

**CitiMortgage, Inc. v Borek**

2016 NY Slip Op 32202(U)

September 14, 2016

Supreme Court, Suffolk County

Docket Number: 21804/2013

Judge: Jr., Howard Heckman

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

**COPY**

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

INDEX NO.: 21804/2013  
MOTION DATE: 01/16/2015  
MOTION SEQ. NO.: 001 MG  
002 MD

-----X  
CITIMORTGAGE, INC.,

Plaintiffs,

-against-

AMELIA BOREK A/K/A AMY BOREK;  
JAMESBOREK,

Defendants.  
-----X

**PLAINTIFFS' ATTORNEY:**  
FEIN, SUCH & CRANE, LLP  
1400 OLD COUNTRY ROAD, STE. C103  
WESTBURY, NY 11590

**DEFENDANTS' ATTORNEYS:**  
MEYERS, TERSIGNI, FELDMAN & GRAY, LLP  
14 WALL STREET, 30<sup>TH</sup> FLOOR  
NEW YORK, NY 10005

**DEFENDANT PRO SE:**  
JAMES BOREK  
22 WINSTON ROAD  
CENTEREACH, NY 11720

Upon the following papers numbered 1 to 38 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers 13-36; Answering Affidavits and supporting papers \_\_\_; Replying Affidavits and supporting papers 37-38; Other \_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff CitiMortgage, Inc., Successor by Merger to ABN AMRO Mortgage Group, Inc., seeking an order: 1) granting summary judgment striking the answers of defendants Amelia Borek a/k/a Amy Borek and James Borek; 2) substituting Jesse Borek as a named party defendant in place and stead of a defendant identified as "John Doe #1" and discontinuing the action against defendants identified as "John Doe #2" to "John Doe #5" and "Jane Doe #1" to "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 defendants Amelia Borek and Jesse Borek seeking an order pursuant to CPLR 3212, 3215(d) & 3217(b): 1) granting summary judgment dismissing plaintiff's complaint for lack of standing; 2) dismissing plaintiff's complaint against defendant Jesse Borek as abandoned; and 3) granting a voluntary discontinuance of the first and second counterclaims set forth in defendant Amelia Borek's answer is granted solely to the extent that the first and second counterclaims set forth in defendant Amelia Borek's answer are hereby dismissed. All remaining requests for relief asserted by the defendants are 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 \$322,700.00 executed by the defendants James Borek and Amelia Borek on September 15, 2003 in favor of ABN AMRO Mortgage Group, Inc.. On that same date the defendants also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By Certificate of Merger dated August 21, 2007, ABN AMRO Mortgage Group, Inc. merged into CitiMortgage, Inc. Plaintiff claims that the defendants have defaulted in making timely monthly mortgage payments since February 1, 2012. 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 the cross motion, the defendant Amelia Borek submits an affidavit and claims that since prior to August 14, 2013 through June, 2014 she made repeated attempts with CitiMortgage representatives to obtain a loan modification but was denied any loan modification plan that would have reduced mortgage payments within an amount commensurate with her ability to pay. Defendants claim that plaintiff's motion must be denied since the plaintiff has failed to establish its right to prosecute this foreclosure action based upon its lack of standing. Defendants contend that there is no evidence to prove that CitiMortgage owned the promissory note and the mortgage at the time this action was commenced and therefore the bank does not have standing. Defendants contend that plaintiff's counsel has conceded that the mortgage loan is owned by Freddie Mac and not CitiMortgage. Defendants also contend that the submission of an affidavit from CitiMortgage's Business Operations Analyst does not provide admissible evidence since it is not based upon the testator's personal knowledge of the facts underlying the parties transaction. Defendants also claim that the plaintiff has failed to provide sufficient evidence of compliance with the notice provisions pursuant to RPAPL 1304 and that absent compliance with the notice requirements the plaintiff's motion must be denied. Defendant also claims that their remaining affirmative defenses asserting discharge in bankruptcy; injunctive relief pursuant to Section 524(a)(2) of the U.S. Bankruptcy Code; violations of the Fair Debt Collection Practices Act; violations of the New York General Business Law & Banking Law; bad faith; failure to comply with the Consent Judgment entered on April 4, 2012 in the United States District Court for the District of Columbia in an action entitled *United States of America v. Bank of America* (Civil Action # 12-0361); and third counterclaim asserting a violation of the New York Banking Law remain viable defenses to the plaintiff's foreclosure action. Defendants also claim that the complaint against defendant Amelia Borek should be dismissed based upon the plaintiff's lack of standing, and that the complaint against defaulting defendant Jesse Borek must be dismissed as abandoned since CitiMortgage failed to seek judgment within one year of Borek's default in answering the complaint. Finally, defendant asserts that the first two counterclaims must be voluntarily discontinued on the basis that the identical relief can be granted through prosecution of the defendant's third counterclaim.

