

Wells Fargo Bank, NA v Benitez
2017 NY Slip Op 32747(U)
December 10, 2017
Supreme Court, Suffolk County
Docket Number: 15433/13
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/5/17
SUBMIT DATE 10/19/17
Mot. Seq. # 001 - MG
CDISP Y N X

-----X
WELLS FARGO BANK, NA, :
 :
 Plaintiff, :
 :
 -against- :
 :
 VERONICA BENITEZ a/k/a VERONICA E. :
 BENITEZ, MARTHA MANCILLI, JORGE :
 CINENECES and HUGO CINECINCES, :
 :
 Defendants. :
-----X

SHAPIRO, DiCARO & BARAK
Attys. For Plaintiff
175 Mile Crossing Blvd.
Rochester, NY 14624

GUERRERO LAW OFFICES, PC
Attys. For Defendant Benitez
1836A Fifth Ave.
Bay Shore, NY 11706

Upon the following papers numbered 1 to 7 read on this motion for renewal
_____ ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of
Cross Motion and supporting papers: _____ ; Opposing papers: 4-5 ; Reply papers 6-7 ;
Other _____ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by the plaintiff for renewal of its prior motion (#001) and upon renewal, for full summary judgment and the appointment of a referee to compute, is granted in its entirety, and it is further

ORDERED that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith and it is further

ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(3).

Familiarity with the granting of partial summary judgment by the Hon. Daniel Martin, A.J.S.C., on December 14, 2016, is presumed. The matter was reassigned to this Part pursuant to Administrative Order No. 110-17, dated September 28, 2017 and submitted for decision on October 19, 2017. In essence, the only issues left unresolved by the prior order were the compliance with the RPAPL §1304 notice and the issue of standing of the eNote, in particular, the transfer registry/history. The court permitted a motion to renew on those remaining issues, within 120 days of the date of the order. Plaintiff has timely taken advantage of the court's permission for a new motion.

The new motion (#002) has addressed the prior concerns of Justice Martin, as expressed in his prior order. As to the issue of RPAPL § 1304, an affidavit of mailing is offered from Jermiah Herberg, Vice President Loan Documentation of Wells Fargo Bank, N.A., who attests to the mailing of the required notices on October 3, 2012. He references the 20-digit certified mail tracking number and submits TrackRight System records that show the U.S. Postal Service delivery attempts and the U.S. Postage Paid for the first-class mailing and the certified mailing. He relies upon the certified mailing receipt return card, which was signed and dated October 9, 2012.

He explains the Wells Fargo's practices and procedures and that he has personal knowledge of all the relevant documents. He describes the plaintiff's regular practice at the time concerning the first-class mailing and the certified mailing. Importantly, he states that he is trained on the use, maintenance and access to these records.

Any claim that the RPAPL §1304 notice was not properly mailed is rejected. As noted by the Court of Appeals, "[i]t is a general rule that the law presumes that a letter properly addressed, stamped and mailed is duly delivered to the addressee" (*Trust & Guar. Co. v Barnhardt*, 270 NY 350, 1 NE2d 459 [1936]; see also *Engel v Lichterman*, 95 AD2d 536, 538, 467 NYS2d 642 [2d Dept 1983] ["[i]t has long been recognized in the law of evidence that a letter properly mailed is presumed to have been received"]). Here, in light of the submission of the affidavit of Jermiah Herberg, an employee of the plaintiff who relied upon the accuracy of the business records which demonstrate the proper mailing of the notices, the Court need not address defendants' concerns as to the quality of the affidavit since it satisfied the admissibility requirements of CPLR 4518(a) (see *Stewart Title Ins. Co. v Bank of New York Mellon*, __ AD3d __, 61 NYS3d 634 [2d Dept 2017]; *Citigroup v Kopelowitz*, 147 AD3d 1014, 1015, 48 NYS3d 223 [2d Dept 2017]; see generally, *Citimortgage, Inc. v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]).

Moreover, the affidavit is more detailed than the affidavit submitted in the recent appellate holding of *HSBC Bank USA v Ozcan*, __ AD3d __, 2017 WL 4657992 (2d Dept 2017), which clarified the requirements for satisfaction of the business records rule.

In any event, a business record will be admissible if that record "was made in the regular course of any business and ... 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" (*One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1, 925 NYS2d 61 [1st Dept 2011]; CPLR 4518[a]). While

“the mere filing of papers received from other entities is insufficient to qualify the documents as business records, such records may be admitted into evidence 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” (*Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]; quoting *State v 158th St. & Riverside Dr. Hous. Co., Inc.*, 100 AD3d 1293, 956 NYS2d 196 [3d Dept 2012], citing *People v Cratsley*, 86 NY2d 81, 90–91, 629 NYS2d 992 [1995]).

