[* 1]

SHORT FORM ORDER

COPY

INDEX No. 13-7445

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 9/7/16
SUBMIT DATE: 1/27/17
Mot. Seq. # 003 - MG
CDISP: No

STATE OF NEW YORK MORTGAGE AGENCY Plaintiff, -against- KENNETH ASHFORD a/k/a KENNETH M. ASHFORD, ANGELA ASHFORD a/k/a ANGELA D. ASHFORD, and "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 Attys. For Plaintiff 175 Mile Crossing Blvd. Rochester, NY 14624 BLUTTER & BLUTTER, ESQS. Attys. For Defs. Ashford 497 So. Oyster Bay Rd. Plainview, NY 11803

Upon the following papers numbered 1 to 8 read on this motion for summary judgment and appointment of referee among other things; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ____; Answering papers 5-6; Reply papers 7-8; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#003) wherein the plaintiff seeks summary judgment on its complaint against the obligor/mortgagor defendants together with the appointment of a referee to compute amounts due under the subject note and mortgage is granted; and it is further

ORDERED that the pre-trial conference scheduled to be held on **May 3, 2017**, at 9:30 a.m in the courtroom of the undersigned located in the Annex Building of the Supreme Court at One Court Street, Riverhead, NY 11901 is not necessary and is therefore cancelled.

By the instant motion (#003), the plaintiff, for the second time, with permission granted by the Court at a conference held on July 21, 2016, seeks an award of summary judgment on its complaint against the Ashford defendants. The plaintiff also seeks an order appointing a referee to compute amounts due under the terms of the note and mortgage. In short, in order to purchase a home, the Ashford defendants, on July 11, 2008, borrowed $323,000.00 from plaintiff's predecessor-in-interest and has not made a payment pursuant to the note and mortgage since March 1, 2012.

By prior Order dated March 16, 2016, this Court granted partial summary judgment dismissing the affirmative defenses asserted in the answer of the Ashford defendants. Additionally, the Court made specific judicial findings, pursuant to CPLR 3212(g), that the plaintiff is possessed of the requisite standing to prosecute its claims for foreclosure and sale and declared that the issue of standing was resolved in favor of the plaintiff for all purposes. The Court also held, based upon the documentary evidence submitted, that a trial of this action was necessary but that same shall be limited to the issues of fact framed by the court as follows: whether the plaintiff complied with the ninety-day notice requirements imposed by RPAPL § 1304 and whether the plaintiff can establish the existence and contents of the promissory note executed by the Ashford defendants on July 11, 2008, the original of which has been lost, so as to entitle the plaintiff to its contractual remedy of foreclosure and sale. Familiarity with this Court's March 16, 2016 Order is assumed.

The motion is opposed by the Ashford defendants in papers consisting of an affirmation of their counsel. No affidavits are submitted from the Ashford defendants refuting any of the claims or documentary evidence submitted by the plaintiff.

For the reasons stated below, the motion is granted in its entirety.

Two issues must be addressed: 1) whether the plaintiff complied with the ninety day notice requirements imposed upon it by RPAPL § 1321; and 2) the existence and execution of the July 11, 2008 promissory note by the defendants and the contents of such note, the original of which has allegedly been lost.

The applicable law concerning entitlement to summary judgment in favor of the foreclosing plaintiff is set forth, in detail, in this Court's Order of March 16, 2016 and need not be repeated here. The Court adheres to its holding that no waiver arises from the Ashford defendants' failure to assert the plaintiff's purported non-compliance with the RPAPL § 1304 pre-action, ninety-day notice requirements, since caselaw holds that such a waiver extends only to defendants who defaulted in appearing by answer and who do not establish grounds for the vacatur of his or her default on excusable default grounds (*see* ***HSBC Bank USA v Clayton***, __ AD3d __, 2017 WL 355967 [2d Dept 2017]; *cf* ***MidFirst Bank v Ajala***, __ AD3d __, 2017 WL 189163 [2d Dept 2017]).

