HSBC Bank USA, N.A. v Janowitz
2017 NY Slip Op 32754(U)
December 18, 2017
Supreme Court, Suffolk County
Docket Number: 25127/2013
Judge: Howard H. Heckman
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Short Form Order

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

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

INDEX NO.: 25127/2013
MOTION DATE: 10/24/2017
MOTION SEQ. NO.: 002 MG

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HSBC BANK USA, N.A.,

Plaintiffs,

-against-

MICHAEL JANOWITZ A/K/A MICHAEL K. JANOWITZ, LAURIE JANOWITZ,

Defendants.

---X

PLAINTIFF'S ATTORNEY:
RAS BORISKIN, LLC
900 MERCHANTS CONCOURSE
WESTBURY, NY 11590

DEFENDANT'S ATTORNEY:
ADAM C. GOMERMAN, ESQ.
807 EAST JERICHO TNPK.
HUNTINGTON STATION, NY 11746

Upon the following papers numbered 1 to 22 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-17 ; Notice of Cross Motion and supporting papers___ ; Answering Affidavits and supporting papers 18-20 ; Replying Affidavits and supporting papers 21-22 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff HSBC Bank USA, N.A. seeking an order: 1) granting summary judgment striking the answer of defendants Michael Janowitz and Laurie Janowitz; 2) substituting Sam Janowitz and Doris Striet as named party defendants in place and stead of defendants designated as "John Doe #1" and "John Doe #2" and discontinuing the action against defendants designated as "John Doe #3" through "John Doe #12"; 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 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 $662,000.00.00 executed by defendants Michael Janowitz and Laurie Janowitz on December 18, 2006 in favor of Fidelity Mortgage. On the same date both defendants executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Defendants subsequently executed a loan modification mortgage agreement dated October 26, 2010 creating a single lien in the sum of

$708,068.28. By assignment dated July 12, 2013 the mortgage and note were assigned to plaintiff HSBC Bank USA, N.A. Plaintiff claims that the defendants defaulted under the terms of the mortgages and note by failing to make timely monthly mortgage payments beginning February 1, 2013 and continuing to date. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on September 17, 2013. Defendants Michael Janowitz and Laurie Janowitz served an answer dated October 2, 2013 containing twelve affirmative defenses. Plaintiff's motion seeks an order granting summary judgment striking defendants' answer and for the appointment of a referee.

In opposition to plaintiff's motion, defendants Janowitz claim that: 1) plaintiff has failed to prove that it complied with the service requirements set forth pursuant to the mortgage and RPAPL 1304; 2) plaintiff lacks standing to maintain this action; 3) plaintiff's computation of the amounts due and owing are incorrect; and 4) defendants are entitled to conduct discovery.

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)).

Proper service of RPAPL 1304 notices on borrower(s) are conditions 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.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendants do not contest their failure to make timely payments due under the terms of the promissory note and mortgage agreements. Rather, the issues raised by the defendants concern whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon defendants' continuing default, plaintiff's compliance with the mortgage and statutory pre-foreclosure notice requirements, and plaintiff's standing to maintain this action.

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

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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); *see also Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Company,* 25 NY3d 498, 14 NYS3d 283 (2015); *Deutsche Bank National Trust Co. v. Monica,* 131 AD3d 737, 15 NYS3d (3rd Dept., 2015); *People v. DiSalvo,* 284 AD2d 547, 727 NYS2d 146 (2nd Dept., 2001); *Matter of Carothers v. GEICO,* 79 AD3d 864, 914 NYS2d 199 (2nd Dept., 2010)). 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 incorporated the original records into its own records and 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)).

The statute (CPLR 4518) clearly does not require a person to have personal knowledge of each and every entry contained in a business record (*see Citibank N.A. v. Abrams,* 144 AD3d 1212, 40 NYS3d 653 (3rd Dept., 2016); *HSBC Bank USA, N.A. v. Sage,* 112 AD3d 1126, 977 NYS2d 446 (3rd Dept., 2013); *Landmark Capital Inv. Inc. v. LI-Shan Wang, supra.*)). As the Appellate Division, Second Department recently stated in *Citigroup v. Kopelowitz,* 147 AD3d 1014, 48 NYS3d 223 (2nd Dept., 2017): "There is no requirement that a plaintiff in a foreclosure action rely on a 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." Decisions interpreting CPLR 4518 are consistent to the extent that the three foundational requirements: 1) that the record be made in the regular course of business; 2) that it is in the regular course of business to make the record; and 3) that the record must be made at or near the time the transaction occurred. – if demonstrated, make the records admissible since such records are considered trustworthy and reliable. Moreover, the language contained in the statute specifically authorizes the court discretion to determine admissibility by stating "*if the judge finds*" that the three foundational requirements are satisfied the evidence shall be admissible.

The affidavit submitted from the mortgage service provider's vice president provides the evidentiary foundation for establishing the mortgage lender's right to foreclose. The affidavit sets forth the employee's review of the business records maintained by the service provider (Ocwen); the fact that the books and records are made in the regular course of Ocwen's business; that it was Ocwen's regular course of business to maintain such records; that the records were made at or near the time the underlying transactions took place; and that the records were created by an individual with personal knowledge of the underlying transactions. Based upon the submission of this affidavit,

the plaintiff has provided an admissible evidentiary foundation which satisfies the business records exception to the hearsay rule with respect to the issues raised in this summary judgment application.

With respect to the issue of standing, plaintiff's servicer's affidavit reveals that HSBC had possession of the original promissory note with two allonges on September 17, 2013, which is the date this action was commenced thereby establishing plaintiff's standing to prosecute this action (*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)). In addition, the plaintiff has attached a copy of the promissory note with two allonges to the complaint, together with the certificate of merit (CPLR 3012-b). Such evidence of possession establishes the plaintiff's standing to prosecute this foreclosure action (*see JPMorgan Chase Bank, N.A. v. Weinberger, supra.; Nationstar Mortgage LLC v. Catizone, supra.*).

