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.: 7586/2011
MOTION DATE: 10/23/2017
MOTION SEQ. NO.: 001 MG
002 MD

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WELLS FARGO BANK, N.A.,

Plaintiffs,

-against-

ROBERT A. CAPASSO, et.al.,

Defendants.

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PLAINTIFF'S ATTORNEY:
SHAPIRO, DICARO & BARAK, LLC
175 MILE CROSSING BLVD.
ROCHESTER, NY 14624

DEFENDANT'S ATTORNEY:
RONALD D. WEISS, P.C.
734 WALT WHITMAN RD., STE. 203
MELVILLE, NY 11747

Upon the following papers numbered 1 to 31 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-11(#001) ; Notice of Cross Motion and supporting papers 12-29 (#002) ; Answering Affidavits and supporting papers 30-31 ; Replying Affidavits and supporting papers ____; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Wells Fargo Bank, N.A. seeking an order: 1) granting summary judgment striking the answer of defendant Robert A. Capasso; 2) discontinuing the action against defendants designated as "John Doe"; 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 defendant Robert A. Capasso seeking an order dismissing plaintiff's complaint or, in the alternative, granting defendant leave to amend his answer and compelling plaintiff to complete discovery including production of the original promissory note and to provide an accounting is 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 original sum of $225,000.00 executed by defendant Robert A. Capasso on March 8, 2006 in favor of Wells Fargo Bank, N.A. On the same date defendant Capasso executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Plaintiff claims that Capasso defaulted under the terms of the

mortgage and note by failing to make timely monthly mortgage payments beginning October 1, 2010 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 March 8, 2011. Defendant Capasso served an answer on May 12, 2011. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee. Defendant's cross motion seeks an order denying plaintiff's motion and dismissing this action or, in the alternative, permitting Capasso leave to amend his answer and compelling the plaintiff to complete discovery, produce the promissory note and to provide an accounting.

Among the claims set forth in defendant's cross motion are: 1) defendant is entitled to conduct discovery prior to granting summary judgment including production of the original promissory note: 2) the complaint should be dismissed as abandoned based upon plaintiff's failure to prosecute; 3) defendant should be permitted to amend his answer; 4) plaintiff's failure to file an RJI together with plaintiff's filing of a defective summons and defective certificate of merit require that the complaint be dismissed; 5) plaintiff cannot prove standing; 6) plaintiff cannot prove its compliance with RPAPL 1304 and mortgage default notice service requirements; 7) plaintiff has failed to submit sufficient admissible evidence to prove defendant's default; and 8) defendant is entitled to an accounting.

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)).

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. Defendant Capasso does not contest his failure to make timely payments due under the terms of the promissory note and mortgage agreements for the past 7+ years. Rather, the issues raised by the defendant concern whether the action should be dismissed as abandoned based upon plaintiff's failure to prosecute; whether defendant should be permitted to amend his answer; whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon defendant's/mortgagor's continuing default; whether the issue of plaintiff's compliance with pre-foreclosure notice requirements has been waived; whether plaintiff lacks of standing to maintain this action; and issues related to plaintiff's allegedly defective summons, certificate of merit, RJI filing, and defendant's right to an accounting.

With respect to the defendant's claim that the complaint must be dismissed for failure to prosecute, a court's power to dismiss a complaint sua sponte is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal (*see Chase Home Finance, LLC v. Kornitzer*, 139 AD3d 784, 31 NYS3d 559 (2nd Dept., 2016); *Wachovia Bank, N.A. v. Akojenu*, 138 AD3d 1112, 30 NYS3d 659 (2nd Dept., 2016)). The legal grounds for dismissing a pre-note of issue action are dictated by the requirements of CPLR 3216. The statute does not permit dismissal "unless a written demand is served upon the party against whom such relief is sought requiring the plaintiff to serve and file a note of issue within 90 days of receipt of the demand (CPLR 3216(b)(3); *see BankUnited v. Kheyfets*, 150 AD3d 948, 57 NYS3d 159 (2nd Dept., 2017)). In this case no written demand has been served upon the plaintiff and no extraordinary circumstances exist which could possibly warrant dismissal of the plaintiff's complaint (*Deutsche Bank National Trust Co. v. Cotton*, 147 AD3d 1020, 46 NYS3d 913 (2nd Dept., 2017); *Deutsche Bank National Trust Co. v. Rauf*, 139 AD3d 789, 29 NYS3d 811 (2nd Dept., 2016)).