Appellate case authorities have thus held that a loan servicer may testify as to payment defaults and other matters relevant to a foreclosing plaintiff's prima facie case on records it maintains in the regular course of its business as servicer of the subject mortgage loan (see *Pennymac Holdings, LLC v Tomanelli*, 139 AD3d 688, 32 NYS3d 181 [2d Dept 2016]; *Deutsche Bank Natl. Trust Co. v Naughton*, 137 AD3d 1199, 28 NYS3d 444 [2d Dept 2016]; *Deutsche Bank Natl. Trust Co. v Abdan*, 131 AD3d 1001, 16 NYS2d 459 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Arias*, 121 AD3d 973, 995 NYS2d 118 [2d Dept 2014]; see also *Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737, *supra*; *HSBC Bank USA, Natl. Ass'n v Sage*, 112 AD3d 1126, 977 NYS2d 446 [3d Dept 2013]; *Aames Capital Corp. v Ford*, 294 AD2d 134, 740 NYS2d 880 [1st Dept 2002]). It is also established law that an assignee or other transferee of the loan documents may rely upon the business records of the loan originator or other predecessors in interest to establish such transferee's claims for recovery of amounts due from the debtor so long as it establishes that it relied upon those records in the regular course of its business (see *Landmark Capital Inv., Inc. v Li-Shan Wang*, 94 AD3d 418, 941 NYS2d 144 [1st Dept 2012]; see also *Portfolio Recovery Assoc., LLC v Lall*, 127 AD3d 576, 8 NYS3d 101 [1st Dept 2015]).

That there is no requirement that the affiant have personal knowledge of every entry is clear, particularly where there is a business relationship between the entities entering and maintaining the records and those incorporating and relying upon them in the regular course of their business (see *Citibank, NA v Abrams*, 144 AD3d 1212, 1216, 40 NYS3d 653 [3d Dept 2016] [“Polk was entitled to rely on the loan records in addressing the issue of possession, as CPLR 4518[a] does not require a person to have personal knowledge, ...”]; *Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737, 739, *supra*; *HSBC Bank USA, N.A. v Sage*, 112 AD3d 1126, 1127, *supra*; *Landmark Capital Inv., Inc. v Li-Shan Wang*, 94 AD3d 418, *supra* [“Plaintiff established its entitlement to judgment as a matter of law by relying in part on the original loan file prepared by its assignor. Plaintiff relied on these records in its regular course of its business”]).

Here, as set forth in the affidavit of Jermiah Herberg, he is personally familiar with plaintiff's regular business practice, he describes the practice and swears that the business records were relied upon on a regular basis in the course of plaintiff's business as custodian, with respect to this loan in default. Therefore, plaintiff relied upon the records in its regular course of business and such reliability is key to its admissibility (see *Corsi v Town of Bedford*, 58 AD3d at 231–232, 868 NYS2d 258 [2d Dept 2008], *lv. denied* 12 NY3d 714, 883 NYS2d 797 [2009]; *Matter of Carothers v GEICO Indem. Co.*, 79 AD3d at 865, 914 NYS2d 199 [2d Dept 2010]).

It is the Court which must determine the threshold requirement for admissibility (*see People v Kennedy*, 68 NY2d at 576, 510 NYS2d 853 [1986]). The Court of Appeals in *Bossuk v Steinberg*, 58 NY2d 916, 919, 460 NYS2d 509 (1983) held that there was no need to produce the person who did the actual mailings since “[t]he proof of the Sheriff’s regular course of business in this regard sufficed.” In *Hospital for Joint Diseases v Elrac, Inc.*, 11 AD3d 432, 433, 783 NYS2d 612 (2d Dept 2004), the Second Department held that an affidavit based upon records maintained by an insurer in the ordinary course of business did constitute admissible evidence (“Personal knowledge of such documents, their history, or specific content are not necessarily required of a document custodian”). Various cases, particularly in the Second Department, have held that such business records are admissible (*see CitiMortgage, Inc. v Espinal*, 134 AD3d 876, *supra*; *Olympus America, Inc. v Beverly Hills Surgical Inst.*, 110 AD3d 1048, 974 NYS2d 89 [2d Dept 2013]; *Burrell v Barreiro*, 83 AD3d 984, 922 NYS2d 465 [2d Dept 2011]; *DeLeon v Port Auth. of N.Y. & N.J.*, 306 AD2d 146, 761 NYS2d 54 [1st Dept 2003]; *We’re Assocs. Co. v Rodin Sportswear Ltd.*, 288 AD2d 465, 734 NYS2d 104 [2d Dept 2001]; *Spangenberg v Chaloupka*, 229 AD2d 482, 645 NYS2d 514 [2d Dept 1996]).

