| **M&T Bank v Arcate** |
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| 2016 NY Slip Op 32201(U) |
| September 2, 2016 |
| Supreme Court, Suffolk County |
| Docket Number: 08124/2013 |
| Judge: Howard, Jr. Heckman |
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART 18 - SUFFOLK COUNTY



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

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M&T BANK,

Plaintiffs,

-against-

GINA ARCATE,

Defendants.

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INDEX NO.: 08124/2013
MOTION DATE: 12/26/2014
MOTION SEQ. NO.: 001 MG
002 MD

**PLAINTIFFS' ATTORNEY:**
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WESTBURY, NY 11590

**DEFENDANTS' ATTORNEYS:**
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325 EAST SUNRISE HIGHWAY
LINDENHURST, NY 11757

Upon the following papers numbered 1 to 29 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-10 ; Notice of Cross Motion and supporting papers 11-24 ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 25-29 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff M&T Bank, seeking an order: 1) granting summary judgment striking the answer of the defendant Gina Arcate; 2) substituting Robert Arcate as a named party defendant in place and stead of the defendant identified as "John Doe #1" and discontinuing the action against defendants identified as "John Doe #2" through "John Doe # 5" and "Jane Doe #1" through "Jane Doe #5" ; 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 the cross motion by defendant Gina Arcate seeking an order pursuant to CPLR 3211(a)(3) dismissing plaintiff 's complaint based upon plaintiff's lack of standing or, in the alternative, restoring this action for a court settlement conference and imposing sanctions as a result of the plaintiff's alleged failure to negotiate in good faith is denied; 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 $415,000.00 executed by the defendant Gina Arcate on September 5, 2007 in favor of Countrywide Bank, FSB. On that same date

the defendant also executed a promissory note promising to re-pay the entire amount of the monies borrowed to the lender. By assignment dated June 22, 2012 Mortgage Electronic Registration Systems, Inc. as nominee for Countrywide Bank, FSB assigned the mortgage to plaintiff M&T Bank. Plaintiff claims that the defendant has defaulted in making timely monthly mortgage payments since December 1, 2011. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In opposition and in support of her cross motion, defendant submits an affidavit and an affirmation of counsel and claims that plaintiff M&T Bank has failed to prove that it has standing to maintain this action. Defendant contends that the plaintiff has failed to submit sufficient proof to make a prima facie showing that the Bank took physical delivery of a properly endorsed original note prior to the commencing this action. Defendant argues that although the servicing agent's representative states that the bank was in physical possession of the note indorsed in blank prior to this action being filed, the representative fails to provide any evidence as to how the lender came into possession of the note. It is defendant's position that absent such details the plaintiff's offer of proof fails to establish the plaintiff's standing to maintain this action. Defendant also claims that plaintiff cannot establish ownership of the underlying mortgage because MERS did not have authority to assign the mortgage to M&T Bank. Defendant also argues that the plaintiff has failed to provide sufficient evidence of compliance with the 90 day notice provisions required pursuant to RPAPL1304 and that absent proof of compliance the plaintiff's motion must be denied. Defendant asserts that he must be entitled to conduct discovery concerning these issues. Finally, defendant claims that the plaintiff failed to negotiate in good faith with her during the five mandatory court settlement conferences and sanctions must be imposed pursuant to CPLR 3408 including cancellation of interest on the unpaid principal balance of the mortgage. Defendant argues in the alternative that additional court settlement conferences should be scheduled to implement a reasonable modification plan.

In reply, the plaintiff submits an attorney's affirmation and argues that the employee affidavit submitted in support of the summary judgment motion, which was based upon documentary evidence maintained by the service provider, provides sufficient proof to establish the bank's entitlement to summary judgment. Plaintiff claims that records maintained in the ordinary course of business can be relied upon by the mortgage servicing employee as adequate evidentiary proof in support of the bank's claims. Plaintiff asserts that the admissible evidence submitted proves that M&T Bank had standing to maintain this action as the holder of the note and mortgage by demonstrating that the note was in the bank's possession on July 3, 2012 which was well prior to the date this action was commenced by filing the complaint on March 20, 2013. Plaintiff argues that no further details are required once proof has been submitted that the lender was in physical possession of the note which was indorsed in blank and therefore plaintiff is entitled to an award of summary judgment based upon the defendant's continuing default in making timely monthly mortgage payments. Plaintiff also claims that the 90 day notices required to be pursuant to RPAPL 1304 were properly served and claims that no legal basis exists to impose sanctions based upon the claim of "bad faith" and that the defendant is not entitled to another court settlement conference having previously been afforded five such conferences with reaching a settlement.

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)).

Poof that the plaintiff was in possession of the note on a day certain or an "on or before" date (*see Wells Fargo Bank, N.A. v. Joseph,* 137 AD3d 896, 2016 NY Slip OP 01661 (2nd Dept., 2016)) prior to the commencement of the action is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*Aurora Loan Services v. Taylor, supra; Loancare v. Firshing, supra*)). Delivery of the note to a custodial agent of the plaintiff on a date prior to the commencement of the action will suffice to establish the standing of a foreclosing plaintiff (*see Deutsche Bank National Trust Co. v. Whalen,* 107 AD3d 931, 969 NYS2d 82 (2nd Dept., 2013); *HSBC Bank USA v. Sage,* 112 AD3d 1126, 977 NYS2d 446 (3rd Dept., 2013)).