With respect to defendant's cross motion seeking leave to amend his answer, leave to amend a pleading may be granted at any time, including prior to or during trial absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit (*Galarraga v. City of New York*, 54 AD3d 308, 863 NYS2d 47 (2nd Dept., 2008); *Marcum, LLP v. Silva*, 117 AD3d 917, 986 NYS2d 508 (2nd Dept., 2014)). In this case court records indicate that the defendant delayed making any application to amend his answer until more than five years after serving his original answer and after participating in two court mandated settlement conferences on April 11, 2016 and July 7, 2016, during which time he was represented by counsel for both appearances. Upon being served with this summary judgment motion on August 4, 2016, the defendant elected to seek this amendment in an attempt to insert a multitude of new issues into the case. Under these circumstances, the significant delay in seeking such relief without any reasonable explanation for having waited so long to seek such an amendment, clearly prejudices the plaintiff's ability to prosecute its claims. Moreover, a review of the proposed additional affirmative defenses shows that they are devoid of merit and are palpably insufficient to raise genuine issues of fact at this

juncture (*see Wells Fargo Bank, N.A. v. Morgan,* 139 AD3d 1046, 32 NYS3d 595 (2nd Dept., 2016); *North American Savings Bank, FSB v. Esposito-Como,* 141 AD3d 706, 35 NYS3d 491 (2nd Dept., 2016); *U.S. Bank, N.A. v. Lomuto,* 140 AD3d 832, 35 NYS3d 123 (2nd Dept., 2016)).

With respect to the admissibility of the evidence submitted by the plaintiff, 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); *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)).

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.

With respect to the issue of standing, plaintiff has submitted an affidavit from a Wells Fargo Bank vice president of loan documentation which provides admissible evidence satisfying the business records exception to the hearsay rule (CPLR 4518). Such evidence, together with the documentary proof submitted by the plaintiff, provides relevant, admissible evidence to establish plaintiff's standing to maintain this foreclosure action based upon plaintiff's continuing possession of the promissory note beginning March 15, 2006, which was prior to the commencement of the action on March 8, 2011 thereby establishing the Bank's standing (*see HSBC Bank USA, N.A. v. Armijos,* 151 AD3d 943, 57 NYS3d 205 (2nd Dept., 2017); *Central Mortgage Co. v. Davis,* 149 AD3d 898, 53 NYS3d 325 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Ostiguy,* 127 AD3d 1375, 8 NYS3d 669 (3rd Dept., 2015); *U.S. Bank, N.A. v. Cruz,* 147 AD3d 1103, 47 NYS3d 459 (2nd Dept., 2017)).

With respect to the issue of the defendant's/mortgagor's default, 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 mortgage agreement, and an affidavit attesting to the defendant's undisputed default in making timely mortgage payments sufficient to sustain its burden to prove defendant has defaulted under the terms of the parties agreement by failing to make timely payments since October 1, 2010 (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 his continuing default, plaintiff's application for summary judgment against the defendant based upon his breach of the mortgage agreement and promissory note must be granted.

With respect to service of the pre-foreclosure mortgage and RPAPL 1304 90-day notices, defendant's answer does not assert these affirmative defenses and Capasso cannot therefore raise these defenses in opposition to plaintiff's motion for summary judgment absent a reasonable explanation for his failure to assert them in his answer, since such defenses are not jurisdictional defects sufficient to provide independent grounds to defeat a summary judgment motion (*see U.S.*

Bank, N.A. v. Carey, 137 AD3d 894, 28 NYS3d 68 (2nd Dept., 2016); *Pritchard v. Curtis*, 101 AD3d 1502, 957 NYS2d 440 (3rd Dept., 2012)). As defendant's attempt to amend his answer some five (plus) years after serving his original answer has previously been denied, no legal basis exists to permit Capasso to now assert these defenses as viable in opposition to plaintiff's motion since such defenses have been waived (*see Bank of America v. Agarwal*, 150 AD3d 651, NYS3d (2nd Dept., 2017); *HSBC Bank USA, N.A. v. Clayton*, 146 AD3d 942, 45 NYS3d 543 (2nd Dept., 2017); *Flagstar Bank v. Jambelli*, 140 AD3d 829, 32 NYS3d 625 (2nd Dept., 2016)). Moreover, a review of the evidence submitted by plaintiff in support of its motion reveals that sufficient proof has been submitted to support a finding that the mortgage default notice and the RPAPL 1304 90-day notices were timely and properly served.

With respect to defendant's remaining contentions concerning plaintiff's alleged failure to timely file an RJI, sign the original summons, and file a defective certificate of merit, none of these claims raise a genuine issue of fact sufficient to defeat plaintiff's summary judgment motion. The failure to file an RJI in 2011 does not provide grounds for dismissal of the complaint and plaintiff's subsequent filing of a supplemental summons on March 24, 2011 corrected any alleged error contained in the original summons. Plaintiff's certificate of merit complied with statutory requirements and equally without merit is defendant's claim that he is entitled to additional discovery, since no legal basis exists to further delay prosecution of this action as sufficient admissible, credible evidence has been submitted by the plaintiff to establish its right to foreclose the mortgage. As to defendant's claimed right to an "accounting", any claimed errors in the amounts due and owing to the mortgage lender will be the subject of the referee's computations and will be ultimately determined by this court upon submission of all relevant evidence pertaining to the amount of damages due the plaintiff.

Finally, defendant has failed to raise any admissible evidence to support any of his remaining affirmative defenses set forth in his answer 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, defendant's cross motion is denied in its entirety and plaintiff's motion seeking summary judgment is granted. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: January 17, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.