However, upon consideration of the record adduced on this motion, the court finds that the plaintiff's submissions were sufficient to establish that its predecessor-in-interest complied with the notice provisions of RPAPL § 1304. Plaintiff has submitted an Affidavit of Mailing of James A. Ranaldi (Ex. C to the motion), who was employed by the original lender, JPMorgan Chase Bank,

N.A. [hereinafter Chase], and who continued as servicer of the mortgage at the time the notices were sent, on August 24, 2012 and at the time of commencement of the action on March 13, 2013. The affidavit properly complies with CPLR 4518(a), in that the business records being reviewed include "...my own personal knowledge of how such records are kept and maintained." Attached to the Affidavit of Service are the imaged business records, including the RPAPL § 1304 pre-action, ninety-day notices, the proof of mailing from the U. S. Postal Service, and the NYS Department of Financial Services Proof of Filing Statement pursuant to RPAPL § 1306. The Ranaldi affidavit is not challenged by the Ashford defendants, who do not expressly deny receipt of the required notice.

The plaintiff claims that Chase continued to service the loan until June 2, 2014 when servicing rights were transferred to M&T Bank (*see* ¶ 28 of the Affirmation of plaintiff's counsel attached to the moving papers). In support of these assertions the plaintiff submits various Powers of Attorney executed by the plaintiff on February 6, 2003, March 7, 2005 and May 15, 2013 in favor of Chase. The Court finds the March 7, 2005 Power of Attorney to be controlling, for purposes of the power and authority to comply with the RPAPL § 1304 pre-action, ninety-day notices. That document provided authority over all real estate transactions and as such, servicing rights. Moreover, the above described Ranaldi affidavit clearly states that Chase was the servicer at the time of the mailings, which is unchallenged, aside from pure speculation and surmise. Additionally, by statute, a servicer is authorised to act on behalf of the owner or holder of a note (*see* RPAPL § 1304[1]).

Confusion arose in the first motion before the Court with the submission of a March 2, 2015 affidavit of Dawn M. Bechtold, an employee of M&T Bank, who is now alleged to be the current loan servicer. She states that she has personal knowledge of the facts alleged therein including the mailings of the RPAPL § 1304 notices. The plaintiff further submits a Power of Attorney executed by the plaintiff on February 15, 2012 in favor of M&T Bank which was accepted by M&T Bank on May 25, 2012 and recorded in the office of the County Clerk on July 21, 2012 (*see* Exhibit I attached to the moving papers). However, in light of the fact that Chase was the servicer who previously authored and mailed the RPAPL § 1304 notices, the Bechtold affidavit fails, for that purpose, to satisfy the business records exception to the hearsay rule, in that it fails to detail the obvious fact that the records being reviewed were those of Chase. While Bechtold certainly has personal knowledge of the business records of M&T Bank and the payment history of the loan, she fails to claim that she has personal knowledge of the record-keeping practices of the Chase business records (*see* ***Arch Bay Holdings, LLC v Albanese***, __ AD3d __, 2017 WL89206 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Brewton***, 142 AD3d 683, 37 NYS3d 25 [2d Dept 2016]; *cf* ***Citibank, NA v Abrams***, 144 AD3d 1212, 40 NYS3d 653 [1st Dept 2016]).

Furthermore, the Court must acknowledge a misstatement set forth in its March 16, 2016 Order, wherein the Court stated that the Power of Attorney executed by the plaintiff on February 15, 2012 in favor of M&T Bank "was revoked by the terms of a subsequent Power of Attorney executed by the plaintiff on May 15, 2013 in favor of JPMorgan Chase Bank, N.A." That Chase Power of Attorney clearly states that "The execution of this statutory short form power of attorney shall not revoke any prior power of attorney" (*see* section [g][3] of Ex. D of the moving papers). The same

language is set forth in the Power of Attorney executed by the plaintiff on February 15, 2012 in favor of M&T Bank (*see* section [g][3] of Ex. I of the moving papers). Therefore, the M&T Bank Power of Attorney was not revoked by the subsequent Chase Power of Attorney. As explained by counsel for the plaintiff, this plaintiff "has entered into several Powers of Attorney with multiple entities it uses to service its loans. ... Plaintiff simply uses multiple services for their mortgage loans" (*see* ¶ 33 of the Affirmation of plaintiff's counsel attached to the moving papers).

