

HSBC Bank USA v Jones
2016 NY Slip Op 30296(U)
February 9, 2016
Supreme Court, Queens County
Docket Number: 706555/14
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

HSBC BANK USA, NATIONAL ASSOCIATION AS
TRUSTEE FOR NOMURA ASSET ACCEPTANCE
CORPORATION, MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2006-AR4,

Index No. 706555/14

Motion

Date September 24, 2015

Plaintiff,

Motion

Cal. No. 81

- against-

JUDITH JONES, SHEVION ROWE, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.,
AS NOMINEE FOR FIRST NATIONAL BANK OF
ARIZONA, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., AS NOMINEE
FOR GMAC MORTGAGE, LLC, UNITED STATES
OF AMERICA BY THE INTERNAL REVENUE
SERVICE, MUNICIPAL CREDIT UNION,
BENEFICIAL NEW YORK, INC., CITY OF NEW
YORK ENVIRONMENTAL CONTROL BOARD,
CITY OF NEW YORK DEPARTMENT OF
TRANSPORTATION PARKING VIOLATIONS
BUREAU and JOHN DOE,

Motion

Seq. No. 1

Defendants.

The following papers read on this motion by plaintiff pursuant to CPLR 3212 for summary judgment in its favor as against defendant, Judith Jones, to dismiss the answer of defendant, Judith Jones, for leave to appoint the referee to compute the sums due and owing plaintiff, and pursuant to CPLR 3211(b) to dismiss the affirmative defenses asserted by defendant, Judith Jones, and for leave to amend the caption substituting Frank Smith for defendant "John Doe."

Papers
Numbered

Notice of Motion - Affirmation - Exhibits.....	EF 31-34
Affirmation in Opposition - Exhibits.....	EF 35-37
Reply Affirmation.....	EF 38-39

Upon the foregoing papers, it is ordered that the motion is determined as follows:

Plaintiff commenced this action on September 15, 2014, to foreclose a mortgage given by defendants, Judith Jones and Shevion Rowe, as against real property known as 116-39 147th Street, a/k/a 11639 147th Street, Jamaica, New York, to secure a note evidencing a loan from First National Bank of Arizona. In the complaint, plaintiff alleges that the note and mortgage were modified pursuant to a loan modification agreement dated February 23, 2011, it is the holder of the note, as modified, and defendants, Judith Jones and Shevion Rowe, defaulted in paying the mortgage installment due on April 1, 2013, and thereafter, and as a consequence, plaintiff elects to declare the entire mortgage debt to be due and owing.

Defendant, Judith Jones, served an answer, asserting various affirmative defenses, including lack of standing, and failure to provide pre-foreclosure notices including a notice of default and the notice pursuant to RPAPL 1304. Defendant, Municipal Credit Union, served a notice of appearance and waiver. Defendants, Mortgage Electronic Registration Systems, Inc., as nominee for First National Bank of Arizona, Mortgage Electronic Registration Systems, Inc., as nominee for GMAC Mortgage, LLC, United States of America by the Internal Revenue Service, Beneficial New York, Inc., City of New York Environmental Control Board, City of New York Department of Transportation Parking Violations Bureau and Frank Smith s/h/a “John Doe,” are in default in appearing or answering the complaint.

By order dated March 12, 2015, the Court Attorney Referee noted that the case met the criteria for the Residential Foreclosure Part and indicated that defendant borrower had failed to provide plaintiff with a quit claim deed or a “full” modification packet. The Court Attorney Referee directed plaintiff to appear for a status conference on December 22, 2015, and file an application seeking an order of reference and a foreclosure affirmation or certificate of merit pursuant to Administrative Order #208/2013 by that date.

Defendant, Judith Jones, opposes the motion. The remaining defendants have not appeared in relation to the motion.

At the outset, the court notes that although counsel for plaintiff refers to a memorandum of law submitted in support of the motion, no working (hard) copy of such memorandum was provided to the court as required pursuant to the court’s rules regarding e-filed motions. Therefore, the court did not consider it in making its determination.

That branch of the motion by plaintiff for leave to amend the caption as proposed is granted.