In reply, the plaintiff submits an attorney's affirmation and argues that the employee affidavit submitted in support of the summary judgment motion, which is 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 CitiMortgage had standing to maintain this action as the holder of the note by demonstrating that the note was in CitiMortgage's possession prior to August 14, 2013 (the date this action was commenced). Plaintiff claims that Freddie Mac, as owner of the note, requires that the mortgage servicer commence a foreclosure action upon a mortgagor's default and that CitiMortgage has established standing by evidence of possession of the promissory note, indorsed in blank, prior to commencement of this action. Plaintiff argues that no further details are required once proof has been submitted that CitiMortgage was in physical possession of the note and therefore plaintiff is entitled to an award of summary judgment based upon the defendants' continuing default in making timely monthly mortgage payments. Plaintiff also claims that all notices required to be served pursuant to RPAPL 1304 were properly served and that the defendants remaining affirmative defenses and counterclaim are without legal merit and must therefore be dismissed.

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 (2<sup>nd</sup> Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2<sup>nd</sup> Dept., 2015)).

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 (2<sup>nd</sup> Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2<sup>nd</sup> 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.

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 by confirming that the note was in CitiMortgage's possession prior to the commencement of this action (*Aurora Loan Services v. Taylor, supra.*; *Wells Fargo Bank v. Parker, supra.*; *CitiMortgage v. Klein*, NY Slip Op. 04687 (2<sup>nd</sup> Dept., 2016); *One West Bank v. Albanese*, 139 AD3d 831, 2016 Slip Op. 03726 (2<sup>nd</sup> Dept., 2016)).

Moreover, the plaintiff has submitted sufficient proof to establish that notice was given to the defendant Amelia Borek in compliance with the requirements of RPAPL 1304. With respect to 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 28, 2013 which was more than 90 days prior to commencing this action, together with copies of the 90 day notices, and copies of the United States Postal Service Tracking Information and a copy the "Proof of Filing Statement" filed with New York State Banking Department pursuant to RPAPL 1306 to confirm within three days of mailing that the 90 pre-foreclosure notice was served upon the defendants. The absence of an affidavit from the defendant Amelia Borek denying receipt of such notices is fatal to defense counsel's claim that the plaintiff failed to comply with the statutory condition precedent (*see Grogg v. South Road Assoc.*, 74 AD3d 1021, 907 NYS2d 22 (2<sup>nd</sup> Dept., 2010); *Emigrant Mortgage Co. v. Gosdin*, 119 AD3d 639, 989 NYS2d 609 (2<sup>nd</sup> Dept., 2014); *Emigrant Mortgage Co. v. Persad*, 117 AD3d 676, 985 NYS2d 608 (2<sup>nd</sup> Dept., 2014)). Moreover defense counsel's submission of a claim on behalf of a client counsel does not represent, claiming the notice was not properly served on that defendant, is not supported by any relevant, admissible evidence sufficient to raise an issue of fact which would defeat plaintiff's summary judgment application (*see PHH Mortgage Corp. v. Muricy*, 135 AD3d 725, \_\_ NYS3d \_\_ (2<sup>nd</sup> Dept., 2016); *HSBC Bank v. Espinal*, 137 AD3d 1079, 28 NYS3d 107 (2<sup>nd</sup> Dept., 2016)).

The defendant's remaining series of contentions asserted as set forth in her answer's affirmative defenses and counterclaim concerning plaintiff's failure to comply with the United States Bankruptcy Code, a prior Consent Judgment in the United States District Court in the District of Columbia, the New York State Banking & General Business Law and the Fair Debt Collection Practices Act, and plaintiff's claimed "bad faith" and abandonment of prosecution of the defaulting defendant Jesse Borek are equally without merit and fail to raise issues of fact sufficient to deny plaintiff's summary judgment motion (*see Dulac v. Dabrowski*, 4 AD3d 308, 774 NYS2d 487 (1<sup>st</sup> Dept., 2004); *Deutsche Bank National Trust Co. v. Gillio*, 22 Misc.3d 1131(A), 881 NYS2d 362 (Sup. Ct., Suffolk Cty., 2009); *Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539 (1975); *Citibank, N.A. v. Barclay*, 124 AD3d 174, 999 NYS2d 375 (1<sup>st</sup> Dept., 2014); *U.S. Bank, N.A. v. Sarmiento*, 121 AD3d 187, 991 NYS2d 68 (2<sup>nd</sup> Dept., 2014); *HSBC Bank USA, N.A. v. Traore*, 139 AD3d 1009, 2016 NY Slip Op 04022 (2<sup>nd</sup> Dept., 2016); *Brown v. Rosedale Nurseries*, 259 AD2d 256, 686 NYS2d 22 (2<sup>nd</sup> Dept., 1999)).

Finally, the bank has shown that the defendants have defaulted under the terms of the September 15, 2003 mortgage by failing to make timely monthly mortgage payments since February 1, 2012. 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. Accordingly the defendants' 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 14, 2016



Howard H. Heckman Jr.

J.S.C.

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