U.S. Bank N.A. v Vanderbaan
2017 NY Slip Op 31150(U)
May 19, 2017
Supreme Court, Suffolk County
Docket Number: 13397/2013
Judge: Howard H. Heckman, Jr.
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

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

INDEX NO.: 13397/2013
MOTION DATE: 12/01/2016
MOTION SEQ. NO.: 001 MG

----------X

U.S. BANK N.A., AS TRUSTEE FOR J.P. MORGAN ALTERNATIVE LOAN TRUST 2006-A3,

Plaintiffs,

-against-

LINDA VANDERBAAN a/k/a LINDA VAN DER BAAN, STEPHEN DECLEMENTE, HEATHER DECLEMENTE,

Defendants.

----------X

PLAINTIFFS' ATTORNEY:
PARKER IBRAHM & BERG, LLC
5 PENN PLAZA, STE. 2371
NEW YORK, NY 10001

DEFENDANTS' ATTORNEYS:
JAMES F. MISIANO, P.C.
200 MOTOR PKY., STE. C17
HAUPPAUGE, NY 11788

Upon the following papers numbered 1 to 46 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-37 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 38-44 ; Replying Affidavits and supporting papers 45-46 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff U.S. Bank, N.A. seeking an order: 1) granting summary judgment striking the answer of defendant Linda Vanderbaan; 2) discontinuing the action against defendants designated as "John Doe" and "Jane Doe"; 3) discontinuing the action against the defendant identified as Jan William Vanderbaan; 4) deeming all appearing and non-appearing defendants in default; 5) amending the caption; and 6) 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 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 original sum of $322,500.00 executed by defendant Linda Vanderbaan on April 13, 2005 in favor of Novastar Mortgage Inc. On the same date defendant Vanderbaan also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated February 13, 2006, Mortgage Electronic Registration Systems, Inc. as nominee for Novastar assigned the mortgage to JPMorgan

Chase, N.A. Defendant Vanderbaan thereafter executed a consolidation mortgage agreement and promissory note dated February 17, 2006 forming a single lien in the sum of $360,000.00. The consolidated note and mortgage were assigned to plaintiff on February 27, 2013. Plaintiff claims that Vanderbaan defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning September 1, 2009. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In opposition, defendant Vanderbaan submits an attorney's affirmation and claims that: 1) the action is stayed as a result of defendant Jan William Vanderbaan's death on September 19, 2016 and no further proceedings can take place until substitution is made for the decedent; 2) there is insufficient relevant, admissible evidence submitted by the plaintiff in support of the motion to grant summary judgment since the mortgage servicer's representative's affidavits are hearsay and not admissible as evidence; 3) there is insufficient proof to show that the mortgage loan was owned by the plaintiff and included in the pooling and servicing agreement; 4) plaintiff lacks standing to maintain this action since the allonge was not affixed to the promissory note; 5) summary judgment must be granted in favor of defendant Vanderbaan dismissing the complaint; and 6) plaintiff's application for an order pursuant to CPLR 3126 must be denied.

In reply, the plaintiff submits an attorney's affirmation and argues that no basis exists to deny granting plaintiff's application for an award of summary judgment. Plaintiff claims that the proof submitted in the form of an affidavits from the mortgage servicer's employees together with copies of the promissory notes and mortgage agreements provide sufficient evidence entitling the mortgage lender to foreclose the mortgage. Plaintiff contends the mortgage servicer's representative's affidavit detailing the bank records pertaining to the defendant's notes and mortgages satisfies the business records exception to the hearsay rule and reveals that defendant has defaulted under the terms of the mortgage by failing to make mortgage payments for nearly the past eight years. Plaintiff claims the evidence shows that U.S. Bank, N.A. has standing to maintain this action as the holder and continuous physical possessor of the promissory notes and allonge since March 3, 2006 . Plaintiff also claims that the proof submitted shows that the notes were included in the pooling and servicing agreement and that the allonge has been affixed to the promissory note since March 16, 2006. Plaintiff also asserts that no basis exists to stay the action based upon the plaintiff's application to discontinue the action against the decedent and in view of the fact that the decedent had no ownership interest in the mortgaged premises.