It is **ORDERED** that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

-----X
HSBC BANK USA, NATIONAL ASSOCIATION AS
TRUSTEE FOR NOMURA ASSET ACCEPTANCE
CORPORATION, MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2006-AR4,

Plaintiff

Index No. 706555/2014

-against-

JUDITH JONES, SHEVION ROWE, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.
AS NOMINEE FOR FIRST NATIONAL BANK OF ARIZONA,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC. AS NOMINEE FOR GMAC MORTGAGE, LLC,
UNITED STATES OF AMERICA BY THE INTERNAL
REVENUE SERVICE, MUNICIPAL CREDIT UNION,
BENEFICIAL NEW YORK, INC., CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD, CITY OF NEW
YORK DEPARTMENT OF TRANSPORTATION
PARKING VIOLATIONS BUREAU, and
FRANK SMITH,

Defendants

-----X.

With respect to the branch of the motion by plaintiff for summary judgment against defendant, Judith Jones, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (*see Wells Fargo Bank, N.A. v Erobobo*, 127 AD3d 1176, 1176 [2d Dept 2015]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 1080 [2d Dept 2010]). Where standing is at issue, the plaintiff seeking summary judgment must also submit evidence to show “[e]ither a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action” (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]; *see also Flagstar Bank, FSB v Anderson*, 129 AD3d 665 [2d Dept 2015]). In addition, where as here, the plaintiff in a residential foreclosure action alleges in its complaint that it has sent the RPAPL 1304 notices to the borrower, the plaintiff also has the burden of establishing its allegation by tendering sufficient evidence demonstrating the absence of material issues of fact as to its strict compliance with RPAPL 1304 (*see Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, 107

[2d Dept 2011]; *Bank of New York Mellon v Aquino*, 131 AD3d 1186 [2d Dept 2015]). If there is a contractual condition precedent to the commencement of the action, a plaintiff also must establish satisfaction of such condition as part of its *prima facie* case (see *GMAC Mortgage, LLC v Bell*, 128 AD3d 772 [2d Dept 2015]; *Nationstar Mtge., LLC v Dimura*, 127 AD3d 1152, 1153 [2d Dept 2015]; *HSBC Mortg. Corp. [USA] v Gerber*, 100 AD3d 966, 967 [2d Dept 2012]; see also *OneWest Bank, FSB v Smith*, ___ AD3d ___, 2016 WL 71508, 2016 NY App Div LEXIS 82 [3d Dept 2016]).

In support of its motion, plaintiff submits, among other things, a copy of the pleadings, the mortgage, note and loan modification agreement, affirmations of its counsel, and an affidavit of Natalie Bryant, a vice-president of loan documentation for Wells Fargo Bank, N. A., d/b/a America's Servicing Company (Wells Fargo), the servicer for plaintiff.

These submissions do not establish plaintiff's *prima facie* entitlement to summary judgment against defendant, Judith Jones.

To the extent plaintiff relies upon the loan modification agreement, the copy submitted to the court as an exhibit appears to be incomplete insofar as the agreement indicates it is eight pages in length, numbered 1 through 8, but only those pages numbered 1 through 6 have been presented. In addition, the copy of the modification agreement attached to the certificate of merit also is missing pages numbered 7 and 8 (see CPLR 3012-b[a]). Plaintiff makes no claim that the modification agreement in fact was only 6 pages long, and has offered no explanation as to the reason for its failure to provide a complete copy.

In addition, plaintiff has failed to establish, *prima facie*, that it had standing to bring this action. To the extent plaintiff asserts it was the holder of the note at the time of the commencement of the action, the affidavit of Ms. Bryant contains conclusory statements regarding plaintiff's possession of the note, without any factual details of a physical delivery, including when plaintiff obtained the note and thus, fails to establish that plaintiff had physical possession of the note prior to commencing this action (see *Deutsche Bank Nat. Trust Co. v Weiss*, 133 AD3d 704 [2d Dept 2015]; *Deutsche Bank Nat. Trust Co. v Idarecis*, 133 AD3d 702 [2d Dept 2015]; *Flagstar Bank, FSB v Anderson*, 129 AD3d 665, 665–666; *US Bank N.A. v Faruque*, 120 AD3d 575, 577 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 682 [2d Dept 2012]; cf. *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). Furthermore, the copy of the note submitted by plaintiff merely contains an allonge with an undated indorsement by the original lender to First National Bank of Nevada, and a second undated indorsement in blank (see *Flagstar Bank, FSB v. Anderson*, 129 AD3d at 666; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 754). In addition, the written assignment of mortgage to plaintiff dated June 16, 2009, transferred only the mortgage and, thus, fails to demonstrate that the note also was assigned at that time (see *Deutsche Bank Nat. Trust Co. v Weiss*, 133 AD3d 704; *Flagstar Bank, FSB v Anderson*, 129 AD3d at 666; *Wells Fargo Bank, NA v Burke*, 125 AD3d 765, 767 [2d Dept 2015]; *US Bank N.A. v Faruque*, 120 AD3d at 577). Plaintiff has failed to show that the note also was assigned at that time (see *Deutsche Bank Nat.*

Trust Co. v Idarecis, 133 AD3d 702; *Flagstar Bank, FSB v Anderson*, 129 AD3d at 666; *Wells Fargo Bank, NA v Burke*, 125 AD3d at 767; *US Bank N.A. v Faruque*, 120 AD3d at 577).