Proper service of an RPAPL 1304 notice on the borrower(s) is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing compliance with this condition (*Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd Dept., 2010)). RPAPL 1304(2) provides that notice be sent by registered or certified mail and by first-class mail to the last known address of the borrower(s), and if different, to the residence that is the subject of the mortgage. The notice is considered given as of the date it is mailed and must be sent in a separate envelope from any other mailing or notice and the notice must be in 14-point type.

CPLR 3408 mandates that the court hold a settlement conference in a residential foreclosure action. The statute requires that the parties to a foreclosure action must "negotiate in good faith to reach a mutually agreeable resolution including a loan modification, if possible." A determination of

whether a party breached the duty to negotiate in good faith must be based on the totality of the circumstances taking into account that CPLR 3408 is a remedial statute (*Citibank, N.A. v. Barclay,* 124 AD3d 174, 176, 999 NYS2d 375, 377 (1st Dept., 2014); *U.S. Bank, N.A. v. Sarmiento,* 121 AD3d 187, 991 NyS2d 68 (2nd Dept., 2014)). The test for determining whether a party participated in good faith in the CPLR 3408 process is clearly one of reasonableness taking into considerations the actions taken by the parties engaging in the settlement conference.

Plaintiff has submitted sufficient evidence in the form of an affidavit from a mortgage servicing representative (satisfying the business records exception to the hearsay rule) to prove it had standing, as the holder of the note and mortgage by confirming that the note was in the bank's possession prior to the commencement of this action (*see Nationstar Mortgage LLC v. Catizone,* 127 AD3d 115, 9 NYS3d 315 (2nd Dept., 2015); *Aurora Loan Services v. Taylor, supra.; Wells Fargo Bank v. Parker, supra.; CitiMortgage v. Klein,* NY Slip Op. 04687 (2nd Dept., 2016); *One West Bank v. Albanese,* 139 AD3d 831, 2016 Slip Op. 03726 (2nd Dept., 2016)).

Plaintiff has also submitted sufficient proof to establish that notice was given to the defendant in compliance with the requirements of RPAPL 1304. The plaintiff's proof consists of the affidavit submitted by the bank's mortgage service representative stating that service was made in compliance with statutory requirements on March 22, 2012, which was more than 90 days prior to commencing this action, together with copies of the 90 day notices, the United States Postal Service Tracking Statement confirming delivery and a copy the "Proof of Filing Statement" filed with New York State Banking Department pursuant to RPAPL 1306 to confirm that within three days of mailing that the 90 pre-foreclosure notice was served upon this defendant. Defendant's submission of conclusory denials of ever having received such notices fails to raise an issue of fact sufficient to defeat plaintiff's summary judgment application (*see PHH Mortgage Corp. v. Muricy*, 135 AD3d 725, __ NYS3d __ (2nd Dept., 2016); *HSBC Bank v. Espinal*, 137 AD3d 1079, 28 NYS3d 107 (2nd Dept., 2016)).

With respect to the issue of "bad faith" there is insufficient proof that the bank acted in "bad faith" during the negotiating process at the mandatory court settlement conferences. Court records indicate that settlement conferences were conducted on August 1, 2013; September 19, 2013; November 25, 2013, December 9, 2013 and March 7, 2014 when the action was marked "not settled". There is no indication that the court attorneys/referees responsible for conducting the conferences considered the conduct of either party as acting in bad faith. While there is evidence of confusion between the parties concerning the amounts due under proposed modification plans offered during the course of negotiations, the record does not show that the bank representatives acted in "bad faith" during negotiations, or for the reason that the bank was unwilling to consent to the terms the defendant claimed she could afford. Under these circumstances no valid basis exists sufficient to warrant imposition of sanctions, or to reschedule additional settlement conferences as the defendant was afforded multiple opportunities to modify the loan which were not acceptable to her.

Finally the defendant's remaining series of contentions concerning plaintiff's lack of standing based upon authentication of the endorsements contained on the promissory note, the business records hearsay exception, the failure to establish ownership of mortgage based upon the MERS assignment of the mortgage, the claimed "separation" of the note and mortgage, and the defendant's right to conduct additional discovery are equally without merit and fail to raise issues of fact

sufficient to deny plaintiff's summary judgment motion (*see Deutsche Bank v. Weiss,* 133 AD3d 704, 21 NYS3d 126 (2nd Dept. 2015); CPLR 4518; *Landmark Capital Investments v. Li Shan Wang,* 94 AD3d 418, 941 NYS2d 144 (1st Dept., 2012); *MERS v. Coakley,* 41 AD3d 674, 838 NYS2d 622 (2nd Dept., 2007); *Bank of New York v. Silverberg,* 86 AD3d 274, 926 NYS2d 531 (2nd Dept., 2015); *Seaway Capital Corp. v. 500 Sterling Realty Corp.,* 94 AD3d 856, 941 NYS2d 871 (2nd Dept., 2012); *Sasson v. Setina Mfg. Co., Inc.,* 26 AD3d 487, 810 NYS2d 500 (2nd Dept., 2006)).

Finally, the bank has shown that the defendant has defaulted under the terms of the September 5, 2007 mortgage by failing to make timely monthly mortgage payments since December 1, 2011. 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. Accordingly the defendant's cross motion is denied and the plaintiff's motion seeking an order granting summary judgment and for the appointment of a referee must be granted. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Dated: September 2, 2016

J.S.C.

**Hon. Howard H. Heckman Jr.**