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. Erobobo*, 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)). A plaintiff's attachment of a duly indorsed note to its complaint or to the certificate of merit required pursuant to CPLR 3012(b), coupled with an affidavit in which it alleges that it had possession of the note prior to the commencement of the action, has been held to constitute due proof of the plaintiff's standing to prosecute its claims for foreclosure and sale (*JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

The plaintiff's proof in support of its motion consists of: 1) a copy of the signed adjustable rate promissory note dated April 13, 2005 indorsed in blank and signed by the vice president of the original mortgage lender, Novastar Mortgage, Inc. ; 2) a copy of the signed "InterestFirst" adjustable rate promissory note dated February 17, 2006 in the sum of $33,417.85 with the lender, JPMorgan Chase Bank, N.A.; 3) a copy of the signed "InterestFirst" adjustable rate note dated February 17, 2006 in the sum of $360,000.00 with the lender JPMorgan Chase Bank, N.A. and an allonge payable to plaintiff, U.S. Bank, N.A., signed by an authorized officer of JPMorgan Chase Bank, N.A.; 4) copies of the three signed mortgage agreements and a copy of the signed consolidation agreement; ; 5) a copy of the assignment of the mortgage dated February 13, 2006 from MERS as nominee for Novastar Mortgage Inc. to JPMorgan Chase Bank, N.A. ; 6) a copy of the assignment of the mortgage dated February 27, 2013 from JPMorgan Chase Bank, N.A. to U.S. Bank, N.A.; 7) a copy of the Pooling and Servicing Agreement dated June 1, 2006 naming plaintiff as trustee; and 8) an affidavit from the document control officer of Select Portfolio Servicing dated March 3, 2016 (the current mortgage servicer) and an affidavit from an authorized signer of JPMorgan Chase Bank, N.A. dated October 7, 2015 (the former mortgage servicer) testifying about the contents of the loan (business) records maintained by the mortgage lenders.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendant does not argue her failure to make payments due under the terms of the promissory notes and mortgage agreements. Rather, the issues raised by the defendant concern whether the action must be stayed; whether plaintiff has standing; and whether sufficient admissible proof has been submitted to entitle the bank to foreclose.

CPLR 4518 provides:

Business records.

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

The Court of Appeals in *People v. Guidice*, 83 NY2d 630, 635, 612 NYS2d 350 (1994) explained that "the essence of the business records exception to the hearsay rule is that records systematically made for the conduct of business... are inherently highly trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them truthful and accurate for purposes of the conduct of the enterprise." (quoting *People v. Kennedy*, 68 NY2d 569, 579, 510 NYS2d 853 (1986)). It is a unique hearsay exception since it represents hearsay deliberately created and differs from all other hearsay exceptions which assume that declarations which come within them were not made deliberately with litigation in mind. Since a business record keeping system may be designed to meet the hearsay exception, it is important to provide predictability in this area and discretion should not normally be exercised to exclude such evidence on grounds not foreseeable at the time the record was made (*see Trotti v. Estate of Buchanan*, 272 AD2d 660, 706 NYS2d 534 (3rd Dept., 2000)).

The three foundational requirements of CPLR 4518(a) are: 1) the record must be made in the regular course of business- reflecting a routine, regularly conducted business activity, needed and relied upon in the performance of business functions; 2) it must be the regular course of business to make the records– (i.e. the record is made in accordance with established procedures for the routine, systematic making of the record); and 3) the record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made (*see People v. Kennedy, supra* @ pp. 579-580)). The "mere filing of papers received from other entities, even if such papers are retained in the regular course of business, is insufficient to qualify the documents as business records." (*People v. Cratsley*, 86 NY2d 81, 90, 629 NYS2d 992 (1995)). The records will be admissible "if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business." (*State of New York v. 158th Street & Riverside Drive Housing Company, Inc.*, 100AD3d 1293, 1296, 956 NYS2d 196 (2012); *leave denied*, 20 NY3d 858 (2013)). In this regard with respect to mortgage foreclosures, a loan servicer's employee may testify on behalf of the mortgage lender and a representative of an assignee of the original lender can rely upon business records of the original lender to establish its claims for recovery of amounts due from the borrowers provided the assignee/plaintiff establishes that it relied upon those records in the regular course of business (*Landmark Capital Inv. Inc. v. Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 (1st Dept., 2012); *Portfolio Recovery Associates, LLC. v. Lall*, 127 AD3d 576, 8 NYS3d 101 (1st Dept.,

2015); *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.*, 30 AD3d 336, 819 NYS2d 223 (1st Dept., 2006)).

As recently stated in the Appellate Division, Second Judicial Department decision in *Citigroup, etc., v. Kopelowitz, et al.*, 2017 NY Slip Op 01331 (2nd Dept., 2/22/17): "There is no requirement that a plaintiff in a foreclosure action rely upon any particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a), and the records themselves actually evince the facts for which they are relied upon (citations omitted)."

The affidavits submitted from the mortgage service providers 9current and former) provide the evidentiary foundation for establishing the mortgage lender's right to foreclose. The affidavits sets forth each servicer employee's review of the business records maintained by Chase and U.S Bank; the fact that the books and records are made in the regular course of business; that it was the mortgage servicer's regular course of business to maintain such records; that the records were made at or near the time the underlying transaction took place; and that the records were created by individuals with personal knowledge of the underlying transactions. Based upon submission of these affidavits, the plaintiff has provided an admissible evidentiary foundation which satisfies the business records exception to the hearsay rule with respect to issues raised in its summary judgment application.

