellon Trust Co., NA v Sachar***, 95 AD3d 695, 943 NYS2d 893 [2d Dept 2012]; *cf.* ***Deutsche Bank Natl. Trust Co. v Haller***, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2012]). Such evidence demonstrates that the plaintiff holds the original note. Accordingly, the branch of the defendant mortgagor's motion to amend the answer asserting standing as an affirmative defense is denied.

The Court reaches a different conclusion with respect to the issue of the plaintiff's compliance with the notice requirements of RPAPL 1304. In its present form, RPAPL 1304 provides that in a legal action, including a residential mortgage foreclosure action, at least 90 days before the lender commences an action against the borrower, the lender must send a notice to the borrower including certain language and the notice must be in 14-point type. The notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage (*see* RPAPL 1304). Such notice shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice (*id.*). The statute further provides that the notice shall contain a list of at least five housing counseling agencies that serve the region where the borrower resides (*id.*). RPAPL 1304 provides that the notice must be sent to the "borrower," a term not defined in the statute (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 105, 923 NYS2d 609 [2d Dept 2011]).

Unlike the defense of a failure to satisfy a contractual condition precedent which must be pleaded (*see* CPLR 3015 [a]; 3018), a party who has timely appeared may raise the absence or defective notice

defense on motion, even though it was not included in an answer nor made the subject of a pre-answer to dismiss. Failure to comply with RPAPL 1304 is not jurisdictional (***Pritchard v Curtis***, 101 AD3d 1502, 1505, 957 NYS2d 440 [3d Dept 2012]). Rather, it is a defense which may be raised at any time (***U.S. Bank N.A. v Carey***, 137 AD3d 894, 896, 28 NYS3d 68 [2d Dept 2016]). Because the notice defense remains viable during the pendency of the action it may be raised by a non-defaulting party any time prior to judgment (***Citimortgage, Inc. v Pembelton***, 39 Misc3d 454, 960 NYS2d 867 [Sup Ct, Suffolk County 2013] [finding that the failure to comply with RPAPL 1304 gives rise to a heightened or "super" defense to the plaintiff's claim that is not subject to waiver]; *cf.* ***PHH Mtge. Corp. v Celestin***, 130 AD3d 703, 11 NYS3d 871 [2d Dept 2015] [defendant precluded from raising RPAPL 1304 defense since he was not entitled to an order vacating his default pursuant to CPLR 5015 [a]).

Proper service of the RPAPL 1304 notice containing the statutorily-mandated content on the "borrower" or "borrowers" is a condition precedent to the commencement of a foreclosure action, and the plaintiff's failure to show strict compliance requires dismissal (***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, 596, 977 NYS2d 895 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 910, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, *supra* at 103; *see also*, ***Pritchard v Curtis***, 101 AD3d 1502, *supra* at 1504). Since this action was commenced on or after January 14, 2010, the 90-day notice requirement set forth in the statute is applicable (*see* RPAPL 1304; Laws 2008, ch 472, § 2, eff Sept 1, 2008, as amended by Laws 2009, ch 507, § 1-a, eff Jan 14, 2010). Thus, in support of its motion for summary judgment on the complaint, the plaintiff was required to prove its allegations by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers (***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d at 106 [citation omitted]).

In meeting this burden, the plaintiff benefits from the long-standing doctrine of presumption of regularity – generally, a letter or notice that is properly stamped, addressed, and mailed is presumed to be delivered by that addressee (***Trusts & Guar. Co. v Barnhardt***, 270 NY 350, 352 [1936]; ***News Syndicate Co. v Gatti Paper Stock Corp.***, 256 NY 211, 214-216 [1931]; ***Connolly (Allstate Ins. Co.)***, 213 AD2d 787, 787, 623 NYS2d 373 [3d Dept 1995]; ***Kearney v Kearney***, 42 Misc3d 360, 369, 979 NYS2d 226 [Sup Ct, Monroe County 2013]). The presumption of receipt by the addressee "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 680, 729 NYS2d 776 [2d Dept 2001]). CPLR 2103 (f) (1) defines mailing as "the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state" (*see*, ***Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP***, 129 AD3d 790, 12 NYS3d 124 [2d Dept 2015]). "If that proof is established, the burden shifts to the borrower," and "the final legal truism prevails: once the presumption of proper service has been established, mere denial of receipt is insufficient to rebut the presumption" (***Kearney v Kearney***, 42 Misc3d 360, *supra* at 370; *see* ***Matter of ATM One v Landaverde***, 2 NY3d 472, 478, 779 NYS2d 808 [2004]).

The plaintiff's submissions are insufficient to demonstrate evidentiary proof of compliance with RPAPL 1304 (*see* ***Cenlar, FSB v Weisz***, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]; ***Bank of N.Y. Mellon v Aquino***, 131 AD3d 1186, 16 NYS3d 770 [2d Dept 2015]; ***Wells Fargo Bank, NA v Burke***, 125 AD3d 765, 5 NYS3d 107 [2d Dept 2015]; ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, *supra*). The plaintiff submitted neither affidavits of service of the 90-day notice allegedly sent by ASC upon the defendant mortgagor, nor an affidavit from one with personal knowledge of the mailing, along with copies of the certified mailing receipts stamped by the United States Post Office on the date of the alleged mailing (*see* ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, *supra*).