Plaintiff also has failed to make a *prima facie* showing of the absence of material issues as to plaintiff's strict compliance with RPAPL 1304 (see *HSBC Mortgage Corp. v Gerber*, 100 AD3d 966). A violation of the provisions of RPAPL 1304 constitutes a defense to a home loan mortgage foreclosure action (see RPAPL 1302[2]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 105). The notice requirement of RPAPL 1304 is a statutory condition precedent to suit which must be satisfied as an element of the foreclosure claim itself (see *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95). Ms. Bryant states that she reviewed "the 90 day pre-foreclosure notice sent to borrowers by certified mail and also by first-class mail to the last known address of the borrowers, and if different, to the residence that is the subject of the Mortgage." Such statement is unsubstantiated and conclusory relative to the mailing of the notice. It does not state when the notice was sent by certified mail and by first-class mail, and does not state to which address the notice was sent. The affirmation of plaintiff's counsel is not based upon personal knowledge and therefore, is of no probative or evidentiary significance regarding the issue of whether plaintiff complied with the notice requirements pursuant to RPAPL 1304 (see *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Nor can plaintiff rely upon the affidavit of April H. Hatfield, a vice-president of loan documentation for Wells Fargo, and the exhibits annexed thereto, to establish compliance with RPAPL 1304, because they were submitted for the first time in the reply papers in support of its motion (see *L'Aquila Realty, LLC v Jalyng Food Corp.*, 103 AD3d 692 [2d Dept 2013]; *GJF Constr. Corp. v Cosmopolitan Decorating Co., Inc.*, 35 AD3d 535, 535 [2d Dept 2006]; *Voytek Tech. v Rapid Access Consulting*, 279 AD2d 470, 471 [2d Dept 2001]).

Plaintiff furthermore has failed to make a *prima facie* showing that it complied with the condition precedent contained in the subject mortgage agreement (paragraph 22) which requires that it provide defendants, Judith Jones and Shevion Rowe, with a notice of default prior to demanding payment of the loan in full. The affidavit of Ms. Bryant states that "a notice of default was mailed to the mortgagors at the last known address provided to this institution by the mortgagor." Again, such statement is unsubstantiated and conclusory. It does not establish that when the notice was mailed and if the required notice was mailed by first class mail or actually delivered to the notice address if sent by other means, as required by the terms of the mortgage agreement (see paragraph 15), when it was mailed (see *Wells Fargo Bank, N.A. v Eisler*, 118 AD3d 982, 982–983 [2d Dept 2014]; *HSBC Mtge. Corp. [USA] v Gerber*, 100 AD3d 966, 966–967; *Norwest Bank Minn. v Sabloff*, 297 AD2d 722, 723 [2d Dept 2002]). The affirmation of plaintiff's counsel is not based upon personal knowledge and therefore, is of no probative or evidentiary significance regarding the issue of whether plaintiff complied with the contractual condition precedent (see *Zuckerman v City of New York*, 49 NY2d at 563).

That branch of the motion by plaintiff for summary judgment against defendant, Judith Jones, is denied.

In view of the open question of whether plaintiff has complied with the statutory condition precedent pursuant to RPAPL 1304 and the contractual condition precedent regarding the provision of notice of default, those branches of the motion by plaintiff to strike the affirmative defenses of defendant, Judith Jones, for leave to enter a default judgment with respect to defendants, Mortgage Electronic Registration Systems, Inc., as nominee for First National Bank of Arizona, Mortgage Electronic Registration Systems, Inc., as nominee for GMAC Mortgage, LLC, United States of America by the Internal Revenue Service, Beneficial New York, Inc., City of New York Environmental Control Board, City of New York Department of Transportation Parking Violations Bureau and Frank Smith, and for leave to appoint a referee, are denied at this juncture.

Dated: February 9, 2016

DARRELL L. GAVRIN, J.S.C.