With respect to the issue of the defendants' default in making payments, in order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, the plaintiff must submit the mortgage, the unpaid note and admissible evidence to show default (*see PennyMac Holdings, Inc. V. Tomanelli,* 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016)*; North American Savings Bank v. Esposito-Como,* 141 AD3d 706, 35 NYS3d 491 (2nd Dept., 2016); *Washington Mutual Bank v. Schenk,* 112 AD3d 615, 975 NYS2d 902 (2nd Dept., 2013)). Plaintiff has provided admissible evidence in the form of a copy of the note and mortgages, and an affidavit attesting to the defendants' undisputed default in making timely mortgage payments sufficient to sustain its burden to prove defendants have defaulted under the terms of the parties agreement by failing to make timely payments since February 1, 2013 (CPLR 4518; *see Wells Fargo Bank, N.A. v. Thomas, supra.; Citigroup v. Kopelowitz, supra.*)). Accordingly, and in the absence of any proof to raise an issue of fact concerning the Janowitz's continuing default, plaintiff's application for summary judgment based upon defendants' breach of the mortgage agreements and promissory note must be granted.

With respect to service of the pre-foreclosure mortgage and RPAPL 1304 90-day notices, the proof required to prove strict compliance with the statute (RPAPL 1304) can be satisfied: 1) by plaintiff's submission of an affidavit of service of the notices (*see CitiMortgage, Inc. v. Pappas,* 147 AD3d 900, 47 NYS3d 415 (2nd Dept., 2017); *Bank of New York Mellon v. Aquino,* 131 AD3d 1186, 16 NYS3d 770 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Spanos,* 102 AD3d 909, 961 NYS2d 200 (2nd Dept., 2013)); or 2) by plaintiff's submission of sufficient proof to establish proof of mailing by the post office (*see HSBC Bank USA, N.A. v. Ozcan,* 154 AD3d 822. 64 NYS3d 38 (2nd Dept., 2017); *CitiMortgage, Inc. v. Pappas, supra pg. 901; see Wells Fargo Bank, N.A. v. Trupia,* 150 AD3d 1049, 55 NYS3d 134 (2nd Dept., 2017)). Once either method is established a presumption of receipt arises (*see Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co., supra.; Flagstar Bank v. Mendoza,* 139 AD3d 898, 32 NYS3d 278 (2nd Dept., 2016); *Residential Holding Corp. v. Scottsdale Insurance Co.,* 286 AD2d 679, 729 NYS2d 766 (2nd Dept., 2001)).

In this case, the record shows that plaintiff was not obligated to serve pre-foreclosure 90-day notices to the borrowers pursuant to RPAPL 1304(3) which states that the notice requirement "shall not apply, or shall cease to apply, if the borrower has filed an application for the adjustment of debts..." Defendants execution of a loan modification agreement dated October 19, 2010 was clearly an "adjustment of debts" which under the terms of the statute exonerate the plaintiff from having to

serve pre-foreclosure notices. Moreover, even were the court to overlook the defendants' execution of the loan modification agreement, there is sufficient evidence to prove that mailing by certified and first class mail was done by the post office. Plaintiff has submitted proof in the form of an affidavit from the mortgage servicing representative confirming that the mailings were done more than 90 days prior to commencing this action on September 18, 2012, together with a two copies of the 90 day notice, the second notice of which contains the certified article (tracking) number and the RPAPL 1306 filing statement with the New York State Banking Department confirming step one mailing of September 18, 2012 and step two mailing on September 17, 2013. Such proof establishes the plaintiff's compliance with statutory requirements (*see HSBC Bank USA v. Ozcan, supra.*). Defendants and defense counsel's conclusory denial of service, is not supported by any relevant, admissible evidence sufficient to raise a genuine issue of fact which would defeat plaintiff's summary judgment motion (*see PHH Mortgage Corp., v. Muricy,* 135 AD3d 725, 24 NYS3d 137 (2nd Dept., 2016); *HSBC Bank v. Espinal,* 137 AD3d 1079, 28 NYS3d 107 (2nd Dept., 2016)).

Similarly, the plaintiff has submitted sufficient proof of service of the mortgage default notice as required under the terms of the mortgage by submission of the mortgage servicer's affidavit attesting to timely service together with a copy of the mortgage default notice addressed to the borrower at the mortgaged premises and dated March 16, 2013. Such proof establishes plaintiff's compliance with mortgage requirements and defendants' conclusory denial of receipt of the mortgage default notice fails to raise any genuine issue of fact sufficient to defeat plaintiff's summary judgment motion (*see PHH Mortgage Corp. v. Muricy, supra.*)

With respect to defendants' remaining claims, there is no requirement further discovery be conducted since sufficient evidence has been submitted to resolve all significant issues of fact concerning the defendants' liability and breach of the parties' agreements. Moreover, any dispute related to the amount of damages to be awarded to the plaintiff will be resolved upon submission of the referee's computations and any admissible evidence the defendants will submit to contradict the referee's computations. Upon submission of all relevant evidence by the parties, this court will determine the amount of damages to be awarded to the plaintiff.

Finally, the defendant has failed to raise any admissible evidence to support any of their remaining twelve affirmative defenses in opposition to plaintiff's motion. Accordingly those 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 0144, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez,* 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly, plaintiff's motion seeking summary judgment is granted. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: December 18, 2017

HON. HOWARD H. HECKMAN, JR.

J.S.C.