At I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 18th day of June 2018.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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U.S. BANK, N.A., as trustee on behalf of the holders of the J.P. Morgan Chase Mortgage Acquisition Corp. 2006-FRE1 Asset Backed Pass-Through Certificates Series 2006-FRE1,

Plaintiff,

Index No. 508264/2014

-against-

FENOL HILARION, 987 Herkimer LLC, et. al.,

Decision and Order

Defendants.

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Preliminary Statement

This mortgage foreclosure matter was tried in Part 95 on June 12, 2018. Defendant, mortgagor Fenol Hilarion, did not appear. The alleged owner of the residential premises, 987 Herkimer LLC appeared with counsel.

Facts

Although the court was initially of the impression that a framed issued hearing was to take place, plaintiff proceeded to present an entire prima facie case, without objection by defendant. Plaintiff's first witness, Patrick Pittman, litigation director of Select Portfolio Services (SPS), a subservicer for JP Morgan Chase, testified that the subject loan, number 0014842082, has been serviced by SPS since June 1, 2013. This was evidenced by a limited power of attorney which references the 2006-FRE1 Asset Backed Pass-Through Certificates (Exhibit 1). Mr.

Pittman testified that the relevant note was in possession of SPS at the time of commencement of the action and SPS was holding same for the benefit of U.S. Bank and Chase. The original note, endorsed in blank, evidenced an agreement by defendant Hilarion to pay Freemont Investment & Loan $442,400 in monthly installments of $2,869.40 commencing December 1, 2005, with interest of 6.750% on any unpaid principal (Exhibit 3). A copy of the note was attached to the complaint when it was filed and plaintiff's possession of same is confirmed in its Contact History Report (Exhibit 6).

Plaintiff also presented a copy of the mortgage (Exhibit 4) and two 90-day notices which Mr. Pittman alleged were served by regular and certified mail in compliance with RPAPL §1304 (2). He provided the details for the mailing of notices from SPS which included the fact that when notices are mailed they are mailed by certified and regular mail whenever certified mail is required for any mailing. However, plaintiff conceded the first purported 90-day notice, dated May 30, 2014, was deemed defective by SPS since it did not include the complete list of attachments required by New York law (Exhibit 5). The second 90-day notice, dated June 10, 2014, was also served by regular and certified mail (Exhibit 7). Unlike Exhibit 5, this document included a United States Postal Service confirmation for certified mail addressed to Fenol Hilarion at 987 Herkimer Street, Brooklyn, NY 11233. Mr. Pittman also showed the court a reference to this document in the Contact History Report (Exhibit 6) and confirmation of proof of the mailing with the New York Department of State (Exhibit 8). Mr. Pittman further testified that since SPS has been servicing the loan, no payments have been made. He presented the Payment History Report as proof (Exhibit 9).

Subsequently, Albert Smith, a senior account manager with JP Morgan Chase testified

regarding the bank's business practices in servicing the loan. He testified Chase serviced the loan from 2006 to June 2014, and served a notice of default on Mr. Hilarion, dated November 2, 2007 (Exhibit 10). He also produced the loan payment history evidencing an outstanding balance in the amount of $433,934.72, effective June 28, 2011 (Exhibit 11).

Defendant, 987 Herkimer LLC (Herkimer), alleged it is the current owner of the premises, having acquired same for an unreported nominal fee. Herkimer argued plaintiff failed to prove it has authority to appear in this action, although the power of attorney demonstrates such. Herkimer also argued plaintiff failed to demonstrate proper mailing of the 90-day notice and the amount due.

Discussion

In a mortgage foreclosure action, plaintiff has standing where it is the holder or assignee of the underlying note at the time the action is commenced (*see U.S. Bank, N. A. v Collymore*, 68 AD3d 752, 753-754 [2d Dept 2009]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*Id.* at 754 [citations omitted]; *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). Here, plaintiff demonstrated that it had possession of the note prior to commencement of the action and therefore has standing.

Further, as here, plaintiff may establish its case as a matter of law by production of the mortgage, the unpaid note and evidence of default (*Aames Funding Corp. v Houston*, 44 AD3d 692 [2d Dept 2007] [citations omitted]). Plaintiff produced a copy of the mortgage, the unpaid note and evidence of plaintiff's default. Defendant cannot and does not challenge plaintiff' s

contention and the documentary proof that Mr. Hilarion defaulted in failing to pay the mortgage and note. Instead, Herkimer contends plaintiff failed to demonstrate proper mailing of the 90-day notice and the full amount owed to date and should be denied a judgement of foreclosure.

Turning to the notice, proper service of a 90-day notice is a condition precedent to the commencement of a foreclosure action and plaintiff has the burden of establishing proper notice was given (*Aurora Loan Servs., LLC*, 25 NY3d at 361-362). If the 90-day notice is not mailed properly the action must be dismissed (*Id.*; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162 [2d Dept 2010]). Mailing of the 90-day notice can be established by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure the items are properly addressed and mailed, or a combination of both (*American Tr. Ins. Co. v Lucas*, 111 AD3d 423, 424 [1st Dept 2013] [citations omitted]).

Mr. Pittman credibly testified regarding the mailing of the notices and the standard office procedures and practices of SPS. SPS, however, conceded the notice dated May 30, 2014, was defective and was substituted with a second notice dated June 10, 2016. SPS also produced business records further substantiating proper mailing of the 90-day notice dated June 10, 2014 (Exhibits 6 and 8). Therefore, the court finds SPS, as subservicer of the loan, had practices in place adequate to provide notice to the mortgagor and properly mailed the June 10, 2014 90-day notice consistent with these procedures (Exhibit 7). The court further finds that the confirmation notice attached and the references in Exhibits 6 and 8 provide additional credence to this contention.

Conclusion

Therefore, the court finds plaintiff established its entitlement to a judgment of foreclosure. The parties stipulated on the record that plaintiff shall be excluded from recovering one year of 12 monthly payments that extend beyond the six-year statute of limitations period from commencement of this case. Plaintiff shall be granted a judgment accordingly. A referee will conduct further proceedings to assess the total amount currently due.

Plaintiff shall submit a proposed judgment of foreclosure and order of reference, on notice to defendants, within 30 days of receipt of this decision.

Dated: June 18, 2018

Honorable Reginald A. Boddie

HON. REGINALD A. BODDIE
J.S.C.