Under the facts presented, the statements set forth in the affidavit of Renee Hicks, an Authorized Signer of Ocwen Loan Servicing, LLC ("Ocwen"), servicer, and a Vice President of Loan Documentation from Wells Fargo, regarding the 90-day pre-foreclosure notice, even when combined with copies of certain submitted documentation, are insufficient to meet the requirements of the statute (*see* ***JPMorgan Chase Bank, N.A. v Kutch***, 142 AD3d 536, 36 NYS3d 235 [2d Dept 2016]; ***Hudson City Sav. Bank v DePasquale***, 113 AD3d 595, *supra*). Even though Ms. Hicks alleges that the subject notice was mailed to the defendant mortgagor, she did not set forth sufficient facts as to how or when compliance was accomplished. She also did not state that she served the notice; nor did she identify the individuals who allegedly did so. Further, it is noted that Ms. Hicks' affidavit does not constitute sufficient proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed by certified mail and by first class mail (*see* ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 877, 955 NYS2d 70 [2d Dept 2012]; *cf.* ***Preferred Mut. Ins. Co. v Donnelly***, 111 AD3d 1242, 974 NYS2d 682 [4th Dept 2013]; ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, *supra*).

Additionally, the plaintiff's affiant neither specified the exact business records upon which she relied in her affidavit; nor did she allege that she is familiar with ASC's and/or Ocwen's record keeping practices and procedures to insure that items are properly addressed and mailed and, thus, she did not attempt to lay a foundation for their admissibility (*see* CPLR 4518 [a]; ***Citibank, N.A. v Cabrera***, 130 AD3d 861, 14 NYS3d 420 [2d Dept 2015]; ***US Bank N.A. v Madero***, 125 AD3d 757, 5 NYS3d 105 [2d Dept 2015]; ***Palisades Collection, LLC v Kedik***, 67 AD3d 1329, 890 NYS2d 230 [2d Dept 2009]; *see also* ***Cadle Co. v Gregory***, 293 AD2d 335, 739 NYS2d 825 [1st Dept 2002]). Because the plaintiff's representative failed to lay a proper foundation for the admission of the records relating to the alleged service of the 90-day pre-foreclosure notice, under the business records exception to the hearsay rule (*see* CPLR 4518 [a]), those of her assertions that were based on these records are inadmissible (*see* ***US Bank N.A. v Madero***, 125 AD3d 757, *supra*). Therefore, the plaintiff failed to establish its *prima facie* entitlement to judgment as a matter of law with respect to the 90-day notice (*see* ***US Bank N.A. v Madero***, 125 AD3d 757, *supra*).

Accordingly, the branch of the defendant mortgagor's motion for an CPLR 3025 (b) for leave to interpose an amended answer is granted solely as to the interposition of a first affirmative defense alleging the plaintiff's failure to demonstrate compliance with the service requirements of the 90-day notice pursuant to RPAPL 1304. The remainder of the branch of the defendant mortgagor's motion for leave to interpose an amended answer is denied.

The Court next turns to the ancillary relief requested by the plaintiff. The branch of the instant motion for an order pursuant to CPLR 1024, amending the caption by substituting Tracy Dobrie in place of "JOHN DOE," and by excising the remaining descriptive wording relating thereto is granted (*see* ***PHH Mtge. Corp. v Davis***, 111 AD3d 1110, 975 NYS2d 480 [3d Dept 2013]; ***Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

The plaintiff's request for an order fixing the defaults of the non-answering defendants is denied with leave to renew. The Court takes judicial notice from the electronic records maintained by the Office of Court Administration that the defendant Richard M. Gold, Esq. ("Gold"), who was allegedly served with service of process pursuant to CPLR 308 (2), is now deceased. The plaintiff's submissions are deficient to the extent that it has neither furnished a copy of Gold's death certificate, nor furnished pertinent information as to Gold's heirs-at-law and next-of-kin. Absent the proper joinder of Gold's heirs-at-law and next-of-kin by way of, *inter alia*, stipulation of all appearing parties, intervention or an amendment of the complaint by leave of court, the rights, if any, of Gold's heirs-at-law are unaffected by the judgment (*see generally* ***Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.***, 98 AD2d 400, 470 NYS2d 642 [2d Dept 1983]). Because Gold is merely a judgment creditor, however, the joinder of Gold's estate is unnecessary (*see* RPAPL 1311 [3]; ***Financial Freedom Senior Funding Corp. v Rose***, 64 AD3d 539, 883 NYS2d 546 [2d Dept 2009]; ***Countrywide Home Loans, Inc. v Keys***, 27 AD3d 247, 811 NYS2d 362 [1st Dept 2006]). Parenthetically, the Court notes that the plaintiff has alleged in the complaint that Gold's judgment held against the defendant mortgagor was entered on February 24, 2011, in the amount of $512.00.

In view of the open question of whether the plaintiff strictly complied with the 90-day notice requirement of RPAPL 1304 and in light of the death of Gold, the remaining branches of the plaintiff's motion are denied at this juncture with leave to renew within 120 days of the date herein or, in the alternative, the filing of a note of issue within 120 days of the date herein. The plaintiff's renewed motion, if any, shall include proof by way of affidavits of service or affidavits from one with personal knowledge, together with business records, that detail a standard of office practice or procedure with respect to the 90-day pre-foreclosure notice, as well as the proof outlined above relative to Gold. Accordingly, these motions are determined as indicated above.

In view of the foregoing, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: April 28, 2017

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**