Therefore, contrary to this Court's prior finding in its March 16, 2016 Order, there is no reason to offer documentary proof that M&T Bank was re-appointed as agent on June 2, 2014 as its power was not revoked by the subsequent Chase Power of Attorney. As alleged by plaintiff, M&T Bank is the current loan servicer, as shown in its affidavit of merit (the Bechtold affidavit) and the affirmation of plaintiff's counsel referenced above. There is thus no longer a question of a fact as to the due and proper service of the RPAPL § 1304 notice issued by Chase, which it filed with the Superintendent of Banking pursuant to RPAPL § 1306 in August of 2012. Plaintiff satisfied its prima facie burden on that issue with the Ranaldi affidavit and the Ashford defendants failed to refute same.

The Court will next address the second issue, that is, the existence and execution of the July 11, 2008 promissory note by the defendants and the contents of such note, the original of which has allegedly been lost. The Court finds that the plaintiff's new submissions establishes, prima facie, due proof of the defendants' execution of the lost note and of its contents. As noted in this Court's prior Order, to establish entitlement to the enforcement of a lost note under the Uniform Commercial Code, the plaintiff must demonstrate defendants' execution of the note, the circumstances surrounding its custody and its loss and the content of the terms of such note (*see* UCC § 3–804; ***Marrazzo v Piccolo***, 163 AD3d 369, 558 NYS2d 103, 104 [2d Dept 1990]; *see also* ***CitiBank, N.A. v Benedict***, 2000 WL322785 [S.D.N.Y. 2000]).

Here, the plaintiff alleged in its complaint that the original note was lost. In its moving papers, the plaintiff, through its counsel, alleges that a copy of the note was found and such copy is submitted, together with an affidavit of lost note executed on September 17, 2012 by an employee of the custodial subsidiary of the original lender, Chase. As noted above, plaintiff's counsel asserts that Chase continued to service the loan following its assignment of the note and mortgage to the plaintiff in 2008 until June 2, 2014 when the servicing rights were transferred to M&T Bank. The affidavit of lost note was thus properly executed on September 17, 2012 by the custodial agent of the original lender who was then serving as the loan servicer. There is no doubt that Chase was the proper attorney-in-fact for the plaintiff at the time the Lost Note Affidavit was executed.

In addition, plaintiff has now supplied this Court with various documents, signed by the Ashford defendants, which satisfy its prima facie burden of proving the existence, terms and content of the lost note, including the Truth-In-Lending statement, the Settlement Statement, and the Uniform Residential Loan Application (*see* Ex. E attached to the moving papers). Moreover, a signed copy of the note is attached as Ex. A to the moving papers.

Plaintiff also points to the recorded mortgage, duly executed by the Ashford defendants, which states, "The note signed by Borrower and dated July 11, 2008, will be called the 'Note.' The Note shows that I owe Lender Three Hundred Twenty-Three Thousand, and 00/100 Dollars (U.S. $323,000.00) plus interest and other amounts that may be payable. I have promised to pay this debt in Periodic Payments and to pay the debt in full by August 1, 2048" (*see* section "[D]" of Mortgage, Ex. A to the moving papers).

Contrary to this Court's prior holding in its March 16, 2016 Order, and as noted above, the various Powers of Attorney do not contradict the factual allegations set forth in the September 17, 2012 affidavit of Lost Note. Plaintiff has establish the execution of the note by the Ashford defendants and the contents of the lost note were duly established, not only by the additional documentation submitted, but by the actual copy of the note, signed by the Ashford defendants. Plaintiff has satisfied its burden and no questions of fact exist or are raised by the Ashford defendants with respect to the plaintiff's entitlement to the remedy of foreclosure and sale. Sufficient proof of the existence and contents of the note has been presented.

As to the two issues discussed above, the plaintiff established its prima facie entitlement to judgment as a matter of law, and the Ashford defendants failed to raise a triable issue of fact in opposition to that showing. Plaintiff has eliminated the need for a trial of the issues previously framed by this Court for trial. The motion for summary judgment is granted in its entirety. The submitted Order will be signed simultaneously with this short form order.

DATED: 2/8/17

THOMAS F. WHELAN, J.S.C.