Here, Jermiah Herberg, as the current recipient of the records, can establish personal knowledge of the maker’s business practices and procedures, “and the records themselves actually evince the facts for which they are relied upon (citations omitted)” (*Citigroup v Kopelowitz*, 147 AD3d 1014, *supra*). Therefore, this Court holds that the records relied upon, in the affidavit of Jermiah Herberg, are admissible pursuant to the business records rule. Rejected as unmeritorious is defendants’ counsel’s claim that the plaintiff’s affidavit of mailing is insufficient due to a lack of personal knowledge on the part of the affiant, who is an employee of the plaintiff.

Even under the dictates of *CitiMortgage, Inc. v Pappas*, 147 AD3d 900, 47 NYS3d 415 (2d Dept 2017), plaintiff has met its burden. Due proof of the mailing of the RPAPL § 1304 notice can be established by any one of three alternative methods. First, by the submission of an affidavit of service (*see JPMorgan Chase Bank, N.A. v Schott*, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; *Wells Fargo v Moza*, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015]); second, by “proof of mailing by the post office” alternative method of proof of proper mailing set forth in *CitiMortgage, Inc. v Pappas*, 147 AD3d 900, *supra*); or the third method, that is, the business record exception alternative of proof of proper mailing set forth in *CitiMortgage, Inc. v Pappas*, 147 AD3d 900, *supra* (*see* CPLR 4518). Here, plaintiff satisfied the “proof of mailing by the post office” mailing requirements of RPAPL § 1304 with the submission of an Affidavit of Mailing of Jermiah Herberg. As such, the second alternative under *CitiMortgage, Inc. v Pappas*, 147 AD3d 900, *supra*, has been satisfied.

Additionally, based upon the discussion set forth above, the affidavit of Jermiah Herberg, satisfies the third alternative under *CitiMortgage, Inc. v Pappas*, 147 AD3d 900, *supra*; *see generally*, *Flagstar Bank, FSB v Mendoza*, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]). The affidavit adequately sets forth the basis of his knowledge and established the admissibility of the documents appended to the affidavit as business records (*see Olympus America, Inc. v Beverly Hills Surgical Inst.*, 110 AD3d 1048, *supra*; *DeLeon v Port Auth. of N.Y. & N.J.*, 306 AD2d 146, *supra*).

Wells Fargo Bank v Benitez
Index No. 15433/13
Page 5

The reason that entries made in the regular course of business are admissible as an exception to the hearsay rule is that since their purpose is to aid in the proper transaction of the business and they are useless for that purpose unless accurate, the motive for following a routine of accuracy is great and the motive to falsify is nonexistent (*see Nimble v Earls M. Jorgenson, Co.*, 358 Ill. App 3d 400, 414, 294 Ill. Dec. 402, 830 N.E.2d 814 [2005]).

Plaintiff has established its standing with the submission of the affidavits from Katie Paolangeli, a Vice President of MERSCORP Holdings, Inc. and a second one from Jeremiah Herberg. These affidavits establish plaintiff's standing as the controller of the eNote, since Wells Fargo maintains the single authoritative copy of the eNote and is entitled to enforce same (*see* 15 USC §7021[d]; §7021[f]; §7006[5]; *see also New York Community Bank v McClendon*, 138 AD3d 805, 29 NYS3d 507 [2d Dept 2016]). The MERS eRegistry is explained and documents are attached showing the Transfer of Control. The terms of the eNote further establish plaintiff's standing. These submission address the concerns of Justice Martin.

In opposition, defendant only submits an affidavit from counsel. However, the affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Defendant's counsel's new argument, which was not raised before Justice Martin, claiming a lack of signature on the eNote, is specious. The signature satisfies the federal statutes set forth above (*see also* General Construction Law §46). What is set forth on the note demonstrates an "intent to execute ... such instrument." Defendant's reliance upon *Vista Surgical Supplies, Inc. v Travelers Ins. Co.*, 50 AD3d 778, 860 NYS2d 532 (2d Dept 2008), is misplaced. That case dealt with a CPLR 2106 affirmation (*compare, Martin v Portexit Corp.*, 98 AD3d 63, 948 NYS2d 21 [1st Dept 2012]). Here, no affidavit is offered from the defendant denying her intent to execute the eNote.

Therefore, the Court grants plaintiff's motion (#002) in its entirety and simultaneously signs the proposed Order, as modified.

DATED: 12/16/17


THOMAS F. WHELAN, J.S.C.