With respect to the issue of standing, plaintiff has submitted sufficient evidence in the form of affidavits from both mortgage servicers' representatives to prove the plaintiff has standing (as the holder of the original promissory notes signed by the defendant, together with the indorsement affixed to the original promissory note and an attached duly indorsed allonge to the subsequent promissory note) which have been in the mortgage lender's possession beginning on March 3, 2006 and was in the mortgage servicer's possession on or before May 17, 2013, which was the date the action was commenced (*Aurora Loan Services v. Taylor; supra.; Wells Fargo Bank, N.A. v. Parker, supra.; U.S. Bank, N.A. v. Ehrenfeld*, 144 AD3d 893, 41 NYS3d 269 (2nd Dept., 2016); *GMAC Mortgage, LLC v. Sidberry*, 144 AD3d 863, 40 NYS3d 783 (2nd Dept., 2016)). The mortgage servicers' affidavits together with a copy of the pooling and servicing agreement provides sufficient proof that the plaintiff is holder and owner of the defendant's mortgage loan. Moreover, any alleged issues surrounding the mortgage assignments have been rendered irrelevant to the issue of standing since the plaintiff has established possession of the duly indorse promissory notes prior to commencing this action (*see FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016)).

With respect to the death of a party, as a general rule, if a cause of action survives the death of a party, such death divests the court of jurisdiction until a duly appointed personal representative is substituted for the decedent (CPLR 1015; *Giroux v. Dunlop Tire Corp.*, 16 AD3d 1068, 791 NYS2d 769 (4th Dept., 2005); *Gonzalez v. Ford Motor Company*, 295 AD2d 474, 744 NYS2d 468 (2nd Dept.,, 2002); *Matter of Einstoss*, 26 NY2d 181, 309 NYS2d 184 (1970)). However, where a party's death does not affect the merits of an action, there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution (*Bova v. Vinciguerra*, 139 AD2d 797, 526 NYS2d 671 (3rd Dept., 1988); *Alaska Seaboard Partners Ltd. Partnership v. Grant*, 20 AD3d 436, 799 NYS2d 117 (2nd Dept., 2002)).

In this case, the decedent who was named a party defendant, had no ownership interest in the mortgaged premises and was never a signatory to the mortgages or the promissory notes. The decedent/defendant was not therefore a necessary party to the foreclosure action and the only basis to deny plaintiff's motion (and further delay the proceedings) would be in the situation where the plaintiff is seeking a deficiency judgment against the defaulting defendant (*see FNMA v. Connelly*, 84 AD2d 805, 444 NYS2d 147 (2nd Dept., 1981); *Heidgerd v. Reis*, 135 AD 414, 119 NYS21 (1st Dept., 1909); *Mutual Life Ins. Co. Of New York v. Ninety-Fifty Street & Lexington Avenue Corp.*, 60 NYS2d 450 (NY Cty. Sup.Cti., 1946)). Since, upon his death, the defendant Jan William Vanderbaan retained no ownership interest in the premises, and in view of the fact that as part of the mortgagee's application, the bank now seeks to discontinue the action against the decedent and has elected to waive its right to seek a deficiency, there is no reason to stay this action since the defendant's demise does not affect the merits of this foreclosure proceeding (*see HSBC' Bank USA v. Ungar Family Realty Corp.*, 111 AD3d 673, 974 NYS2d 583 (2nd Dept., 2013); *DLJ Mortgage Capital, Inc. v. 44 Brushy Neck Ltd.*, 51 AD3d 857, 859 NYS2d 221 (2nd Dept., 2008); *FNMA v. Connelly, supra.; Paterno v. CYC, LLC*, 46 AD3d 788, 850 NYS2d 131 (2nd Dept., 2007); *Countrywide Home Loans, Inc. v. Keys*, 27 AD3d 247, 811 NYS2d 362 (1st Dept., 2006); *see also Residential Credit Solutions, Inc. v. Lalji et al.*, 39 Misc 3rd 1218(A), 975 NYS2d 369 (Qns. Cty. Sup. Ct., 2013)).

With respect to defendant's remaining contentions, none of the issues raised by the defendant create an issue of fact sufficient to defeat the plaintiff's summary judgment motion. The evidence submitted by the bank has shown, and the defendant does not factually dispute, that the mortgagor has defaulted under the terms of the mortgages and promissory notes by failing to make timely monthly mortgage payments since September 1, 2009. 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.

Finally, as the defendant has failed to raise any evidence to address her remaining affirmative defenses in opposition to plaintiff's motion, those affirmative defenses must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Therault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly the plaintiff's motion seeking an order granting summary judgment and for the appointment of a referee is granted. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Dated: May 19, 2017

Hon. Howard H. Heckman Jr.

J.S.C.