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.: 18292/2011
MOTION DATE: 05/08/2018
MOTION SEQ. NO.: #004 MG

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WELLS FARGO BANK. NA

Plaintiff,

-against-

JASON SCHLOMANN

Defendants.

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PLAINTIFF'S ATTORNEY:
WOODS OVIATT GILMAN LLP
2 STATE STREET
ROCHESTER, NEW YORK 14614

DEFENDANT'S ATTORNEY:
IVAN YOUNG ESQ.
80 ORVILLE DRIVE
BOHEMIA, NY 11716

Upon the following papers numbered 1 to 27 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-16 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17-27 ; 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 Jason Schlomann and ; 2) deeming all appearing and non-appearing defendants in default; and 3) 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 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 $297,500.00 executed by defendant Jason Schlomann on December 15, 2005 in favor of American Brokers Conduit. On the same date defendant Schlomann executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. By assignment dated July 28, 2010 the mortgage and note were assigned to plaintiff. Plaintiff claims that defendant defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning January 1, 2011 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 June 3, 2011. Defendant Schlomann served a timely answer. By short form Order dated September 11, 2017 plaintiff's motion for an order granting summary judgment and appointing a referee to compute the sums due and owing to the mortgage lender was granted to the extent that all defenses asserted in defendant's complaint were dismissed with the sole exception being defendant's affirmative defense claiming plaintiff failed to comply with RPAPL 1304 requirements. That order denied defendant's cross motion seeking dismissal of plaintiff's complaint.

The September 11, 2017 short form Order also provided that the parties appear for the purpose of preparing for trial with respect to the remaining issue, or to provide a briefing schedule in preparation of submitting additional summary judgment motions. Plaintiff's motion seeks an order granting summary judgment against the defendant and for the appointment of a referee. In opposition, defendant claims that plaintiff's successive summary judgment motion should not be permitted absent "newly discovered" evidence or, in the alternative, that plaintiff's motion must be denied.

With respect to defendant's claim that a second summary judgment motion is not permitted absent "newly discovered" evidence, a court has discretion to consider a successive summary judgment motion when it is substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts" (*see Kolel Damsek Eliezer, Inc. v. Schlesinger,* 139 AD3d 810, 33 NYS3d 284 (2nd Dept., 2016) quoting *Graham v. City of New York,* 136 AD3d 747, 748, 24 NYS3d 754 (2nd Dept., 2016); *Landmark Capital Investments, Inc. v. Li-Shan Wang,* 94 AD3d 418, 941 NYS2d 144 (2nd Dept., 2012); *Town of Angelica v. Smith,* 89 AD3d 1547, 933 NYS2d 480 (4th Dept., 2011)). This court deems consideration of this successive motion as "substantively valid" and in the interests of judicial economy and furthering the ends of justice.

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)).

By short form Order dated September 11, 2017 plaintiff's motion for an order granting summary judgment was granted as to all issues except with respect to the issue of service of the pre-foreclosure 90-day notices required pursuant to RPAPL 1304. Proper service of such 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 plaintiff's compliance with statutory pre-foreclosure notice requirements..

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 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 affidavits submitted from two Wells Fargo vice presidents of loan documentation provides the evidentiary foundation for establishing the mortgage lender's right to foreclose. The affidavits sets forth both employees review of the business records maintained by the mortgagee/loan servicer; the fact that the books and records are made in the regular course of Wells Fargo's business; that it was Wells Fargo'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. The "affidavit of mailing" also states that the mortgage representative has acquired personal knowledge as a result of training concerning Wells Fargo's procedures related to how the lender "drafts, generates, triggers, sends and stores letters in the servicing process." Based upon the 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 the remaining issue raised in this summary judgment application.

As to service of the pre-foreclosure 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 there is sufficient evidence to prove that mailing by certified and first class mail was done by the post office proving strict compliance with RPAPL 1304

mailing requirements. Plaintiff has submitted proof in the form of two affidavits from mortgage service representatives confirming that the mailings were done more than 90 days prior to commencing this action on January 16, 2011; together with two copies of the 90 day notices, one containing a ten digit tracking number with respect to first class mailing (2245498182), and one containing a twenty- two digit certified article (tracking) number (71969006929493404770)–each of the 90-day notices were addressed to the defaulting mortgagor, Schlomann, at the mortgaged premises; the 90-day notices contained the then statutorily mandated five (5) United States department of housing and urban development approved housing counseling agencies "that serve the ***region*** where the borrower resides" (RPAPL 1304(2)(emphasis added-- as the statute in existence in 2011 provided the agency be within the "region", and not the "county" (as required in the current statutory language) which would include the Nassau County agency)); together with a copy of the green card certified receipt addressed to Schlomann (containing the tracking number) and the printed "Return to Sender Unclaimed Unable to Forward" notation dated 2/17/11"; and a copy of the United States Postal Service Tracking records confirming the attempted certified mailing delivery which was "unclaimed" with the article numbers attached; and the RPAPL 1306 filing statement with the New York State Department of Financial Services confirming mailing of the notice to the defendant/mortgagor. Such proof is entirely consistent with the evidence submitted by the plaintiff in *HSBC Bank USA, N.A. v. Ozcan supra.,* which the appellate court determined was in strict compliance with RPAPL 1304 requirements (*see also Bank of America, N.A. v. Brannon,* 156 AD3d 1, 63 NYS3d 352 (1st Dept., 2017)). 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)).

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

Hon. Howard H. Heckman Jr.

Dated: May 30, 2018

J.S.C.